

THE
FEDERAL REPORTER.

VOLUME 121.

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

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A TABLE OF STATUTES CONSTRUED IS GIVEN
IN THE INDEX.

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COURT RULES.

UNITED STATES CIRCUIT COURT OF APPEALS.

Ninth Circuit.

38.

PHOTOGRAPH OF CHINESE TO BE ATTACHED TO BAIL BOND.

Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody a photograph of the defendant shall be attached to said bond.

Rules in Admiralty.

1.¹

NOTE TO RULE 1 IN ADMIRALTY.

This rule so far modifies Rule 11 of the General Rules (31 C. C. A. cxlvi, 90 Fed. cxlvi) that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in Rule 4 of the Admiralty Rules.

¹ For rule as originally adopted, see 40 C. C. A. iii, 100 Fed. iii.

FEDERAL REPORTER, VOLUME 121.

JUDGES

OF THE

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

FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
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Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.

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Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania.....Scranton, Pa.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

¹ Appointed additional District Judge March 3, 1903, by Act Cong. Feb. 9, 1903.

² Resigned February 24, 1903.

JUDGES OF THE COURTS.

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Hon. JOHN K. RICHARDS, Circuit Judge.....Ironton, Ohio.
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Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. GEORGE P. WANTY, District Judge, W. D. Michigan.....Grand Rapids, Mich.
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Hon. FRANCIS J. WING, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.....Cincinnati, Ohio.
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Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.....Memphis, Tenn.

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Hon. HENRY B.¹ BROWN, Circuit Justice.....Washington, D. C.
Hon. WILLIAM R. DAY, Circuit Judge.....Canton, Ohio.
Hon. JAMES G. JENKINS, Circuit Judge.....Milwaukee, Wis.

¹Appointed February 25, 1903.

²Assigned to Third Circuit.

³Appointed Associate Justice United States Supreme Court February 25, 1903.

Hon. PETER S. GROSSCUP, Circuit JudgeChicago, Ill.
 Hon. FRANCIS E. BAKER, Circuit JudgeIndianapolis, Ind.
 Hon. CHRISTIAN C. KOHLSAAT, District Judge, N. D. Illinois Chicago, Ill.
 Hon. ALBERT B. ANDERSON, District Judge⁶.....Indianapolis, Ind.
 Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
 Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.....Sheboygan, Wis.
 Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.....Madison, Wis.

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 Hon. AMOS M. THAYER, Circuit Judge.....St. Louis, Mo.
 Hon. WILLIS VAN DEVANTER, Circuit Judge⁸.....Cheyenne, Wyo.
 Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
 Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
 Hon. MOSES HALLETT, District Judge, Colorado.....Denver, Colo.
 Hon. OLIVER P. SHIRAS, District Judge, N. D. Iowa.....Dubuque, Iowa.
 Hon. SMITH MCPHERSON, District Judge, S. D. IowaRed Oak, Iowa.
 Hon. WILLIAM C. HOOK, District Judge, KansasLeavenworth, Kan.
 Hon. WM. LOCHREN, District Judge, Minnesota.....Minneapolis, Minn.
 Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.....St. Louis, Mo.
 Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.....Kansas City, Mo.
 Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
 Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
 Hon. JOHN E. CARLAND, District Judge, South Dakota.....Sioux Falls, S. D.
 Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
 Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

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 Hon. THOMAS P. HAWLEY, District Judge, Nevada.....Carson City, Nev.
 Hon. CHARLES B. BELLINGER, District Judge, Oregon.....Portland, Or.
 Hon. JAMES H. BEATTY, District Judge, Idaho.....Boise City, Idaho.

⁶ Appointed December 8, 1902.

⁷ Resigned June 4, 1903.

⁸ 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.

EDWARDS v. BEGOLE.

(Circuit Court of Appeals, Sixth Circuit. March 9, 1903.)

No. 1,073.

1. PUBLIC LANDS—CONSTRUCTION OF STATUTE—CONFIRMATION OF HOMESTEAD CLAIMS ON FORFEITED RAILROAD GRANT.

By Act March 2, 1889 (25 Stat. 1008), forfeiting certain unearned land grants in the state of Michigan, prior sales or dispositions of any of such lands by the Land Department under color of the public land laws were confirmed, with a proviso that "nothing herein contained shall be construed to confirm any sales or entries of lands * * * upon which there were bona fide pre-emption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed." *Held*, that the words "actual occupation," as used in the statute, mean residence on the land, and that one who had merely gone upon a tract of the land, and had partly constructed a building thereon, prior to May 1, 1888, with the intention of acquiring title under the homestead law, but who did nothing further until in March, 1889, remaining until that time a resident and voter in another township, was not in the actual occupation of the land on May 1st, and his claim was not confirmed by the act, as against one who prior to his taking up his residence on the land, and after the passage of the act, had filed an application to enter the same as a homestead.

2. SAME—FINDINGS OF FACT BY LAND DEPARTMENT—CONCLUSIVENESS.

A determination by the Land Department, in a contest between homestead claimants, that one of the parties did not become an actual occupant of the land until a certain date, is one of fact, and conclusive on the courts.

3. SAME—ABANDONMENT OF CLAIM.

One claiming homestead rights in a tract of land as a settler thereon, who acquiesced in the decision of the Land Department adverse to his claim, and thereafter filed a new application to enter the same as a homestead as public land, on the ground that a prior entry thereof by another was invalid, must be regarded as having abandoned his original claim, and cannot thereafter maintain a suit based thereon.

4. SAME—HOMESTEAD SETTLEMENT—LANDS IN UNFORFEITED GRANT.

Under section 3 of Act May 14, 1880, 21 Stat. 141 [U. S. Comp. St. 1901, p. 1393], giving settlers on public lands, claiming under the homestead laws, the same time to file their homestead applications and to perfect

their entries as had been previously allowed to settlers under the pre-emption laws, and providing that their rights should relate back to the time of settlement, no rights can be acquired by settlement on land which is not at the time public land, but the title to which is vested in the state by a prior grant, although such grant is subsequently declared forfeited under power therein reserved.

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

By the first section of the act of Congress of March 2, 1889 (25 Stat. 1008), all lands theretofore granted to the state of Michigan by an act of Congress of June 3, 1856 (11 Stat. 17), to aid in the construction of certain railroads in said state, which were opposite to and coterminous with the uncompleted portion of any of such railroads, were forfeited to the United States, and declared to be a part of the public domain. By that act the state of Michigan had been authorized to dispose of said lands in aid of the construction of said railroads only as the work progressed, and it was provided that, if any of them was not completed within 10 years, no further sales should be made, and the lands unsold should revert to the United States. The construction of certain, if not all, of said railroads, was not begun within said prescribed period of 10 years, and at the time of the passage of the Act of March 2, 1889, portions of certain of said railroads were still uncompleted. And it was in the exercise of the right on the part of the United States to resume the title to the then unearned portions of said grant of June 3, 1856, that said act was passed. The necessity of such or other action on the part of the United States to make said forfeiture clause operative was not understood at first. Indeed, until the decision of the Supreme Court of the United States in the case of *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551, delivered in 1874, as to the effect of a like clause of forfeiture in a like grant to the state of Wisconsin, said clause in the Michigan grant was deemed to be automatic, and upon the termination of the 10 years, ipso facto, to put an end to the grant, and restore the unearned lands to the public domain. In 1866, after the expiration of that period, said lands were put upon the market by the Land Department of the United States, and kept there at least until the rendition of said decision. Sales thereof were made to cash entrymen, and selections were made therefrom in aid of the construction of a canal between Portage Lake and Lake Superior under grants made to the state of Michigan in 1865 to 1866, and possibly under the swamp land act and other acts of Congress. Possibly such dispositions of certain of said unearned lands were made even after 1874, and until the passage of said act of March 2, 1889. Possibly, also, sales of portions of said unearned lands had been made to pre-emption and homestead claimants under the pre-emption and homestead laws after the expiration of said 10 years. It is certain that at the time of the passage of said act there were, and for some time prior thereto had been, persons who were looking to the ultimate acquisition of the title to certain of said lands under said laws, some of whom were in the actual occupancy of the lands hoped to be acquired by them. Neither said cash purchasers, nor the holders of said selections, nor the persons expecting to acquire title under the pre-emption or homestead laws, had any interest whatever, legal or equitable, in the lands covered by their respective claims, because of the fact that the legal title thereto was outstanding in the state of Michigan at the time of the transpiration of the things upon which said claims could be based. But Congress recognized that certain of said claimants were entitled to consideration at its hands, and, in view of this, provided by the third section of said act of March, 1889, as follows, to wit:

"That in all cases when any of the lands forfeited by the first section of this act or when any lands relinquished to or for any cause resumed by the United States from grants heretofore made to the state of Michigan, have heretofore been disposed of by the proper officers of the United States or under state selections in Michigan, confirmed by the Secretary of the Interior, under color of the public land laws, where the consideration received therefor

is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be and is hereby confirmed: provided, however, that where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States; that nothing herein contained shall be construed to confirm any sales or entries of lands or any tracts in any such state selections upon which there were bona fide pre-emption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed."

Amongst the railroads in aid of the construction of which said grant of June 3, 1856, was made was one from Marquette to Ontonagon; and at the time of the passage of the act of March 2, 1889, a portion, if not all, of said railroad was uncompleted. On the 24th of January, 1888, the appellant, James P. Edwards, at the time and many years prior thereto a citizen and resident of Houghton, Mich., went upon the S. W. $\frac{1}{4}$ of section 19, township 50 north, range 35 west, Houghton county, Mich.—a part of the unearned lands granted June 3, 1856, to the state of Michigan in aid of the construction of the said railroad from Marquette to Ontonagon—to build a house thereon. He remained a couple of days, built a foundation, and cut some logs for the house, and then left. February 6, 1888, he made application at the land office at Marquette, Mich., to enter said quarter section of land under the homestead laws of the United States, and his application was rejected upon the ground that it was within the limits of said railroad grant. April 4, 1888, appellant returned to the land, and remained eight or ten days, in which time he erected the walls of the house about eight feet high, and then went away. It was his intention at that time to complete the house and make a clearing, but he was prevented by rheumatism. In July, 1888, he was on the land again for a couple of hours, to see in what shape things were, and was not there any more until March 13, 1889. Up until at least March 9, 1889, he remained a citizen and resident of Houghton. He was a trustee of the village during the entire year of 1888, and until March 9, 1889, when he resigned, and he voted there in the fall of 1888. On March 13, 1889, he went upon the land in question again, and remained there until April 30th. During that time he completed the house and made a clearing, and on the 1st of April he voted at Laird, the township in which the land was located. Notice had been given by the Land Department that on May 1, 1889, applications to enter lands forfeited by the act of March 2, 1889, would be received, and on that date appellant filed a homestead application for said quarter section of land at Marquette. May 14, 1889, he returned to the land with his family, planted some vegetables, and remained there until in October, 1889, when his family left the land finally. Appellant for two or three years afterwards was on the land for a good part of the summer of each year and portions of the winter.

On March 6, 1889, one Jesse Ford, filed a homestead application for said land, which he renewed May 1, 1889. On March 7, 1889, one Mollie O'Connor went on the land and cut some brush. She also cut four poles, which she arranged in the shape of a foundation for a house, and employed men to build her one. They completed it by March 30th, and thereupon she established her residence there, which she continued to maintain for several years afterwards. On May 1st she, too, filed a homestead application for said land.

The pendency of these three separate applications to enter this land under the homestead law brought on a contest amongst the applicants in the Land Department to determine which had the better right to the land, and it was carried from the register and receiver at Marquette, through the Commissioner, to the Secretary of the Interior, who decided it on June 18, 1894. The register and receiver decided the contest in favor of appellant, the Commissioner in favor of Mollie O'Connor, and the Secretary of the Interior in favor of Jesse Ford. The ground of the latter's decision was that the lands forfeited by the act of March 2, 1889, were open to entry from that date, when it became a law. Ford's claim to the land dated from March 6, 1889, when he made his application to enter it. Mollie O'Connor's claim could not date

prior to March 7th, the day after Ford's application to enter; and really her act of settlement did not begin until after March 13th, when appellant was on the land. Appellant's claim could not be placed earlier than March 13th, because "until March 9th he remained a legal resident of Houghton, * * * and did not become both a legal and actual resident on the land until March 13, 1889."

Motion for a review of the decision of the Secretary of the Interior was made, which was overruled, and the case was closed January 21, 1895. March 6, 1895, Ford made homestead entry for the land. On July 6, 1895, he relinquished that entry, and on same day one William A. Cornelius made homestead entry for the W. $\frac{1}{2}$ and S. E. $\frac{1}{4}$ of said quarter section of land, and George H. Berry made homestead entry for the N. E. $\frac{1}{4}$ thereof. These entries were made under the law providing for soldier's additional homestead.

Thereafter, on October 24, 1895, appellant filed at Marquette an original application to make homestead entry for that portion of said quarter section included within the entry theretofore made by Cornelius, in accordance with the requirements of section 5 of the act of Congress of March 3, 1891, 26 Stat. 1096 [U. S. Comp. St. 1901, p. 1550], relating to pre-emption and homestead entries. It was rejected by the register and receiver upon the ground that the lands sought to be so entered were not public lands, as they had been segregated therefrom by the entry of Cornelius. The case made by this application of the appellant was carried by him on appeal through the Commissioner to the Secretary of the Interior, and each officer affirmed the decision of the register and receiver. It was closed May 3, 1897. The ground upon which appellant claimed that said land was a part of the public domain, and subject to entry on his part, was that Cornelius had, prior to the making of the entry in question, made an entry in Minnesota under the soldier's additional homestead law, and was not entitled, therefore, to make another entry thereunder. It appeared, and was so held by said officers of the Land Department, that the Minnesota entry in Cornelius' name was fraudulent, not having been made by him or by his authority, and it was therefore canceled. Having thus failed to get his said application granted, on May 1, 1897, appellant began an attack on said entry made by the said Cornelius July 6, 1895, upon the ground that it had been made for the use and benefit of said Jesse Ford, and, further, that it had not in fact been made by said Cornelius. This attack was carried through the various officers by appeal to the Secretary of the Interior, and it was decided by all of them that it was not warranted, because Cornelius had a right to make the entry for the use and benefit of the said Ford, and he had in fact made it. This case was closed May 23, 1897.

On May 3, 1898, appellant filed a petition before the register and receiver for the issuance of patent to him for said quarter section of land upon the ground that on the 1st day of May, 1888, he was in the actual occupation of the said land in good faith, claiming the same under and by virtue of the homestead laws, and that therefore his said claim was confirmed and validated by said section 3 of the act of March 2, 1889. This petition was forwarded to the Commissioner, who denied it on August 20, 1898. October 14, 1898, appellant appealed from the decision to the Secretary of the Interior, and pending this appeal this suit was brought.

Before proceeding to state the nature thereof, and the relief sought, it is necessary to go back a little, and narrate some further action in relation to said land. After said Cornelius and Berry had made their respective entries, on July 6, 1895, and on the same day, they each executed and delivered warranty deeds to said Ford for the lands embraced by their said entries. Thereafter and on the same day said Ford executed and delivered a mortgage on said land to L. C. Black to secure a note given by him to said Black for the sum of \$1,600. April 15, 1896, a patent was duly issued for the land embraced in his entry to said Berry; there being no opposition thereto. November 12, 1897, said Ford conveyed and warranted said quarter section of land to one Lydia A. Mapes, subject to said mortgage to Black. January 29, 1898, said Black assigned and transferred said note and mortgage to the appellee, Frederick H. Begole. And on August 27, 1898, a week after the denial by the Commissioner of appellant's petition, a patent duly issued to said Cornelius for the portion of said quarter section of land embraced in his entry.

This suit was brought by the appellant against said Lydia A. Mapes, the holder of the legal title to said land, and the appellee, Frederick H. Begole. Other persons connected with the timber on said land were also made defendants, but it is not necessary to state the nature of their relation thereto. The object of the suit was to have it adjudged and decreed that the said Lydia A. Mapes held the legal title to said land in trust for the appellant, free from appellee's mortgage, and to compel a conveyance thereof to him, and a relinquishment of said mortgage, because of a prior equitable right to said land in the appellant. The ground upon which it was claimed that he had this prior right was the same as that set forth in his petition filed in the land office on May 3, 1898, as a reason why a patent should be issued to him for said land, to wit, that "on the 1st day of May, A. D. 1888, he was in the actual occupation of said land in good faith, claiming said land under and by virtue of the homestead laws of the United States, within contemplation of section 3 of the act of March 2, 1889"; that by said section thereof "the claims of all persons who in good faith on May 1, 1888, were in the actual occupation of any portion of the lands forfeited by said act, claiming same under color of the homestead or pre-emption laws, were confirmed, where such claims were being asserted by such occupation"; and that therefore his "claim was thereby confirmed." This was the sole equitable claim to the land which the appellant alleged in his bill as a basis for the relief sought by him. He set forth the proceedings in the Land Department which resulted in the decision that the said Ford had the prior equitable claim. He also set forth his petition to said department for the issuance to him of a patent for said land, and alleged that, by fraud of an attorney and two clerks in the department, said patents were issued to said Berry and Cornelius before said petition was finally disposed of, and the jurisdiction to consider further said petition was ousted. No reference was made in the bill to his application to make an entry of date October 24, 1895, or to his attack on the entry of Cornelius. A default decree was entered, and thereafter, upon petition of the appellee, Begole, that decree was set aside, and he permitted to defend the suit. Upon final hearing the lower court dismissed the appellant's bill.

Rush Culver, for appellant.

A. B. Eldredge and A. E. Miller (L. C. Black, of counsel), for appellee.

Before DAY, Circuit Judge, and THOMPSON and COCHRAN, District Judges.

COCHRAN, District Judge, after stating the foregoing facts, delivered the opinion of the court.

It seems to us clear that the appellant was not entitled to the relief sought, and that therefore the decision of the lower court was right. Counsel for appellee contend that section 3 of the act of March 2, 1889 (25 Stat. 1008), confirms pre-emption or homestead claims of the character therein described, in so far as they conflict with the claims of cash purchasers and those claiming under state selections, and no further, and that, inasmuch as it did not appear by allegation or proof that there was any claim to the land involved herein by a cash purchaser or under a state selection, appellant's claim was not within said section 3, or confirmed by it. In support of the first part of their contention, they cite the following extract from the opinion of Mr. Justice Brewer in the case of Lake Superior Ship R. & I. Canal Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183, in which there was a contest between said canal company, claiming under a state selection, and a homestead claimant, in regard to a quarter section of land forfeited by said act of March 2, 1889, to wit:

"Congress knew that these lands, the title of which it was purposed to resume, discharged of all right on the part of the state of Michigan to use them in aid of the construction of a railroad, were already subject to other and conflicting claims, of no legal validity, yet of a character justifying consideration. Under those circumstances, with the view of securing an equitable adjustment of these conflicting claims, it enacted the second and third sections of this act."

They cite also this further extract therefrom, in which he considers the closing sentence of said section, to wit:

"Evidently the intent of Congress was that, in all cases of a conflict between a selection in aid of the canal grant and the claim of any settler, the confirmation should depend upon the state of things existing at a named date, to wit, May 1, 1888; that date being about ten months prior to the passage of the act. If at that time there were no bona fide pre-emption or homestead claims upon any particular tract, the title of the canal company was confirmed. If, on the other hand, there was then a bona fide pre-emption or homestead claim, arising or asserted by actual occupation of the land under color of the laws of the United States, such pre-emption or homestead claim was to have preference, and was confirmed. It was the purpose not to leave open to dispute between the parties any question as to the relative equities of their claims, but to fix a precise time, and to describe with particularity the conditions which must exist at that time in order to give the one priority over the other."

It is undoubtedly true that the main, if not only, object and purpose of section 3, was the fixing of priority between such conflicting claims. Indeed, it appears from the debates in Congress, and the section itself shows the motive for said section was the confirmation of the claims of cash purchasers and those claiming under the state selections; but as it was conceded upon all hands that the pre-emption and homestead claims of the character therein described were more meritorious than said other claims, even though coming into existence later, it was provided that there should be no confirmation of said other claims as against said pre-emption and homestead claims. And if the last clause of the section, to wit, "and all such pre-emption and homestead claims are hereby confirmed," which seems to have been added to the section as originally drawn, had not been so added, there would have been nothing in the section expressly confirming said pre-emption and homestead claims as against the United States. But the effect of said clause was so to confirm them. Mr. Justice Brewer, in said case, in referring further to said closing sentence, said:

"The claim of any settler coming within the scope of this clause was declared by it prior to the claim of the canal company, and was also, as against the United States, confirmed."

It is to be considered, therefore, whether Congress did not intend by said last clause to confirm all pre-emption and homestead claims of the character described in said closing sentence, where there were no such conflicting claims, as well as where there were. It may be urged that if pre-emption and homestead claims of that character were deemed to be so meritorious that they were confirmed all around, even where they came into existence subsequent to such conflicting claims, no reason can be assigned why Congress would not desire to confirm them as against the United States alone, where there was

no conflict, and that by the word "such," in said last clause, it meant simply pre-emption and homestead claims of the character described in said closing sentence, and no more. And so far as said extracts from the opinion of Judge Brewer, relied on, are concerned, it may be said that they go to the extent of saying that the section confirms pre-emption and homestead claims of the character described, where there is a conflict, and not of saying that it does not confirm them where there is no conflict; that question not being involved in the case.

But we do not find it necessary to dispose of this question herein. Conceding that pre-emption and homestead claims of the character therein described are confirmed by said section in all cases, appellant was not entitled to the relief he sought. That section does not confirm all pre-emption and homestead claims, but only pre-emption and homestead claims of a certain character. They must be "bona fide," and "arising or asserted by actual occupation of the land under color of the laws of the United States." Mr. Justice Brewer, in the case already referred to, directed attention to both these characteristics. Concerning the latter, he said:

"While the term 'homestead claim' is sometimes used to denote the more formal application at the local land office, obviously this is not the purport of the term as used in this section, for it is defined by the succeeding words, 'arising or asserted by actual occupation of the land.' This obviously includes cases in which the party is on the 1st of May, 1888, in the actual occupation of the land, with a view of making a homestead on it under the laws of the United States."

Concerning the former, he said:

"If a party entering upon a tract, although he knew that it was within the limits of an old railroad grant, did so under the honest belief and expectation that that grant, if not technically extinguished by lapse of time, had remained so long unappropriated by any beneficiary that Congress would shortly resume it, and in that belief determined to make for himself a home thereon, with a view of perfecting his title under the land laws of the United States when the forfeiture should be finally declared, it must be held, we think, that he is, within the terms of the confirmatory act, a bona fide claimant of a homestead."

No doubt, appellant came within this required characteristic, but he did not come within the other. His claim did not arise, nor was it asserted, by actual occupation of the land. He did not become an actual occupant of the land prior to March 13, 1889. In 21 A. & E. Enc. of Law (2d Ed.) p. 768, it is said that:

"Occupancy may consist of cultivation and use, without actual residence, or may be by tenant. The term, however, as used in some relations, may import actual residence."

We think the words "actual occupation," as here used, mean residence. In this sense of the word, it is clear that appellant was not an actual occupant of the land involved herein before March 13, 1889. He was on it prior thereto three times in the year 1888—the latter part of January, the early part of April, and in July. At the first time he was there about two days, and built a foundation and cut some logs for a house; the next time he was there eight or ten days, and partially completed the house; and the last time he spent

a couple of hours there, seeing how things were. During all this time his residence and domicile were at Houghton. He was a trustee of the village and voted there in the fall of 1888. Before he became a resident upon the land, to wit, on March 6, 1889, Ford's claim had attached thereto by his homestead entry of that date, and appellant could not thereafter acquire, by anything he did, any right in or to the land as against Ford.

Besides this, it was a question of fact whether or not he was an actual occupant of the land on May 1, 1888, and in the contest between him and Jesse Ford and Mollie O'Connor, before the Land Department, as to who had the prior claim to the land, it had jurisdiction, in disposing of that contest, to determine this question of fact. This it did adversely to appellant's contention, and its determination thereof is final. In the recent case of *American School of Magnetic Healing v. McAnnulty* (decided by the Supreme Court of the United States on November 17, 1902) 23 Sup. Ct. 33, 47 L. Ed. —, Mr. Justice Peckham said:

"The Land Department of the United States is administrative in its character, and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. *Burfenning v. Chicago, St. P., M. & O. R. Co.*, 163 U. S. 321 [16 Sup. Ct. 1018, 41 L. Ed. 175]; *Johnson v. Drew*, 171 U. S. 93, 99 [18 Sup. Ct. 800, 43 L. Ed. 88]; *Gardner v. Bonestell*, 180 U. S. 362 [21 Sup. Ct. 399, 45 L. Ed. 574]."

It will be seen, therefore, that the effect of this decision was to finally dispose of all claim on appellant's part under said act of March 2, 1889, and that he could not thereafter successfully maintain same either before the Land Department or in the courts. And even if it did not have that effect, and he thereafter had the right to assert his said claim and to have its validity passed on in either forum, there is room, at least, for maintaining that by his conduct subsequent to the rendition of that decision he abandoned same, and by reason thereof lost any rights he may theretofore have had by reason thereof. He acquiesced in said decision, and on October 24, 1895, filed an original application under the homestead laws to enter the three-fourths of the land covered by the soldiers' additional entry made by Cornelius on July 6, 1895. This he did upon the basis of the claim that Cornelius' right to make same had been exhausted by a prior entry, and that portion of said land was therefore public land, and subject to homestead entry. He filed no such application to the one-fourth thereof covered by Berry's entry, no doubt because said entry was considered to be valid, and patent was permitted to issue to him on the 15th day of April, 1896, without objection on his part. After this application was finally rejected, and the case was closed, on May 3, 1897, he made the attack upon the entry of Cornelius on the grounds hereinbefore stated, with the view, no doubt, of throwing the land covered by it open to entry again. It was not until a year after this attack was disposed of adversely to his contention, and after appellee had in good faith acquired the note and mortgage in question herein for value, and without other notice of appellant's

claim than the records afforded, to wit, on May 3, 1898, that he filed his petition for issuance of a patent, which relief he sought upon the ground that his original homestead claim had been confirmed, and he had thereby acquired title to the land "out and out" by the act of March 2, 1889. That his said claim was the subject of abandonment is clear. Even if his claim was within the confirmatory provision of said act, the effect of said confirmation was not so thoroughgoing as claimed by appellant in his said petition. This court so held in the case of *Cunningham v. Metropolitan Lumber Co.*, 49 C. C. A. 72, 110 Fed. 332. Judge Clark, in delivering the opinion of the court, said:

"The contention of plaintiffs in error is that the proviso to the act of Congress of March 2, 1889, confirming the rights of homestead claimants, as construed by the Supreme Court of the United States in *Iron Co. v. Cunningham*, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183, had the effect to change the inchoate homestead claim recognized by the act into an absolute title, so that thereafter homestead claimants in the situation of *Cunningham* stood clothed with full title, without the necessity of the payment of any sum to the United States, or otherwise complying with such regulations and conditions as would have been required by law in the absence of the confirmatory grant contained in this act of Congress. * * * In this view we are unable to concur. Such a construction of the act would not be just to the United States, and it was certainly more than justice to a homestead claimant in *Cunningham's* situation required. It was the intention of Congress to recognize such equitable considerations as existed in favor of those who had undertaken in good faith to acquire a homestead, and to comply with the general law and regulations of the land office in relation to such a claim, and to enable them to go forward in the ordinary way and perfect their right by compliance with the law."

The conclusion is therefore irresistible that appellant has no equitable right to the land by virtue of the confirmatory provision of the act of March 2, 1889. He did not come within that provision, as the facts proven herein show, and the decision of the Land Department held. And if he did, there is room at least for holding that he abandoned his claim thereunder.

But appellant does not rest his claim to said land alone upon said confirmatory provision. He urges here, and there is ground for believing that he so urged in the lower court at the hearing therein, that he has an equitable right to the land, as against the legal title and appellee's mortgage claim, by virtue of section 3 of the act of May 14, 1880, 21 Stat. 141 [U. S. Comp. St. 1901, p. 1393], which is in these words:

"That any settler, who has settled or who shall hereafter settle, on any public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office, as is now allowed to settlers under the pre-emption laws to put their claims on record, and his rights shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

He claims that though what he did prior to Ford's entry on March 6, 1889, was not an actual occupation of the land, within the act of March 2, 1889, it was a settlement, within the meaning of said section of the act of March 14, 1880, and of the public land laws of the United States, and therefore his claim and application to enter

under the homestead laws of May 1, 1889, took precedence to said Ford's entry; and that, if this position is not well taken, what he did after March 13, 1889, amounted to such a settlement, and upon the relinquishment of Ford on July 6, 1895, his claim by virtue thereof attached at once, and same, followed up by his homestead entry on October 24, 1895, took precedence of the entries of Berry and Cornelius on July 6, 1895.

To this it may be answered that at no time was such a contention set up in the long litigation pending in the Land Department. The contention at first was that appellant was entitled to the land under the confirmatory provision of the act of March 2, 1889, and afterwards under the homestead laws, because of his original application and the invalidity of Cornelius' entry. Besides, no such contention is set up in the bill in this suit. Appellant's case herein is founded upon no such theory. It is based solely upon said confirmatory provision of the act of March 2, 1889, and he ought not, therefore, to be allowed to recover on any other theory. But the contention is without merit otherwise. Assuming that what appellant did on the land in 1888 amounted to a settlement if same had been open to settlement, at that time it was not so open. It was not public land. The title thereto was in the state of Michigan. After March 2, 1889, when same was restored to the public domain, and before Ford's entry of March 6th, he did nothing on the land which amounted to a settlement. Likewise, assuming that what appellant did on the land after March 13, 1889, amounted to a settlement if same were open to a settlement, it was not so open, because of Ford's prior entry. At the time of Ford's relinquishment, appellant was not then residing on the land, having given up his residence thereon several years prior thereto; and he did nothing in the way of a settlement after said relinquishment, and before the entry of Berry & Cornelius. The settler upon whom section 3 of the act of May 14, 1880, confers any rights, is a settler "on any of the public land of the United States," and at no time whilst the land in question was public land of the United States did appellant settle thereon, or perform any act amounting to a settlement. That it is only in such cases that said section applies was recognized by the Supreme Court in the recent case of *Nelson v. The Northern Pac. Ry. Co.* (decided Jan. 26, 1903) 23 Sup. Ct. 302, 47 L. Ed. —; a case in which said section was applied. Mr. Justice Harlan, in delivering the opinion of the court, said:

"The third section of this statute is a distinct confirmation of the rights of a qualified person who had theretofore settled or should thereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, though, of course, no lands could be deemed of that character which had prior to such settlement become vested in a railroad company in virtue of an accepted map of definite location."

And again he said:

"Nelson's occupancy occurred after the passage of the act of 1880. While that act did not apply to a railroad company which had acquired the legal title by a definite location of its road, it distinctly recognized the rights prior to such time to settle upon the public lands, whether surveyed or unsurveyed,

with the intention of claiming same under the homestead laws. In occupying the land here in dispute, Nelson did not infringe upon any vested right of the railroad company; for there had not been at the date of such occupancy, in 1881, any definite location, of the line of the railroad, and the land so occupied, with other lands embraced by the map of general route, constituted only a 'float'; the company having, at most, only an inchoate interest in them—a right to acquire them if at the time of definite location it was not occupied by homestead settlers, 'nor incumbered with other claims or rights.'"

The judgment appealed from is affirmed.

DAY, Circuit Judge, participated in the decision of this case.

KILPATRICK et al. v. CHOCTAW, O. & G. R. CO.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1903.)

No. 1,694.

1 INJURIES TO SERVANT—DEFECTIVE APPLIANCES—UNBLOCKED RAILROAD FROGS.

It is not negligence to use unblocked frogs in a railroad freightyard, whereby the feet of employes coupling cars are liable to be caught, it appearing that unblocked frogs are generally in use in the same section of the country, and that it is doubtful whether they are not the better kind.

Caldwell, Circuit Judge, dissenting.

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

W. E. Rogers, W. O. Davis, and J. H. Garnett, for plaintiffs in error.

C. B. Stuart, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action for personal injuries which resulted in the death of R. E. Kilpatrick, at Shawnee, in the Territory of Oklahoma, on February 13, 1897. Minnie Kilpatrick, the plaintiff below and the plaintiff in error here, who was the wife of the deceased, sues for herself and as next friend for her minor children, Ethel Kilpatrick and Robbie Kilpatrick, basing her right to sue on sections 435 and 436 of the Laws of Oklahoma Territory, which provide, in substance, that, when the death of a person is caused by the wrongful act or omission of another the personal representatives of the deceased may maintain an action therefor against the wrongdoer if the deceased might have maintained an action had he lived; and that such action may also be brought by the widow, or, where there is no widow, by the next of kin, provided no personal representative has been appointed. It was charged in the complaint

¶ 1. Duty of railroad companies to block switches, see note to *Hauss v. Railroad Co.*, 46 C. C. A. 98.

See Master and Servant, vol. 34, Cent. Dig. § 190.

that R. E. Kilpatrick was in the employ of the Choctaw, Oklahoma & Gulf Railroad Company at the time of his death, acting in the capacity of a brakeman on one of its freight trains; that at the time and place of his death it became necessary for the deceased to go between two freight cars standing on the defendant's track, and to uncouple them while the train to which they were attached was moving slowly; that, by reason of the negligence of the defendant company, the coupling pins, coupling links, coupling chains, cranks, and means provided for coupling and uncoupling the two cars, had, through the defendant's negligence, been permitted to become defective, broken, and out of repair, so that the cars could not be uncoupled without going between the cars while they were in motion; that as he stepped in between the two cars for the purpose of uncoupling them, being at the time in the exercise of due care, his foot was caught and became wedged between what is known as the "guard rail" and the "main rail" at a point where the space between the main rail and the guard rail was only about two inches in width; and that, by reason of his foot being caught and so held, he was run over, and his leg and body were so crushed and mangled that he died within half an hour thereafter. It was further alleged in the complaint that the defendant company had caused a guard rail at the place in question to be so laid, alongside of the main rail, that there existed at each end of the guard rail an open and unblocked space about four inches in width; that this space gradually decreased in width from each end of the guard rail for about six inches until it reached a point where the space between the main rail and guard rail was not over two inches wide; that the laying of the guard rail in this manner, without blocking it, rendered the track at that point unsafe and dangerous, as the defendant company knew, or by the exercise of ordinary care ought to have known, long prior to the accident in question; and that for years prior to the accident, as the defendant company well knew, there was in use a plain and simple device for preventing the feet of railroad employes from becoming wedged between the two rails, such device being a block or wedge of wood placed between the guard rail and the main rail at each end of the guard rail, which wedge or block, when inserted, will effectually prevent a person's foot from becoming wedged between the two rails; but that, notwithstanding such knowledge on the part of the defendant company, it negligently failed and omitted to make use of such a device or insert such a block. While the complaint alleged that the coupling appliances on one of the cars in question were broken and out of repair, yet in the course of the trial it was stipulated by the plaintiff's attorneys that the failure to block the frog in the defendant's track was the proximate cause of the injury complained of, and that the plaintiff would rely for a recovery solely upon the failure of the defendant company to block the frog, and that he would not rely for a recovery upon the other ground stated in the complaint, that the coupling appliances were out of repair. At the conclusion of all of the testimony, the trial court directed the jury to return a verdict in favor of the defendant company, which was accordingly done, and the judgment subsequently rendered in

favor of the defendant was affirmed on appeal by the United States Court of Appeals for the Indian Territory. 64 S. W. 560.

The case appears to have been decided, both at nisi prius and on appeal by the United States Court of Appeals in the Indian Territory, upon the ground that it was ruled by the decision of the Supreme Court in *Southern Pacific Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; and in that view we feel constrained to concur. In the *Seley* Case the Supreme Court, after describing the method which is sometimes employed of blocking the frogs of switches by filling the angle between the guard rail and main rail with a piece of wood or iron, referred to the fact that the evidence in that case plainly showed that on other great railroad systems in the West the unblocked frog was generally used, and that there was evidence tending to show that the unblocked frog is the better form, as the blocked frog is liable to become broken and cause the derailment of trains. It thereupon held that the following instruction contained a correct declaration of law applicable to the case, and should have been given:

"The jury are instructed that if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the railroads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

The court then referred to several cases (especially *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003, and *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235) in which it had been held substantially that neither railroad corporations nor employers generally are bound to supply "the best and safest or newest" of appliances, but are justified in using such appliances and devices as are in common use, and are considered ordinarily safe and reasonably well adapted to the purposes to which they are applied, and concluded, in view of such decisions and the evidence in the case showing that unblocked frogs were in use on many railroads throughout the country, that it was "plain that the defendant was entitled, not merely to the instruction" aforesaid, "but that, upon the whole evidence, the prayer for a peremptory instruction in the defendant's favor ought to have been granted." This decision, therefore, as we construe it, clearly decides that so long as many railroads of the country use the unblocked frogs, believing such frogs to be ordinarily safe, and less liable to get out of order and occasion derailments than blocked frogs, negligence cannot be imputed to a railroad company simply because it uses unblocked frogs. According to the doctrine so enunciated, it seems that railroad companies are at liberty to determine for themselves, in the light of their experience, which form of frog is preferable, so long as both forms are in common use, and that it is not competent for a jury to hold a railroad company guilty of negligence because it adopts one form of frog in preference to another.

Applying the doctrine enunciated in that case to the case in hand, the judgment below must be permitted to stand, since it is shown

by the testimony, without substantial contradiction, that only about 25 per cent. of the railroads in the United States have adopted the practice of blocking their frogs, while the remaining roads, believing it to be the better or safer practice, leave their frogs unblocked. Counsel for the plaintiffs in error urge with great force that the question whether an unblocked frog is a dangerous contrivance, and more liable to occasion loss of life and limbs than blocked frogs, is in its nature and essence a question of fact to be determined by the testimony of railroad employes, who, in the discharge of their duties as trainmen, are daily brought in contact with both kinds of appliances, and who thus become familiar with the comparative risks which are encountered by the use of each. They further urge that as this is a question of fact it is within the legitimate province of a jury to determine it, and also within the province of a jury to hold a railroad company accountable for a want of ordinary care amounting to culpable negligence if it fails to block its frogs, provided the triors of the fact are satisfied by the evidence that unblocked frogs are so far dangerous and liable to entrap trainmen that they ought not to be used. We feel constrained to hold, however, that this view has not met with the approval of the Supreme Court, but is expressly overruled in the case above cited, the rule enunciated being, as above stated, that so long as both kinds of frogs are in use on railroads, and many roads prefer those that are unblocked, and it is questionable which is the safest or most suitable appliance for the business of railroads, a jury cannot impute negligence to a company which uses one of these appliances in preference to the other. It results from this authoritative statement of the law that the judgment below must be affirmed, and it is so ordered.

CALDWELL, Circuit Judge (dissenting). In *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, 300, 37 C. C. A. 499, 48 L. R. A. 68, Judge Taft, speaking for the Court of Appeals of the Sixth Circuit, referring to the Ohio statute which makes it obligatory on railroad companies to block their guard rails and frogs, says:

"The intention of the Legislature of Ohio was to protect the employes of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device."

In *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464, the Supreme Court of the United States said:

"Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that, in all occupations which are attended with great and unusual danger, there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence."

In *Union Pacific Railway Co. v. James*, 56 Fed. 1001, 1006, 6 C. C. A. 217, this court said:

"We think that it might properly have been left to the jury to determine whether the maintenance of an unblocked frog at the time and place of the accident was an act of culpable negligence. * * *"

In this case the defendant did not itself treat the question as one of law. It did not demur to the complaint, but took issue on the question of fact as to whether its track in this regard was properly constructed, and introduced expert testimony on the subject. All the testimony of men having practical experience is that blocking is necessary. One of the witnesses called by the plaintiff testified as follows:

"I have been braking and switching on railroads for about nine years. * * * I know why the M., K. & T. blocks its rails. Protection to the men is one thing, safety, because that open guard rail is just simply a dead trap a man is liable to step in at any time, because you will catch some cars you can't uncouple. When it is unblocked it is not safe for anybody at all. I would say it is dangerous. When it is blocked it is not dangerous, because then a man can't get his foot in there at all. The L. & N. Railroad is the Louisville & Nashville. That and the Illinois Central block their guard rails. I do not know whether the Rock Island block their guard rails or not. I never was over its road. I am a practical brakeman, working on the local right here, where I handle hundreds and thousands of cars every week, as far as that is concerned. My experience in coupling and uncoupling cars has been large. An unblocked guard rail is dangerous just simply because a man's foot will get right in there walking along uncoupling cars. The ball of the rail will prevent it from coming out. The rail is three inches at the top and at the bottom it is about six, and there is a hollow in there, and whenever your foot gets below that you can't pull it out. If that block is in there his foot can't get caught there. The top of the rail is called the ball, and the bottom is the web, and there is a hollow place between them."

Another witness, Otto Sullivan, testified:

"I know the M., K. & T. Company. It blocks its guard rails. After a guard rail is blocked at both ends, a man's foot cannot go in and get caught. * * * Where the guard rail is not blocked it is a dangerous contrivance. It is dangerous because you can run your foot up in there and cannot get it out. It is held there and stays."

Numerous other witnesses, having large experience as brakemen and switchmen and otherwise in the practical operation of trains, testified to the same facts.

Engineering experts treating the subject theoretically say they are not necessary. The defendant was careful not to call a single brakeman or switchman, whose practical experience and observation would have enabled him to testify to facts instead of theories. The language of the Supreme Court in the Seley Case has reference to the facts disclosed by the record in that case, and does not decide as matter of law that it is not necessary to block guard rails or frogs. In that case the conductor, who was killed, was clearly guilty of contributory negligence, and so the court decided, and whatever it said as to the railroad company not being under any legal obligation to block its frogs was not necessary to the decision of the case, and must be treated as the mere obiter dictum of the judge writing the opinion. Moreover, if the opinion is construed as holding that as matter of law a railroad company is not under obligation to its employes to block its guard rails, it must be held to be overruled by the doctrine of the

later case of *Mather v. Rillston*, supra. See, as to this case, *Western Coal & Mining Co. v. Berberich*, 94 Fed. 327, 36 C. C. A. 364.

It is not at all likely that the judges of that court would attempt to determine the question either as engineering experts or from practical experience as brakemen and switchmen. Judges not being qualified to speak either as engineering experts or from actual observation and practical experience, it is difficult to understand upon what principle they can declare that railroad companies are not required, for the protection of their employes, to block their guard rails and frogs, or resort to some equivalent or better device to protect their employes from the known and obvious dangers of open guard rails and frogs.

It is common knowledge that open guard rails and frogs are extremely dangerous to the lives and limbs of railroad employes, and, if the courts are going to take it upon themselves to declare as matter of law either that they should or should not be blocked, then the rule prescribed by the courts should require them to be blocked.

It is an impeachment of the intelligence and skill of railroad engineers and managers to say that they are not capable of devising any means of preventing or lessening the numerous fatal accidents resulting to railroad brakemen and switchmen by the use of open guard rails and frogs, and our reason revolts and our humanity is shocked at the judicial declaration that railroad companies are not required to do anything in that direction, not even so much as to use, in the language of Judge Taft, "a well-known safety device."

It should be left to the jury, upon a consideration of all the evidence, to say whether the railroad company is guilty of culpable negligence in neglecting to provide, in the language of the Supreme Court, "such readily attainable appliances" as would lessen or prevent the danger. Juries, upon a consideration of the evidence, are much more capable of deciding this question than judges, and besides, it is a question of fact which belongs to the domain of juries to decide. If in the beginning, instead of leaving these questions to the jury, where they rightfully belong, judges had taken it upon themselves to decide that railroad companies were not required to do this thing or that thing for the safety of their employes or passengers, or were not required to operate their trains in this manner or that manner for a like purpose, there would to-day be small safety either for employes or passengers. It is mainly to the verdicts of juries we owe most of the improvements in appliances and methods of operating railroads which have lessened the dangers to their employes and passengers.

Whenever it is made to appear to a railroad company that it costs more to pay the damages assessed against it by the verdicts of juries for maintaining a dangerous condition of its track or appliances than it would cost to substitute safe ones in their place, the substitution is quickly made. But, as long as courts hold as matter of law that what the witnesses in this case declare to be "simply a dead trap" may be maintained with impunity and without incurring any pecuniary liability, the death trap will remain and the slaughter go on. The decision of the majority of the court makes human life in this circuit a cheaper commodity than lumber. It is perfectly certain from the evi-

dence in this case that the deceased brakeman would not have been killed had the guard rail been blocked.

Whether it was culpable negligence in the defendant not to block its guard rails at the place where this accident occurred was a question of fact to be submitted to the jury, and not one of law to be determined by this court.

MONTGOMERY COUNTY v. COCHRAN et al.

(Circuit Court of Appeals, Fifth Circuit. March 3, 1903.)

No. 1,205.

1. PUBLIC OFFICERS—BONDS—LIABILITY FOR "FUNDS OR MONEY" RECEIVED.

In a statute providing that the proceeds of certain county bonds should be paid to and kept by the county treasurer, and that he should be "responsible for the safe-keeping of all of the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer," the terms "proceeds of sale" and "funds or money" are not limited in meaning to coin and bank bills, but include any other medium of payment authorized by general commercial usage, and the treasurer is equally responsible where he accepted a check given by the purchaser, and receipted for the same as the proceeds of the bonds.

2. SAME—ACCEPTANCE OF CHECK.

By the statute of Alabama (Code 1896, § 3070), a county treasurer is required to give a bond "faithfully to discharge the duties of such office during the time he continues therein or discharges any of the duties thereof." He is also expressly made responsible on his bond for "his failure to perform or the improper or neglectful performance of those duties imposed by law." By a special act the board of revenue of a county of which defendant was treasurer was authorized to issue \$100,000 in bonds, and to use the proceeds as therein directed. The act provided that the proceeds should be paid to and kept by the treasurer, who should be responsible for the same as for other funds or money of the county. After the board had accepted a bid for the bonds from a local bank, defendant accepted a check of such bank in payment, and receipted to the board for the amount as the proceeds of the bonds on which they were delivered. Defendant deposited the check in the bank, having the same credited to himself as treasurer, as a special fund. After a small part of the fund had been checked out by him in payment of warrants, the bank failed. *Held*, that the effect of the transaction was the same as though defendant had received coin or bank bills from the board as the proceeds of the bonds, and had deposited the same, and that he was liable to the county on his bond as for conversion of the money, it being the law of the state that a general deposit of county funds in a bank by the treasurer is a conversion of the money.

3. SAME—NEGLECTFUL PERFORMANCE OF DUTY.

Conceding that defendant had no right to accept the check, and that not having actually received money he was not responsible for its safe-keeping, his acceptance of it and his receipting to the board for the proceeds of the bonds, by reason of which they were issued and became obligations of the county, amounted to an improper or neglectful performance of a duty imposed by law, and he and the surety on his bond were liable for the loss resulting to the county.

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

This suit was brought in the city court of Montgomery, Ala., by the county of Montgomery against John J. Cochran, a citizen of Alabama, and the

Fidelity & Deposit Company of Maryland, a corporation chartered under the laws of Maryland. It was removed to the Circuit Court of the United States for the Middle District of Alabama on the application of the Fidelity & Deposit Company on the ground of prejudice and local influence. 116 Fed. 985. The action is on Cochran's bond as treasurer of Montgomery county.

On being elected treasurer of Montgomery county, John J. Cochran gave bond payable to the county for \$120,000. The Fidelity & Deposit Company of Maryland became his only surety. The condition of the bond is, as provided by statute (Code Ala. 1896, § 3070): "Now, if the said John J. Cochran shall faithfully discharge the duties of such office during the term he continues therein, or discharges any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and effect."

On September 1, 1900, Cochran, with approval of his surety, appointed John P. Kohn his agent, deputy, or attorney in fact by a power of attorney, conferring on him power "to receive and receipt for, in my name, all moneys coming in my possession as treasurer of the county of Montgomery, Ala., and in my name, as treasurer, to pay out all money required by law to be paid by me upon checks signed by the clerk of the board of revenue of said Montgomery county; and, further, to make reports, keep all books required by law to be made or kept by me as such county treasurer, and to do and perform all acts and things I might lawfully do in my own name as such county treasurer; and I hereby ratify and confirm all the acts and things that may be done by the said John P. Kohn, acting as my agent, under the authority of this power, as if the same were done in person by myself."

John P. Kohn was an employé of the banking house of Josiah Morris & Co., which banking business was conducted by F. M. Billing. On December 13, 1900, the Legislature passed an act to authorize the board of revenue of the county to issue bonds of the county for an amount not to exceed \$100,000 for improving the public roads. The fourth section of the act provides "that the board of revenue of said county are hereby authorized to negotiate and sell such bonds as are issued by them by virtue of this act, but said bonds shall not be sold for less than par (100 cents on the dollar), and the proceeds of said bonds shall be paid over to and kept by the treasurer of said county and applied to pay for the building of and improving the public roads of the county upon a permanent and well-considered system, and for erecting bridges in said county; such use, payment and application of said proceeds to be under the direction and by authority of said board of revenue of said county of Montgomery, and the said county treasurer to be responsible for the safe-keeping of all the proceeds accruing from the sale of said bonds, which may come into his hands in his official capacity, the same as for other county funds or money in his hands as such treasurer; and there shall be no commissions paid said county treasurer for disbursing the funds accruing from the sale of the bonds named in this act." Acts Ala. 1900-01, p. 703.

Under the authority of this act, the board issued \$100,000 of negotiable coupon bonds payable to bearer, and sold them January 8, 1901, to Josiah Morris & Co. for \$111,109.58. The bonds were held by and under the control of the board. Charles A. Allen was the clerk of the board. Seeking to obtain possession of the bonds, John P. Kohn tendered to the clerk of the board the check of Josiah Morris & Co. for \$111,109.58 on the bank of Josiah Morris & Co., and the clerk declined to receive the check for the bonds. Kohn then left the presence of the clerk, and later returned, and presented to him this receipt:

"The State of Alabama, Montgomery County.

"Office of County Treasurer,

"No. 507, Montgomery, Ala., Jan. 8th, 1901.

"Received from board of revenue of county \$111,109.58, proceeds sale \$100,000.00 bonds.

John J. Cochran, County Treasurer,

"By John P. Kohn, His Atty."

On presentation of this receipt, the bonds were delivered to John P. Kohn, who carried them to the banking house of Josiah Morris & Co., and delivered them to F. M. Billing. They were immediately sold, and are outstanding

against the county. Kohn testified as to the disposition of the check: "I indorsed the check, 'John J. Cochran, County Treasurer, by John P. Kohn, His Attorney in Fact,' and made out a deposit slip for the amount of the check to the credit of 'John J. Cochran, County Treasurer, Road and Bridge Fund,' and turned the check and deposit slip in to the receiving teller of the bank for him to make the entries, and the amount was accordingly credited to said Cochran as treasurer on the books of the bank as 'Road and Bridge Fund.' Nothing else was done toward paying that check, except these entries. At the same time, as the attorney in fact of the said treasurer, Cochran, I made an entry on the cashbook of the county treasurer, charging said treasurer with said amount as received from the board of revenue as the proceeds of the sale of \$100,000.00 of road and bridge bonds. No money actually passed as between said Josiah Morris & Co. and said board of revenue and said treasurer, but the check was drawn, indorsed, and the amount placed to the credit of the said Cochran, as I have stated. All this occurred on the afternoon of the 8th of January, 1901."

Seventeen days after these transactions, on January 25, 1901, the bank closed its doors, and remains suspended. Before the bank was closed, on and after January 8th, warrants to the amount of \$5,769.00, drawn by the treasurer on the road and bridge fund, were paid at the bank.

At the time the check was deposited the actual amount of cash in bank was about \$35,000. On the trial the plaintiff offered to prove that at the time the check was deposited the banking house of Josiah Morris & Co. had, together with the cash on hand, available assets in the bank and in New York sufficient to pay the check; but the court, after being informed by counsel for plaintiff that they did not propose to prove that any money was actually set aside and separated from the other assets of the bank, so that the title thereto vested, on motion of the defendant excluded this evidence. The plaintiff further offered to prove that the bonds were immediately, upon their purchase by said Josiah Morris & Co., sent to New York, and a cash credit obtained two days later on them of \$95,009 by Josiah Morris & Co.; but the court, on motion of the defendants, excluded this testimony. On February 12, 1901, Cochran made a report to the grand jury of the county showing that he had received from the sale of bonds \$111,109.58; but this report was excluded as evidence against the company, Cochran having testified that no money was actually received by him.

It was agreed in open court that, at the time of the failure of Josiah Morris & Co., January 25, 1901, there was on deposit of the general fund of the county, and two or three small special funds about which there is no dispute, not taking into consideration any of the proceeds of the sale of \$100,000 of road and bridge bonds, the sum of \$32,221.80, and the defendants admitted in open court that the plaintiff was entitled to recover in this action \$32,221.80, together with the further sum of \$4,648.12, the interest thereon making a total of \$36,869.92.

The Alabama statutes provide that the condition of official bonds shall be "faithfully to discharge the duties of such office during the time he continues therein or discharges any of the duties thereof." Code 1896, § 3070. "Every official bond is obligatory on the principal and sureties thereon: (1) For any breach of the condition during the time the officer continues in office, or discharges any of the duties thereof. (2) For the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition be expressed therein. (3) For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law." Id. § 3087. It is the duty of the county treasurer to receive and keep the money of the county, and disburse the same according to law." Id. § 1429.

The complaint, as amended, contained nine counts. Each of them contained a statement of the material facts; in some of them a condensed statement, and in others a full and elaborate statement. The breach of the bond in the first five counts and in the seventh count is the deposit of the money, the proceeds of the bonds, in bank, whereby it was lost. These counts sug-

gest the contention that the treasurer, by the deposit, had converted the fund, and that the conversion was a breach of the bond, and that, the money having been lost by the failure of the bank, there was a breach of the undertaking to safely keep the money. The sixth count avers that there was a breach of the bond, in this: that the treasurer represented that the purchase price of the bonds was paid to him as treasurer, when in fact no part thereof had been paid. The breach alleged in the eighth count is that the treasurer undertook to collect the check for the price of the bonds, and wrongfully failed to collect the same. The breach alleged in the ninth count is the false report of the treasurer that he had the proceeds of the bonds. The court sustained demurrers to the sixth, seventh, eighth, and ninth counts. The chief ground of demurrer was that the counts did not show that the treasurer had actually received the money. To the first five counts of the declaration the defendants filed pleas, setting up the fact that the treasurer had not actually received any money arising from the proceeds of the bonds, and claiming that there was no breach of the bond, because no money was received by the treasurer. The plaintiff demurred to the pleas, and the demurrers were overruled.

The court instructed the jury to find for the plaintiff for \$36,869.92, about which sum there was no controversy, but decided that the plaintiff was not entitled to a verdict for any part of the proceeds of the sale of the bonds. Exception was duly taken to this ruling, and to the refusal to give charges for the plaintiff involving the same question. The decisions of the court on the pleadings and on the instructions to the jury are assigned as error.

William L. Martin (John G. Finley and Jesse F. Stallings, on the brief), for plaintiff in error.

Edgar H. Gans (Thos. H. Watts, Alexander Troy, Thomas A. Whelan, Gordon McDonald, William W. Hill, and Willy C. Hill, on the brief), for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

The foregoing facts show that Montgomery county has lost the price of \$100,000 of its bonds. The treasurer and the surety on his bond, admitting that the former gave a receipt for the purchase money of the bonds and charged himself on his account with the same, claim that he cannot be held for a breach of his bond because he never actually received the price in coin or bank bills. It was not incumbent on the treasurer, they contend, to safely keep the proceeds of the sale, because he never received them, and that as to the fund in question there could be no breach of the bond except failure to safely keep the fund. The plaintiff in error contends that the treasurer did receive the proceeds of sale, and that he failed to safely keep them.

The defendants' position is based on section 4 of the act which authorized the issuance of the bonds. It is there provided that the board of revenue is authorized to sell the bonds, and that "the proceeds of said bonds shall be paid over to and kept by the treasurer of said county," and that the treasurer shall be "responsible for the safe-keeping of all of the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer." Acts Ala. 1900-01, p. 703. It is asserted by the defendants in error that it was the duty of the board of revenue to get the "proceeds of the bonds in such shape that when they paid them over the treasurer could

keep them until disbursement," and the keynote to the defense is that the treasurer had no right to receive anything but coin or bank bills as the proceeds of sale of the bonds. These contentions depend on the meaning of the act. Was it the intention of the Legislature that no transactions with the board of revenue and the purchaser of the bonds and the treasurer should be permitted except by the use of coin or bank bills? The statute must be construed in the light of commercial usage and common knowledge of business transactions. The word "money," when used as in this statute, does not mean only coin and bank bills. "Such a construction," said Lyon, C. J., in *State v. McFetridge*, 84 Wis. 473, 515, 54 N. W. 1, 10, 998, 20 L. R. A. 223, "would be extremely technical, and is, we think, uncalled for. 'Money' is a generic term, and may mean not only legal tender coin and currency, but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representatives of value." And it was held that a certificate of deposit was money within the meaning of a statute. In *Taylor v. Robinson* (D. C.) 34 Fed. 681, Judge McCormick said: "The term 'money' is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term 'land' designates all real estate." In *Allibone v. Ames*, 9 S. D. 74, 81, 68 N. W. 165, 167, 33 L. R. A. 585, the court applies this definition to a certificate of deposit: "When the certificate of deposit was delivered to plaintiff, and accepted by him, it had all the characteristics of money. Its return to the bank must be regarded as a deposit of that amount of currency. It was, the parties so treating it, precisely the same as if the treasurer had received the coin and again deposited it. To say that if a person deposits a draft or certificate of deposit with a bank, and receives credit for the amount of it, he does not make a deposit of that amount, is simply absurd, in view of the modern methods of transacting business."

And there are other authorities to the same effect, showing that the words "funds or money" and "proceeds of sale," as used in the act, should not be confined in their meaning to coin and bank bills. *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *Byrom v. Brandreth*, 16 L. R. Eq. Cases, 475; *State v. Hill*, 47 Neb. 456, 66 N. W. 541; *People v. McKinney*, 10 Mich. 55; *Bork v. People*, 16 Hun, 476.

The use of checks, certificates of deposit, and other commercial instruments is so universal and so essential in large transactions that we cannot assume that the Legislature of Alabama meant to forbid their use in the negotiation and sale of the bonds. If *Josiah Morris & Co.* had had the coin on hand to pay for the bonds in question, the transaction would have been conducted by the use of checks or certificates of deposit, and we think without any violation of the terms of the statute. If silver coin had been in bank as the basis of the transaction, its weight (about 6,546 pounds) would have made the use of checks or certificates necessary to conveniently complete the transaction. We think, therefore, that checks or certificates of deposit received in good faith by the board of revenue, and delivered to the treasurer, or delivered by direction of the board of revenue to the treasurer, would be "funds or money" or the "proceeds of

sale" of the bonds in the hands of the treasurer. The check for the price of the bonds in the hands of the treasurer, he having receipted for the same as money, was "funds or money" in his hands, within the meaning of the statute. It was not his duty to keep the check, but to have it cashed, and to keep the coin or notes received on the check. In doing this, he should conform to the law of the state, and keep the coin or notes under his actual personal control, as, for example, in his own safe, or on special deposit. It is conceded to be the settled law in Alabama that, if the check was money in the treasurer's hands, it was a conversion of it to make a general deposit of it in a bank. *Alston v. State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659. If there was reluctance in applying this rule generally to a deposit in a solvent bank, it should be applied without question under the circumstances under which the treasurer deposited this fund. If the check was funds or money, within the meaning of the statute, that would seem conclusive. But, if it was necessary that the check be collected before it became money, it is urged with great force that the effect of the deposit of the check to the credit of the treasurer was to collect the check. When the check was presented at the bank and accepted by crediting the amount of it to the treasurer, the effect in law of the transaction was the same as if the amount of the check had been handed to the treasurer and by him returned to the bank. *National Bank v. Burkhardt*, 100 U. S. 689, 25 L. Ed. 766; *City National Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *Zane on Banks & Banking*, § 133.

The condition of the bond sued on is that Cochran, the treasurer, "shall faithfully discharge the duties of such office during the time he continues therein or discharges any of the duties thereof." One of the treasurer's duties under the general statute is to "receive and keep the money of the county and disburse the same according to law." Code Ala. 1896, § 1429. The act authorizing the bonds provides that the proceeds of the bonds "shall be paid over to and kept by the treasurer," and applied as provided by the statute. Both by the general statute and by the special act it is made the duty of the treasurer to receive the money arising from the sale of the bonds. If it be conceded that the act may be construed that the board of revenue was to sell the bonds, and first receive the proceeds of sale and pay them to the treasurer, there is nothing in the act to forbid the board to permit or require the price of the bonds to be paid directly to the treasurer by the purchaser, the bonds to be delivered to the purchaser on the production of the treasurer's receipt. So the purchaser's money reached the treasurer's hands, it is immaterial whether it passed actually through the hands of the board of revenue or not. The law clearly imposed two duties on the treasurer—first, to receive, and, second, to keep, the funds arising from the sale of the bonds. It would be a breach of the treasurer's bond for him to refuse to receive and receipt for money lawfully tendered to him. The condition of his bond is for the faithful discharge of his duties, which includes both the receiving and the keeping of the money. In the usual course of business, it would be the treasurer's duty to receipt for money paid to him. The giving of a receipt for money

paid to him is one of his official duties. Acts Ala. 1888-89, p. 1050, § 4.

Having this power to receive and receipt for the funds arising from the sale of the bonds, he executed a receipt for \$111,109.58, proceeds of sale of bonds. Admit, for the purposes of the argument, that the contention here is true, that he received no money but received only a "worthless check," and that there can be no breach of the bond for the failure to safely keep the money, would it not be a breach of the treasurer's bond for him to execute the receipt alleging that he had received the money, when in fact he had not received it? We have seen that he is charged with the duty of both receiving and keeping the money. In Alabama, by express statute, the officer's bond stands as an indemnity against "the improper or neglectful performance of those duties imposed by law." Code Ala. 1896, § 3087. This statute, before the adoption of the present Code, to which it was transferred, was construed to extend the liability of sureties on official bonds beyond that imposed by the common law. Rev. Code Ala. § 169; *Kelly v. Moore*, 51 Ala. 364. One of the objects of the statute was to extend the remedy beyond those cases in which a wrong is done in the discharge of the legitimate duties of the office, to those in which a wrong is done under color of office. *Mason v. Crabtree*, 71 Ala. 479. To receive a "worthless check" as money, receipting for it as money and charging the amount as cash upon his official accounts under such circumstances as to cause a loss to the county, would be, we think, to say the least of it, an improper and neglectful performance of duties imposed by law. And, aside from the statutes, at common law it is an error to suppose that the agreement to perform the duties of the office faithfully means merely that the incumbent will not willfully do any wrong act. It has a stretch beyond this, and is broken by a neglect or by carelessness in the discharge of official duty as well as by an intentional misfeasance. *Mayor v. Evans*, 31 N. J. Law, 342.

In *U. S. v. Girault*, 11 How. 22, 13 L. Ed. 587, an action was brought on the official bond of Girault, a receiver of public money. The condition of the bond was that Girault should faithfully execute and discharge the duties of his office as receiver of public moneys. The breach of the bond assigned was that Girault had received a large amount of the public money, which he had neglected and refused to pay to the government. The sureties pleaded that Girault gave receipts as receiver for money to the amount of \$10,000, when in fact no money was paid to or received by him, and that this was the same money mentioned in the declaration. After disposing of the question raised by demurrer to the plea, the court added:

"The principle, however, upon which these pleas are founded, is as indefensible as the rule of pleading adopted for the purpose of setting it up. The condition of the bond is that Girault shall faithfully execute and discharge the duties of his office as a receiver of public moneys. The defendants have bound themselves for the fulfillment of these duties, and are, of course, responsible for the very fraud committed upon the government by that officer which is sought to be set up here in bar of the action on the bond. As Girault would not be allowed to set up his own fraud for the purpose of disproving the evidence of his indebtedness, we do not see but that, upon the

same principle, they should be estopped from setting it up as committed by one for whose fidelity they have become responsible."

This case, we think, shows that the execution of the receipts by Girault when he had not received the money was a breach of his duty to faithfully execute and discharge the duties of his office as a receiver of public moneys. If Girault was not liable for the money because he had not received it, he was liable for executing the receipts to the loss of the government in the amount thereof when in fact he had received no money.

In *Alston v. The State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659, the court dealt with a case in many respects like this one. It was an action by the state of Alabama on the official bond of the probate judge. The suit was for money alleged to have been collected by the judge, who had received from one Morris his draft or check for the sum of \$250 as state license tax for retail dealer. The draft was on the John McNab Bank, of the city of Eufaula, and on January 2d the judge deposited the draft in that bank, and the same was placed to the "credit of A. H. Alston, Judge of Probate, License Money." The bank was of good repute, and had the confidence of the public. On March 31st the bank made an assignment, and was closed. Alston demanded the money of the bank, but never received it. There was no law which authorized the probate judge to issue a license for a "worthless check." The facts showed that he never received any money. It does not appear that he ever saw or touched any money in reference to the transaction. He only received the check on a bank which turned out to be insolvent, and had the same placed to his credit, as stated. The trial court instructed the jury to find a verdict for the plaintiff for the amount of the check, and the Alabama Supreme Court affirmed the decision. Alston was in no better position from having received a bad check than he would have been if he had received the money. The court held that the deposit of the check under the circumstances was merely a general deposit, and that the probate judge had no right to make such deposit of the state's funds. The result was that he was held liable just as if he had received the \$250 in cash and deposited it in the bank. Alston, having accepted payment of the license money by the check of the licensee, and having had the same placed to his credit, it does not seem to have occurred to the court that the check could be treated otherwise than as money in a suit on Alston's bond. It is admitted that this case would be in point if it were the treasurer's duty to collect. "It is clear," the learned counsel admit, "that, if an officer is bound to collect as well as safely keep, he violates the duty of collecting in taking a check which is not afterwards realized." But it is urged the case has no application, because the treasurer's only duty was to safely keep the fund when paid to him. Alston, the probate judge, was not a collector in the sense that he was required to take active affirmative steps to collect. No statute required him to search for the licensee. The person intending to retail liquors applies to the probate judge for the license, and it is his duty to issue it only when the amount prescribed by the statute is paid to him. He is a collector only in the sense that he is to receive the money. A simi-

lar duty, as we have shown, is imposed upon the treasurer as to the proceeds of the sale of the bonds. It is his duty to receive such proceeds. The official bonds of the probate judge and county treasurer have the same conditions, and the same statute is applicable to increase their common-law liability.

If the treasurer had received, instead of the check, bank bills, and had deposited them to his credit, as he did the check, and had charged himself with the sum on his account as treasurer, causing the county the same loss as in this case, could he or his sureties, when called on for settlement, plead that the bills received and receipted for were in fact counterfeit, that the treasurer placed them to his credit in bank, and that the bank had become insolvent? The same argument could be made that is made here, that the statute made his sureties responsible only for the safe-keeping of money, and that he had received no money. The counterfeit bills would be of less value than the check in question. Would such contention constitute a defense to be submitted to a jury? We think not; because, if the bills were genuine, the treasurer, having received and converted them, would be liable on his bond for the amount; if they were not genuine bills, he would be liable for a neglectful or improper performance of official duty in receiving them as genuine. In either case, there would be a plain breach of the bond.

Public policy requires that every officer charged with the duty of receiving and keeping public money should be held to a strict accountability. He should be required to exercise the highest degree of vigilance. When loss has fallen on the public through his official acts, he should not be permitted to avoid responsibility by averments of the improper or neglectful performance of duties imposed on him by law. To permit such defenses would open the door to frauds which might be practiced with impunity. The treasurer or other depositary could lay his plans and arrange his proofs to make good the defense of his sureties by impeaching his own official acts. His own neglect or fraud would become their defense. The condition of the treasurer's bond and considerations of public policy both forbid such defense. *Murfree on Official Bonds*, § 694. The Supreme Court has held that a custodian of public money could not defend on the ground that the money was stolen (*U. S. v. Prescott*, 3 How. 578, 11 L. Ed. 734); nor that he had been robbed of it (*Boyden v. U. S.*, 13 Wall. 17, 20 L. Ed. 527); nor that the notes had been accidentally destroyed by fire (*Smythe v. U. S.* [decided Jan. 26, 1903] 23 Sup. Ct. 279, 47 L. Ed. —). In the last case the sureties on the bond of the custodian of the money were held for the face value of the burnt notes, although they were merely the government's promises to pay. This harsh conclusion was reached by a divided court, but is upheld by reason and a sound public policy, for a different conclusion would unduly encourage such fires.

It is true that the obligation of the surety is subject to the strictest interpretation, and that his liability must be found within the terms of his contract; but where the bond is for the faithful discharge of official duty, and stands as indemnity against its improper or neglectful performance, and a loss occurs by failure to discharge

such duty, or from a wrongful act done by virtue and authority of the office, such failure and such act are within the very reason and purpose of the law requiring official bonds.

When the board by its clerk declined to receive the check, it was withdrawn, and later the treasurer's receipt for the price of the bonds was presented. It was then that the bonds were delivered. It is contended that the clerk of the board knew that the treasurer had received only the check. That does not change the result. If the execution of the receipt for the check as for cash and the use of it as proved was a breach of the treasurer's bond, the fact that the board or its clerk was also guilty of negligence or of some breach of duty would not afford a defense to the treasurer. The county entered into no contract with the treasurer that its officers would perform their duty, and it is not bound by their neglect. *Hart v. U. S.*, 95 U. S. 316, 24 L. Ed. 479; *Jackson Co. v. Derrick*, 117 Ala. 348, 23 South. 193. If the treasurer and the clerk wrongfully combined to do just what was done, knowing the ultimate result of loss to the county, such acts would not be the less a breach of the bond of the former. The culpability of one of the plaintiff's agents or officers could not excuse or justify the improper or neglectful performance of duty by another.

The rulings of the Circuit Court are in conflict with the views we have expressed. The judgment, therefore, must be reversed, and the cause remanded, with instructions to grant a new trial.

HOWARD et al. v. DELGADO & CO.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1903.)

No. 1,188.

1. **EQUITABLE LIENS—ADVANCES TO BE REPAYED BY SHIPMENTS—INSOLVENCY OF BORROWER BEFORE SHIPMENT.**

Interveners made advances to defendant corporation, which was operating a central sugar refinery and a number of plantations, to enable it to carry on its business through the season, under a written contract by which the company agreed to ship all sugar products made at its refinery to interveners, who were to apply the proceeds in payment of the advances. Such advances, however, largely exceeded the amount called for by the contract. What sugar was shipped from the refinery was shipped to interveners, but, owing to a scarcity of cars, it accumulated in the refinery, and a quantity remained there at the time of the appointment of a receiver for the company. *Held*, that interveners were entitled to an equitable lien upon the sugar so remaining in the hands of the receiver, as against general creditors, under the maxim that equity regards that as done which ought to be done.

2. **SAME—EXCLUSION BY STATUTORY LIENS—LAW OF LOUISIANA.**

The law of Louisiana, although it makes no provision for liens aside from contractual privileges and mortgages, does not preclude the allowance and enforcement of an equitable lien by a federal court.

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

Edward Rightor, for appellants.

John Clegg and Lamar C. Quintero, for appellees.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. On the 18th day of January, 1902, the Caffery Central Sugar Refinery & Railroad Company was placed in the hands of a receiver on petition of a bondholder, without opposition on the part of the defendant company. The company had operated at Franklin, La., in the sugar country, in the parish of St. Mary, what is known in Louisiana as a "Central Refinery." Its main business consisted of buying sugar cane from the outlying plantations, and manufacturing it into sugar and molasses. It also appears to have operated three plantations—the Peoples, Foster, and Starling places. After the receiver had taken charge of the property, the appellees, Delgado & Co., filed their intervening petition in the cause, which intervening petition was as follows:

"The petition of intervention of Samuel Delgado and Isaac Delgado, and the commercial copartnership composed of the aforesaid persons, all residents of the city of New Orleans, state of Louisiana, with respect shows: That the Caffery Central Sugar Refinery and Railroad Company, Limited, is justly indebted to them in the sum of ninety-eight thousand four hundred and sixty (\$98,460.15) dollars and fifteen cents, for this, to wit: That during the year 1901, and for the purpose of enabling the aforesaid defendants to make its crops and to manufacture the same into sugar and molasses, your petitioners, interveners, advanced and paid them large sums of money, which sums are entitled to a credit for the proceeds of certain sugars sold; that there is now due your petitioners for advances made as aforesaid, after deducting the credits that ought to be allowed, the sum of ninety-eight thousand four hundred and sixty and $\frac{15}{100}$ dollars, all of which more fully appears by the annexed detailed statement of account, which is made a part hereof, and is marked 'Exhibit A.' Your petitioners show that this sum and these advances thus made were made upon the special lien and privilege granted to your petitioners by agreement and contract made on the 13th day of February, 1901, in the city of New Orleans, by and between your petitioners and the said defendant company, wherein the aforesaid company agreed and stipulated for the advances to be made, the rate of interest being six per cent. from the dates of payments of drafts drawn by the president of the said defendant company, and stipulating further that, in order to secure your petitioners for the advances made, the said defendant company agreed and bound itself to ship all sugars produced by it, or produced under its direction, to your petitioners, and did specially pledge the said crops and sugars to your petitioners, granting them special lien and privilege upon all sugars, syrups, and molasses produced by said defendant company. Your petitioners show that they have a lien and privilege granted them by law as furnishers of supplies, and by virtue of the provisions of article 3217 of the Revised Civil Code of Louisiana. Petitioners further show that they have a lien and privilege granted them by law arising by virtue of their performance of their agreement made on the 13th day of February, 1901, as hereinbefore set out, which agreement is hereto annexed and made a part hereof, and marked 'Exhibit B.' Your petitioners show that during the year 1901 the defendant, with and by means of the aforesaid advances made, grew certain crops of sugar cane in the parishes of St. Mary and Iberia, state of Louisiana, on its own account; and that the said defendant company loaned and advanced to its tenants and to other cane growers sums of money advanced to it by petitioners, in order that these persons might be able to cultivate and harvest the crops of cane, and to grind and manufacture the same into sugar and molasses at the mill and factory of the defendant company. Your petitioners further show that they are entitled to a special lien and privilege on the crops of sugars, syrups, and molasses and the proceeds thereof, and are entitled to be paid by preference

over all others out of the proceeds of the sales of all these sugars, syrups, and molasses made by the said Caffery Central Sugar Refinery and Railroad Company, Limited, during the year or season of 1901. Your petitioners show that these sugars, syrups, and molasses manufactured during the year 1901, and during the season known as the season of 1901, out of the cane grown during the year 1901, are now in the factory or sugar house of the said defendant company, in the parish of St. Mary, or in the course of shipment, or in the city of New Orleans; that the same has been taken possession of by A. G. Brice, appointed receiver by the judge of this court, and are by him held subject to the order and disposition of this court. Your petitioners show that they are entitled to be paid the proceeds of these sugars, syrups, and molasses, upon which they have a lien and privilege, as fast as the same are realized or received by the receiver aforesaid, until the amount aforesaid, advanced for the growing and manufacture of said sugars, shall have been paid to your petitioners. Wherefore, the premises considered, your petitioners pray leave to file this intervention, and that the same be ordered filed and heard, and that upon hearing there be judgment in favor of your petitioners, ordering and decreeing that A. G. Brice, Esq., receiver, pay to your petitioners out of the proceeds of any and all sugars, syrups, and molasses by him received, being the property of the Caffery Central Sugar Refinery and Railroad Company, Limited, grown and made during the year 1901, or season of 1901, the sum of ninety-eight thousand four hundred and sixty and $\frac{15}{100}$ dollars, or so much thereof as may be due to your petitioners after hearing, and that he be ordered and required to pay the sums over as fast and as soon as the same may come into his hands; and that A. G. Brice, Esq., the receiver, be ordered to hold separate and part from all other funds, the proceeds of all sugars, syrups, and molasses that have come or may come into his hands as receiver of said defendant company, subject to the privileges, liens, and pledge of your petitioners, and until the further order of this court. Petitioners also pray for all such further orders in the premises as may be necessary to fully protect their rights, and as justice and right may require, and for all general relief."

Annexed to this petition was the contract between Delgado & Company and the Caffery Central Sugar Refinery & Railroad Company, Limited, which was as follows:

"This agreement entered into this 13th day of February, 1901, in the City of New Orleans, State of Louisiana, by and between The Caffery Central Sugar Refinery and Railroad Company, Limited, party of the first part, herein represented by H. Chapman, Esq., its general manager, duly authorized by its board of directors at a meeting of said board held on Saturday, January 26th, 1901; and Messrs Delgado and Co., a commercial firm of the City of New Orleans, La., party of the second part—Witnesseth:

"Whereas, the said party of the first part requires and will require throughout the sugar season of 1901 advances, or loans of money to the extent of eighty thousand (80,000) dollars, and whereas, the said Delgado and Company, party of the second part, is willing to make said advances or loans of money, therefore, it is hereby agreed and understood:

"That the said Delgado & Co., party of the second part, shall honor and pay all drafts drawn on said Delgado & Company by the Caffery Central Sugar Refinery and Railroad Company, Limited, party of the first part, through its general manager, H. Chapman, or any other duly authorized officer of said company, to the extent of eighty thousand (80,000) dollars, and shall charge interest on the amount of said drafts at the rate of six per cent. per annum from the respective dates of the payment of said drafts, and in order to secure said Delgado & Co., party of the second part, for the amount of said loans or advances, they shall retain the first mortgage gold bonds of the Caffery Central Sugar Refinery and Railroad Company, Limited, and of the Franklin and Abbeville Railroad Co., to the extent of thirty-seven thousand (37,000) dollars now held by them, and the said party of the first part agrees to ship to said Delgado & Co. all sugars produced by it, or produced under its direction, and the said party of the first part does

hereby grant unto the party of the second part a special lien and privilege on all of the said sugar produced."

On the 1st day of February this intervening petition was by the judge of the circuit court referred to William Grant, Esq., as special master, for examination and report. On the hearing before the special master the following facts developed: That Delgado & Co., by the written contract annexed to their petition, contracted to advance the Caffery Company the sum of \$80,000, but without specifying for what purpose it was to be used. They, however, in fact advanced \$299,074.66, as the same was required by the Caffery Company to enable it to cultivate its plantations and to purchase cane and to carry on the operations of the refinery. The contract specially provided that all the sugar and molasses manufactured should be shipped to Delgado & Co. With the exception of some small supplies advanced by other parties, they furnished all the funds used in conducting the operations of the Caffery Company from the beginning of 1901 to the date of the appointment of the receiver, January 19, 1902. During this period they received and sold all of the manufactured product of the refinery, from which they realized the net sum of \$207,645.06. It appears further that while the amount agreed to be advanced by Delgado & Co. in the contract was \$80,000, this stipulation was, by the tacit consent of both parties, disregarded. The Caffery Company continued to draw drafts against Delgado & Co., which they paid up to the sum of \$299,074.66. The evidence shows, and the special master so found, that this large sum was advanced upon the stipulation on the part of Caffery & Co. to ship to Delgado & Co. all the sugar produced by the factory. It appears further that a considerable amount of sugar was on hand at the factory at the time the receiver was appointed, and of which he took possession, and the reason the sugar was not in the hands of Delgado & Co. was on account of the scarcity of cars on the Southern Pacific Railroad, over which the sugar should have been shipped. The first claim before the special master seems to have been that Delgado & Co., under the laws of Louisiana, were entitled to a contract lien under an act of the Legislature of Louisiana of 1874, and, further, to a "privilege" or priority of payment under the statutes of Louisiana. Whatever may have been true as to this, the special master found that any such right was extinguished by the amount realized by Delgado & Co. from sugar shipped to them by the Caffery Company, viz., \$207,645.06. The question then arose—and upon that the case is now before this court—as to whether, under the facts of this case, and under the law and equitable principles applicable thereto, Delgado & Co. are entitled to an equitable lien giving them a priority of payment over general creditors out of the proceeds of sugar manufactured by the Caffery Company, and which went into the hands of the receiver and was sold by him, for the balance of their claim of \$91,429.60.

This presents a most interesting question, and one not free from difficulty. It would be proper to inquire, first, whether, under the peculiar facts and circumstances of this case, Delgado & Co. would be entitled in a federal court, enforcing its own doctrine on the sub-

ject, and the doctrine generally recognized in the United States, to an equitable lien.

In *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, the doctrine is thus stated (syllabus):

"(3) Where a debtor, by an agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another person, whom he directs to pay it to the creditor, the agreement is, when assented to by such person, an appropriation, binding upon the parties and all who, having notice, subsequently claim under the debtor an interest in the fund.

"(4) A party may, by agreement, create a charge or claim in the nature of a lien on real as well as personal property whereof he is the owner or in possession, and the court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement."

In the case of *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075, the creditor had advanced money for the purpose of purchasing skins to be tanned and finished. The case differs from this in the special respect that the creditor had obtained possession of the property on which he claimed an equitable lien, by reason of making advances to purchase the same. But the discussion of the case by Mr. Justice Matthews in the opinion is quite applicable to the case at bar.

In *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, Mr. Justice White, delivering the opinion of the court, states the doctrine (quoting from *Pomeroy Eq. Jurisp.* vol. 3, par. 1235) as follows:

"The doctrine may be stated, in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice.
* * * The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done.'"

The special master to whom this case was referred in the Circuit Court filed an able report, which, so far as it deals with this particular question, will appear from the following extract:

"Delgado & Company, having failed in establishing a statutory privilege for supplies furnished the Caffery Company, now claim an equitable lien on the product of the refinery in the hands of the receiver for the balance due on their account. It appears from the contract dated February 13, 1901, attached to their petition of intervention, offered in evidence, that the Caffery Company required, throughout the sugar season of that year, advances or loans of money, to the extent of \$80,000, which Delgado & Company declared they were willing to make; the Caffery Company stipulating to ship to Delgado & Company all sugars produced by it, granting them a special lien and privilege on all said sugar produced. The contract is brief and somewhat unskillfully drawn, as is usually the case in agreements made between business men, but it sufficiently establishes the true relation between the parties, which was that of factor and client. The amount agreed to be advanced was \$80,000, but the limit as to the amount agreed to be advanced seems, by tacit consent, to have been disregarded by both parties, for the Caffery Company continued to draw drafts against Delgado & Com-

pany for further advances, which they paid, up to the sum of \$299,074.66. That this enormous amount was advanced by Delgado & Company on the faith of the stipulation to ship to them for their reimbursement all the sugar produced by the factory is too obvious to require argument. From the terms of the contract, the situation of the parties, their relation with each other, and all the surrounding circumstances, the inevitable conclusion must be drawn that the Caffery Company intended to bind itself to ship all the sugar it expected to manufacture from the crop of 1901 to Delgado & Company, to be by them sold, with authority to apply the proceeds to the payment of the amount due them on account, as Act No. 66 of 1874 would apply then, under such circumstances, the second and third sections of which creates a right of pledge in favor of the consignee for any balance of account due him from the time the bill of lading is put in the mail. The question, therefore, is whether the contract of the Caffery Company, by which it covenanted to ship to Delgado & Company all the sugar produced by it, should not be considered and treated by a court of equity as an existing pledge or equitable lien, under the maxim that equity considers that as done which ought to be done."

The special master then cites *Walker v. Brown*, supra, and the extract from *Pomeroy's Equity Jurisprudence* approved by the court in that case, and proceeds:

"Commenting on the character of proof necessary to bring a case within the rule, the court says: 'It is clear that if the express intention of the parties was to create an equitable lien, or if such intention arises by necessary implication from the terms of the agreement, construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be implied by a court of equity.' In *Re Strand Music Hall Co.*, 3 DeG., J. & S. 147, cited by the Supreme Court in *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, the court laid down the rule that where it appears it was intended to create a charge, and the parties who intended to create it had the power to do so, the court will give effect to the intention, notwithstanding any mistake which the parties may have made in attempting to effect it.

"The fact that the sugar was not promptly shipped to Delgado & Company after its manufacture, but was allowed to remain at the refinery at Franklin until after the receiver was appointed, is urged as a circumstance which repels the presumption that the money in this case was advanced on the faith of any agreement that they were to be reimbursed from the sale of the sugar. But whatever force this fact might ordinarily have is done away with by the explanations given by Mr. Isaac Delgado, who says that in the fall of that year, when the refinery commenced grinding, sugar accumulated, and the Caffery Company would want more money and ask for payment of drafts, promising to ship the sugar by the Southern Pacific R. R., but owing to the scarcity of cars the sugar would not come for one or two weeks. The manager would state that he was using his best efforts to get the sugar down to pay drafts. Delgado & Company would hesitate to pay the drafts unless they had a promise to ship sugar to repay them, but that shipments were delayed by the scarcity of cars:

"The case of *Express Co. v. Railroad Co.*, 99 U. S. 191, 25 L. Ed. 319, does not conflict with the doctrine of the court in *Walker v. Brown*, as has been suggested. In that case an equitable lien was sought to be enforced upon the property of a railroad company in the hands of a receiver, appointed for the benefit of mortgage creditors who do not appear to have notice of the asserted lien; and it may be conceded that as to such creditor the lien could not be enforced under the rule established in the case of *Walker v. Brown*. There is no conflict between the two cases, but, if there is, the decision in the latter case must prevail.

"I conclude that Delgado & Company are entitled to the equitable lien claimed by them in this case, and have included them in Schedule D, hereto annexed, as entitled to be paid out of the proceeds of the cane manufactured in the Caffery Refinery, by preference over ordinary creditors."

The special master seems to have assumed that, if an equitable lien existed in favor of Delgado & Co., it would be enforced in this case, as it would elsewhere, although arising in Louisiana. It is contended, by the creditors opposing Delgado & Co.'s lien, that the law of Louisiana is prohibitive in this respect: that unless the creditor has a contractual lien or privilege under the laws of the state he can have no other lien or priority of payment. They contend that an equitable lien which would arise elsewhere by reason of a contract, express or implied, between the parties, has no existence in the state of Louisiana, and that a federal court sitting in Louisiana will not recognize or enforce such a lien. Unquestionably, equitable relief, generally speaking, will be granted in Louisiana in proper cases.

Article 21 of the Civil Code of Louisiana is as follows:

"In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

A portion of article 1965 of the Civil Code is in these words:

"* * * When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity."

In *Wheeler v. Insurance Company*, 101 U. S. 439, 25 L. Ed. 1055, taken to the Supreme Court on appeal from the Circuit Court of the United States for the District of Louisiana, the case was, as is this, in all respects a Louisiana one. One firm of factors had taken out insurance on the buildings, gin house, machinery, and cotton of a planter to secure an indebtedness by the planter to the factor. The property was burned, and the insurance was more than sufficient to pay the debt of the firm of factors who had taken out the insurance. Another firm of factors had transferred to the appellant Wheeler certain mortgages which they held on the property which had been covered by the insurance, and he, as transferee of the mortgagees, claimed an equitable lien on the overplus in the hands of the insurance company. On this branch of the case, the Supreme Court, in an opinion by Mr. Justice Bradley, said:

"But as the debt due to Johnson & Goodrich will not exhaust the whole amount of insurance, and as the balance rightfully belongs to Green, the question arises whether, as to that balance, the claim of the appellants is not maintainable. It is undoubtedly the general rule that a mortgagee has no right to the benefit of a policy taken out by the mortgagor, unless it is assigned to him. *Carter v. Rockett*, 8 Paige, 437. But it is settled by many decisions in this country that, if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgage, the latter will have an equitable lien upon the money due on the policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. *Thomas' Adm'rs v. Vonkapff's Ex'rs*, 6 Gill & J. 372; note to 3 Kent, Com. 376; *Angell, Fire and Life Insurance*, § 424, and cases there cited. And this equity exists, although the contract provides that, in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense. *Nichols v. Baxter et al.*, 5 R. I. 491. Of course, the mortgagee's equity will be governed by the scope and object of the agreement; as, if the agreement be to insure for a certain amount, the equity will not apply beyond that amount, and, as its object is to afford better

security for the payment of the debt, it will not be enforced farther than is necessary for such security; if the debt is abundantly secured by the property which remains liable to the mortgage, a court of chancery would properly decline to enforce it. The present case, however, is not embarrassed by any questions of this sort. The appellants have proceeded to sell the immovable property mortgaged, which did not more than satisfy the first mortgage; and the amount of insurance money remaining after satisfying the claim of Johnson & Goodrich is less than the insurance stipulated for in the mortgages. The equitable doctrine upon which the appellants' claim is founded undoubtedly obtains in Louisiana. It is derived from the principles of the civil law, which is the basis of the Civil Code of that state; and it is supported by the authorities cited from the Louisiana Reports. See Civ. Code, La. art. 1965; Williams v. Winchester, 7 Mart. (N. S.) 22; Citizens' Bank v. Dugue and Louisiana State Bank, 5 La. Ann. 12; Braden v. Louisiana Insurance Co., 1 La. 220 [20 Am. Dec. 277]."

While it is true, as claimed by counsel for appellants in the case at bar, that the facts of that case are different from the facts in this, we are unable to see why, in principle, the cases are not alike. If an equitable lien would exist and be enforced in the case cited, we are wholly unable to see why it should not exist and be enforced in the case now before the court.

In the case of Burdon Sugar Refining Co. v. Payne, 167 U. S. 127, 17 Sup. Ct. 754, 42 L. Ed. 105, in the opinion by the chief justice (page 147, 167 U. S., page 758, 17 Sup. Ct., 42 L. Ed. 105) on the precise question now before the court, this was said:

"If it was within the power of the contracting parties to create an equitable lien upon the bounty collected, the terms of the contract effectuated that purpose. Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, and cases cited. The right of the parties, however, by the contract, to create an equitable lien, and the power of a court of equity to enforce such lien, is denied upon the ground that as, by the provisions of the law of Louisiana, equality of distribution is the rule among creditors, and preferences can only result from privileges and mortgages, and as the subject-matter from which the lien here arose was not one of the cases to which the law of Louisiana gives a privilege, therefore an equitable lien could not be created by contract or enforced in violation of the terms of the statutes of Louisiana. But, without passing on the correctness of this proposition, we think it has no relation to the matter under consideration. * * * The right to collect the bounty having arisen from a law of the United States, and the provisions of that law creating a necessary relation between the grower and the manufacturer, making them, in effect, joint producers of the sugar, the right to the equitable lien stipulated by the contract was not controlled by the provisions of the local law of Louisiana, even although as a general rule—and in regard to this we express no opinion—the effect of that law would be to deprive contracting parties, except when expressly allowed, of the right to contract for an equitable lien, and to deny to courts of equity the power to enforce the same."

The most that can be said for this case is that the question now under consideration is left by the Supreme Court an open one.

Counsel for appellants has cited us in his brief, and alluded in oral argument, to quite a number of cases decided by the Supreme Court of Louisiana, which it is urged support his contention that an equitable lien, as claimed in this case and as has been herein discussed, is unknown to the law of Louisiana. We have examined the cases cited, and are unable to see that they support his contention. Indeed, some of the cases, we think, may be regarded as sustaining a contrary view.

It is contended for the appellants that the pleadings in the case, namely, the intervening petition of Delgado & Co., as above set forth, did not set up the right of the interveners to an equitable lien, or pray for the allowance of the same in such terms as would justify the master in granting it. We have had some difficulty on this question, but we think, inasmuch as the petition set out all the necessary facts, and contained substantially a prayer for priority of payment, that it is sufficient, particularly as it would certainly have been amendable, and the only effect of sending the case back upon that ground, having expressed the views we have on the merits, would be that the petition would then be amended, and the same result follow.

It results from the foregoing that there was no error in the action of the Circuit Court in overruling the exceptions to the master's report, which report granted to Delgado & Co., under the facts and circumstances of this case, an equitable lien, to be paid out of the proceeds of the cane manufactured in the Caffery Refinery by preference over ordinary creditors.

The judgment of the Circuit Court is therefore affirmed.

S. JARVIS ADAMS CO. v. KNAPP.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1903.)

No. 1,133.

1. CONTRACT IN RESTRAINT OF TRADE—CONSIDERATION.

Where an employé of a corporation, on leaving its service, was entitled under his contract of employment to rights in certain stock of the company, held for his benefit, but the extent of his interest in the stock depended upon whether or not he left the company for the purpose of engaging in a competing business, the payment to him by the company of a sum in excess of that to which he would have been entitled if he left for such purpose is a sufficient consideration for an agreement by him not to enter into a competing business or to disclose its secret processes.

2. SAME—VALIDITY—AGREEMENT AS INCIDENTAL TO SALE OF PROPERTY.

An employé of a corporation on leaving its service had the right, under his contract of employment, to purchase a certain amount of stock which was held for his benefit, and upon the price of which dividends had been credited to him. *Held*, that a contract by which, in consideration of the payment to him of a sum of money, he surrendered his interest in the stock and his right to purchase the same, and agreed that for 10 years he would not engage in a competing business, nor disclose, use, or sell the secret processes used by the corporation in its business, was valid, the agreement in restraint of competition being for the protection of the value of the stock the equitable title to which he sold to the corporation.

3. EQUITY PLEADING—SUFFICIENCY OF BILL—ALLEGATION OF BUSINESS SECRETS.

A bill to enjoin the use by defendant, in violation of a contract, of processes and methods used by complainant in its manufacturing business, sufficiently alleges their character as business secrets, as against a general demurrer for want of equity, where it alleges that they were not generally known or understood by other manufacturers or by the public, and that defendant acquired his knowledge of them while an employé of complainant and its predecessor, and where it also sets out the contract, by which defendant agreed not to disclose such processes and methods to others.

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

The appellant, who was complainant in the court below, filed this bill for the purpose of obtaining an injunction restraining the defendant from manufacturing and selling, within the United States and east of Denver, Colo., certain special metallic castings described therein, and from using the processes used by the complainant in the manufacture of such castings, and for an accounting of previous manufacture and sales. The defendant demurred to the bill. The demurrer was sustained, and the bill dismissed.

The bill alleges, in substance, the following facts: In September, 1899, and for some time previously, a firm, styled S. Jarvis Adams & Co., were engaged in the manufacture and sale of certain articles made of iron or steel, by methods and processes not generally known to the public, at Pittsburg, Pa., where it had established a business and acquired a reputation. Certain parties, McKnight, Fownes, Speer, and Speer, contemplating the formation of a corporation and the purchase of the plant, business, and good will of the firm, and wishing to secure for the corporation the services of some of the employes of the firm, the defendant Knapp among them, who were familiar with the business and the methods and processes used therein, entered into the following written agreement with them:

"This agreement, made and entered into this twenty-eighth day of September, A. D. 1899, between Charles McKnight, H. C. Fownes, J. McK. Speer and J. Ramsey Speer, all of the city of Pittsburg, Pennsylvania, who have or are about to associate themselves together under the firm name of the S. Jarvis Adams Company, parties of the first part, and T. K. Miller, J. M. Bossert and S. A. Knapp, of the same place, parties of the second part, witnesseth:

"Whereas, the parties of the first part are about to purchase the plant of S. Jarvis Adams & Company, including both the real estate and their foundry business operated by said company; and

"Whereas, they are desirous of continuing in their employ the parties of the second part in the positions now held by them with the said S. Jarvis Adams & Company, or in some similar capacity or position of employment with the parties of the first part:

"Now this agreement witnesseth: That the parties of the first part agree to hold for the use and benefit of each of the said parties of the second part the sum of twenty-five thousand dollars (\$25,000.00) respectively, of the capital stock of a corporation to be formed by the said parties of the first part, under the name of The S. Jarvis Adams Company, the capital stock of which is to be not more than six hundred thousand (\$600,000.00) dollars, and until said corporation is formed, to hold for them such proportionate share of the business as the said allotment of capital stock bears to the entire capitalization mentioned. The stock thus to be held for the benefit of the said second parties is to remain unsubscribed in the treasury of the corporation, and an account is to be opened with each of the said second parties and all profits or dividends applicable to said stock is to be credited thereon and thus the stock is to be carried until fully paid out of the dividends or as hereinafter provided and upon its full payment in the manner mentioned certificates of stock are to be made out and delivered to each of the said parties for such number of shares as shall make up the sum of twenty-five thousand dollars (\$25,000.00). The said second parties are also each to be employed about the business either in their present capacities or in such capacity or work as the said first parties shall designate or direct for the term of one (1) year from the first day of October, A. D. 1899, at the annual salary of twenty-five hundred (\$2500.00) dollars, payable monthly.

"If, however, the said second parties, or any one or more of them, should prove unsatisfactory to the said first parties in the manner of the discharge of their duties which may be assigned to them, or in any other way or manner whatsoever, then the party so becoming unsatisfactory may be discharged and relieved of any further duties, but the party so discharged shall be entitled to receive the balance of his salary due to him for the full year's employ-

ment above designated at the rate named. In event of said discharge of any one or more of said second parties, the party so discharged shall also receive, in addition to his salary, the earnings upon his stock or interest, as shown by the books of the company, so as aforesaid set apart and held by the said first parties for him, to be estimated for such portion of the year as he may have actually served the said first parties. After the expiration of the first year as above mentioned, from October 1, A. D. 1899, the further employment of the said second parties shall be at the pleasure and discretion of the first parties, but, in the event of such discharge at any time after the expiration of the first year, the party so discharged shall receive his salary only for the portion of the year for which he may have actually rendered services down to the time of his discharge and he shall also, at the same time, transfer and set over by proper paper, his interest in the stock so as aforesaid held for him in the treasury of the company and shall receive therefor such amount as the said stock may be shown by the books to be then worth over and above the charges against it for the unpaid amount still due on the account opened between him and the parties of the first part. It being the purpose and intent of this agreement to give to each of said second parties in event of his discharge the book value of the stock held for him after subtracting from it the amount still due from him to the company, and the arrangement so specified is further to go into effect in event of death of any of the second parties or in case of their resignation; except, however, in case said resignation shall be for the purpose of entering a competing business, in which event the party so resigning shall receive back only the amount which has actually been credited to his stock account. When and in event of the stock becoming fully paid out of the earnings or dividends of the company, as above provided for, then certificates therefor shall duly be made out and issued to the said second parties, as and when the stock becomes fully paid and the stock shall then be held by said second parties free from this contract and in the same manner as other stock of the said company is held. The said second parties, or any of them, after the expiration of the first year, as aforesaid, may further make any payments which they may desire in addition to the earnings of the stock upon their respective stock accounts and receive proper credit therefor.

"And the said second parties do further covenant and agree each for himself that they will give their full time, energy and attention to the business and prosecution of the work which may be committed to them by the said first parties, to the best of their respective abilities.

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

"Charles McKnight. [Seal.]
 "Henry C. Fownes. [Seal.]
 "J. McK. Speer. [Seal.]
 "J. Ramsey Speer. [Seal.]
 "T. K. Miller. [Seal.]
 "J. M. Bossert [Seal.]
 "S. A. Knapp. [Seal.]"

A corporation was formed under the title of the S. Jarvis Adams Co., and the purchase was made. Knapp and the other parties named in the contract entered the service of the corporation, and the business went on until a month or two after the expiration of the first year, when the defendant gave notice of his intention to resign and withdraw from the company, and taking such share of the profits as had accrued to him. A controversy arose between him and the company in respect to the terms upon which such withdrawal should take place; the officers of the company believing that he was intending to withdraw for the purpose of going into a competing business, in which case he would not be entitled to take profits, but only pay for his services and the amount which he had been credited on his stock. But he denied that he had such purpose, and if so he was entitled to pay for his services and the value of his stock, less the amount unpaid upon it. To settle this controversy, the parties entered into the following agreement:

"This agreement, entered into this twelfth day of November, 1900, between Sanford A. Knapp, party of the first part, and The S. Jarvis Adams Co., its successors and assigns, party of the second part, witnesseth:

"That Sanford A. Knapp, having resigned from the employ of The S. Jarvis Adams Co., now covenants and agrees, in consideration of the sum of six thousand, four hundred and eighty and ninety-five hundredth (\$6,480.95) dollars, to him in hand paid, that he will not directly or indirectly, as an individual or partner or as a stockholder, director or officer of any corporation, limited partnership or other concern, or as an employé of any corporation, limited partnership, or other concern, or any person or persons whatsoever, enter into the manufacture and sale, or either, or disclose or sell or use any of the processes or methods used by the said second party, in the manufacture of any of the specialties, viz.: Pipe Balls, Bell Dies, Tong Dies or Axle Boxes, now manufactured by said second party, for a period of ten (10) years from the date hereof, in that part of the United States east of a line drawn north and south through the city of Denver, Colorado.

"Should the first party engage in the foundry business, as an individual or in partnership with James M. Bossert, he reserves the right to use the aforementioned processes and methods in the manufacture of any castings except the specialties enumerated above.

"But should the said first party engage in the foundry business with any other partner or partners than the said James M. Bossert, or as an employé, stockholder, director or officer of any corporation, limited partnership, or other concern, then the prohibition as to the disposal, sale or use of the processes and methods, as outlined above, is to continue in force.

"The said Sanford A. Knapp, doth hereby assign and release to The S. Jarvis Adams Co., all right, title, interest in or claim upon any of the stock of The S. Jarvis Adams Co., and doth authorize the return of the said stock to the treasurer of the corporation.

"In witness whereof, we have hereunto set our hands and seals this twelfth day of November, 1900.

Sanford A. Knapp. [Seal.]

"The S. Jarvis Adams Company,

"Henry C. Fownes, Pres.

"Wm. C. Fownes, Jr., Sec."

Subsequently, and about July 1, 1901, Knapp, with Bossert and others, formed a partnership, and at Coshocton, Ohio, went into the business of manufacturing and selling the same specialties, using the methods and processes of the complainant which he had learned and acquired while in the service of the corporation and its predecessors. On September 27, 1901, the defendant and his associates formed a corporation under the name of the Coshocton Iron Company, Knapp becoming one of its directors, and continued the same business at Coshocton, using the same methods and processes, taking over the plant and business of their former firm. The complainant has built up a large business in said specialties, particularly in axle boxes, and sells them within the portion of the United States east of Denver. The defendant's business is a competing business within the same territory, and the defendant, as an officer of his corporation, promotes the competition. The demurrer to the bill was a general demurrer for want of equity.

Watson, Burr & Livesay, for appellant.

Bargar & Bargar and Pomerene & Pomerene, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

The ground upon which this demurrer was sustained was that the contract of November 12, 1900, upon which the bill ultimately rests, had for its sole purpose the restraint of competition, and that it was therefore void because it was opposed to public policy. Still other

grounds are taken by the appellee in support of the decree. One, which reaches to the whole bill, is that the stipulations of the defendant, the violation of which is complained of, do not rest upon a legally sufficient consideration; and the other, which extends only to the stipulation not to disclose, sell, or use the complainant's methods and processes, is that it is not sufficiently alleged that they were trade secrets; and, further, that it is only vaguely stated what the methods and processes are.

We shall take these questions up in the following order: First, was there a sufficient legal consideration for the defendant's stipulation?

By the terms of the contract, Knapp, after the end of the first year, was entitled to the following rights and privileges: He had the right to resign from his employment. In case of his resignation, he was entitled to receive the proper proportion of his salary of \$2,500 per annum. He was bound to assign his interest in the \$25,000 of stock, and was thereupon entitled to receive such sum as the books should then show the stock to be worth, less the amount which remained unpaid upon it. If, however, he should resign for the purpose of going into a competing business, he would be entitled to receive his salary and the amount he had been credited upon his stock, which he would thereupon be required to transfer to the company. He could at that time become the absolute owner of the stock by completing the payment for it, and could have required certificates therefor, and would have held it "free from the contract." If he continued to perform his duty according to the contract, the company, having no valid reason for forfeiting his right, could not prevent him from exercising it.

In this situation, he gave notice of his intention to resign. The company believed he did so for the purpose of going into a competing business, and insisted on settling upon that basis, which would require that he be paid only his salary and what he had credited upon his purchase of stock. He denied that he had the purpose imputed to him, and demanded, in addition to his salary, the value of the stock as shown by the books, less the amount remaining unpaid upon it. They compromised their differences by making the contract of November 12, 1900, whereby the company agreed to pay Knapp the sum of \$6,480.95; and in consideration thereof he agreed that he would not, directly or indirectly, enter into the manufacture or sale, or disclose or sell or use, any of the processes or methods used by the company in the manufacture of any of certain specialties, for the period of 10 years, within the described territory. And he thereby assigned and released to the company all right in or claim to the stock, and authorized the return thereof to the treasury of the corporation.

We cannot see any reason for doubting that his agreement not to enter into competition, and not to disclose, sell, or use the company's processes and methods, was supported by a sufficient consideration; and certainly the agreement to pay the money, and thereby compromise their differences, is not open to any legal objection.

Second, a further question is whether these stipulations were valid. It is said that the stipulation not to enter into competition was void because it was contrary to public policy. It may be admitted as

claimed, and as held by the court below, that "a bald covenant in restraint of trade, for which there is no other consideration than the payment of money for the obligation itself, without any purchase of the business, products, trade, or plant of the covenantor, is void." Assuming this to be a correct proposition, it is contended by the appellee that the consideration for this agreement "was a cash sum of money, part of which it is conceded was a debt owed by the complainant." But the stipulation in question was not the only object of the contract. We must look to the whole contract, and see what was the object and purpose of it, and what relation this particular stipulation bears to its other parts. The defendant had not yet sundered his relation to the company. He had, it is true, indicated his purpose to leave its service; but he still held the right to purchase the stock, and would continue to hold it until some adjustment was made which would result in its relinquishment. That result was effected by the stipulation in this contract that "the said Sanford A. Knapp doth hereby assign and release to The S. Jarvis Adams Co. all right, title, interest in, or claim upon any of the stock of The S. Jarvis Adams Co. and doth authorize the return of the said stock to the treasurer of the corporation." The recital, "Sanford A. Knapp having resigned from the employ of The S. Jarvis Adams Co.," means no more than that he had taken a step which required a settlement of their relations; and the settlement made was not upon the terms of the old contract, though the new one recognized that under the old contract Knapp had rights to the stock which by the new one he "assigned and released" to the company. The whole matter was *in fieri* until it was closed by the new contract of November 12, 1900. The substance of that contract was that the company was to pay to Knapp \$6,480.95 for what it owed him for services, the surrender of his interest in the stock, and his agreement not to enter into competition with the complainant's business or to disclose or use its processes and methods.

If Knapp had fully paid for his stock and had acquired the legal title to it, we think there could be no doubt that upon the purchase of it by the corporation, assuming this to be permissible, the latter might lawfully obtain a stipulation from the seller not to do anything to depreciate its value, as by entering into competition or exposing the secret processes of its business. And we can perceive no difference in principle between such a case and one where the purchase is of a right to obtain its stock under an executory contract already partly performed. In the first instance, the thing purchased would be a legal title; in the latter, an equitable interest; but the right to purchase protection would rest upon the same ground in either case.

The underlying principle upon which the modern cases upon this subject are grounded is that, although one cannot stifle competition by a bargain having that purpose only, yet when he purchases something, or acquires some right, the value of which may be affected by the subsequent conduct of the seller, the purchaser may lawfully obtain the stipulation of the seller that he will refrain from such conduct. In the present case the stipulation would increase the value of the benefit purchased by the corporation, and it was associated with that contract in its essence and in its purpose. These consid-

erations seem to us to bring the case within the principle of those in which the validity of such stipulations has been maintained. The subject was elaborately discussed in the opinion of this court delivered by Judge Taft in the case of the *United States v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122, and we have no occasion to go over the ground covered by that opinion. That case did not call for an opinion, nor was any opinion expressed, upon precisely such circumstances as are found in this; but it seems to us that the principles there laid down upon much consideration are broad enough to affect and control the decision we ought to render here, and that they are not consistent with the conclusion reached by the Circuit Court upon the subject we are considering. The learned judge of the Circuit Court did not question the principles indicated as sound in the opinion in the *Addyston Pipe & Steel Co.* Case, but held that they were inapplicable for the reason that the contract in which the stipulations in question were embodied did not show that any interest was transferred which those stipulations supported. In this we think he erred.

In respect to the stipulation not to disclose, sell, or use the methods and processes of the complainant, we think the allegations of the bill, taken in connection with the contract of November 12, 1900, which by reference is made part of this bill, are sufficient to show that those methods and processes were trade secrets which he had no right to disclose or use. The allegations of the bill are that the defendant "had theretofore been in the employ of said S. Jarvis Adams & Co., and knew and understood the use of certain processes and methods employed by said firm in the manufacture of said specialties, which said processes were not generally known or understood by other manufacturers of said products, or by the public," and that the defendant was employed "partly by reason of his said knowledge." We think that this contains a fair implication that such processes and methods—which are substantially synonymous terms—were secrets of the business which the complainants took over, and that, when it is said that they were not generally known to the public, it was intended to distinguish between the knowledge of the company and its employes and the knowledge of the rest of the public. Especially do we think this the proper construction in view of the language of the contract to which the defendant was a party, wherein he expressly agrees that he will "not disclose any of the processes and methods" of the company. This is an admission of a positive character that such processes and methods were secret. Otherwise the stipulation was nugatory. As against a general demurrer for want of equity, it must be held that it sufficiently appeared that the processes were business secrets. *Story's Eq. Plead.* § 528.

Then, as to the suggestion that it is not stated what those processes were, we think the complainant was not required to state them. We know of no precedent for holding that a party must make public the secrets of his business in order to obtain protection against their unlawful disclosure. He would lose his right in endeavoring to save it.

The decree will be reversed, and the case remanded, with directions to allow the defendant to answer and to take further proceedings not inconsistent with this opinion.

DAY, Circuit Judge, participated in the decision of this case.

UNITED STATES v. J. D. ILER BREWING CO.

(Circuit Court of Appeals, Eighth Circuit. February 9, 1903.)

No. 1,777.

1. INTERNAL REVENUE—WAR REVENUE TAXES—PROPRIETARY MEDICINES.

A mild form of beer, put up and sold by the manufacturer in bottles, labeled "J. D. Iler's Rochester Tonic," was subject to the special stamp tax imposed by Schedule B of the war revenue act of June 13, 1898 (30 Stat. 462), which required the payment of such tax on every bottle containing any tonics or medicinal preparations or compositions whatever, or (section 20 [U. S. Comp. St. 1901, p. 2297]) "which are advertised on the package or otherwise" as remedies or specifics, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, "use or effect"; and it is not exempt from such tax because the manufacturer paid the revenue tax thereon as beer before it was bottled, since it cannot be presumed that it violated the provisions of Rev. St. § 3449 [page 2277], which makes it a criminal offense to ship or remove any spirituous or fermented liquors under any other than their proper name, and the article was, moreover, correctly designated as a tonic.

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

Schedule B of the act of Congress of June 13, 1898 (30 Stat. 462), provides as follows: "For and upon every packet, box, bottle, pot, or phial, or other inclosure containing any pills, powders, tinctures, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters (except natural spring waters and carbonated natural spring waters), essences, spirits, oils, and all medicinal preparations or compositions whatsoever, made and sold, or removed for sale, by any person or persons whatever, wherein the person making, or preparing the same has or claims to have any private formula, secret, or occult art for the making or preparing the same, or has, or claims to have, any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or trade-mark, or which, if prepared by any formula, published or unpublished, are held out or recommended to the public by the makers, venders, or proprietors thereof as proprietary medicines, or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body"—shall pay stamp taxes as thereafter set forth. Section 20 of the same act [U. S. Comp. St. 1901, p. 2297] provides: "The stamp taxes provided for in Schedule B of this act shall apply to all medicinal articles compounded by any formula, published or unpublished, which are put up in style or manner similar to that of patent, trade-mark, or proprietary medicine in general, or which are advertised on the package or otherwise as remedies or specifics for any ailment, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, use, or effect."

Section 3449 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2277] provides that: "Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and

quality of the contents of the casks or packages containing the same, or causes such an act to be done, he shall forfeit such liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars."

The plaintiff, a brewing association, manufactured and put on the market, among other products, one which it bottled and labeled "J. D. Iler's Rochester Tonic, Kansas City, Mo. U. S. A.," and sold the same as a tonic, and had a large sale in localities where the laws prohibited the sale of beer. The proper officers of the United States Internal Revenue Department assessed a tax against the plaintiff for the manufacture and sale of this article under section "b" of the act of Congress quoted, which the plaintiff paid under protest, and brought this suit to recover it back. The plaintiff recovered in the lower court, and the United States sued out this writ of error.

A. S. Van Valkenburgh and D. P. Dyer (William Warner, on the brief), for plaintiff in error.

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

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

It appears the article which the plaintiff put up in bottles and labeled "J. D. Iler's Rochester Tonic, Kansas City, Mo. U. S. A.," and which it put on the market and sold as and for a tonic, was "a mild form of beer" containing "about two per cent. of alcohol," and that the plaintiff paid the revenue tax of \$2 per barrel on the same as beer before it was bottled. The contention of the plaintiff is that this article is not a tonic within the meaning of Schedule B of section 30, above quoted, and for that reason is not liable to the stamp tax on tonics imposed by that section.

Schedule B of section 30 includes "every * * * bottle * * * containing any * * * medicinal preparations or compositions whatsoever, * * * or which, if prepared by any formula, published or unpublished, are held out or recommended to the public by the makers, venders, or proprietors thereof as proprietary medicines, or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body." And section 20 provides that the stamp taxes provided for in Schedule B shall apply to all articles "which are advertised on the package or otherwise as remedies or specifics for any ailment, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, use, or effect."

The court does not feel called upon to go into any extended inquiry as to the exact nature of this tonic, or its value for medicinal purposes. It is sufficient to say that its medicinal virtues probably equal, if they do not excel, those of the majority of the popular tonics on the market for the sale of which stamp taxes are assessed and paid without question. Alcohol was present in this tonic, and probably constituted its chief tonic quality, as it does in many tonics. A tonic is defined to be "any remedy which improves the tone or vigor of the fibres of the stomach and bowels or of the

muscular fibres generally." Century Dictionary, tit. "Tonic." Among the drugs or preparations which are classed as tonics are "weak alcoholic beverages in very moderate quantities." Universal Cyclopaedia, tit. "Tonic." The same authority says: "The stimulant and tonic properties of beer are due to the alcohol and bitter principle of the hop, while its nutritive value is ascribed to the extractive matters derived chiefly from the malt. The exact character of many of the constituents of beer is not known." Id. tit. "Beer."

Beyond all question the article put on the market by the plaintiff and labeled as a tonic was a tonic as that term is defined by standard authorities. Whatever else it contained, it contained alcohol and the bitter principle of the hop in proportions that made it a mild tonic, instead of an intoxicating beverage. This is undeniable, since the plaintiff explains that its reason for putting the article up in the manner it did was to sell it in the Indian Territory and the state of Kansas and other prohibition localities, where it was unlawful to sell ordinary beer and other intoxicating beverages.

It is common knowledge that physicians frequently prescribe some kinds of beer as a tonic to be taken by their patients for physical ailments. The word "tonic" in itself signifies to the common understanding a preparation having medicinal qualities. The plaintiff unquestionably used the word in this sense, as it well might do, for, as we have seen, the alcohol and hop extract which the preparation contained did constitute it a tonic according to all definitions of that term, which might well be used, and often is used, for medicinal purposes; and brought it directly within the terms of the statute which embraces every medicinal preparation or composition whatsoever which is held out as having remedial properties, or as remedies for any diseases or affections of the human body, or which are advertised on the package or otherwise as remedies for any ailment, or as having any special claim to merit or to any peculiar advantage in mode of preparation, quality, use, or effect. By labeling its bottles "J. D. Iler's Rochester Tonic" the plaintiff did thereby distinctly advertise on the package that its tonic had tonic or medicinal qualities. The statute does not require the ingredients of the tonic or its mode of preparation to appear on the package. The plaintiff will be presumed to have conformed to the law, which prohibited it under heavy penalties from shipping or removing its fermented liquors under any other than the proper name or designate their kind and quality. The plaintiff knew the ingredients and qualities of its products, and with this knowledge, and the further knowledge that the law required it under heavy penalties to mark or label its packages with "the proper name" of their contents, it deliberately chose to name and label this product "Rochester Tonic," and put it on the market as such, and obtained an extensive sale for it in that character. Having enjoyed all the benefits of its sale as a tonic, it is now too late to call it by another name for the purpose of escaping taxation. Law and morals alike forbid the allowance of such a claim. We feel constrained to accept the name the plaintiff itself bestowed on its product under the most serious sanctions, and thus acquit it of a deliberate intention to perpetrate a fraud on the pub-

lic, and violate the criminal laws of the United States. Moreover, to hold otherwise would give the plaintiff a great and unfair advantage over its competitors in the fermented liquor trade.

It is said that to compel the plaintiff to pay a stamp tax on this product will be subjecting it to double taxation; but it is not so. A tax paid on beer in the barrel does not exempt that product from a stamp tax when it possesses mild tonic properties, and is put up in bottles, and named and labeled in a manner that brings it within the purview of Schedule B. The plaintiff voluntarily assumed the obligation to pay the stamp tax when it bottled and labeled and named it a tonic, which, as we have seen, it really was.

It was amply compensated for paying a stamp tax by the extended sale of its tonic to persons who wanted to purchase a tonic, and not beer, or any stronger beverage, and by its very extended sale in localities where beer could not be sold.

For the sale of "Rochester Tonic" the plaintiff paid no tax until it paid the tax which it seeks in this suit to recover back. Moreover, it would be entirely competent for Congress to impose a tax on beer in barrels and an additional tax on it when put up in bottles.

If the plaintiff had been proceeded against criminally for a violation of section 3449 of the Revised Statutes, it is not doubted but what it could and would have successfully defended the prosecution upon the ground that the contents of these bottles was not ordinary beer, but a mild tonic, and that the bottles were, therefore, truthfully labeled.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the plaintiff's petition.

NORTHERN PAC. RY. CO. v. SPIKE.

(Circuit Court of Appeals, Eighth Circuit. February 19, 1903.)

No. 1,797.

1. RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate was riding home alone after dark, in a lumber wagon, when he was killed by a collision at a crossing. The highway and railroad ran parallel for some distance, till within 75 feet of the crossing the highway turned down a declivity to the crossing. At the time of the accident the train was 12 hours late, and running at a speed of 30 miles an hour, in the same direction deceased was driving. It gave no signals upon approaching the crossing, and the wind was in the opposite direction. The view of the track was more or less obstructed from the highway, and from the turn to the crossing neither the train nor its headlight could be seen until one was on or near the track. Defendant attempted to show by photographs taken some time after the accident, and in the daytime, that at various points before reaching the crossing decedent could have seen the headlight on the locomotive, had he looked, but no photograph was shown of any point between the turn and the crossing. *Held*, that decedent was not shown to have been guilty of contributory negligence, as a matter of law.

2. SAME—CROSSING—STATUTORY SIGNALS.

Where the view of a railroad track, running almost parallel with a highway, is obstructed by trees, fences, etc., so that a train can be seen

only at intervals, and at a distance of 75 feet from a crossing such view is entirely cut off by an embankment till the traveler is on or near the track, it is imperatively necessary for the safety of travelers that trains give the statutory signals on approaching the crossing.

2. SAME—CONTRIBUTORY NEGLIGENCE—PRESUMPTION.

The presumption that a traveler killed at a railroad crossing was at the time in the exercise of due care is sufficient to warrant a recovery in the absence of countervailing testimony.

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

L. T. Chamberlain (C. W. Bunn, on the brief), for plaintiff in error.

Halvor Steenerson (Charles Loring, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. On the 31st day of December, 1900, about 8:25 p. m., William I. Spike, a man of intelligence, 31 years old, in the full possession of all his senses, was traveling along the public highway, with which he was familiar, leading from Detroit, Minn., to his home; driving a span of mules, hitched to an ordinary lumber wagon. For some distance the highway runs east and west, and nearly parallel to the railroad, but at varying distances from it, until the highway approaches within about 75 feet of the point at which it crosses the railroad track, when it turns south, and, going down a declivity, crosses the railroad at grade. At this crossing a locomotive pulling one of defendant's passenger trains came in collision with the team driven by Mr. Spike, killing him instantly, and this action is brought by his administratrix, under the Minnesota statute, to recover damages for his death, upon the ground that the accident resulted solely from the culpable negligence of the defendant railway company. In this court it is not contended that the evidence did not warrant the jury's finding that the railway company was guilty of negligence. The contention is that the deceased was guilty of contributory negligence, and that this court should so declare, as matter of law. The burden is on the defendant to establish this defense of contributory negligence by clear and satisfactory testimony. A brief summary of some of the leading facts will show very clearly that it has not discharged this burden.

The accident occurred after night. The deceased and the train were going in the same general direction until the highway turned sharp to the south to cross the railroad track. The train was running at the speed of 30 miles an hour. As it approached the highway it gave no signal by whistle or bell, as required by the law of the state. The wind was blowing in the opposite direction to that which the deceased and the train were moving. The train was 12 hours behind its schedule time. The country along and over which the highway ran was somewhat broken, and owing to this fact, and the presence of brush, trees, telegraph poles, fences, and the like, the train or its headlight could only have been seen at intervals by one

looking back for that purpose; and, owing to a railroad cut and the topography of the country, neither the train nor its headlight could be seen from the point where the highway turned to the south to cross the railroad track until one was on or near the track.

The defendant's evidence consists chiefly of photographs taken under the supervision of its claim agent, which, it is claimed, show that at various points before the deceased reached the crossing he might have seen the headlight of the approaching train if he had turned and looked. But it is obvious enough that these photographs were taken only at the points from which the train could be seen, and not at any of the points along the road from which the train could not be seen, and particularly was no photograph taken from the point in the highway where it descends to and crosses the railroad track. The photographs were taken some time after the accident, and in daylight, and from points of view chosen by the defendant. Having been taken under such widely varying conditions from those surrounding the deceased at the time of the accident, they fall far short of furnishing the clear and satisfactory evidence essential to establish the defense of contributory negligence. Courts have had frequent occasion to consider this character of evidence, and comment on its inconclusive and unsatisfactory character, in this class of cases. *Miller v. Truesdale*, 56 Minn. 274, 57 N. W. 661; *Hutchinson v. St. Paul Ry. Co.*, 32 Minn. 401, 21 N. W. 212; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 77; *Massoth v. Delaware & Hudson Canal Co.*, 64 N. Y. 524.

The rules governing the rights and duties of travelers and railway trains at grade crossings are clearly defined by the Supreme Court of the United States in *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403, and *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, and by this court in *St. Louis & S. F. Ry. Co. v. Barker*, 23 C. C. A. 475, 77 Fed. 810. In the first of these cases the Supreme Court, speaking by Mr. Justice Bradley, says:

"The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. * * * On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case."

And it is further said in the same case:

"Conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition."

And in *Texas & Pacific Ry. Co. v. Gentry*, *supra*, the court, speaking by Mr. Justice Harlan, says:

"Whether he [the deceased] did or did not stop and look and listen for approaching trains the jury could not tell from the evidence. The presumption is that he did; and, if the court had given the special instructions asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track."

No one was with the deceased or witnessed his movements, and the presumption prevails that he exercised ordinary care in approaching this crossing, and that he would not have been killed but for the culpable negligence of the defendant in neglecting to give the required timely warning of the train's approach. The conditions prevailing at this crossing at the time of the accident were such as to make it imperatively necessary for the safety of travelers for the railway train to give the statutory signals of its approach.

The rule is well settled that where the accident results in instant death, as it did in this case, "the law, out of regard to the instinct of self-preservation, presumes the deceased was at the time in the exercise of due care, and this presumption is not overthrown by the mere fact of injury. The burden rests upon the defendant to rebut this presumption." *Flynn v. Railroad Co.*, 78 Mo. 195, 212, 47 Am. Rep. 99.

The presumption arising from this natural instinct of self-preservation stands in the place of positive evidence, and is sufficient to warrant a recovery, in the absence of countervailing testimony. *Johnson v. Railroad Co.*, 20 N. Y. 65, 69, 75 Am. Dec. 375; *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310; *Adams v. Iron Cliffs Co.* (Mich.) 44 N. W. 270, 18 Am. St. Rep. 441; *Railway Co. v. State*, 29 Md. 420, 438, 96 Am. Rep. 545; *Railroad Co. v. Nowicki*, 46 Ill. App. 566; *The City of Naples*, 32 U. S. App. 613, 16 C. C. A. 421, 69 Fed. 794; *Allen v. Willard*, 57 Pa. 374; *Schum v. Railroad Co.*, 107 Pa. 8, 52 Am. Rep. 468; *Cox v. R. Co.* (N. C.) 31 S. E. 848; *Cameron v. Railway Co.* (N. D.) 77 N. W. 1016. Nor is this presumption applied only when no one witnesses the accident. It has its application in all cases, and may be strong enough to overcome the testimony of an eyewitness. In the case of *McGhee v. Kennedy's Adm'r*, 66 Fed. 502, 13 C. C. A. 608, 31 U. S. App. 366, a witness testified that the deceased saw the train, and attempted to get over before it, and whipped up his horses to do so. The Circuit Court of Appeals states that, "if that were true, it would have been the duty of the court below to charge the jury to return a verdict for the receivers." But the court said:

"It is very improbable that, if Kennedy had seen the train coming, he would have attempted to cross when so far from the track that he could not reach it with his wagon wheels before the coming of the train. The presumption of fact, and of law, too, would be against the existence of such wanton and reckless negligence, and the plaintiff was entitled to have the jury weigh the credibility of Miss Caldwell's evidence in the light of the circumstances."

This principle has been repeatedly affirmed and applied by the Supreme Court of the United States. *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Railway Co. v. Griffith*, 159 U. S. 603, 610,

16 Sup. Ct. 105, 40 L. Ed. 274; Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186.

The court said to the jury:

"Mr. Spike had the highest motives to do just that—to look and to listen, to be on the alert and diligent to discover the presence of an approaching train, for his life depended upon that kind of caution; and you may take that fact into consideration in determining whether or not he did look and listen—the motive which he had to look and listen. That is one element that you may consider."

The defendant excepted to this part of the charge, and assigns the same for error; but, from the authorities already cited, it will be seen the charge of the court was not as strong in favor of the plaintiff in this regard as it might well have been.

The judgment of the Circuit Court is affirmed.

HODGE v. CHICAGO & A. RY. CO.

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

No. 1,765.

1. REMOVAL OF CAUSES—PETITION—INCORRECT DESIGNATION OF DIVISION.

A petition for the removal of a cause incorrectly designated the division of the district to which removal was prayed as the Southern instead of the Eastern. There was no Southern Division, and the city where the court was held was properly designated. *Held*, the defect was immaterial, and would be disregarded.

2. SAME—BOND—INCORRECT DESIGNATION OF DISTRICT—AMENDMENT.

A bond for a removal of a cause obligated the petitioner to lodge the transcript in the Circuit Court for the Central Division of the Western District of Missouri. The county in which the action was brought was within the Eastern District of Missouri, but had formerly been in the Central Division of the Western District. The petition for removal disclosed all the essential jurisdictional facts, and the bond was filed in connection therewith. *Held*, that the defect in the bond was not jurisdictional, but could be amended, on leave of court, after the time allowed to remove the cause had expired.

3. APPEAL—INSTRUCTIONS—FAILURE TO EXCEPT.

If all the points in a case have not been covered by the court's charge, or have not been properly presented, the court's attention should be called thereto, and an instruction covering the points requested, and an exception taken to its refusal, especially when the court at the conclusion of the charge inquires whether there are any such matters.

4. SAME—INSTRUCTIONS—REFUSAL TO GIVE—EXCEPTION IN GROSS.

An exception in gross to the refusal of a list of instructions will not be noticed on appeal when some of the instructions were superfluous, because embraced substantially in the charge as given.

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

R. D. Rodgers and P. H. Cullen (J. S. McIntyre, on the brief), for plaintiff in error.

F. Houston, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action for personal injuries, which was brought by J. R. Hodge, the plaintiff in error, against the Chicago & Alton Railway Company, defendant in error, in the circuit court for Audrain county, in the state of Missouri, on March 29, 1901. The action was returnable to the June term of that court, which convened, pursuant to law, on the first Monday of that month. At the return term, and on June 3, 1901, the defendant company appeared by its counsel and filed a petition and bond for the removal of the cause to the federal Circuit Court; alleging in its petition for a removal that the plaintiff was a citizen and resident of the state of Missouri; that the defendant company was duly incorporated under the laws of the state of Illinois; that the amount in controversy exceeded \$2,000, exclusive of interest and costs; and that the time allowed by law to the defendant company to plead to the complaint would not expire until the succeeding day, to wit, June 4, 1901.

Originally Audrain county, Mo., formed a part of the Eastern Judicial District of Missouri, and was in the Northern Division of that district. Act Feb. 28, 1887, 24 Stat. 424, c. 271 [U. S. Comp. St. 1901, p. 385]. By a later enactment, approved October 1, 1888, Audrain county was detached from the Northern Division of the Eastern Judicial District of Missouri, and attached to the Central Division of the Western Judicial District of Missouri, whose courts are held at Jefferson City, Mo. Act Oct. 1, 1888, 25 Stat. 498, c. 1056 [U. S. Comp. St. 1901, p. 388]. By a still later act, approved on January 28, 1897 (29 Stat. 502, c. 106 [U. S. Comp. St. 1901, p. 389]), the county was restored to the Eastern Judicial District of Missouri, but was assigned to the Eastern Division of that district, whose courts are held at St. Louis, Mo.; the courts of the Northern Division, to which it was originally attached, being held at Hannibal, Mo.

When the defendant company applied for the removal of the cause, through inadvertence it prayed that the action might be removed to "the Circuit Court of the United States for the Southern Division of the Eastern District of Missouri, at St. Louis, Missouri." On the other hand, the bond, which it tendered was conditioned that the defendant company should file the transcript "in the Circuit Court of the United States in and for the Central Division of the Western District of Missouri on the first day of its next session." Discovering the error in the petition and in the bond for removal, the defendant company applied to the state court on June 7, 1901, for leave to amend its petition and bond so as to describe the removal court correctly as the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and for leave to file a new bond, obligating it to lodge the transcript in the last-named court on the first day of its next session. This application to amend the petition and for leave to file a new bond was denied by the state court on the next day, to wit, June 8, 1901. Thereupon, on June 24, 1901, having first obtained leave so to do, the defendant company lodged a complete transcript of the cause, showing all the proceedings aforesaid, in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. On the same day it filed in that court a bond for the requisite amount, containing a proper condition

obligating the defendant company to lodge the transcript in that court, and to pay all costs that might be awarded if it should be held that the cause was wrongfully or improperly removed thereto. On July 8, 1901, the plaintiff filed a motion in the federal Circuit Court to remand the cause to the state court, which motion, having been heard and considered, was overruled on October 21, 1901. The case was subsequently tried to a jury, resulting in a verdict and judgment in favor of the defendant company, whereupon the plaintiff below removed the cause to this court by a writ of error.

The principal question to be determined by this court is whether the federal Circuit Court, in view of the facts aforesaid, acquired jurisdiction of the case, or should have remanded it to the state court, as it was requested to do. It will be observed that the original petition for a removal clearly showed that the case was one of federal cognizance, because of diversity of citizenship and the amount in controversy, and that the only defect in the petition was in the prayer, which erroneously described the court to which a removal was desired as sitting in the Southern Division of the district, instead of the Eastern Division. But as there was no such division of the district as the Southern, and as the place where the court was held, to wit, the city of St. Louis, was correctly described, the error in question was one of those obvious errors, such as a court can correct, at pleasure, or disregard. The intent to remove the case to the Eastern Division of the Eastern District was plain, and the court was privileged to construe the prayer according to the manifest intention of the petitioner, disregarding the obvious mistake made in describing the division.

The bond, however, was defective, in that it obligated the petitioner to lodge the transcript in the Circuit Court of the United States for the Central Division of the Western District of Missouri—a court which could not acquire jurisdiction of the case by removal under any circumstances. But it was equally manifest that this mistake in the bond was occasioned by the fact that Audrain county had been shuffled about from one division and district to another until some persons had lost track of it, and did not know where it belonged. It was also manifest that the petitioner intended to obligate itself to lodge the transcript in that court, where, under the law, it ought to be lodged. The petitioner subsequently executed, and, by permission of the Circuit Court of the United States for the Eastern District of Missouri, filed, a proper bond, and the only question which need be considered is whether the original defective bond could be thus amended after the time allowed to remove the case had expired.

This question, we think, was answered in the affirmative by the Supreme Court of the United States in *Ayers v. Watson*, 113 U. S. 594, 598, 5 Sup. Ct. 641, 28 L. Ed. 1093. It was there held, with respect to the judiciary act of March 3, 1875, 18 Stat. 470, c. 137 [U. S. Comp. St. 1901, p. 507], which act, in so far as the question now before us is concerned, is not substantially different from the judiciary act of March 3, 1887, 24 Stat. 552, c. 373 [U. S. Comp. St. 1901, p. 514], that the second section of that act, providing when a cause may be removed from the state to the federal court, contains a statement of matters that are in their nature jurisdictional; that a petition for re-

removal must disclose that the case is one within the jurisdiction of the federal court by reason of diversity of citizenship, amount in controversy, etc.; that, if such jurisdictional facts are not disclosed, the defect will be fatal at any stage of the case; and that defects of that kind cannot be waived; whereas the provisions of the third section of the same act, which prescribe the time for filing the petition and bond, and the form of the bond, are not jurisdictional, but "modal and formal," and that, according to general rules of law, an "application in due time, and the proffer of a proper bond," and other defects in matters of procedure only, may be waived "either expressly or by implication." The doctrine in that case was reaffirmed in *Powers v. Chesapeake & Ohio Railway*, 169 U. S. 92, 98, 101, 18 Sup. Ct. 264, 42 L. Ed. 673, wherein it was said, *inter alia* :

"A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show; taken in connection with other matters on that record, the jurisdictional facts upon which the right of removal depends, because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction; and, if it does, the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case. *Crehore v. Ohio & Mississippi Railway*, 131 U. S. 240 [9 Sup. Ct. 692, 33 L. Ed. 144]; *Jackson v. Allen*, 132 U. S. 27 [10 Sup. Ct. 9, 33 L. Ed. 249]. But if, upon the face of the petition and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds. *Carson v. Dunham*, 121 U. S. 421, 427 [7 Sup. Ct. 1030, 30 L. Ed. 992]; *Martin v. Baltimore & Ohio Railroad*, 151 U. S. 673, 690, 691 [14 Sup. Ct. 533, 38 L. Ed. 311]."

In view of these authorities, it is clear that as the petition for removal disclosed all the essential jurisdictional facts, and as a bond was filed in connection with the petition, this bond, although defective in form, was amendable, even after the time limited for a removal had expired; and the federal Circuit Court did not exceed its powers, but acted properly, in permitting it to be amended. If a petition for removal can be amended in the Circuit Court of the United States so as to state "more fully and distinctly" the grounds of removal, no reason is perceived why defects in the bond for removal—especially such a defect as that involved in the case in hand—may not be remedied in like manner by an amendment. The mistake which was made consisted of a mistake in matter of procedure only, and not in a failure to aver essential jurisdictional facts. We hold, therefore, that the motion to remand was properly denied, and that the lower court acquired lawful jurisdiction of the case.

Concerning the merits of the case but little need be said, because the record, as made up for this court, is in such a shape that it precludes us from considering many of the questions that are discussed in the brief. The plaintiff asked 17 instructions, some of them being of considerable length, all of which were refused, except in so far as they were embraced in the charge of the trial court, which in itself covers 10½ pages of the printed record, and deals with the case and all of its features at great length, and, as we may add, in a very able manner. Most of the exceptions that have been

argued go to the refusal of the court to give the 17 instructions that were refused, but an inspection of the record shows that exceptions were not taken separately to the refusal of each request, so as to challenge the court's attention to each proposition of law as it was presented. On the contrary, counsel for the plaintiff took an exception in gross to the refusal of all of the 17 instructions. The learned trial judge might very well have concluded that after delivering an elaborate charge of his own motion, embracing, as he supposed, every feature of the case, nothing remained to be said that would be of any practical benefit to the jury. At all events, if any point in the case had not been covered by the court's charge, or was not properly presented, counsel for the plaintiff should have called the attention of the court to the fact, and presented an instruction such as they desired, covering the point; and they should have taken an exception to the action of the court if it refused their request. Especially is this so in the case in hand, since the record shows that at the conclusion of the charge the court specially inquired of counsel if they desired the court to call the attention of the jury to any other matter before they retired, and counsel for the plaintiff in error answered the court's inquiry in the negative. We have several times held that an exception in gross, taken to the refusal of a long list of instructions, will not be noticed on appeal if any of them were erroneous or superfluous, as many of those which were asked in the present instance were, because they were embraced substantially in the charge, and a repetition thereof was wholly unnecessary. *New England Furniture & Carpet Co. v. Catholicon Co.*, 24 C. C. A. 595, 79 Fed. 294; *Price v. Pankhurst*, 3 C. C. A. 551, 53 Fed. 312; *Association v. Lyman*, 9 C. C. A. 104, 60 Fed. 498; *Railway Co. v. Spencer*, 18 C. C. A. 114, 71 Fed. 93. In short, the exception which was taken in behalf of the plaintiff only raises the question whether all of the 17 instructions were correct and ought to have been given. We have no hesitation in answering this question in the negative.

We have examined those parts of the court's charge to which exceptions are said to have been taken by counsel for the plaintiff in error, as it was delivered, but we judge that they were probably taken subsequently, when the bill of exceptions was settled and signed. Be this as it may, however—giving the plaintiff in error the benefit of these exceptions, and assuming that they were taken at the proper time—we find nothing therein which is materially erroneous; nor do counsel for the plaintiff in error seem to contend that the parts of the charge to which their exceptions are addressed would warrant a reversal. Their chief contention seems to be that some of the instructions which they asked ought to have been given, but, for the reasons already stated, we cannot sustain their contention in that behalf.

Finding no error therein, the judgment below is affirmed.

COWELL et al. v. CITY WATER SUPPLY CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1903.)

No. 1,785.

1. JURISDICTION OF CIRCUIT COURT—SUM OR VALUE OF MATTER IN DISPUTE.

The sum or value of the matter in dispute, which conditions the jurisdiction of a federal circuit court, is the amount or value of that which the complainant claims to recover, or the amount or value of that which the defendants will lose if the complainant obtains the recovery he seeks.

2. SAME.

In a suit by an alleged owner of $\frac{1}{325}$ of certain real property, constituting waterworks and their appurtenances, to cancel and avoid mortgages thereon for \$475,000, and to declare his interest in the property free from the liens of those mortgages, the sum or value of the matter in dispute is not the amount of the mortgages or the value of the entire property, but the value of the $\frac{1}{325}$ of the property which the complainant claims to own, and seeks to relieve from the liens of the incumbrances.

(Syllabus by the Court.)

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

For opinion below, see 96 Fed. 769. See 120 Fed. 309.

W. E. Blake, for appellants.

William A. Underwood (William McNett, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which sustained a demurrer to and dismissed a bill in equity against the City Water Supply Company, a corporation, and other parties, which was exhibited by William F. Cowell in the district court of Wapello county, in the state of Iowa, in September, 1898. The suit was removed to the Circuit Court of the United States for the Southern District of Iowa on the petition of the defendants and on April 3, 1899, the complainant, Cowell, made a motion to remand the case to the state court on the ground that the matter in dispute, exclusive of interest and costs, did not exceed the sum of \$2,000. This motion was denied and the ruling of the court denying it is the first error assigned. This alleged error will be first considered, because, if this ruling was erroneous, the court below was without jurisdiction to determine the merits of the case, and it will be unnecessary to state or discuss them.

When the motion to remand was made, the sum or value of the matter in dispute was determinable from the averments of the bill and an affidavit of William A. Underwood that the value of the property of the defendant the City Water Supply Company was \$300,000. The bill contained allegations of the following facts: The

¶ 1. Jurisdiction of circuit courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

See Courts, vol. 13, Cent. Dig. §§ 890, 897.

complainant, Cowell, was the owner of one of 400 bonds, of \$1,000 each, made by the Iowa Water Company, secured by a mortgage of its waterworks at Ottumwa, Iowa, and dated April 15, 1887. Default had been made in 1894 in the payment of the interest upon these bonds, and the defendants Frederick E. Potter, Winthrop Smith, Charles G. Sanford, and Frederick H. Mills became a committee of the bondholders, as such issued a plan for protecting the interests of the bondholders, and solicited the deposit of bonds with themselves under that plan. The complainant deposited his bond under the plan, and 327 other bonds of like amount and character were deposited with the committee in the same way. Thereupon this committee foreclosed the mortgage securing these bonds, bid in the property at the foreclosure sale, incorporated the defendant the City Water Supply Company, unlawfully issued \$80,000 of preferred stock and \$20,000 of common stock of this new company, conveyed the waterworks and their appurtenances to this corporation, and caused it to make two mortgages upon this property—one for \$150,000 and one for \$325,000—both of which, together with the bonds which they secure, are void, and constitute a fraud upon the rights of the complainant, for numerous reasons set forth at large in the bill. The committee have also organized an illegal voting trust, by means of which they hold the possession and power to vote the stock of the water supply company, and the possession and operation of the plant and property of that company. The complainant brings this suit on behalf of himself and on behalf of all others of the same class who may join in the proceeding, and his prayer is that the organization of the City Water Supply Company, the stock it has issued, and the mortgages it has made, may be declared void; that his undivided interest, which he avers to be $\frac{1}{325}$ of the property held by the City Water Supply Company, may be declared to be free from all liens and incumbrances except a lien for \$51,000, evidenced by an old underlying mortgage made by the Ottumwa Waterworks Company before the mortgage which was foreclosed was executed, or that, in the event that the court should sustain the incorporation of the supply company, and the stock and mortgages it has made, the complainant may recover of the individuals constituting the committee a sum of money equal to $\frac{1}{325}$ of \$524,000 and $\frac{1}{325}$ of \$1,509.79, and $\frac{1}{325}$ of the income and earnings of the property since it came into the hands of the committee on September 12, 1897.

It will be seen from this brief statement of the averments of the bill that the property of the City Water Supply Company was not worth, and is not claimed to be worth, more than \$525,000, and that the complainant's alleged share of it was not of a value exceeding $\frac{1}{325}$ of \$525,000, or \$1,615.38, while the amount of the judgment for money which he sought to recover in case the stock and the mortgages of the supply company were sustained did not exceed \$1,650, and the debt he was endeavoring to collect was only \$1,000 and interest.

The Circuit Courts of the United States have no jurisdiction unless "the matter in dispute exceeds, exclusive of interest and costs,

the sum or value of two thousand dollars." 25 Stat. 433; 1 U. S. Comp. St. 1901, tit. 13, § 629, p. 508.

Where a suit is brought by one of a class on behalf of himself and all others similarly situated who may join in the proceeding, the sum or value of the matter in dispute is the amount or aggregate value of the interests of those who have joined in the suit. It is not the amount or value of the interest of the entire class. Foster's Federal Practice, § 16, p. 33. As no one had joined in this suit with the complainant when the motion to remand was made, the sum or value of the matter in dispute at that time was the amount or value of that which he would gain or of that which the defendants would lose if he recovered that for which he prayed in his bill.

It was admitted by the court below, and it is conceded by counsel for the appellee, that the amount or value of the property or of the money which the complainant sought to recover in this suit was less than \$2,000. But their contention is that because the complainant prays in his bill that the mortgages made by the City Water Supply Company, aggregating \$475,000, be canceled and annulled, and that his $\frac{1}{325}$ of the property covered by them may be declared to be free from their liens, the amount involved is the amount of the mortgages, \$475,000, and the federal court has jurisdiction. In support of this contention, cases are cited in which owners of property were contesting opposing claims to it, where it is held that the value of the property the complainant claims to own is the test of jurisdiction, as in *Berthold v. Hoskins* (C. C.) 38 Fed. 772; *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.* (C. C.) 43 Fed. 545; *Parker v. Morrill*, 106 U. S. 1, 1 Sup. Ct. 14, 27 L. Ed. 72; and *Smith v. Adams*, 130 U. S. 167, 175, 9 Sup. Ct. 566, 32 L. Ed. 895. If the complainant were the owner of the waterworks, these cases would be controlling, and the value of that property would be the test of the jurisdiction of the court below, and that value would have sustained it. But since he claims to be the owner of only $\frac{1}{325}$ of this property, this fraction of its value, and not its whole value, is the test of the jurisdiction in this case, and that test defeats it. In *Smith v. Adams*, 130 U. S. 167, 175, 9 Sup. Ct. 566, 32 L. Ed. 895, the Supreme Court said: "By 'matter in dispute' is meant the subject of litigation—the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken." Now, the only subject of this litigation is either the bond for \$1,000, or the $\frac{1}{325}$ of the property of the City Water Supply Company, or the judgment for not exceeding \$1,650 against the members of the bondholders' committee for which the complainant prays, and in either case the sum or value of the matter in dispute does not exceed \$2,000. In the complainant's attack upon the mortgages, he does not seek, and he could not, in any event, secure in this suit, as it stood when the motion to remand was made, more than the discharge of the liens of the mortgages and the stock of the supply company upon his $\frac{1}{325}$ of its property. He could not obtain more relief than the cancellation of these charges as to his interest in the property. He was the only complainant, and the interests of the owners of the other $\frac{324}{325}$ of this property could not have been re-

lied from the lien of these mortgages or of this stock by any decree which the complainant alone could have secured in their absence from the suit. The jurisdictional amount in dispute, therefore, was not the entire stock of the water supply company, nor the entire amount of the mortgages, but the undivided interest in the property which the complainant sought in his bill, or the sum which he sought to recover in money of the individual bondholders, or the debt of \$1,000 which he sought to collect, and in neither case did the sum or value in dispute exceed \$2,000, so that the court below could not obtain jurisdiction.

In *Parker v. Morrill*, 106 U. S. 1, 2, 1 Sup. Ct. 14, 27 L. Ed. 72, Parker brought a suit in equity against Morrill and another to remove a cloud upon the title to some 25,000 acres of land, created by a claim set up by Morrill. Parker, who owned only the undivided twentieth of the tract, appealed from the decree dismissing his bill. The supreme court held that the matter in dispute was not the entire tract claimed by Morrill, but the one-twentieth of that tract owned by Parker.

In *Miller v. Clark*, 138 U. S. 223, 225, 11 Sup. Ct. 300, 34 L. Ed. 966, Mrs. Miller, who was one of six legatees, exhibited a bill in equity to compel the five other legatees to pay over to the executor of the will under which she claimed \$5,377.83, to be divided by the executor equally among the six legatees. The defendants claimed that they had received this amount from the testatrix as a gift before her death. The Circuit Court sustained the jurisdiction. When the case arrived on appeal in the Supreme Court, the jurisdiction of that court was challenged on the ground that the amount in dispute did not exceed \$5,000, and that court held that the amount in dispute in the proceeding was not the \$5,377.83 which the complainant insisted that the defendants should pay over to the executor to be distributed, but that it was the interest or share of that amount which the complainant claimed that she would ultimately be entitled to receive—that is to say, one-sixth of that amount—and upon this ground the appeal was dismissed for want of jurisdiction. After this decision the circuit court dismissed the suit upon the same ground. *Miller v. Clark* (C. C.) 52 Fed. 900.

In *Bruce v. Manchester & Keene Railroad*, 117 U. S. 514, 515, 6 Sup. Ct. 849, 29 L. Ed. 990, two bondholders, holding interest coupons amounting to \$3,400, brought suit to foreclose a mortgage for \$500,000 which secured the payment of bonds to that amount, together with the coupons attached thereto, of which those held by the complainants were a part. Upon an appeal to the Supreme Court that court decided that the amount in dispute was not the \$500,000 secured by the mortgage which the complainants sought to foreclose, but the amount of the complainants' interest therein, or \$3,400, and upon this ground dismissed the appeal for lack of jurisdiction in that court.

In *Werner v. Murphy* (C. C.) 60 Fed. 769, 772, where a creditor whose claim was less than \$2,000 brought a suit to avoid a fraudulent conveyance of property worth more than \$100,000, the court held that the amount in dispute was not the value of the property fraudulently conveyed, but the amount of the complainant's claim,

and it sustained a demurrer to the bill because that amount was less than \$2,000.

In *Smithson v. Hubbell* (C. C.) 81 Fed. 593, a creditor sought to enjoin the payment of a fraudulent claim, and it was held that the amount in dispute was the amount of the claim of the creditor, and not the amount of the fraudulent claim, the payment of which that creditor sought to restrain.

Perhaps these cases sufficiently illustrate and establish the rule that (it is the amount or value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction of the Circuit Courts of the United States. *Parker v. Morrill*, 106 U. S. 1, 2, 1 Sup. Ct. 14, 27 L. Ed. 72; *Miller v. Clark*, 138 U. S. 223, 225, 11 Sup. Ct. 300, 34 L. Ed. 966; *Miller v. Clark* (C. C.) 52 Fed. 900; *Bruce v. Manchester & Keene Railroad*, 117 U. S. 514, 515, 6 Sup. Ct. 849, 29 L. Ed. 990; *Werner v. Murphy* (C. C.) 60 Fed. 769, 772; *Smithson v. Hubbell* (C. C.) 81 Fed. 593; *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; *Robinson v. West Virginia Loan Co.* (C. C.) 90 Fed. 770; *Colvin v. Jacksonville*, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053. Since that amount or value was less than \$2,000 in the case at bar when the motion to remand was made, the court below never had jurisdiction of this suit, the decree below must be reversed, and the case must be remanded to the Circuit Court, with instructions to remand it to the state court from which it came, and it is so ordered.

THAYER, Circuit Judge (concurring). Inasmuch as the complainant in this case seeks by his bill to have certain mortgages annulled and canceled, that are a lien upon the property in which he claims to have an equitable undivided interest, the action must be characterized as one to remove a cloud upon a title; and as the trustees in these mortgages have been made parties to the proceeding, and the decree will be binding upon all of the mortgage bondholders, destroying their security if the mortgages are canceled, it would seem that the amount actually in controversy, for jurisdictional purposes, is the amount of these mortgages. In suits to remove a cloud upon a title, the value of the property affected or imperiled by the proceeding determines the amount actually in controversy, for jurisdictional purposes. *Smith v. Adams*, 130 U. S. 167, 175, 9 Sup. Ct. 566, 32 L. Ed. 895, and cases there cited. It would seem, therefore, that the amount of the mortgages which complainant seeks to have annulled ought to be regarded as the amount actually at stake, as it clearly is so far as the defendants are concerned, who removed the action to the federal court. I am of opinion that it should be so regarded if there was no other prayer for relief contained in the bill than the cancellation of the mortgages. But in the last clause of his prayer for relief the complainant prays that he be awarded a judgment against the defendants for the sum of \$1,509.79 in the event that the court declines to cancel the mortgages, which is the first species of relief prayed for. As the complainant does not insist upon

his right to have the mortgages canceled, but professes a willingness to take in lieu of such relief a money decree against the defendants for the sum above stated, it is within the power of the defendants to end the litigation at any time by consenting to the entry of a decree for the latter amount. It is also competent for the court to enter such a decree on final hearing without the defendants' consent; the plaintiff having fixed that value upon his interest in the property, and agreed to take it in lieu of the cancellation of the mortgages. Under these circumstances, I conclude that the sum of money which the complainant offers to accept may well be regarded as the amount actually in controversy, in the present instance, for jurisdictional purposes; and on that ground I concur in the order reversing the decree and directing that the cause be remanded to the state court, where it originated.

CHICAGO TITLE & TRUST CO. et al. v. STATE BANK OF AMBIA.

(Circuit Court of Appeals, Seventh Circuit. August 12, 1902.)

No. 875.

1. BANKS—SALE OF STOCK FOR FAILURE TO PAY ASSESSMENTS—INDIANA STATUTE.

Under the statute of Indiana (4 Burns' Supp. 1897, § 13) which provides that when the state auditor determines that the stock of a state bank has become reduced, by impairment or otherwise, below the amount required by law, an assessment shall be levied on the stockholders, who shall be liable to an amount equal to the par value of their stock, and that on default in payment of such assessment for 60 days the stock shall be sold by the directors, the proceeds of such a sale, less the costs thereof, are the property of the stockholders, who may recover the same in an action at law as for money had and received; and the only requisite of a complaint in such an action, to establish a presumptive right of recovery, is that it shall show ownership of the stock in plaintiff; any lien of the bank or liability of the stockholder for unpaid stock, or otherwise, being matter of defense, or to be asserted in a suit in equity.

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

The plaintiffs in error were the plaintiffs below in an action at law against the State Bank of Ambia, defendant below, to recover the proceeds of a sale made by the bank of 100 shares of its stock, held by the plaintiffs, and sold pursuant to a statute of Indiana providing therefor when the capital stock of a bank was found to be impaired, and an assessment to make good the deficiency was unpaid. Section 13, p. 242, 4 Burns' Supp. 1897 (Acts 1895, p. 202). The defendant demurred to an amended complaint filed by the plaintiffs in two paragraphs, assigning several grounds. The demurrer was sustained to each paragraph, as not stating a cause of action; and, judgment being entered against the plaintiffs, error is assigned upon such rulings.

In the original complaint it was alleged that the shares of stock so sold were owned by the plaintiffs, and were fully paid up, at \$100 per share. Upon like demurrer, ruling, and judgment, the case came before this court on writ of error, and was reversed and remanded for further proceedings not inconsistent with the opinion. 30 C. C. A. 443, 86 Fed. 863, 59 U. S. App. 279.

After the cause was remanded the plaintiffs substituted for the original complaint the amended paragraphs in question, which state with unnecessary detail and prolixity the various proceedings and sources through which the plaintiffs claim title to the shares of stock, and further allege, in substance,

that the defendant bank was organized in 1891 under the laws of Indiana, with a capital stock of \$25,000, divided into 250 shares, of \$100 each; that on September 15, 1892, stock certificate No. 45, for the 100 shares in question, was issued by the bank to "William J. McConnell, trustee," in consideration "of the surrender to it of certain certificates" for like shares of its stock, "which stock had theretofore been subscribed for by" McConnell and "divers other persons, and said certificates issued therefor to said persons, and in consideration of corporation stocks and bonds, and other considerations unknown to the plaintiffs, received by the defendant, issued to William J. McConnell, trustee, under agreement with the United States Loan & Trust Company"; that said certificate No. 45, for 100 shares, was delivered and entered upon the books of the bank as issued for the receipt by the bank of "the sum of ten thousand dollars, the full face value of said shares of stock," and like entries appeared in reference to the original issues; that the plaintiffs' title, through the proceedings recited and by written assignment, was derived from the original holders and owners; and, in effect, that the defendant had knowledge of all the proceedings referred to, and recognized the title of the plaintiffs to the stock as full-paid stock, and gave plaintiffs notice of the assessment, and that the stock would be sold under the provisions of the statute if such assessment was not paid. Aside from these allegations tending to show not only issue of the shares purporting to be full-paid stock, and ownership by the plaintiffs as purchasers for value, but that such issue and ownership were constantly recognized on the part of the defendant, the cause of action is stated substantially as follows: The capital stock of the bank had become reduced by impairment, and in conformity with the statute the auditor of state, on August 1, 1896, "made an assessment of sixty per cent." against the stock to make good the impairment; and the defendant bank gave notice to the plaintiffs and other stockholders of the amount so assessed, and that the stock would be offered for sale if it was not paid within 60 days. On November 10, 1896, the plaintiffs having refused to pay the assessment, the auditor of state duly valued the stock at \$40 per share, and directed sale thereof upon notice; and on January 2, 1897, the 100 shares were sold by the bank accordingly to Thomas McGuire for \$40 per share, making \$4,000, which was paid to the bank by said purchaser. Immediately thereupon the plaintiffs tendered to the bank the certificate for said shares, and demanded the said purchase money, "less all reasonable costs and expenses of said sale," but payment was refused, and the money is retained by the bank, although it has canceled the plaintiffs' certificate, and issued one to the purchaser in lieu thereof, and the assets of the bank, "exclusive of said four thousand dollars, were more than sufficient to pay and discharge all liabilities to the creditors" thereof.

The statutory provision referred to reads as follows:

"Sec. 13. The share-holders of each association formed under the provisions of this act shall be individually responsible to an amount over and above their stock, equal to the par value of their respective shares of stock, for all debts or liabilities of the association and which may be collected by suit and also as herein provided. Those holding shares only in a fiduciary capacity shall not be individually liable, but the assets of the estate, trust or person for whom they are acting shall be liable as herein provided. Whenever the auditor of state shall have reason to believe that the capital stock of any of said associations is reduced by impairment or otherwise, below the amount required by law or by its articles of association and certificate of increase or decrease of capital, as the case may be, the auditor shall require the deficiency to be made good and the board of directors shall immediately give notice of said requisition to each stockholder and of the amount of assessment which he must pay, by notice made to such stockholder at his place of business or served personally upon him. If any stockholder shall refuse or fail to pay the assessment specified in the notice within sixty (60) days from the date thereof, said directors shall have the right to sell said stock, or any part thereof, to the highest bidder at public or private auction, and with or without notice as the auditor may direct the sale to be made, but such stock shall not be sold for a less sum than valuation put thereon by the auditor and certified by him to the board of directors, and the auditor may revalue such

stock, and new offers for sale may be made at any time, and from the proceeds of sale shall first be deducted the costs thereof. If any association shall neglect for sixty (60) days after the auditor shall have required such deficiency to be made good to comply with such request, the auditor shall report the fact to the attorney-general, who shall at once institute such legal proceedings as shall be proper to wind up the defaulting association according to law, and in violation of law, or default named in this act shall be sufficient cause for the appointment of a receiver for any such association."

Smiley N. Chambers, Samuel O. Pickens, and Charles W. Moores, for plaintiffs in error.

Daniel Fraser (Will. H. Isham, of counsel), for defendant in error.

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

SEAMAN, District Judge (after stating the facts as above). The demurrer to the original complaint which was before this court on the previous writ of error raised the single question whether purchase money derived from a sale of bank stock under the provisions of the statute of Indiana above recited belongs to the bank or to the owner of the stock. Its solution depended upon the interpretation of that statute, which was thus given in the opinion by Showalter, Circuit Judge, speaking for the court:

"The directors are empowered to sell, provided the purchaser will pay as much as the value certified by the auditor, but it is nowhere stated that the price received by the directors shall go to and become the property of the bank. Presumably, the price, less the expense of the sale, would belong to the owner of the stock sold. In such case the bank would lose nothing. The purpose of the statute is apparently to enable the bank to get rid of unwilling stockholders and go on with its business. The extra obligation of shareholders for debts and liabilities of the corporation in default of assets is fully provided for in other portions of the statute. No obligation of that sort is involved here. The statute does not in terms, or by necessary implication, create an obligation on stockholders to pay more than the full par value of the shares, merely to replenish or replace capital lost in the business of the corporation."

No construction appears to have been placed upon the statute by the Supreme Court of the state, and that so given by this court is not open to question in the present case, and is decisive, as well, of a prima facie right of recovery on the state of facts alleged in the amended complaint. It was thereby established that the proceeds of a sale of stock under the statute were for the use of the stockholder, and not of the bank, and on such doctrine ownership of the stock so sold was the sole requisite of presumptive right to the purchase money, less the expense of sale. For recovery in that view, an action would lie as for money had and received, and thus the original complaint was sustained. While it was further alleged therein that the plaintiffs' stock was full-paid, the allegation was not material, for the reason that the property right in the proceeds of the statutory sale thus construed depended alone upon ownership of the stock. The amended complaint, however, ignores this rule, and tends to confuse the issue by allegations respecting the original issue of the bank stock, and of other considerations accepted therefor by the bank in lieu of cash, followed by allegations setting out the various transactions and legal proceedings through which the plaintiffs derive title

to the stock in controversy, and were recognized by the bank as purchasers and owners. Of these allegations, it is sufficient to remark that they are unnecessary and violate the rules of pleading at law, but nevertheless show presumptive ownership of the stock in the plaintiffs, and the complaint otherwise states a cause of action for recovery of the proceeds. If the pleading was so framed to anticipate a legal or equitable defense arising out of the original issue of the stock, and to obtain final adjudication on demurrer of any claim or lien for nonpayment, in whole or in part, it cannot have that effect, for the sufficient reason, if not otherwise objectionable, that the necessary facts do not appear to raise that issue, and it is a mere moot question. The allegations of the amended complaint respecting the sale of the stock are identical with the original allegations which were considered on the previous writ of error, and, the decision thereupon being conclusive that the sale under the statute operated to vest legal title to the proceeds in the owner of the stock, any equitable defense cannot be pleaded in the law action for their recovery in the federal court, and "can only be considered on the equity side of the court." *Burnes v. Scott*, 117 U. S. 582, 588, 6 Sup. Ct. 865, 29 L. Ed. 991, and cases cited. It does not appear that the original consideration for the stock was inadequate, nor that any claim or lien exists or is asserted for the statutory liability of stockholders for unpaid stock or otherwise; and no case appears of deficiency of assets of the bank to meet existing liabilities. Without facts on which to predicate a lien upon the stock or liability against the stockholders, no issue is raised in that behalf, and the inquiry is not presented whether a defense founded thereon is legal or equitable in its nature.

We are of the opinion that error is well assigned on the ruling below sustaining the demurrer, but are not to be understood as holding that an action will not lie to charge liability for a deficit against the proceeds of the sale if the 100 shares of stock were not fully paid up, even though the stock was at the time of the sale in the hands of third parties, having no knowledge of the pre-existing equities.

The judgment is reversed, and the cause remanded for further proceedings in conformity with the opinion.

McDOWELL et al. v. McCORMICK.

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

No. 868.

1. APPEAL—FINDINGS—REVIEW.

A general finding is conclusive on all issues of fact raised by the pleadings, and the evidence is not reviewable to ascertain whether it supports the finding.

2. SHERIFFS—WRONGFUL REPLEVIN—LIABILITY—BONA FIDE POSSESSION.

In an action against a sheriff for wrongfully seizing plaintiff's property under a writ of replevin against third parties, where plaintiff's possession of the property was merely colorable, and not bona fide, the rule which authorizes recovery, on the strength of possession alone, against a trespasser disturbing it without right in himself, does not apply.

8. INSOLVENT CORPORATIONS—RECEIVERS—APPOINTMENT—CONCURRENT JURISDICTION.

In an action by a creditor against an insolvent corporation, a court of general jurisdiction entered an order restraining defendant from disposing of its property, and four days later appointed a receiver of the corporation. Subsequently, on the application of another creditor, another court of co-ordinate general jurisdiction also appointed a receiver, who thereupon took possession of defendant's property, excluding the first appointee. *Held*, that the first-named court, by the proceedings therein commenced, acquired complete and exclusive jurisdiction of the subject-matter, with unquestionable right of possession through its receiver, irrespective of any actual seizure of the property or of violation of the restraining order, and the record of such proceedings was admissible in evidence to prove title to the property as against title asserted under the second appointee.

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

The plaintiffs in error, citizens of the state of Illinois (hereinafter mentioned as plaintiffs), sued the defendant in error, who was sheriff of La Porte county, state of Indiana (hereinafter mentioned as defendant), in the court below, in trespass, to recover damages for machinery and other personal property, of the alleged value of about \$10,000, seized and sold by the defendant. The issues were heard by the court on waiver of trial by a jury, resulting in a general finding "for the defendant," and judgment accordingly.

The complaint alleges that the plaintiffs were the owners and in possession of the property described on December 2, 1897, and that it was then wrongfully taken and converted by the defendant, under a writ of replevin in his hands, as sheriff, issued out of the circuit court of La Porte county November 20, 1897, in a replevin action therein brought by one Nichols, as receiver of the Allen Manufacturing Company, a corporation, against one Schwager and other defendants named; the plaintiffs herein not being parties to such action, or named in the writ.

The answer of the defendant consists of a general denial and several additional paragraphs, setting up by way of defense substantially these facts: On and prior to October 11, 1897, the Allen Manufacturing Company, a corporation of Indiana, owned the machinery and other property in suit, located in the State Prison at Michigan City, La Porte county, Ind., operating therewith as a manufacturing plant, and employing convict labor. The Hartford Rubber Works, a contract creditor of the Allen Manufacturing Company, commenced an action against the latter corporation, in the nature of a creditors' bill, as authorized by the statutes of Indiana, on allegations of indebtedness and insolvency of the corporation. Complaint therein was filed in the circuit court for La Porte county October 11, 1897. An injunction and the appointment of a receiver were sought, and the court made a temporary order on the same day restraining disposition of the property pending the hearing of application for further order to be noticed for October 15, 1897. Both summons in the action and notice of such application were personally served on the defendant corporation October 11, 1897. On October 15, 1897, the court heard the application and continued the restraining order, and at the same time entered an order appointing Alonzo S. Nichols receiver of the defendant corporation, as "an emergency requirement." The receiver immediately qualified and demanded possession, but Schwager (alleged receiver, hereinafter mentioned) and the other defendants named in the replevin writ interposed after the defendant corporation was so served with process and notice, and prevented both access to the property and possession by the receiver, Nichols. Thereupon the court authorized the receiver to sue such parties for possession, and on November 20, 1897, the receiver filed in the same court the complaint and affidavit for replevin against Schwager and the other parties withholding the property. The summons and writ of replevin were issued and delivered to the defendant sheriff November 23, 1897, and personally served upon each of the defendants therein the same day. The sheriff at the same time de-

manded the property, and the defendants in the writ refused to deliver, and prevented the sheriff from access or possession. It is further alleged that Schwager and the other replevin defendants retained possession and concealed the property until December 2, 1897, when they placed it on cars at Michigan City for shipment to the plaintiffs in the present suit; that it was then seized by the defendant sheriff under the replevin writ while in the possession of the replevin defendants; that any claim thereto by the plaintiffs in the present action arises out of a pretended transfer by Schwager to them after the service of the writ on November 23, 1897, and "with full notice and knowledge of all of the proceedings" above recited, the plaintiff confederating therein with Schwager for the purpose of preventing the sheriff "from getting possession of said property" under the writ of replevin; that before the defendant sheriff had completed his seizure the plaintiffs herein informed him that they "rescinded the pretended sale and purchase of said property," and they immediately served written notice to that effect upon the replevin defendants, and as well upon the defendant sheriff; that, relying upon such notice and representations, the defendant sheriff proceeded in and completed his levy, and subsequently turned the property over to the plaintiff in the writ, "with the full knowledge of the plaintiffs herein, and without objection on their part," and "thereby placed the same beyond his power to return or deliver" to them; and that the plaintiffs are estopped from reclaiming the property or making any demand therefor. Other proceedings are alleged, but they are merely cumulative, if material.

The plaintiffs, for reply to these defenses, allege title through Schwager, as receiver appointed by the La Porte superior court (a court of co-ordinate jurisdiction with the circuit court of La Porte county), on October 14, 1897, in an action brought by Union Drop Forge Company against the Allen Manufacturing Company; allege that the receiver qualified the same day, and entered into possession of the property in suit, and so remained until November 24, 1897; that he then sold the property, under an order of the superior court, to the plaintiffs in this action, who purchased the same at auction in good faith, and for a valuable consideration, "and without any notice or knowledge whatsoever of the pendency of the" action of the Hartford Rubber Works Company; that the plaintiffs endeavored to rescind the sale, under the advice of Chicago counsel, but rescission was not allowed, and they demanded the property from the defendant. Other matter is stated which has no relevancy to the issue.

The bill of exceptions does not purport to contain all the evidence, but contains all on which error is assigned. It also states that evidence offered by the plaintiffs tends to show that "said plaintiffs had actual notice and knowledge of the institution and pendency of" the replevin suit, "and endeavored to move said property out of the state, and thus defeat the execution of said writ by the defendant"; that "the evidence tended to show that the suit brought in said superior court was instituted in bad faith, for the purpose of defeating the suit previously begun in the La Porte circuit court"; and that the complaint in the superior court suit was filed October 13, 1897.

The errors assigned are for the admission of testimony (over objection and refusal to strike out) offered on the part of the defendant, and the sole reliance for reversal is the admission of the record of proceedings in the prior case commenced in the state circuit court by the Hartford Rubber Works Company against Allen Manufacturing Company.

Linton Cox, for plaintiffs in error.

George H. Peaks and John R. Wilson, for defendant in error.

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

SEAMAN, District Judge (after stating the facts as above). The general finding for the defendant is conclusive upon all issues of fact raised by the pleadings, and the evidence is not reviewable to ascertain whether it supports the finding. Error in the admission or re-

jection of testimony is alone subject to review. *Martinton v. Fairbanks*, 112 U. S. 670, 673, 5 Sup. Ct. 321, 28 L. Ed. 862, and cases cited, 10 Rose, Notes U. S. Reports, 936; *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 121, 127, 22 Sup. Ct. 55, 46 L. Ed. 113; *Distilling & Cattle Feeding Co. v. Gottschalk Co.*, 24 U. S. App. 638, 639, 13 C. C. A. 618, 66 Fed. 609. The plaintiffs in error recognized this rule in the assignment of errors, but not in the questions raised upon the argument. Thus the primary contention for reversal assumes that the pleadings raise no issue upon the possession of the property by the plaintiffs when it was taken by the defendant under the writ of replevin; and, so assuming that the possession of the plaintiffs was unquestioned, the rule is invoked which authorizes recovery on the strength of possession alone against a trespasser "who disturbs it without right in himself." *Cooley on Torts*, 436. Were this assumption well founded, the objections to evidence of title in the replevin plaintiff, on which error is assigned, would doubtless present the question whether the defendant was a mere trespasser, within the rule stated, in so taking the property specified in the writ from the custody of a stranger to the suit—a question on which the decisions are not entirely harmonious, the solution depending in a measure upon the various provisions for the writ. *Vide Billings v. Thomas*, 114 Mass. 570, 574; *Bullis v. Montgomery*, 50 N. Y. 352, 356; *Sexton v. McDowd*, 38 Mich. 148, 150, 152; *State v. Jennings*, 14 Ohio St. 73, 78. The contention is not tenable, however, in the case at bar, for the reason that the answer not only denies the alleged possession by the plaintiffs, but states affirmatively that the defendants in the writ were in possession of the property when it was seized, and were engaged in its removal for the purpose of placing it beyond the reach of the writ of replevin, and that the plaintiff herein was acting only in collusion with them, under a pretended sale, without bona fide possession, actual or constructive. While the findings foreclose any question of actual possession, it is sufficient, under all the authorities, that any participation or custody on the part of the plaintiffs was merely colorable, and not bona fide; and both findings and bill of exceptions are conclusive thereupon.

The question remains whether the record of the proceedings in the circuit court of La Porte county, wherein Nichols was appointed receiver of the alleged insolvent corporation, is admissible in evidence to prove title to the property involved, as against title asserted under the receiver appointed by the La Porte superior court—a court having general jurisdiction co-ordinate with such circuit court. The action in each case was against the Allen Manufacturing Company, alleged to be an insolvent corporation, and involved the same subject-matter. The relief sought was the appointment of a receiver and administration of the property of the defendant corporation—a proceeding in the nature of a creditors' bill, expressly authorized by statute in Indiana, and having effect to hold the property "in custodia legis, whether the court had actually seized it or not." *Wild v. Noblesville Building Loan Fund & Savings Ass'n*, 53 N. E. 944, 945, 153 Ind. 5. In the first-mentioned suit in the circuit court, the com-

plaint of the Hartford Rubber Works Company, a creditor, was filed October 11, 1897; and the court entered an order the same day for the hearing on October 15, 1897, of an application for a restraining order against the defendant, and restraining disposition of property meantime, and for notice thereof to be served on the defendant. Both summons and notice were personally served on the defendant October 12th. On October 15th the restraining order was continued in force—the defendant appearing to object to such order—and at the same time, in the same order, the court appointed one Nichols receiver of the corporation, the receiver promptly qualifying. The action of the La Porte superior court was instituted October 13, 1897, in the name of the Union Drop Forge Company, another creditor, by the filing of a complaint and service of a summons. On the same day the defendant corporation appeared before that court, and one Schwager was thereupon appointed receiver. Forthwith the corporation surrendered to this appointee possession of its property, which consisted of the manufacturing plant and material in the State Prison; and Schwager, aided by other persons, excluded the receiver of the circuit court, when appointed, October 15th, from possession of or access to the property.

Upon the facts thus appearing, the authorities which control the present controversy uniformly establish the doctrine that the proceedings so commenced in the circuit court of La Porte county gave to that court complete and exclusive jurisdiction of the subject-matter—the res in controversy—with unquestionable right of possession through its receiver. These citations for the proposition are sufficient and conclusive: *Peck v. Jenness*, 7 How. 612, 624, 12 L. Ed. 841, and subsequent cases noted in 4 Rose Notes U. S. Reports, 725; *Farmers' Loan & Trust Company v. Lake Street Elevated R. Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; *Appleton Waterworks Co. v. Central Trust Co.*, 35 C. C. A. 302, 93 Fed. 286, 288; *Taylor v. City of Ft. Wayne*, 47 Ind. 274, 282; *Wild v. Noblesville*, etc., Ass'n, *supra*. The nature of the action established the custodial legis in the court wherein the proceedings were first instituted; and this irrespective of any actual seizure of the property, or of violation of the restraining order entered in the primary suit. Jurisdiction of the res became paramount in the circuit court through prior service of its process, if not from the filing of the complaint and entry of the preliminary restraining order. As said in *Taylor v. City of Ft. Wayne*, *supra*:

"It is a clear principle of jurisprudence that, when there exist two tribunals possessing concurrent and complete jurisdiction of the subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted."

Other courts having no supervisory powers are thereby excluded from exercising jurisdiction until the duty of the prior court "is fully performed and the jurisdiction involved is exhausted." *Harkrader v. Wadley*, 172 U. S. 148, 164, 19 Sup. Ct. 119, 125, 43 L. Ed. 399. The rule of decision in Indiana which governs the state courts conforms to that of the federal jurisdiction. It is adopted as a "principle of jurisprudence" whereby "the jurisdiction becomes exclusive in the

one before which proceedings are first instituted." *Taylor v. City of Ft. Wayne*, *supra*. So defined, it is not a mere rule of comity, but one of necessity, which "leaves nothing to discretion or mere convenience." *Covell v. Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. Ed. 390.

When the complaint on behalf of another creditor was filed in the La Porte superior court, and summons was served and appearance entered, that court was without present jurisdiction of the subject-matter, "for the property could not be subject to two jurisdictions at the same time." *Id.*, 111 U. S. 182, 4 Sup. Ct. 358, 28 L. Ed. 390. Possession of the property obtained by its receiver was, of course, nugatory, as were any orders for the sale thereof. The question of jurisdiction was clearly open to inquiry in the litigation of title thereunder (*Cooper v. Newell*, 173 U. S. 555, 567, 19 Sup. Ct. 506, 43 L. Ed. 808), and the effect of the statement in the bill of exceptions that "the evidence tended to show that the suit brought in said superior court was instituted in bad faith" requires no consideration. The interference with the custodia legis of the circuit court violated these canons of the law, and conferred neither possession nor title which can be recognized or enforced in the case at bar.

We find no error in the rulings of the court below, and the judgment is affirmed.

SUPREME COUNCIL OF ROYAL ARCANUM v. TAYLOR.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1903.)

No. 1,764.

1. LIFE INSURANCE—BENEFIT ASSOCIATION—WAIVER OF PROMPT PAYMENT OF ASSESSMENTS.

A fraternal benefit association cannot be deemed to have waived a condition of its contract with a member requiring the payment of an assessment on or before the last day of each calendar month, without notice, and which provided that in default of such payment the member should stand suspended, and prohibited the collector of the local council from receiving an assessment after the day it became due; nor was it estopped to insist upon such suspension, which occurred some days before the member's death, because on some previous occasions he had paid after the close of the month, where that fact was not reported to the local council nor known to the supreme council, but where, in fact, the assessment had in each case been advanced for him by the collector under an arrangement between them.

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

James H. Brown (Frederick H. Bacon and Andrew W. Gillette, on the brief), for plaintiff in error.

Ralph Hartzell, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action is founded on a benefit certificate promising the payment of \$3,000 to Anna T. Taylor, the

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1914.

defendant in error on the death of her husband, George F. Taylor, which was issued by the Supreme Council of the Royal Arcanum (hereafter termed the "Supreme Council") on September 3, 1895. George F. Taylor, the plaintiff's husband, appears to have become a member of a local council termed the Arapahoe Council, No. 1,643, of the Royal Arcanum, located at Denver, Colo., on the date last mentioned, and received at that time a benefit certificate payable to his wife. Taylor died on November 17, 1900. The supreme council refused to pay the promised indemnity, whereupon this action was commenced.

The supreme council declined to pay the promised indemnity on the ground that the deceased did not comply with the terms and conditions of the benefit certificate, in that he made default in the payment of a regular assessment thereon that was due on the last day of October, 1900, and thereby, under the constitution and rules of the order, became suspended. The plaintiff below replied to this defense by averring, in substance, that the supreme council was estopped from interposing such a plea because it had made a practice of receiving assessments days after they were due, and had thereby lured the deceased into the belief that a prompt payment of assessments was unnecessary. On this issue the case went to trial, resulting in a verdict for the plaintiff below.

The facts developed on the trial, that were not controverted, are these: The supreme council had an officer connected with the local council, termed a "collector," whose duty it was, under the constitution and by-laws of the order, to keep full and correct accounts between the local council and its members, and to receive all dues and assessments paid by the members, and to turn them over to another officer of the local council, termed the "treasurer," who, in turn, transmitted to the supreme council what was collected from members to replenish the widows' and orphans' fund held by the supreme council, out of which all indemnities to members were paid. It was the practice of the collector to report to the treasurer the number of members whose dues had been paid either by them or for them, but not the names of the members who had thus paid their dues, and the treasurer made a like report to the supreme council when he transmitted the money belonging to the widows' and orphans' fund. The plaintiff's husband was never reported to the local council as delinquent as respects any assessments that became payable prior to the one that was due on October 31, 1900, but, so far as the records of the local council and the records of the supreme council showed, had paid all of his dues and assessments in due season. The fact is, however, that on seven or eight occasions during the year 1899, and probably on one occasion during the year 1900, the deceased had made his payments to the collector several days after the last day of the month on which the assessments were due. The testimony showed, however, and the fact is not contradicted by any evidence contained in the record, that on each of these occasions, by an arrangement between the deceased and the collector, the latter person advanced the assessments to the treasurer out of his own moneys, and reported them as paid in due season, and was subsequently reimbursed for

such advances by the deceased. The assessment that should have been paid on October 31, 1900, was not thus advanced by the then collector, and the deceased was reported as delinquent. He died before this assessment was paid, and it was never paid, although it seems to have been tendered on November 5, 1900, to the local treasurer, but when so tendered the money was not accepted, because the deceased had already forfeited his membership and been suspended.

The following provisions are contained in the constitution and general laws of the order, namely:

- (a) "Each member of the Order shall pay to the collector of his Council, without notice, twelve regular assessments in each calendar year, due and payable before ten o'clock p. m. of the last day of each calendar month; * * *"
- (b) "Any member failing to pay any regular or extra assessment before the time prescribed for such payment, shall stand suspended from the Order and all benefits therefrom."
- (c) "The collector shall immediately notify the Regent (of the local Council) of every suspension of a member for nonpayment of assessments and the date thereof."
- (d) "A collector shall not receive an assessment tendered by or for a member after the time for payment thereof has expired and any such receipt shall not prevent suspension."
- (e) "The neglect or failure of a member's agent or friend to pay for him an assessment, shall not prevent his suspension."

Learned counsel for the defendant in error relies on the receipt of assessments by the collector of the local council after they were due as constituting a waiver of the defense pleaded in the answer or as an estoppel, and it may be conceded that if, on the occasions when the deceased did not pay the assessments in due season, they had not been advanced by the collector, so that credit was in fact extended by the supreme council, and if it had been aware of the collector's action and had taken no exceptions thereto, the plea of estoppel or waiver, whichever it may be termed, would have been tenable. The law to this effect is so well settled that it is unnecessary to cite any of the numerous authorities. But in the present instance the evidence does not show that any credit was extended by the supreme council, or the local council, for that matter. The collectors say that when the deceased did not pay his dues in time they advanced them for him out of their own funds up to October, 1900, so that he was never in default in the payment of his dues until the last-mentioned month. Moreover, if we were able to concede that there was any evidence tending to show that credit was at any time extended by the supreme council, and that an assessment payable by the deceased was not paid, when due, either by the deceased or any one for him, and that it was subsequently paid to and accepted by the collector, then there is not a particle of evidence tending to show that such conduct on the part of the collector was known to the supreme council or ratified by it, and the case falls squarely within the decision of the Supreme Court in *Northern Assurance Co. v. Grand View Building Ass'n*, 183 U. S. 308, 361, 22 Sup. Ct. 133, 46 L. Ed. 213, and of this court in *Modern Woodmen of America v. Tevis* (C. C. A.) 117 Fed. 369, 375, 377. The promise contained in the benefit certificate to pay an indemnity on the death of the member was made on condition that he

complied "in the future, with the laws, rules and regulations now governing the said Council and Fund or that may hereafter be enacted by the Supreme Council to govern said Council and Fund." This condition, as a matter of course, affected the member with knowledge of all such laws, rules, and regulations, or, at least, it made it the member's duty to become acquainted therewith, and he is conclusively presumed to have done so, although in point of fact he may have been ignorant of some of the rules. These rules declared, as above shown, that assessments were due on the last day of each month, without notice, and must be paid before 10 p. m. of that day; that a member failing to pay any such assessment became at once suspended; that a collector should not receive an assessment tendered by or for a member after the time for payment had expired; and that the neglect or failure of a member's agent or friend to pay for him an assessment when due should not prevent his suspension. Knowledge was thus brought home to the deceased that a collector had no right to accept assessments for and in behalf of the supreme council after they were due, and that he violated the laws of the order and the instructions of his principal by so doing. Conceding, therefore, that the collector was the agent of the supreme council in collecting assessments for the widows' and orphans' fund, yet the deceased cannot assert that the supreme council waived its right to exact payment of assessments on the day they became due because of the unauthorized conduct of the collector, of which the deceased must be held to have been fully aware, unless it is shown that such unauthorized act was subsequently ratified by the supreme council, and there is no such proof. *Northern Assurance Co. v. Grand View Building Ass'n*, and *Modern Woodmen of America v. Tevis*, *supra*.

It results, from what has been said, that the plaintiff in error, at the conclusion of all of the testimony, was entitled to an instruction in the trial court that the plaintiff could not recover. Because such an instruction was asked and was not given, the judgment below is reversed, and the cause is remanded for a new trial.

In re FIEGENBAUM.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 19.

1. BANKRUPTCY—REFUSAL OF DISCHARGE—SECOND PROCEEDING.

A bankrupt who has been refused a discharge because of fraudulent concealment of assets from the trustee may not, a few months thereafter, file a new petition alleging the same facts, and prosecute a new application for discharge.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

On petition to review order vacating the stay theretofore granted, and permitting the bankruptcy proceedings to continue before the referee, and refusing to enjoin the bankrupt from prosecuting an application for his discharge.

William S. Maddox and Francis L. Noble, for petitioners.

Ignace I. Apfel and I. Gainsburg, for bankrupt.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The simple question presented by this review is whether a bankrupt, who has been refused a discharge, after full hearing, on the ground that he has fraudulently concealed assets from the trustee, will be permitted, within a few months thereafter, to file a second petition alleging the same facts and prosecute a new application for a discharge. It is admitted that the debts and assets in the two petitions are identical except that there is a difference of \$8 in the amount of property claimed as exempt. There is no attempt to disguise the fact that the purpose of the present proceeding is to obtain the discharge which the court refused to grant. The judgment of the court refusing the discharge in the first proceeding remains in full force, no appeal having been taken.

We do not deem it necessary to decide whether the bankruptcy proceedings should be dismissed in such circumstances, but we are clearly of the opinion that the bankrupt should be restrained from filing and prosecuting a second application for a discharge. Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, in limine, so flagrant an attempt to circumvent its decrees.

Assuming that this proceeding is allowed to go on, what will be the result? The bankrupt will present a petition for discharge; the creditors will file specifications alleging the same grounds of opposition, the issue thus joined will be referred in due course and the referee and the judge will thereafter be called upon to decide the same questions which have already been determined, upon the same proof and between the same parties. It is true that in such circumstances it is probable that the same conclusion will be reached, but why should the creditors be harassed by further proceedings? Why should they be compelled to employ counsel and expend their money in trying again and again a question upon which the bankrupt has had his day in court? For if his contention be correct there is nothing to prevent him from filing a third petition if his discharge be again refused and so on *ad infinitum*.

A proceeding in bankruptcy is in the nature of a bill in equity in which the bankrupt is complainant and the creditors are defendants. Where a discharge is refused on the merits the judgment inures to the benefit of all the creditors. Both parties are bound by it and neither party should be permitted to try the same question again; it is *res judicata*.

We have proceeded upon the assumption that in the present proceeding the creditors can avail themselves of the same objections interposed in the former proceeding and sustained there. If for technical reasons or otherwise they are prevented from doing this the inequity of this attempt to procure a discharge is still more apparent. It is the contention of the bankrupt's counsel that this is an entirely new and distinct proceeding and in this view he is undoubtedly correct.

Can the misconduct of the bankrupt in the former proceeding be imported into this proceeding? Suppose the creditors should again interpose the objection that the bankrupt has "knowingly and fraudulently concealed while a bankrupt * * * from his trustee property belonging to his estate," can they prove the allegation by showing that he has been guilty of this misconduct in some former bankruptcy? Does not the statute refer to the pending proceeding and the trustee then in esse? If so, it will be at once apparent that the creditors may in many instances be remediless and the second petition may be used to consummate the most glaring frauds. The same observations are true regarding the failure to keep books, etc. This must be done with intent to conceal the bankrupt's true financial condition and in contemplation of bankruptcy. What bankruptcy? The present or some previous bankruptcy?

Other considerations of a similar nature might be suggested as showing the questions which may arise if this unjustifiable proceeding be permitted to continue. They are advanced tentatively and without intending to express any opinion as to whether they are tenable or not, our sole purpose being to demonstrate the proposition that the creditors having succeeded upon the question of the discharge ought not to be called upon to face a situation where they may be defeated on technicalities by a clever maneuver of the bankrupt.

All the facts constituting the estoppel are before the court; they cannot be changed by any subsequent testimony. The bankrupt is not entitled to prosecute proceedings for a discharge, the debts and assets being the same as in the former case, and, therefore, he should not be permitted to begin such proceedings.

We are of the opinion that the stay, in so far as it restrained the bankrupt from filing a petition for a discharge, should have been continued and to this extent the order of the district court is reversed with instructions to proceed in accordance with this opinion.

CLELAND et al. v. THAYER.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1903.)

No. 1,659.

1. COPYRIGHT—COLORED PHOTOGRAPHS.

A colored photograph or picture of natural scenery may be the subject of a copyright.

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

F. H. & G. L. Canfield, for appellants.

John S. Mosby, Jr., and Charles J. Blakeney, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

¶ 1. Matter subject to copyright, see note to Amberg File & Index Co. v. Shea, Smith & Co., 27 C. C. A. 248.

CALDWELL, Circuit Judge. H. A. Cleland, William Livingstone, and W. A. Livingstone, the appellants, filed their amended bill against Frank S. Thayer, the appellee, to restrain an infringement of their alleged copyright in a picture or colored photograph of Colorado scenery, entitled "The Palisades-Alpine Pass." The bill alleged that the complainants were the sole proprietors of the print or photograph in question; that a copyright in the same had been duly granted them according to the act of Congress; that they had given notice of such copyright according to law; that their picture was an artistically colored and otherwise embellished, new, original, and useful work, printed from a specially designed plate or film, which was itself produced from an original negative of the scene, also the property of complainants; that in preparing such plate, and producing the copyrighted photograph or picture therefrom, they had employed various original, ingenious, and artistic ideas, conceived in their own minds, and which they had employed in completing the picture by an effectual and lifelike distribution of color, and by arranging and disposing of lights and shadows so as to blend appropriately with the objects of the scene, and also by various changes in the snow and cloud effect, by means of all of which, as well as by other additions and omissions, they had finally produced the original picture in suit; that this picture and prints thereof had been made popular by complainants, and that the sale thereof was a source of profit to them; that defendant had wrongfully made exact copies of said picture, and was selling the same as complainants' work; that his conduct was in violation of complainants' rights, and a fraudulent imitation of their property and production; that defendant's copies were inartistic and of inferior quality, and were so sold by him as to cause the public to believe them to be the work of complainants, and that thereby their reputation for high-class work was injured, and serious damage otherwise caused to them. The defendant demurred to the bill upon the ground that a colored photograph or picture, such as the bill described, could not be made the subject of a copyright under the act of Congress. The demurrer was sustained, the bill dismissed, and a decree rendered accordingly, and the complainants appealed to this court.

The case of *Bleistein et al. v. Donaldson Lithographing Co.* (U. S. Sup. Ct., Oct. Term, 1902) 23 Sup. Ct. 298, 47 L. Ed. —, in which the opinion was handed down since the submission of this case, holds that photographs and pictures such as the bill in this case describes may be copyrighted under the act of Congress; and, on the authority of that case and its citations, the decree of the Circuit Court is reversed, and the cause is remanded, with directions to enter an order overruling the demurrer to the bill of complaint.

In re SURETY GUARANTEE & TRUST CO.

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

No. 895.

1. BANKRUPTCY—CORPORATIONS—PRIVATE BANKERS.

A corporation incorporated under the laws of a state cannot be adjudged an involuntary bankrupt as a "private banker," under Bankr. Act 1898, § 4b (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]).

2. SAME—TRADING AND MERCANTILE PURSUITS—DEALING IN STOCKS.

The words "trading" and "mercantile pursuits" are used in Bankr. Act 1898, § 4b (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) in their technical sense; and a corporation engaged in buying and selling stocks, bonds, and other securities cannot be adjudged an involuntary bankrupt as a trader, or as engaged in mercantile pursuits.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Illinois in Bankruptcy.

This is an original petition, filed in this court by the Surety Guarantee & Trust Company, pursuant to section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), to review the action of the District Court of the United States for the Northern District of Illinois, sitting in bankruptcy, in overruling the demurrer of the petitioner to an amended petition filed by certain of its creditors for its adjudication as a bankrupt. The allegation of the petition upon which rests the decision of this court, is as follows: "That the Surety Guarantee & Trust Company of Chicago, Illinois, a corporation organized and existing under and by virtue of the laws of the state of West Virginia, has for the greater portion of six months next preceding the date of filing the original petition herein had its principal place of business in the city of Chicago, county of Cook, and state and district aforesaid, and was on said date engaged principally in trading pursuits and as a private banker; that said trading pursuits consisted in the buying and selling of stocks, bonds, and other securities; that said the Surety Guarantee & Trust Company was on said date a private banker; and that it did on said date owe debts to the amount of one thousand dollars."

John F. Greeting and Richard F. Towne, for appellant.

Rush C. Butler, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.

The demurrer presents two questions: (1) Can an incorporated company be a "private banker" within the intendment of the bankruptcy act? and (2) Is the buying and selling of stocks, bonds, and other securities a "trading pursuit" within the meaning of the act?

The bankruptcy act (30 Stat. c. 541, § 4b [U. S. Comp. St. 1901, p. 3423]) provides:

"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

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

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."

1. The record does not disclose the act of incorporation of the petitioner, or the powers thereby conferred, or the purposes for which it was incorporated. It is proper for us, therefore, to assume that the business in which it is charged to have been engaged was within the powers conferred by its charter. We may not assume that it acted in violation of the law of its creation. When, therefore, it is charged to have been engaged in the business of banking, it is rightly to be assumed that it was so authorized by its charter. Can then a corporation incorporated under state laws be deemed or held to be a "private banker" as that term is employed in the act? If banking powers were conferred upon the petitioner by its charter, it clearly cannot be adjudged an involuntary bankrupt; for by the express provision of the latter clause of the section it is provided that it may not be.

Can any corporation be a "private banker" within the meaning of the act? This term had long before the passage of the bankruptcy law received a definite and settled meaning. A private banker is a person or firm, not a corporation, engaged in banking without having special privileges or authority from the state. *People v. Doty*, 80 N. Y. 225, 228; *Perkins v. Smith*, 116 N. Y. 441, 448, 23 N. E. 21. It is said that the business of banking, except in the issuance of circulating notes, is a common-law privilege belonging as of right to every citizen. This is true, subject perhaps to control and regulation by the state (*Perkins v. Smith*, supra; *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; *Morse on Banks and Banking*, § 13), and possibly to prohibition by the state (*Myers v. Irwin*, 2 Serg. & R. 368), although the doctrine of state control is denied in *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756. But a corporation has not the common-law rights of an individual, only those corporate powers which are conferred upon it by the state, and it can do no act and make no contract except such as are authorized by its charter. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274. Therefore it is that the term "private banker" has definite signification, and is applied only to individuals or to a firm, and does not comprehend corporations. The term having received such settled and definite meaning at the time of the bankruptcy act, Congress must be assumed to have used the term in that sense; no other or different meaning being stated. *Stephenson v. Higginson*, 3 H. L. Cas. 638; *Perkins v. Smith*, supra. We are of opinion that the "private banker" of the bankruptcy act does not include a corporation.

2. Is the buying and selling of stocks, bonds, and other securities a "trade pursuit" within the meaning of the bankruptcy act? In a popular sense trade comprehends every species of exchange or dealing. It is, however, chiefly used to denote barter by purchase and sale of goods, wares, and merchandise, either at wholesale or at retail. A trader is "one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making

profit." Bouvier, vol. 2, p. 741. The opinion in the case of *In re New York & Westchester Water Company* (D. C.) 98 Fed. 711 (affirmed on appeal sub. nom. *In re Morris*, 43 C. C. A. 91, 102 Fed. 1004), contains an able and lucid review of the definition of the term as known to the law, and declares that "the business of a trader includes both buying and selling, either goods or merchandise, or other goods ordinarily the subject of traffic," and that the term "mercantile pursuits" means "the buying and selling of goods or merchandise or dealing in the purchase and sale of commodities." The term "goods" means articles of trade, commodities, wares, merchandise. Under the bankruptcy law of England it was ruled that dealing in shares in joint-stock companies was not trading within the meaning of the law. *In re Cleland*, L. R. 2 Ch. App. 466. And so likewise it was held under the national bankruptcy act of 1867. *In re Woodward*, 8 Ben. 563, Fed. Cas. No. 18,001. We are constrained to agree with these opinions. The present act is more restrictive than the act of 1867, and the term "trader" cannot be enlarged beyond its technical legal meaning. It has usually received such strict interpretation. Thus mining companies are held not to be traders. *In re Elk Park Mining & Milling Company* (D. C.) 101 Fed. 422; *In re Rollins Gold & Silver Mining Company* (D. C.) 102 Fed. 982; *In re Chicago Joplin Lead & Zinc Company* (D. C.) 104 Fed. 67; *In re Woodside Coal Company* (D. C.) 105 Fed. 56; *In re Keystone Coal Company* (D. C.) 109 Fed. 872; *In re Tetopa Mining & Smelting Company* (D. C.) 110 Fed. 120. So, also, insurance companies are held not to be traders. *In re Cameron Town Mutual Fire, Lightning & Windstorm Ins. Co.* (D. C.) 96 Fed. 756. The keeper of a saloon and restaurant (*In re Chesapeake Oyster & Fish Co.* [D. C.] 112 Fed. 960) and an incorporated club (*In re Fulton Club* [D. C.] 113 Fed. 997) are held not to be traders, although they dealt in the buying and selling of commodities. It was held in *Re San Gabriel Sanatorium* (D. C.) 95 Fed. 271, that a corporation maintaining a private hospital for consumptives is a trader, and in *Re Morton Boarding Stables* (D. C.) 108 Fed. 791, it was ruled that a corporation conducting boarding stables is a trader within the meaning of the act. These two cases seem to stand apart and not to be sustained by the weight of authority, and one of them is distinctly disapproved. We are inclined to hold that Congress employed the words "trader" and "mercantile pursuits" in the technical sense by which they were known to the law. If it be desirable that the provisions of the act should be extended to include the business of dealing in stocks and bonds, which now engages the time of many people, it must come about by legislative action, and not by the act of the court in enlarging the technical meaning of a term long known to and well defined in the law.

We must hold, therefore, that the petitioner was not a private banker or trader or engaged in mercantile pursuits within the meaning of the bankruptcy act; that the district court erred in overruling the demurrer to the petition; and such order must be reversed with a direction that it order that the demurrer be sustained. The clerk will certify this ruling to the court below.

F. C. AUSTIN MFG. CO. v. AMERICAN WELLWORKS.

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

No. 868.

1. PATENTS—PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

On appeal from an order granting a preliminary injunction against infringement of a patent, the only question for consideration is whether the legal discretion of the trial court was improvidently exercised.

2. SAME—APPEAL—MATTERS REVIEWABLE.

The question of the validity of a patent which has been sustained in prior contested litigation, not only between other parties, but between the same parties, will not be considered on an appeal from an order granting a preliminary injunction against its infringement.

3. SAME—RECORD IN APPELLATE COURT.

An appeal from an order granting a preliminary injunction must be determined by the appellate court on the record as it stood at the time the order was made, and additional evidence on papers cannot be introduced into the record thereafter by stipulation.

4. SAME—INFRINGEMENT—APPARATUS FOR SINKING WELLS.

The Chapman patent, No. 382,689, for an apparatus for sinking wells, claims 12 and 13, considered by the appellate court, and a finding of the trial court on the hearing of a motion for a preliminary injunction against infringement that a beaded roll used by defendant in its clamp to grasp and rotate the tubing while being sunk in the well was the mechanical equivalent of the "jaws of a circular form, with sharp angles," of the patent, and that defendant's apparatus infringed, *held* warranted, and within the court's discretion.

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

For opinion below, see 98 Fed. 992.

This appeal is brought by the defendant, F. C. Austin Manufacturing Company, from a preliminary injunction granted upon bill filed by the American Wellworks, as complainant, alleging infringement by the defendant of certain claims of letters patent No. 382,689, issued May 15, 1888, to Matthew T. Chapman, for "apparatus for sinking wells." No infringement is asserted in the well boring and sinking machinery used by the defendant, except in its device for clamping and sinking the well tubing, which is alleged to infringe claims 12 and 13 of the patent, namely:

"(12) A rotary clamp adapted to grasp a round article and rotate with the endwise movement of the article clamped, independent of the rotary movement which carries said article around, and having jaws of a circular form, provided with sharp angles, substantially as described.

"(13) A rotary clamp having jaws of a circular form, with sharp angles, adapted to grasp a round article, to rotate with the endwise movement of the article, independent of the rotary movement which carries said article around, in combination with a rotary ring for carrying said clamp, and gearing for driving said ring, substantially as described."

The validity of these claims is challenged, but the main contention for reversal of the order is that the defendant's rotary clamp does not infringe, for the reason that a "round beaded roll" for grasping the pipe is substituted for

¶ 1. Review of interlocutory decree granting or continuing injunction in Circuit Court of Appeals, see notes to Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co., 3 C. C. A. 572; Southern Pac. Co. v. Earl, 27 C. C. A. 189; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 484.

the means described in the claims as "jaws of a circular form, provided with sharp angles."

C. K. Offield and C. C. Linthicum, for appellant.

L. L. Bond, for appellee.

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

SEAMAN, District Judge (after stating the facts as above). The only question for review on this appeal is whether the discretion of the trial court was improvidently exercised in granting the preliminary injunction. *Welsbach Light Company v. Cosmopolitan Incandescent Light Company*, 43 C. C. A. 418, 104 Fed. 83, 85; *United States Gramophone Company v. Seaman*, 51 C. C. A. 419, 113 Fed. 745, 749; *Stearns-Roger Mfg. Company v. Brown*, 52 C. C. A. 559, 114 Fed. 939, 941.

In the record below, strong grounds were presented for the relief sought, if infringement appeared. Not only had the validity of the patent and of the claims in question been contested and finally adjudicated in another court, but the parties to the present bill were before the court below in other litigation involving both validity and infringement of the same patent and claims. Prior hearings had occurred, resulting in an injunction against an alleged infringement by the defendant pending final hearing. The instant case appeared, therefore, as a second attempt to use a device which might evade the patent, while adopting an equivalent means. The presumptions which run with the patent are thus well fortified by circumstances to entitle the owner to injunctive relief against an infringer. *Electric Manufacturing Company v. Edison Electric Light Company*, 10 C. C. A. 106, 61 Fed. 834, 836.

Numerous prior patents are introduced by way of attack upon the validity of the patent in suit, but no device thus shown appears upon its face to be such anticipation of the patent device as calls for consideration, under the rule governing this appeal. The issue thereupon must be reserved for final hearing, aided by such proof as may then be submitted. So that the ruling upon the question of infringement alone remains for review. As the application for an injunction is addressed to the judicial discretion of the court, the order will not be reversed unless it is "clearly erroneous." *Welsbach Light Co. v. Cosmopolitan Incandescent Light Co.*, *supra*. For the exercise of that discretion the rule is well settled in patent cases that the fact of infringement must be clearly established, or, as frequently stated, must appear beyond reasonable doubt. *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718, 720; *Menasha Wood Split Pulley Co. v. Dodge*, 29 C. C. A. 508, 85 Fed. 971, 977; *McDowell v. Kurtz*, 23 C. C. A. 119, 77 Fed. 206, 207; *Blakey v. National Mfg. Co.*, 37 C. C. A. 27, 95 Fed. 136, 137. But the correctness of the order must be considered under the facts and circumstances of the case as presented below, and "from the same standpoint as that occupied by the court granting it," and, if its legal discretion "was not improvidently exercised, we should not disturb its action." *Duplex Printing Press Co. v. Campbell Printing Press &*

Mfg. Co., 16 C. C. A. 220, 69 Fed. 250, 252; Stearns-Roger Mfg. Co. v. Brown, *supra*.

The defendant's device is a rotary clamp, and identical with that of the patent in purpose, operation, and effect. Both are used in connection with machines for well boring and sinking, and are adapted to sink heavy metal tubes in deep wells, for the various sizes and weight of tube required, which range from 4 to 15 inches in diameter, and are frequently 10 to 12 inches. The devices operate alike in grasping the well tube and compelling its continuous rotation, while permitting its movement longitudinally for sinking in the bore. For these objects each is provided with sets of rolls or wheels mounted for rotation, and having "gripping edges" which serve to bite into the surface of the pipe; thus holding it for continuous downward movement, and causing it to turn with the rotation of a ring which carries the gripping means. The devices differ alone in the number and form of these gripping means, and the form of their gripping edges. In the patent "two oppositely located sets of wheels" are employed, called "holding cones" in the specifications. As shown in the drawings, each set consists of two cone-shaped rolls having annular off-sets, which present sharp angles for gripping edges; and they are described in the claims as "jaws of a circular form, provided with sharp angles." The means used by the defendant is described by its expert as "three equidistant radial rolls," each "a cylinder having on its face an unbroken raised central bead, extending completely around its circumference, the bead being substantially half round in cross-section"; and "the beads alone make contact" with the well tubing.

The device of the patent, as an entirety, is adapted to the modern requirement of deep wells, with large bore and heavy tubing, and the theory of the invention in controversy is that continuous revolution of the tubing will aid the descent—in many instances is essential to success—so that a rotary clamp is provided to hold securely, and give and control both movements without injury to the tubing. The advance made in the art of well-sinking requires no present consideration, beyond the remark that the presumptions in favor of the patent are well supported by affidavits tending to show the novelty and utility of the device in this feature. Indeed, the defendant furnishes strong evidence of its utility by persistent adoption of means for like purpose. Under the circumstances shown, with the validity of the claims assumed, the changes made by the defendant in the shape, number, and arrangement of the wheels which constitute the gripping jaws are manifestly not substantial, but formal and evasive, within the doctrine of *Cash-Register Co. v. Cash Indicator Co.*, 156 U. S. 502, 517, 15 Sup. Ct. 434, 39 L. Ed. 511, and analogous cases. The sole question is whether the substitution of the beading on the defendant's wheel as a gripping surface for the angle made in the wheel described in the patent is a substantial departure from the invention claimed. On this record the *prima facie* showing is sufficient that the beading on the wheel operates in the same way, and is effective in holding, revolving, and sinking the pipe; alike biting and indenting the surface without material injury to the pipe. In other words, the beading serves the purpose of the angle shown

in the patent as a gripping edge, and is plainly a mechanical equivalent. A valid patent monopoly cannot be evaded by such substitution or change in form, except through the terms of the grant, express or implied, limiting the invention to the special means and form shown in the patent. Unless on the face of the present record the patent in suit must be construed as so limiting the grant, infringement is unquestionable. No room for doubt would appear, except for the description of this element in the claims as "jaws of a circular form, provided with sharp angles," and the inquiry is thus narrowed to the meaning of the term "sharp angles" in the sense of the invention claimed. In the argument of counsel for the defendant appellant the contentions on this point are twofold: (1) That the proceedings in the Patent Office so limit the claims as allowed that the beading on the wheel does not infringe; and (2) that the express provision of the claim for "sharp angles" is not applicable to the beading on the defendant's wheel.

1. The first proposition rests on the assumption that the "file wrapper and contents" relating to the patent are in the record, but no evidence of that character appears in the transcript of record filed on this appeal. An "Additional Transcript of Record," so called, is presented on behalf of the appellant, purporting to contain such matter, and certified by the clerk of the circuit court as "filed in said court on the 9th day of January, 1902," pursuant to a stipulation of counsel for both parties, therewith certified, but it constitutes no part of the record on appeal. The hearing occurred November 16, 1901. The opinion was filed and the injunctive order entered December 30, 1901. Appeal was allowed the same day, and perfected January 4, 1902, when the assignment of errors was filed. As no rehearing or other subsequent action of the trial court appears, the matter filed January 9, 1902, cannot enter into the record through stipulation, and cannot be considered on the appeal, irrespective of the fact that objection thereto is now raised by counsel. The jurisdiction of this court is appellate only. Its review in law or equity is limited to the record of matters which were before the trial court, and cannot be enlarged or affected by subsequent stipulations between the parties. *Maxwell Land-Grant Case*, 122 U. S. 365, 375, 7 Sup. Ct. 1271, 30 L. Ed. 1211; *Randolph v. Allen*, 19 C. C. A. 353, 73 Fed. 23, 31; *Case v. Hall*, 36 C. C. A. 259, 94 Fed. 300, 302.

2. The contention that the beaded wheel is not an infringement of the patent rests upon the language of the claims that the "jaws are provided with sharp angles," and upon the angled edge disclosed in the drawings and specifications as a gripping means. While each wheel as shown in the patent has more than one angle, to meet the various sizes of the pipe, contact is made in every instance with a single angle or gripping edge, which is the sole object of the angle. It is well described as an "angle," and the term "sharp" is unnecessary, in so far as any requirement is disclosed by the patent or record. The degree of angle is neither specified nor essential, and the term "sharp" is a mere relative term. It is commonly applied in reference to the cutting edge of a knife or razor, to the tooth of a man or animal, or to the prow of a ship, and cannot fairly be construed

here to intend a mathematical angle or particular degree of sharpness. Otherwise, when the edge becomes dulled by use, it is not within the patent. The object of the patent law is "to secure to inventors a monopoly of what they have actually invented or discovered," and it "ought not to be defeated by too strict construction" of terms in the claims, which may be inartificially drawn. *Topliff v. Topliff*, 145 U. S. 156, 170, 12 Sup. Ct. 825, 831, 36 L. Ed. 658. "An excess of description does not injure the patent unless the addition is fraudulent." *Sewall v. Jones*, 91 U. S. 171, 186, 23 L. Ed. 275. The inventor provided a means to make the grip effective by biting into the metal tubing, making an indentation in its course without injuring the tube. The beading makes the same grip in the same way, though more force is apparently necessary, and its track on the tubing is distinct. Treating the term "sharp" as used in the sense of this function—capability of biting into the metal—it is applicable to the beading, which differs only in degree. With the claim so construed, infringement is unquestionable. The exercise of discretion hinged upon the construction given to these terms, and we cannot find, on the record presented, that the construction adopted was unjust or unreasonable. This conclusion is without prejudice to the construction of the claims upon final hearing, or in further proceedings in the Circuit Court.

We are of opinion, therefore, that the discretion of the court was not improvidently exercised in granting the injunction, and the order is affirmed.

REGENT MFG. CO. et al. v. PENN ELECTRICAL & MFG. CO.

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

No 888.

1. PATENTS—VALIDITY AND INFRINGEMENT—MIRRORS.

The Wright & Curry patent, No. 631,033, for a mirror, consisting of a combination of an unframed mirror with beveled edges, a spring-armed metal supporting frame and grooved clips adapted to be rotatably mounted in the arms of the frame to clasp the edges of the mirror and hold it frictionally at any angle to which it may be adjusted by means of the spring pressure of the frame, while the elements were old, shows a combination which produces a useful and new unitary result, and which involved invention. Claims 3 to 6, inclusive, construed, and held not anticipated and infringed.

2. SAME—INJUNCTION AGAINST INFRINGEMENT—PATENTEE.

A patentee, who has assigned his patent, and is in the employ of another, who is making an infringing article, has no ground to object to a decree enjoining him as well as his employer from making and selling such article, where he is not held for the damages caused by the infringement.

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

From a decree awarding the Penn Company an injunction against the Regent Company and Curry, and an accounting against the Regent Company alone, this appeal is prosecuted.

The suit was based on claims 3 to 6, inclusive, of letters patent No. 631,033, August 15, 1899, John A. Wright and James H. Curry, assignors to the Penn Company, as follows: "(3) In a mirror, the combination of a glass, a spring-metal frame normally narrower than the glass, clips 4 grooved on their inner edges and having fixed rotatable mounting in the frame sides, the grooved clips being adapted, upon expansion of the frame, to embrace and frictionally hold opposite edges of the glass at any desired point in the length of the latter, substantially as shown and described. (4) In a mirror, the combination of a glass, an expansible spring-metal frame normally narrower than the glass, and clips on opposite sides of the frame, adapted, upon expansion of the frame, to embrace and frictionally engage opposite edges of the glass at any desired point in the length thereof, whereby the relative position of the glass and frame may be varied, substantially as shown and described. (5) In a mirror, the combination of a glass having its edges continuous and uninterrupted by apertures or other bearing-points, an expansible spring-metal frame normally narrower than the glass, and clips grooved in the direction of the glass edges, said clips secured to opposite sides of the expansible frame and adapted to embrace the glass edges at any desired point in the length thereof, the clips holding the glass by frictional engagement, substantially as shown and described. (6) In a mirror, the combination of a glass having beveled or tapering edges, a frame, clips for securing the glass to the frame, the clips having V-shaped sockets for embracing the back and bevel of the glass without encroaching on the reflecting-surface thereof, and means for frictionally holding the clips at any desired point on the glass edges, the latter having wedging action in the clip-sockets, substantially as shown and described."

When the invention was made, both Wright and Curry were connected with the Penn Company, to which they assigned their application. The Penn Company at once began to make and sell the new mirrors, and up to the time of taking testimony herein had marketed more than half a million of them. Curry left the Penn Company some time in 1900. About the same time the Regent Company prepared to manufacture mirrors. In February, 1901, the Regent Company contracted with Curry "to thoroughly organize the mirror factory of the Regent Company, and to suggest such improvements as may appear desirable, and to assist in any capacity necessary to further the interests of said company," at a stated salary. This suit was commenced in April following. The court held that Curry was estopped to deny the validity of the patent; that the Regent Company was in such privity with Curry that it, too, was estopped; that the patent was infringed; and that the Regent Company alone should account, since Curry had no financial interest in the business or in the profits therefrom.

The prior art is illustrated in the record by letters patent No. 52,531, February 13, 1866, to Chappell; No. 60,699, January 1, 1867, to Cumming; No. 137,383, April 1, 1873, to Olander; No. 167,558, September 7, 1875, to Palmieri; No. 241,512, May 17, 1881, to Ritter; No. 377,282, January 31, 1888, to Wiederer; No. 479,092, July 19, 1892, to Julian; No. 544,300, August 13, 1895, to Hanlon; No. 606,866, July 5, 1898, to Heineken; No. 615,250, December 6, 1898, to Clark; No. 615,928, December 13, 1898, to Wagner.

An alleged prior use is claimed by appellants to be shown in their exhibit "Curry & Company's 1894 and 1895 Mirror."

Under the assignments, the Regent Company contends: (1) That it is not estopped to deny the validity of the patent; (2) that the patent is invalid (a) in view of the prior patents, (b) by reason of prior use, and (c) because it comprises a mere aggregation of old elements and results, and not a patentable combination; and (3) that there is no infringement in the light of the limiting amendments of the claims shown by the file wrapper and contents. And Curry insists that the injunctive decree against him is erroneous.

Other facts are stated in the opinion.

Thomas F. Sheridan and P. C. Dyrenforth, for appellants.

Edward Rector, for appellee.

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

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

1. There is evidence in the record which may fairly be claimed to show that the Regent Company had designed the alleged infringing mirrors before employing Curry, that Curry had no voice in deciding what should be manufactured, and that his efforts were directed to organizing the factory so as to produce better and cheaper what the Regent Company had already determined upon. On this showing there is basis for contending that the Regent Company is not involved in the estoppel against Curry. *Boston Lasting-Machine Co. v. Woodward*, 27 C. C. A. 69, 82 Fed. 97. From other evidence an inference might possibly be warranted that the Regent Company and Curry were knowingly co-operating in an invasion of appellee's rights. We find it unnecessary, however, to pass upon this evidence, in view of our conclusions upon the other questions.

2. (a) The prior patents disclose mirrors, with and without beveled edges, with and without frames, spring-metal frames, and grooved clips. For example, in the patents most strongly relied on, Palmieri shows a mirror gripped between two slotted clips, which are held rigidly with respect to each other and the mirror's edges by a bar connecting them across the back of the mirror, but he does not employ a spring frame, nor clips rotatably mounted in such a frame and adapted to engage and hold the glass by the frame's pressure. Ritter displays a spring wire support, in which the points of the forks are bent inward to set in holes in a solid frame; and Heineken exhibits a particular "detachable clamping and pivot-supporting device for wash basins." These come as near to appellee's structure as any of the prior patents. None forestalls the combination for which the claims in suit are made.

(b) It is not shown when or by whom appellants' exhibit "Curry & Company's 1894 and 1895 Mirror" was made. Curry testifies that the exhibit is a duplicate of a style that Curry & Co. manufactured in 1894 and 1895. In other respects, also, we are not satisfied that the proof of the alleged prior use comes up to the point where it can be accepted to defeat a patent; and especially in this case, where Curry and his employer ask that an asserted use by Curry & Co. in 1894 be taken to falsify Curry's oath in his application for the patent in suit, made in 1899. But if the prior use were duly proven, the exhibit, at its full face value, amounts to no more than the prior patents. The mirror, substantially as in the Palmieri method, is supported and held between two clips (loops) formed in the ends of a wire that extends across the back of the glass. The wire, by means of its ends as pivots, is upheld in a forked frame that has sufficient spring to admit the pivots into their bearings. Without noting other differences, it is plain that the glass is not sustained between the clips by means of the pressure of a spring-armed frame. The real pertinence of the Curry exhibit, and also of the prior patents, comes in considering the next question.

(c) Was a patentable combination formed by bringing together these old elements—an unframed mirror with beveled edges, a spring-armed supporting frame, and grooved clips adapted to be rotatably

mounted in the arms of the frame? Or was this an aggregating of old elements and results? If a useful and new unitary result appears as the product of the interaction of the elements, though all be old, the union is a true combination; and, if unpatentable, it is for want of invention. *Parks v. Booth*, 102 U. S. 96, 104, 26 L. Ed. 54; *Johnson v. R. Co.*, 33 Fed. 499; *National Cash Register Co. v. American Cash Register Co.*, 3 C. C. A. 559, 53 Fed. 367. In the patent in suit it is evident that the spring-metal frame forms a support for the rotatable clips which have their bearings in the arms of the frame, presses the clips inwardly against the edges of the glass with sufficient force to cause the clips to embrace and frictionally to hold the glass at any desired point in its length, and produces sufficient friction between the arms and the clips to hold the glass in angular position. The clips rotatably support the glass so that it may be turned, frictionally and yieldingly sustain the glass in its lengthwise adjustments, and react frictionally against the spring-arms to hold the glass in its angular positions; and the glass, to the accomplishment of the resulting adjustability, necessarily reacts upon the clips and spring-arms. Thus, by the co-operation of the three old elements, is produced a unitary result—the quick, easy, and sure adjustability of the mirror with respect to height and angle. The improvement is confessedly novel. Its utility, apparent on its face, is reaffirmed by its great success. But did the production of it require the exercise of the inventive faculty? The conjunction of its being a true mechanical combination, its novelty, its great utility, and its notable commercial success, is persuasive that more than mechanical skill was required in taking this new step in the very, very ancient art of supporting and adjusting mirrors. The device seems exceedingly simple. But its very simplicity, in such an old field, should be a warning against a too ready acceptance of the *ex post facto* wisdom of the bystander.

3. Between the Regent and the Penn mirrors there are some differences in appearance, due mainly to the use of round wire in the former where the latter has flat; but in each are the same elements, combined and co-operating in the same way, and producing the same result. The defense of noninfringement rests upon the insistence that a spring frame, to be within the patent, must be literally and independently of the clips “normally narrower than the glass,” and that the Regent spring frame, by reason of an asserted greater rigidity of the round wire and wider extension of the clips, does not need to be and is not “normally narrower than the glass.” There can be no question but that the Regent clips, like the Penn, have “rotatable mountings in the frame sides,” and are “adapted, upon the expansion of the frame, to embrace and frictionally hold opposite edges of the glass,” and that the results are due to the inward pressure of the spring-arms. In view of the above phrases quoted from the claims, as well as from a consideration of the whole patent, it would seem that a fair and reasonable interpretation would only require the glass to be held in a spring frame which had to be expanded to receive it. Such a frame, counting all that embraces the glass as frame, is of necessity “normally narrower than the glass.” But if the construc-

tion of the claims be adopted that the naked spring-arms, when free from pressure, must stand nearer each other than the width of the glass, then an infringing mirror may be made noninfringing by bending the spring arms a hundredth of an inch, and vice versa, and the same mirror may at one moment infringe and not at the next. Verily, this would be an instance in which the letter killeth. But we do not understand the Regent Company to urge such a construction, except in view of the history of the application in the Patent Office, from which the contention is drawn that the original claim was intentionally restricted by inserting "normally narrower than the glass" as an amendment to meet the views of the examiner, and that a literal construction is, therefore, required, regardless of the nature and scope of the invention. The trouble is, the premise is not well grounded in fact. Original claims 2 and 4, for which claim 3 now stands, read:

"(2) The combination of a mirror, and a spring mounting adapted to be expanded to engage opposite edges of the mirror and hold it by frictional engagement, substantially as shown and described." "(4) The combination of a mirror, a forked spring-metal frame, and clips trunnioned in the frame forks, the frame being adapted to expand to cause the clips to engage opposite edges of the mirror and hold the latter by frictional contact, substantially as shown and described."

Manifestly, a spring mounting (arms and clips) adapted to be expanded to engage and hold the glass by friction has to be normally narrower than the glass. The examiner did not suggest that he would allow the claims if the alleged restrictive phrase were inserted, but went to the substance, as he viewed it, and rejected the claims upon references to the Ritter and Heineken patents, holding that there was no invention in the applicants' device. The following claim was then offered:

"In a mirror, the combination of a glass, a spring-metal frame normally narrower than the glass, and clips on opposite sides of the frame adapted, when the frame is expanded, to embrace opposite edges of the glass, and at any desired point in the length thereof, and detachably secure the same, substantially as shown and described."

The examiner did not say that, the words "normally narrower than the glass" having now been added, he would allow the claim; but, without indulging in verbal criticisms, rejected this claim on the merits, upon the same references and for the same reason as before. Present claim 3 was then filed, and disallowed on the same grounds. The applicants then added present claims 4, 5, and 6, and requested the examiner to make his decision final, so that they might appeal. The examiner's understanding of the scope and meaning of the claims in suit is shown by his statement on appeal:

"The claims appealed cover a spring-metal frame to embrace a hand-mirror, the glass of which is held directly in two grooved clips, rotatably mounted in the sides of the frame and held against the glass by the spring pressure of the frame. * * * It is held that there is no invention in applying the trunnion clips shown by Heineken to the mirror frame shown by Ritter."

The board of examiners in chief unanimously reversed the decision, saying, among other things:

"The frame of Ritter is not adapted without change to support the clamps of Heineken. This device is one clearly an improvement over Ritter's, and contains novelty which is more than the result of merely copying or using an old device in the place of Ritter's prongs and holes."

So, the applicants never acquiesced in the examiner's action; the examiner did not require the amendment as a condition precedent to the allowance of claims narrower than originally made; and the appellate tribunal allowed the claims after examining the device in the spirit that giveth life.

Respecting Curry: The decree prohibited him from continuing to make the Regent infringing mirrors, but did not hold him in damages. To the latter part of the decree the Penn Company is not objecting. Curry, as patentee, is estopped to deny the validity of the claims; and, as a mere employé, that he "may be enjoined whenever this is necessary to protect the patentee (holder of the patent) against future infringements, is universally conceded." 3 Robinson on Patents, § 912. Under the circumstances of this case, we think that Curry has no cause to complain.

The decree is affirmed.

SEILER v. FULLER & JOHNSON MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1903.)

No. 907.

1. PATENTS—INVENTION—TRANSPLANTING MACHINES.

The Bemis patent No. 423,723, for a transplanting machine, claim 1, is void for lack of patentable invention in view of the prior art, including the Smith transplanter (patent No. 335,724, and improvements covered by later patents), which was an operative machine, the only change in which made by Bemis was to substitute for the pressing rollers pressing plates previously known and used in seed-planters, which was an obvious mechanical substitution.

2. SAME—INFRINGEMENT.

The Bemis patent No. 423,724, for a transplanting machine, claim 6, is void for lack of invention. Claims 3 and 4 held not infringed if valid.

3. SAME.

The Starks and Felland patent, No. 486,200, for a transplanting machine, claims 1 and 2, covering a combination of devices by which the weight of the persons who set the plants is utilized to hold the furrow-opener in the ground, is not infringed by the machine of the Moehring patent, No. 653,425, which employs different means for utilizing the driver's weight for the same purpose. Claims 6 and 7, for means to fasten the tongue rigidly to the frame and to disengage it at the end of the row, in view of the prior agricultural implement art, must be restricted to the means specified, and, as so limited, they are not infringed by the Moehring machine.

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

By the decree appealed from it was adjudged that appellant was infringing claim 1 of letters patent No. 423,723, March 18, 1890, to Bemis; claims 3, 4, and 6 of No. 423,724, March 18, 1890, to Bemis; and claims 1, 2, 6, and 7 of No. 486,200, November 15, 1892, to Starks and Felland, assignors to appellee.

The claims are as follows:

First Bemis patent: "(1) In a transplanting-machine, the combination, with the runner or plow provided with the usual mold-board, of the gathering and spreading plate formed or provided upon its end, on one side thereof, with a downwardly-extending flange, substantially as set forth."

Second Bemis patent: "(3) In a transplanting-machine, the combination, with plow or runner supports, of adjustable angular brackets secured thereto, laterally-extending shoes secured to said adjustable brackets or to their equivalent, and a plow or runner secured between said supports, substantially as set forth. (4) In a transplanting-machine, the combination, with plow or runner supports, of angular brackets secured thereto, said brackets provided on their vertical members with elongated slots, transverse pins passing through said elongated slots and through perforations in the supports, whereby adjustability may be given, laterally-extending shoes secured to the horizontal members or arms of said brackets, and a plow or runner secured between the supports, substantially as set forth." "(6) In a transplanting-machine, the combination, with plow or runner supports, of a plow or runner secured between said supports, and laterally-extending shoes secured to said supports, the outer edges of said shoes being turned downwardly, so as to gather the earth into the furrow after the plant has been set, substantially as set forth."

Starks and Felland patent: "(1) In a machine of the class described, the combination, with the main frame, of the beam, I, pivoted to the main frame, the furrow-opener carried by the beam, and a beam or beams, G, pivoted to the frame and supported upon the furrow-opener beam, all substantially as shown and described. (2) In a machine of the class described, the combination, with the main frame, of the furrow-opener beam, I, the beam or lever, G, pivoted to the main frame and supported upon the furrow-opener beam I, and an adjustable connection between the said beam I and the beam G, whereby the leverage of the latter beam may be varied as desired." "(6) In a machine of the class described, the combination, with a main frame, of a block or frame, Z, pivoted thereto at its forward end, and a lever, b, pivoted to the main frame and adapted to engage slots formed in the main frame and in the frame, Z, all substantially as shown and described. (7) In combination with a main frame having a block B at its forward end, said block having a slot or recess, a, in its rear face, a supplemental frame or block, Z, provided with a wheel, e, and connected with the block, B, of the main frame by means of a bolt, Y, and a lever, b, pivoted to the block, B, and adapted to enter the slot, a, and a corresponding slot in the frame or block, Z."

Charles M. Peck and Lysander Hill, for appellant.

Wm. R. Bagley (Robert M. Bashford, on the brief), for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

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

The patents relate to transplanters. Before Bemis's time (Tucker, No. 93,250, August 3, 1869; Tennent, No. 193,734, July 31, 1877; Smith, No. 335,724, February 9, 1886, reissued No. 10,982, January 29, 1889; Smith, No. 345,184, July 6, 1886), transplanters were known, and the Smith machine was being manufactured and used with some degree of success. The Smith transplanter may be described generally as a wheeled implement having a furrow-opener, with one side—the land side—in line with the draft of the machine, so as to cut perpendicularly into the soil, and the other side extended at an angle so as to throw the earth out of the furrow; at the land side of the furrow-opener, a roller that compresses the

soil and makes firm the perpendicular wall against which the plants are set; at the heel of the furrow-opener, a spout through which at regular intervals water is let into the furrow; following the opener, on the mold side thereof, a plate that gathers the soil into the furrow; to the rear of this, a roller that presses the soil into the furrow and about the plants without touching them; and, suspended from the rear of the frame, seats from which operators may set the plants by hand in the furrow in advance of the scraper and roller. For the Smith roller at the land side of the furrow-opener, Bemis substituted a plate to compress the soil and make firm the perpendicular wall. This feature is included in claim 5 of the first Bemis patent, but is not involved in this suit. For the scraper and roller at the rear and on the mold side of the opener, Bemis substituted a plate having its rear outward portion bent downward obliquely to the furrow. The bent portion gathers the soil into the furrow, and the remainder of the plate presses it about the plants without touching them. This plate is an element in the first claim. In the specification Bemis stated:

"The particular objects of my invention are to provide a machine having improved facilities for smoothing and pressing the soil on one side of the furrows; furthermore, in means for covering the furrow in a simple and effective manner. * * * The advantages claimed by me are the construction of the compressing plate or spring secured to the land side of the runner, which leaves a smooth perpendicular wall against which the plants are placed; also the construction and arrangement of the gathering and spreading plate, which has decided advantages over the rollers ordinarily used for the same purpose, inasmuch as in certain conditions of the soil—as, for instance, when damp or wet—the dirt will adhere to the wheel, thus to a certain extent impairing its effectiveness. This defect, however, is not apparent in the device substituted by me, which in this respect is a considerable improvement in the runner system of planting."

It seems clear that Bemis improved the Smith machine in the respects described; but how far the machine of the first Bemis patent would be superior to the Smith transplanter in actual operation is left to the imagination, since the record discloses that the machine, made and sold extensively by appellee, and used by farmers with success, has a V-shaped furrow-opener, with a gathering and pressing plate following at each side.

Bemis was not the first to conceive and build a wheeled implement, "whereby persons suitably seated upon the vehicle are enabled to place the plants in a furrow or opening made for the purpose, the machine subsequently filling in the opening or furrow and compactly pressing the earth about the roots of the plant." Every item of work that could be done by the machine of the first Bemis patent could likewise be done, though perhaps not so well, by the Smith machine. The functions of each machine, as a whole, and of the parts individually, were identical, precisely. And in the general art of planting, the combination of a furrow-opener with a gathering and pressing plate to fill in the furrow (as an operative equivalent for a combination of a furrow-opener with a gathering plate and pressing roller) was well known. Bagley, No. 211,370, January 14, 1879; Vivion, No. 194,745, August 28, 1877; Bowman and Selby, No. 115,-

688, June 6, 1871. These patents relate to improvements in seed-planters. And where a V-shaped opener and two gathering and pressing plates were used in the seed-planters, it is true that the machines, without alterations, could not be used in setting out plants. The seed spout would have to be removed so as to permit the operator's hand to set the plants at the heel of the furrow-opener, and the gathering and pressing plates would have to be spaced far enough apart to avoid injuring the plants. But even if the necessity and the manner of making these changes were not unavoidably obvious, as we think they were, they had been shown by Bemis's predecessors in transplanter building.

The amount of play in the plates in going over the soil would depend upon the dimensions and flexibility of the plates and supporting arms—matters not specified nor claimed in the patent, and obtainable in actual construction as well in one plate as another.

Claim 1, the combination of the furrow-opener with "the gathering and spreading plate formed or provided upon its end, on one side thereof, with a downwardly-extending flange," describes and covers the furrow-openers and gathering and pressing plates already known. The only difference is that Bemis claimed his combination "in a transplanting machine," while the existing combinations appeared in seed-planters. Granting that Bemis made a new and useful improvement in transplanters, the substitution of a known part of a seed-planter for the corresponding part of a transplanter, with the required and self-suggesting changes, did not, in our judgment, involve the exercise of the inventive faculty. We realize that the line between invention and mechanical skill is hard to draw, and that, in cases of doubt, the fact of successful operation and large demand should resolve the doubt in favor of the patentee; yet, when the court is satisfied that the improvement resulted only from mechanical skill or less, the duty remains to say so. If the fact that an improvement was found to be novel and useful should inevitably establish that the improvement came from an inventor, the skilled mechanic would be eliminated from the *dramatis personæ*, and his part utterly deleted from the play of progress.

The second Bemis patent, issued on the same day as the first, was applied for some five months later. The sixth claim combines the plow supports, the plow, and "laterally-extending shoes secured to said supports, the outer edges of said shoes being turned downwardly so as to gather the earth into the furrow after the plant has been set." The "shoe" of this claim is the "gathering and spreading plate" of the first patent, in which were also shown the plow and plow supports. Tennent's transplanter, and likewise seed-planters above referred to, disclosed a shoe or plate at each side of the furrow-opener. The duplication of the plates in the sixth claim did not, in our opinion, require invention. The third claim embraces the elements of the sixth, and, secured to the plow supports, "adjustable angular brackets" to which the shoes are attached. The fourth claim adds to the third "elongated slots" in the vertical members of the brackets, and "transverse pins passing through said elongated slots

and through perforations in the supports, whereby adjustability may be given." The only office of these brackets, slots, and pins is to afford means for fastening and adjusting the shoes to the supports. As instrumentalities to that end, they had been employed in the Vivion structure. If, in details of construction, Bemis has differentiated from Vivion sufficiently to indicate invention, appellant cannot be held to infringe, because he has adopted the method shown in Farmer's patent, No. 246,106, August 23, 1881.

Claims 1 and 2 of the Starks and Felland patent relate to means for using the weight of persons on the machine to press and hold the furrow-opener in the ground. Claim 1 covers the furrow-opener beam, pivoted to the main frame, and "a beam or beams, G, pivoted to the frame and supported upon the furrow-opener beam." Claim 2 adds "an adjustable connection between the furrow-opener beam and the beam, G, whereby the leverage of the latter beam may be varied as desired." Beam G is a lever for transmitting to the furrow-opener beam the weight of persons on the machine. But it was old to use, by leverage and adjustable leverage, the weight of persons on the machine to press and hold the furrow-opener in the ground. Selby and Bowman, No. 127,648, June 4, 1872; Haworth, No. 263,403, August 29, 1882; Chew, No. 440,738, November 18, 1890. To sustain the validity of claims 1 and 2, it is necessary, therefore (*Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 558, 18 Sup. Ct. 707, 717, 42 L. Ed. 1136), "to refer back to the specification; not, it is true, for a slavish adoption of the identical instrumentalities therein described, but for the understanding of the essential and substantial features of the means therein illustrated." The specification shows that the "beams, G," are the beams that carry the seats for the plant setters at the rear of the transplanter. The instrumentalities specified to effect the desired result comprise a combination of six elements: The pivoted furrow-opener beams; the pivoted seat-carrying beams; the seats thereon; the link connecting to the furrow-opener beams the yoke having notches along its upper edges; the yoke aforesaid; and the yoke attached to the seat-carrying beams to hook into the notches of the first yoke. Appellant uses the device of Moehring's patent, No. 653,425, July 10, 1900. The same general result of impressing a person's weight upon the furrow-opener is accomplished by the union of four elements: The pivoted furrow-opener beam; the pivoted beam to carry the driver's seat at the front of the transplanter; the seat thereon; and the strut interposed between the seat beam and the furrow-opener beam. In the Starks and Felland machine, to utilize the driver's weight instead of the plant setters' would require a material reconstruction involving the substantial abandonment of the means devised by them for effecting the general result. We consider the Moehring device an independent improvement in the old, open field.

The sixth and seventh claims are for means to fasten the tongue rigidly to the frame, which may be disengaged at the end of the row. In the agricultural implement art, numerous devices for this purpose had been employed. *West*, No. 106,898, August 30, 1870; Un-

derwood, No. 177,668, May 23, 1876; Sickler, No. 300,807, June 24, 1884; Anderson, No. 431,683, July 18, 1890; Stanhope, No. 485,994, November 8, 1892. We think the Starks and Felland claims must be restricted to the means specified—a block rigidly attached to the front end of the frame; a block rigidly attached to the rear end of the tongue, having its rear face flush with the rear face of the first block; in the rear faces of the blocks, vertical slots that are in line with each other when the tongue points straight ahead; and a pivoted key to drop into the two slots when in line, which may be disengaged by pressing against the upper end thereof. Appellant's device, constructed under claims of the Moehring patent above mentioned, consists of a notched metallic sector rigidly attached to the rear end of the tongue, and a plate rigidly attached to the frame, carrying a spring latch arranged to engage, by the action of the spring, with the notch of the sector plate when the tongue is in line. At the end of the row, the movement of the lever that is used to lift the furrow-opener out of the ground also loosens the latch and frees the tongue. We think there is no infringement.

The decree is reversed, with the direction to dismiss the bill for want of equity.

GLOBE-WERNICKE CO. v. BROWN & BESLY (three cases).

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

Nos. 805, 806, 807.

1. UNFAIR COMPETITION—IMITATION OF ANOTHER'S GOODS—INJUNCTION.

Complainant for many years made and sold box letter files under the names of "Leader" and "Eureka" files. The names were printed on the back of each file, and also on an emblem on the first of the index sheets inside. Complainant's name did not appear on the files, but they became thoroughly well known to the trade by the names, make-up, and markings as the product of its factory and attained a large sale. Subsequently defendant placed on the market files which copied those of complainant in names, emblems, colors, size, and style of type and general make-up so exactly that it would mislead the ordinary consumer, and having nothing thereon to indicate the maker. *Held*, that such action constituted unfair competition, and entitled complainant to an injunction restraining defendant from the use of such imitations, including the names and emblems, without regard to whether or not they constituted trade-marks.

2. PATENTS—UNAUTHORIZED MARKING OF ARTICLE AS PATENTED—JURISDICTION OF EQUITY.

Defendant, in making letter files on the order of a customer who sold the same as his own, copied from a sample furnished by the customer, which had been made for him by complainant, and upon which was a patent imprint placed there by complainant because of a patented device of its own used in the files. Defendant omitted the patented device, but through a mistake of employés, and without the knowledge of its of-

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

ficers, the imprint was reproduced on a single order. *Held*, that such facts would not sustain a suit in equity for an accounting and injunction, there being no evidence of an intention to continue the infringement, the damages for past injury, if any, being recoverable at law.

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

R. H. Parkinson, for appellant.

Lysander Hill, for appellee.

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

BAKER, Circuit Judge. Appellant began these suits, the first to restrain infringement of trade-marks and unfair competition respecting appellant's "Leader" box-files, the second for the same purposes regarding appellant's "Eureka" box-files, and the third to enjoin appellees in that case from marking box-files with appellant's "Patent Imprint," namely, "Patented December 22, 1896."

In the "Leader" case it is shown that for some years prior to 1897 it was open to the world to make box-files for letters and papers, in book-form, of paper-board, with leatherette-covered backs, paper-covered sides, hinged lids and drop-pieces, and containing index-sheets, and to use generally such colors, printing, and marks as one might choose. The word "Leader" was registered as appellant's trade-mark in 1885. In 1897 appellant had a well-established and valuable trade in its "Leader" file. This file was uniformly made in book-form, with yellow leatherette back, and with the other surfaces covered with marbled paper of a bluish tone. On the back, printed in black letters of different sizes, appeared the words "The Leader File," "Letters," "From" and "To," appropriately spaced and separated by triple horizontal lines. On the edge of the flap was a wafer-like label of reddish hue with the words "Press Here" in white letters thereon. Inside, on the top of the index-sheets, on a reddish ground was exhibited a large globe, in black, with a streamer diagonally across it, on which "Leader" was printed in large black letters. Appellant's name did not appear, but the file was thoroughly well known to the trade by its make-up, name, colors, and markings as the product of appellant's factory, and in its ensemble it was unmistakably and readily distinguishable from all others on the market in 1897. The "Leader" files were in such favor with consumers that jobbers and retailers generally were compelled to carry them in stock to meet the demand, although they were required to pay appellant materially larger prices therefor than other files of practically the same cost of production brought. Prior to 1897 appellee had been putting out, under its own name and marks, box-files that could not be confounded with appellant's. In 1897 appellee put on the market a file that copied the "Leader" in make-up, name, colors, size and style of type, markings, and emblems so exactly that it would mislead the ordinary consumer. This imitation bore nothing to indicate appellee as maker.

Appellant asked separately that it be protected in the use of the word "Leader" as a trade-mark, and in the use of the globe emblem as a trade-mark, and that, on the ground of unfair competition, appellee be enjoined from continuing its imitation of appellant's "Leader" file. The Circuit Court denied the first two prayers, and limited the grant of the third to restraining appellee from using on the top of the index-sheets the combination of the globe emblem (or any imitation thereof) with the word "Leader" streamed across it.

As to unfair competition: There is a contention that this is a "spite" suit, but the evidence satisfies us that it was brought in good faith, and such was necessarily the view of the Circuit Court in granting partial relief. We also agree with the Circuit Court in holding that the imitation of the index-sheets would deceive the ordinary purchaser, and that appellee "had a purpose that such effect should result. This constitutes unfair competition, notwithstanding that the merchant purchasing from the manufacturer may not have been deceived. The point is that the purchaser is given possession of the means to deceive the public." But the injunction should have been extended as well to the exterior imitation. Conceding, *arguendo*, that appellant had no valid trade-mark in the word "Leader" nor in the globe emblem, and that appellee might fairly use any of the elements of appellant's "Leader" file in such a way as honestly and efficiently to distinguish its own files from appellant's, nevertheless it was unlawful for appellee to copy the ensemble of the "Leader" file, as it did, with the purpose and effect of misleading the public. *Hires Co. v. Consumers' Co.*, 41 C. C. A. 71, 100 Fed. 809; *Sterling Remedy Co. v. Spermine Medical Co.*, 50 C. C. A. 657, 112 Fed. 1000. Appellant was entitled to a decree enjoining the use of the imitation set out in the bill and shown by the exhibits, and to an accounting.

Concerning the alleged trade-marks: Whether the globe emblem had been applied by others upon letter-files before appellant began its use, whether "Leader" is a word that may properly be selected as a trade-mark, and whether, if the word may be taken as an arbitrary token of origin, it was actually used by appellant only to mark size, style, quality, and price for convenience in dealing with its customers, we do not deem it our province to inquire, upon this record. This particular file (one of many made by appellant) came to be known to the trade, not by the word or the emblem merely, but by its appearance as a whole, which had been uniformly maintained, and of which the word and the emblem were but two of very many features. The decree to be directed will protect appellant fully in its "Leader" file as made, and we will not undertake to say in advance that appellee is likely to use the word or the emblem upon files which in other respects bear no resemblance to appellant's.

In the "Eureka" case, the controlling facts, *mutatis mutandis*, are the same as in the "Leader" case, and appellant should have the same relief.

In the "Patent Imprint" case it appears that Pettibone, Sawtelle & Co., stationers, for many years prior to 1897 had been selling box-files of their own design, under the name of "The Diamond File," which

were made for them by various manufacturers. On December 22, 1896, appellant obtained a patent for an index-pin. Thereafter in making up an order of "Diamond" files for Pettibone, appellant used its patented device, and at the bottom of Pettibone's design for the back printed the words, "Patented December 22, 1896," in letters so small as to be almost illegible. In March, 1897, Pettibone requested Sullivan, superintendent of appellee's factory, to make one gross of these "Diamond" files. Sullivan examined the sample shown him, noticed the patented pin, told Pettibone he could not use that pin, but in other respects could duplicate the file. Sullivan did not notice the patent imprint on the back. The order was made up and delivered without being examined by Sullivan or any officer of appellee. The imprint was never used but the once by appellee. When appellee's managing officers learned that the imprint had been used on the "Diamond" files made by appellee, they gave orders that thereafter all patent imprints be left off of files made in their factory so that there might be no possibility of mistakes.

These "Diamond" files were marketed as the product of Pettibone, Sawtelle & Co. They could have made them for themselves. They chose to engage manufacturers for that purpose. They had as much right to employ appellee as appellant. Appellee had no intent to infringe appellant's patents or trade-marks or distinctive dresses. The patented index-pin was not used. Appellee intended merely to reproduce, in name and markings, Pettibone's "Diamond" file. Treating what was done as a trespass upon appellant's rights, there was a plain and adequate remedy at law, for the evidence fails to sustain the allegations of threatened continuation and irreparable injury. There was no error in dismissing the bill for want of equity.

The decrees in the "Leader" and "Eureka" cases are reversed, and the causes remanded, with directions to enter decrees in consonance with this opinion. The decree in the "Patent Imprint" case is affirmed.

SCHMITT v. NELSON VALVE CO. et al.

(Circuit Court, E. D. Pennsylvania. February 20, 1903.)

No. 41.

1 PATENTS—DEFENSE TO SUIT FOR INFRINGEMENT—EQUITABLE ASSIGNMENT.

Complainant, while in the employ of defendant, which was engaged in the business of making valves, invented an improved valve, on which he applied for a patent after a number had been made and sold by defendant. A question having arisen between the parties as to compensating complainant for the invention, a settlement was made, and complainant was given a paper, signed on behalf of defendant, by which it agreed that his salary for the ensuing 10 years should be as therein stated, the provision being for an increase from time to time, and complainant orally agreed to assign the patent. He subsequently claimed, contrary to the fact, as found by the court, that it was a further condition of the agreement that defendant would covenant for his employment during such 10 years, and refused to assign the patent otherwise and left defendant's service. *Held*, that by virtue of the contract de

fendant became the equitable owner of the patent, and complainant, having refused to perform on his part, could not maintain a suit for its infringement, which he could not have done if he had performed.

In Equity. Suit for infringement of patent.

Hector T. Fenton, for complainant.

Wm. B. Bodine, Jr., and George Wharton Pepper, for respondents.

DALLAS, Circuit Judge. The bill in this case alleges infringement by the defendants of letters patent No. 675,979, issued to the complainant June 11, 1901, for improvements in valves. The validity of the patent is, for the purposes of this case, conceded; but infringement is denied, and it is further insisted by defendants that the Nelson Valve Company was at first impliedly licensed to manufacture and sell under the patent, and that subsequently it became the equitable owner thereof. With reference to these last-mentioned defenses, the effect of the testimony, where disputed, will now be considered, and my findings of fact upon all the evidence will be stated.

At the time of making this invention, and for some time prior thereto, the complainant was the superintendent and acting draftsman of the Nelson Valve Company. The need for the improvement which he devised was brought to his attention by a representative of the American Product Company, a buyer of valves, who explained to him that those which had been theretofore constructed by the Nelson Company were not satisfactory to the Product Company. He told him why they were not satisfactory, but did not tell him how they could be made so. He pointed out their defective operation, but proposed no remedy for it. He prompted the invention, but he had no part in making it. It was made solely by the plaintiff, but it was his connection with the Nelson Company which led him to make it. He has testified that it was conceived at his home, and that he there made a rough drawing of it; and I would not be warranted in wholly discrediting this testimony, either because he was unable to produce the drawing when the evidence was being taken, or because he had not shown it to Mr. Bonnell, an officer of the Nelson Company, to whom, as has been argued, he would naturally have exhibited it. On the other hand, there is nothing to impeach the testimony of Mr. Bonnell to the effect that the construction of a valve which would meet the requirements of the Product Company was the subject of a conversation, at the Nelson Company's works, between himself and the plaintiff, of the Nelson Company, and Mr. Beaston, of the Product Company, and that suggestions were then made by both Bonnell and Beaston. This may all be true, however, and yet the plaintiff's statement as to the time and place at which the invention was actually made be consistently accepted. That he, and he only, in fact made it, is in this case incontestable; and there is no necessary conflict between his assertion that he worked it out at his home, and that of Mr. Bonnell, that suggestions were made at the Nelson Company's works. In accordance, therefore, with the testimony of both of them, I find the fact to be that the invention was conceived, and was set forth in a rough drawing, at the residence of

the plaintiff, but that suggestions, not effecting, in the sense of the patent law, any substantial change therein, were made at the works of the Nelson Company, before all the mechanical details of the particular valve to be manufactured for the Product Company were determined. The plaintiff made the working drawing for this valve in the company's shop, during working hours, and from the company's material. This drawing the Product Company approved, and at once ordered 32 valves. The plaintiff gave it to the Nelson Company's pattern maker, and had patterns and core boxes made from it, in the company's shop, from its materials, and by its men, who were paid by it for this work. The defendants contend that "there was experimenting with this valve for several days in the company's shop," but I do not think that what was really done has any legal significance. There was no experimenting by the inventor for the purpose of perfecting his invention. It was found that certain parts of the construction should be somewhat modified, and this was done, but without making any change in the original design which, with reference to the patent law, can be regarded as material. The "valve-spindle" was made heavier, and a handhole, for convenience of access to the interior, was put in the casing of the valve; but neither of these affected the integrity of the device. Subsequently valves of the same pattern were made and sold to the Product Company and to another company, and up to the time when the complainant left the employ of the Nelson Company, on January 1, 1902, all of said valves were manufactured and sold under his direction, supervision, and orders, and were, by his direction, marked, "Nelson Valve Co. S. & B. Pat'd," as, with reference to a certain earlier patent of Schmitt and Bonnell, all the valves theretofore manufactured by the Nelson Company had been marked. The defendants contend that "the complainant made no suggestion that he expected compensation (other than the salary he was drawing) for the manufacture and sale of the said valves, until about August, 1901"; but the complainant disputes this statement, and claims that the evidence shows that "the first valves were not put out until March, 1902," that "Schmitt spoke to Bonnell on the subject at or about that time," and that "the complainant (who was in the employ of defendant until December 31, 1901), while permitting the defendant company to make and sell these valves during the year 1901, did so on the promise of defendant's officers that it would be made all right." For solution of the question of fact thus presented, we have but the testimony of Mr. Schmitt upon the one side and of Mr. Bonnell upon the other. The former testified that he had informed Mr. Bonnell that he had applied for a patent some time in March; that he told him that he wanted some compensation for his invention outside of his salary; that Mr. Bonnell replied, "We will make these valves and adjust these small difficulties afterwards." Mr. Bonnell testified that "no conversation of that kind ever took place"; that "there never was such conversation"; that "there was nothing of that kind said"; and that he "never had any conversation with Mr. Schmitt in regard to compensation which he was to receive for the use by the company of this patent." It is only upon the assumption that such a conversation may have occurred and have been forgotten

by Mr. Bonnell that the veracity of both of these witnesses can be sustained, and therefore I deem it to be incumbent upon me to adopt that assumption. Accordingly, I find that Mr. Schmitt did tell Mr. Bonnell that he wanted some compensation for his invention, and that Mr. Bonnell replied, in substance, "We will proceed manufacturing these valves, and will straighten this small difficulty later on." As to the time at which this occurred, the testimony of Mr. Schmitt was very vague and inconclusive. He said that his recollection was that it took place after his application, which is dated March 12, 1901; that he did not recollect whether anything had been done in the way of manufacturing these valves at the time; and though, immediately afterwards, he said that "they had not manufactured them before," yet this seemingly positive statement was in turn followed by a reiteration of his previous avowal that he did not recollect whether the company had or had not manufactured or taken any steps toward the manufacture of these new valves prior to the date of the conversation. The first order was given on or about the last day of February, and the first delivery was made on March 11, 1901; and Bonnell's testimony is that Schmitt never advised him that he had applied for the patent prior to April or May. I therefore cannot say that the conversation in question took place before the Nelson Company had, with Schmitt's knowledge and assent, sold and delivered valves embodying his invention. On the contrary, the testimony as a whole has convinced me, and accordingly I find, that whatever was said by Schmitt on the subject of compensation was said after some of these valves had been ordered, made, and delivered; that Bonnell then indefinitely postponed consideration of the matter; and that Schmitt acquiesced in that postponement, without any understanding having been reached as to whether he was to be compensated by raising his salary, as prior to the making of this invention had several times been done, or by paying him a royalty or license fee. The statement made by Schmitt that the "little difficulty" to which Bonnell had referred was "royalty" is mere surmise; there is no evidence to support it, and Bonnell testified that nothing was ever said by him to Schmitt about royalty.

It is admitted on both sides that there was a parol agreement made between these parties on October 26, 1901, but they differ as to what that agreement was. The undisputed facts are that a special meeting of the directors of the Nelson Valve Company was held upon October 26, 1902, at which a majority of the board, and Mr. Schmitt himself, were present, and at which a paper was drawn up, and signed by all the directors in attendance, as follows:

"It is agreed by the Nelson Valve Company, its successors and assigns, that the salary of H. J. Schmitt shall be as follows from January 1st, 1902, to June 30th, 1904, at the rate of forty-five dollars per week, payable weekly, from July 1st, 1904, to Dec. 31st, 1906, at the rate of fifty dollars per week, payable weekly, from January 1st, 1907, to June 30th, 1909, fifty-five dollars per week payable weekly, from July 1st, 1909, to Dec. 31st, 1911, sixty dollars per week payable weekly, for services to be rendered to the said Valve Company, its successors and assigns.

S. F. Houston.
"E. W. Ward.
"Russell Bonnell."

An attested copy of this paper was given to Schmitt, and subsequently he requested a copy under the company's seal, and this was given to him in substitution for the attested copy. Schmitt has testified that at this meeting all open questions between him and the company were settled, and, indubitably, the assignment of this patent was then agreed upon. But the parties disagree as to the terms upon which this was to be done. The defendants insist that the paper of October 26, 1901, contained the entire agreement on the part of the company, and that thereupon the defendant orally agreed to have his counsel prepare and to execute an assignment to the Nelson Company of, *inter alia*, the patent in suit. The plaintiff, on the other hand, contends that his agreement to assign was made "in consideration of a promise of employment for ten years from the following January 1, 1902, at an increased salary." The question, briefly stated, therefore is: Did Schmitt agree to assign in consideration of the company's undertaking as set forth in the writing of October 26, 1901, without the assumption by it of any obligation to continue him in its employ, other than such as is by law attached to such an undertaking, or was it further and additionally agreed that the company would absolutely, and under all contingencies and conditions, retain him in its employment for ten years? This question admits of but one answer. It is hardly conceivable, I think, that the company would, if asked, have promised that for ten years it would keep Schmitt in its service, no matter what occasion should arise to justify a determination of his connection with it; and, though it is true that the paper of October 26, 1901, did not set out the agreement of Schmitt, yet to me it seems to be evident that it was intended to present the entire agreement on the part of the company, and that the stipulation on its part, which the complainant now asserts was made, would not have been omitted from it if in fact it had been. But probabilities and presumptions need not be dwelt upon, for the weight of the evidence directly upon the subject is unquestionably with the defendants. Bonnell, Ward, and Houston all, in substance, testified that Schmitt expressed himself as being satisfied with the paper which they signed, and that in consideration of the promise evidenced by it, and of that alone, he agreed to assign this patent; and I believe, and therefore find, such to be the fact, notwithstanding the testimony of Schmitt himself to the contrary. I need not impute to him conscious and deliberate falsification; but the utmost that can be fairly said in his exculpation is that some time after the agreement in question had been actually made he was led to think that the writing was not as advantageous to him as it should be, and that, dwelling upon this thought, he may have persuaded himself that an additional oral promise had been made to him, although the fact was otherwise. At all events, he refused to assign the patent unless the company would covenant for his employment for ten years, and this it has declined to do.

I do not deem it necessary to decide whether or not, at any time prior to the meeting of October 26, 1901, the Nelson Company had acquired an implied license to manufacture and sell the invention covered by the patent in suit, or to determine whether, in point of fact, the valves which it has made and sold embodied that invention;

for, in my opinion, the agreement of October 26, 1901, is, in itself, a sufficient and full defense to this suit. It canceled all claims (if any) then existing, for it settled all "open questions," and that, by virtue thereof, the Nelson Company became the equitable owner of the patent itself, seems to me to be scarcely questionable. Walker on Pat., § 274; *Dalzell v. Dueber Co.*, 149 U. S. 320, 13 Sup. Ct. 886, 37 L. Ed. 749. A complainant who has refused performance of a contract cannot be awarded relief to which, if he had performed it, he would not have been entitled.

The bill of complaint is dismissed, with costs.

RYDER v. SCHLICHTER.

(Circuit Court, E. D. Pennsylvania. March 2, 1903.)

No. 10.

1. PATENTS—INFRINGEMENT—SILOS.

The Harder patent, No. 627,732, claim 4, covering "in a silo or tank, having a continuous opening from top to bottom, braces between the edges of the walls, forming the opening door sections for closing the opening, and reinforcing strips for the door sections, substantially as described," must be limited to the special form of braces and reinforcing strips described and shown in the specification and drawings, since such structures, generally speaking, were old, and as so construed the claim is not infringed as to either element by the construction shown in the Schlichter patent, No. 653,967.

In Equity. Suit for infringement of letters patent No. 627,732 for an improvement in silos, granted to George W. Harder, June 27, 1899. On final hearing.

C. A. Chase and S. O. Edmonds, for complainant.

H. C. Kennedy and E. H. Fairbanks, for respondent.

DALLAS, Circuit Judge. This bill of complaint charges the defendant with infringement of claim 4 of letters patent No. 627,732, dated June 27, 1899, granted to George D. Harder for improvements in silos. That claim is:

"(4) In a silo or tank having a continuous opening from top to bottom, braces between the edges of the walls forming the opening door sections for closing the opening and reinforcing strips for the door sections, substantially as described."

The specification contains the following:

"My invention relates to silos or tanks of that class in which a continuous opening is made from top to bottom, through which the contents are removed at intervals. It is particularly designed for tanks used for holding ensilage. I have shown the invention as applied to a round silo composed of various staves and hoops made on the same general principle as a barrel, except that the staves are straight. The vertical opening in this silo is made from top to bottom and practically continuous, and the opening is closed by a succession of boards or sections of doors inserted and removable from the top downward like the opening and sectional closing of an icehouse. I do not herein claim, therefore, the vertical opening from top to bottom, nor the round construction of the tank or silo, nor the means for closing formed in sections and

inserted so as to be removable from the top downward and arranged to be pressed against the wall or any part of the wall in an outward direction, as I am aware that these devices and elements are very old in the same or analogous structures. My invention relates particularly to the special form of brace or stay piece for holding the edges of the opening at the proper distance from each other to prevent collapse, and, further, in the special means for holding the sections of the door firmly in place. My invention is illustrated in the accompanying drawings."

These extracts, I think, make it clear that a silo, though having a continuous opening from top to bottom, is not covered by the fourth claim, unless it be furnished with the braces and reinforcing strips called for; and the question which at the outset is presented, therefore, is, what, as respects these essential elements, does the claim embrace? Does it comprehend all devices which may be inserted between the edges of the walls to prevent them from moving, and all contrivances designed to hold the door sections firmly in place, or should the claim be so construed as to limit its scope to the braces and reinforcing strips specifically described and shown, notwithstanding the fact that the broadly inclusive terms of the claim are not coupled with any words of qualification other than the phrase "substantially as described"? With reference to this question, it may, in the first place, be remarked that the courts are not required to shut their eyes to matters of common knowledge or things in common use (*King v. Gallun*, 109 U. S. 101, 3 Sup. Ct. 85, 27 L. Ed. 870); and, surely, it may safely be said that, generally speaking, braces for holding the edges of an opening at the desired distance from each other, and means for retaining doors or analogous movable parts in position, were commonly known and had been generally used long before this patent was applied for; and it is quite evident that the patentee was not ignorant of this, for in his specification it is said: "My invention relates particularly to the special form of brace or stay piece, * * * and, further, in the special means for holding the sections of the door firmly in place." The drawings, it is said, show "the invention," not an optional or preferred embodiment of it; and the braces, which it is again said "are made in special form," are explained with reference exclusively to that form which the drawings portray. So, too, as to the reinforcing strips. The specification states that certain variations in details, which are not now material, may be made without departing from the invention, but there is no suggestion whatever that anything other than the reinforcing strips which are specifically described and delineated would be within it. It has, however, been argued that, unless the fourth claim be broadly construed, it covers nothing which is not covered by the preceding claims, and I agree that a construction involving such a result should, if possible, be avoided. But in the present instance this consideration, if applicable, cannot be accorded controlling effect. It is not altogether inconceivable that a superfluous claim may have been improvidently allowed, but it is quite certain that no claim can, for any reason, be inclusive of anything more than the invention disclosed. I therefore hold that the claim alleged to have been infringed in this case must be restricted to a silo or tank having the specific braces and reinforcing strips described in the specification and shown in the drawings; and the only remaining ques-

tion which it is necessary to consider is whether or not those particular braces and strips have been appropriated by the defendant.

Patent No. 653,967 was issued to the defendant, July 17, 1900, for an improvement in silos or tanks. His silos are made in conformity therewith, except in this: that none of the hoops of the patent pass entirely around the silo, whereas the silos actually made do have two such hoops, one near the top and the other near the bottom of the structure. This case, however, is not concerned directly with hoops, but with braces and reinforcing strips, and as to them the issuance of the defendant's patent creates a *prima facie* presumption of patentable difference. *Miller v. Eagle Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683. This presumption is not rebutted, but is supported, by the evidence. The specification of the patent in suit, after stating that the inventor's special form of brace was intended "to prevent collapse," further states that, "as a matter of course, the edges of this opening must be braced by crosspieces inserted between the edges to prevent the structure from collapsing." But there is nothing to indicate that the brace was to be so constructed as to prevent, not only collapsing, but also to overcome the tendency of the edges of the opening to become, under certain conditions, too widely separated. It was described merely as a brace, and not at all as a tie-rod, and, though it is now insisted that it really does perform the functions of both (which is at least questionable), this dual service was in no way assigned to it, and, indeed, appears not to have been thought of. On the contrary, I think it is manifest that to prevent expansion of the structure, and consequent widening of its door space, the hoops which were made to entirely surround the silo were wholly relied upon. The fact is that in any such erection, having a continuous opening from top to bottom, this widening will occur if some means be not employed to prevent it, and the complainant's expedient to this end is plainly and materially different from that of the defendant. The encircling hoops of the plaintiff precluded expansion, and consequently no contrivance to prevent the parting of the doorway edges was needful or was proposed. But the defendant's patent dispensed with the completely encircling hoops, and therefore it was requisite that by it some special means should be supplied to secure the opening against widening, and this was done by providing a device which is referred to in the defendant's specification as follows:

"I am aware that it has been proposed to construct silos with braces extending between the posts of the doorway and with hoops extending completely around the silo; but when the silo swells only the braces resist the tendency of the door posts to move towards each other, it being noted that the continuous hoops cause this movement of the posts. In my invention the hoops extend only partially around the silo, and are connected at their ends to the posts. When the silo swells, the tendency of the posts is therefore to move outwardly and separate, due to the outward pull exerted by the hoops, c, which do not correspondingly lengthen. This is resisted by the crossbars, d, but there are no hoops that bind the silo that cause the posts to move inwardly. In other words, in the prior silo, to which I refer, when the staves swell there is a force pressing the posts together that is resisted by the crossbar, while in my invention there is a force drawing the posts apart resisted by the crossbars, d. In said device the greatest force presses the posts together to contract the doorway, while in my device it is the reverse."

In view of the construction which I have felt constrained to put upon the fourth claim of the plaintiff's patent, it seems to be clear that the braces which it calls for are not inclusive of the "crossbars" referred to above. The latter are not braces, but tie-rods. They are not improved braces. They are distinct things. The defendant's device, of course, bears some resemblance to that of the plaintiff, but it differs from it precisely as the different purpose for which it is intended requires. It is true that in practice the defendant has used two of the eight encircling hoops shown in one of the plaintiff's figures; but this user is not charged as an infringement, and I think that the only inference which it suggests (and that is not a necessary one) is that it has been found that the defendant's crossbars alone will not do all that he had expected they would. But this, if true, is unimportant. The question is not as to their efficacy, but as to their substantial identity with the braces of the plaintiff, and upon that question my opinion has been already sufficiently expressed.

The reinforcing strips of the patent sued on, in conjunction with the doorway staves of the silo, form grooves which hold the door sections in place. The purpose of the strips is to produce these grooves, and they constitute the "special means for holding the door sections firmly in place," to which the patent refers. Without applying the doctrine of equivalents much more liberally than is permissible in this case, it cannot be said that the defendant has made use of them. His door sections are held in place, not by grooves, but by wedging devices which operate at the middle of the doors; and the bevel at the sides of his doors and the door opening converges towards the outside of the silo, instead of towards the inside, and in this his construction is unquestionably superior to that shown and described in the patent of the plaintiff. But, in my opinion, the absence of the grooves alone suffices to differentiate the defendant's means for holding the door sections firmly in place from those of the plaintiff; and, therefore, as respects the reinforcing strips of the fourth claim, as well as its braces, my conclusion is that the complainant's allegation of infringement has not been sustained.

The bill of complaint is dismissed, with costs.

**WESTINGHOUSE ELECTRIC & MFG. CO. v. STANLEY ELECTRIC
MFG. CO. et al.**

(Circuit Court, S. D. New York. January 2, 1903.)

1. PATENTS—SUIT FOR INFRINGEMENT—DISTRICT OF SUIT.

Defendant corporation was organized under the laws of New Jersey, and its manufacturing plant and general offices were in Massachusetts. It maintained an office in New York City, where orders were taken for goods, which were forwarded to the general office, and, if accepted, the goods were there delivered on board cars for shipment to the purchaser. *Held*, that a suit for infringement of a patent by machines so made and sold by defendant through its New York office, and shipped to the purchasers in New York City for use there, could be maintained in the Southern District of New York, under Act March 3, 1897, 29 Stat. 695, c. 395 [U. S. Comp. St. 1901, p. 589], giving jurisdiction of such suits

in a district where defendant shall have committed acts of infringement and have a regular and established place of business.

In Equity. Suit for infringement of patent. On pleas raising the question of jurisdiction.

On motion for preliminary injunction, see 116 Fed. 641.

Thomas B. Kerr and Frederic H. Betts, for plaintiff.

William H. Kenyon, for defendants.

WHEELER, District Judge. The circuit courts have jurisdiction of suits for infringement of patents in the district of which the defendant is an inhabitant or "shall have committed acts of infringement and have a regular and established place of business." 29 Stat. 695, c. 395, 1 U. S. Comp. St. 1901, p. 589. This suit is brought for infringement of patents for electric motors.

The defendant corporation is of New Jersey, and the individual of New York. The former by plea denies having a place of business, and infringement, in this district; and the latter of being any officer or more than a salaried employé of the former. The pleas have been traversed and proofs taken, and the cause has been heard upon these issues.

The factory and company offices are at Pittsfield, in the district of Massachusetts; and the corporation has a business office in New York, of which the individual defendant has charge, through which negotiations are had and orders are given for motors, which are finally passed upon at the offices in Pittsfield, and the machines are delivered free on board cars at that place for transportation to purchasers. Some motors alleged to infringe were so sold, delivered, and forwarded to purchasers at, who used them in, New York in this district. The question is whether these transactions with infringing devices constitute acts of infringement in this district.

The monopoly is of making, selling, and using, and it is said, in argument for the defendants, that the making and selling were complete in the other district, and that they did not use in this district. It is true that the making was there, and the sale as to the title to the body of the machines may have been perfected there, but as to the right to use, which the defendants could not sell, it was not consummated there, and could not be by them anywhere. The sales made would carry with them the well-known warranty of full title implied in all sales, and guaranty the right to use for all purposes anywhere, that belongs to full ownership. This use by the purchasers was as well authorized by the defendants as if the right had been expressly inserted in a bill of sale, or given in any other manner, and the authority would follow the machines in the hands of purchasers wherever they should go. Those forwarded to the purchasers in New York under the attempted sales of the right to use carried with them direct although not rightful authority from the defendant corporation as seller to use them there. A recovery for the infringement on account of these sales would include profits or damages, or both, upon the sales as sales for use, with the right to use. *Steam Stone Cutter Co. v. Sheldon*, 22 Blatchf. 484, 21 Fed.

875. The negotiations for these sales were originated here through the individual defendant; and such sales for infringing use here appear to be acts of infringement here by both.

These issues must therefore be found for the plaintiff. Pleas overruled, defendants to answer over by February rule day.

L. E. WATERMAN CO. v. FORSYTH et al.

(Circuit Court, S. D. New York. January 7, 1903.)

No. 7,336.

1. PATENTS—APPLICATION—SECOND APPLICATION FOR SAME DEVICE.

A second application for a patent, which describes precisely the same device as a former one, which has been abandoned by permission, will be treated as continuous of the first.

2. SAME—INVENTION—FOUNTAIN PENS.

The Waterman patent, No. 604,690, for an improvement in fountain pens, which consists essentially in making a conical or tapered joint between the cap and the barrel or nozzle of the pen (the cap being thinner and more elastic at the mouth, to form a noncapillary joint), while showing an improved method of construction, does not disclose patentable invention; the adaptation of such joints, which were old and well known, and in use in other articles made of hard rubber, to use on a fountain pen, requiring only the skill of a mechanic.

In Equity. Suit for infringement of letters patent No. 604,690, for a fountain pen, granted to Lewis E. Waterman May 24, 1898. On final hearing.

Walter S. Logan (Fred C. Hanford and Samuel S. Watson, of counsel), for complainant.

William B. Whitney, for defendants.

HAZEL, District Judge. This is a bill to restrain infringement of United States letters patent No. 604,690, issued to Lewis E. Waterman May 24, 1898, and subsequently, on December 29, 1898, assigned to complainant. The application for the patent was filed August 12, 1895. It was a second application; an antecedent one filed July 31, 1894, being abandoned, by permission of the Patent Office, after its rejection by the Commissioner on appeal. The second application, upon which the patent, after considerable argument and repeated rejections, was finally allowed, was for precisely the same invention described in the first application. It was so treated by the Patent Office. Therefore, under the authorities, the second application for the patent will be treated as continuous of the first. *International Tooth Crown Co. v. Richmond* (C. C.) 30 Fed. 775; *Henry v. Francetown Stove Co.*, 9 O. G. 408, Fed. Cas. No. 6,382; *Colgate v. W. U. Tel. Co.*, 4 Ban. & A. 36, Fed. Cas. No. 2,995; *Graham v. Geneva Mfg. Co.* (C. C.) 11 Fed. 138; *Godfrey v. Eames*, 1 Wall. 317, 17 L. Ed. 684.

The patent relates to improvements in hard rubber fountain pens, and includes 26 claims, and 8 pages of specifications. It was practically conceded on argument that the claims in dispute are merely

for a concentric cone joint, consisting of an elastic outer member at its mouth, and a rigid inner member. It would seem, therefore, to have been entirely unnecessary to multiply such details of claims as the specifications disclose, and to descant upon them with such elaborate and painstaking fullness. The claims alleged to be infringed are 5 to 9 and 17 to 26, inclusive. Claims 5, 6, 7, 8, and 9 read as follows:

"(5) In fountain pens, one or more annular progressive elastic ink and union joints and stops, formed by the combination of truncated tubular wedges, without an abutting shoulder, and with an elastic mouth in the outer member of each joint, engaging the opposite part of the inner wedge or member with a comparatively slight elastic pressure; the stop being formed at and opposite the inner part of the conical chamber, where its wall is thicker, less elastic, and more rigid.

"(6) In fountain pens, an ink and union joint and stop, consisting in the co-operative and supporting union of external and internal conical members, the external member provided with an internal conical surface, seat, or chamber, and composed of material made progressively thicker and less yielding from the outer to the inner end of its conical surface, and the internal member provided with an external conical surface, in which the external member, at, by, and near its mouth, engages the opposite part of the internal member with elastic pressure, and forms a noncapillary joint and stop.

"(7) In fountain pens, an automatic and progressive ink joint and stop, consisting in the co-operative and supporting union of external and internal conical members, the external member provided with an internal conical surface, seat, or chamber, and composed of material made progressively thicker and less yielding from the outer to the inner end of the conical surface, and the internal member provided with an external conical surface, in which the external member, at, by, and near its mouth, engages the opposite part of the internal member with elastic pressure, and forms a noncapillary joint and variable stop, and the internal conical member projects beyond the external conical member, and thereby provides for the automatic maintenance of a progressive ink and union stop and joint during both use and wear.

"(8) In fountain pens, an ink and union joint and stop, consisting in the co-operative and supporting union of external and internal conical members, the external member being also provided at its open end with an elastic, externally beveled annular lip, that engages the opposite part of the internal member with elastic pressure, and forms a noncapillary joint and stop with and upon the internal member.

"(9) In fountain pens, a cap having within its open mouth a conical seat or chamber for the conical end of the fountain, also provided at its mouth with an externally beveled elastic annular lip, engaging the conical end of the fountain at and near its base."

Claims 5 to 9, inclusive, relate to fountain-pen caps, having an interior tapered or conical surface, an elastic exterior, and a tapered or conical external member, consisting of the nozzle or barrel of the fountain pen. Claims 17 to 26 are printed in the opinion of Judge Lowell in the case of *Waterman v. Johnson* (decided Jan. 16, 1902) 122 Fed. —, which was for infringement of the patent in suit, and which renders unnecessary their restatement in extenso. It suffices that claims 17 to 26 constitute the elements of a conical or tapered interior member, and an elastic exterior member consisting of a cap with an elastic mouth. Complainant asserts and the proofs establish that the elasticity of the cap or exterior member is owing to its conformation. The cap has an annular lip, and is thinner at its mouth than at any other part. This manner of construction induces a degree of elasticity which enables the cap, when used as a

cover, to firmly grip the barrel or nozzle of the pen. Union joint connections are thus made between the fountain-pen cap and barrel or reservoir, and between the nozzle and ink fountain. In the one case the cap serves as a cover for the barrel or reservoir when the pen is in operation, and in the other for the nozzle or ink-feeding device when the pen is unemployed. Without passing upon the validity of the patent, Judge Lowell decided in the case before him that the claims were not infringed by the defendant, Johnson, because the interior of the cap used by the defendant for his fountain pen was cylindrically hollow, and had no tapered or conical surface. He also held that it was no invention to adapt a tapered cap joint to a fountain pen, as conical or tapered joints existed in stovepipes, atomizers, and mucilage bottles. Here the infringing pen is known as the "Parker Pen," manufactured by the Parker Pen Company. The defenses interposed are anticipation, want of novelty, and noninfringement. The alleged infringement is the adoption by the defendants of complainant's method of joining the cap with the pen nozzle at one end, and with the barrel or reservoir at the upper end of the fountain pen. The pertinent claims of the patent describe a combination in which the exterior of the nozzle or barrel member and the interior surface of the cap are conical or tapered in form. According to the specifications, the claims are sufficiently broad to include conical or tapered joint formations, as applied to vessels holding fluids. The primary object of the patent, however, is to secure protection for claims relating to a tapered cap joint in fountain pens. Conical or tapered joints are conceded to be old. Complainant contends that such joints are new, as adapted to fountain-pen caps; that tapered or conical joints known to the art at the date of the invention were stiff and unyielding, while the tapered interior of the fountain-pen cap, fitting tightly to the tapered nozzle or barrel, imports to it a non-capillary element, which is not attainable in an unyielding or rigid joint, such as was employed prior to the discovery in suit. A non-capillary joint is formed by slight pressure or manipulation of the cap when the parts are all together. It is claimed by complainant that the differentiating feature from the prior art exists in the conformation of the interior cap surface, and in its elasticity at the mouth, which permits a progressive wedging of the members, and thereby produces a noncapillary result not theretofore achieved. Was the conception patentable? Is the discovery entitled to the dignity of invention? The specifications do not indicate the degree of elasticity required to make the mouth of the cap noncapillary. Caps of hard rubber, the substance employed in the fountain pen, are more or less elastic and yielding, and therefore it is self-evident that a greater degree of elasticity does not constitute invention. *Waterman v. Johnson*, *supra*. It is true, I think, that the beneficial results of the conicity of the cap are attributable to its elastic tendency when its mouth comes in contact with the tapered interior member. But as stated, a hard rubber fountain-pen cap of the old type yields to pressure when in contact with the conical or tapered barrel or ink-feeding device. This result, therefore, is not patentable.

Defendants attack the validity of the patent, and claim no inven-

tion is disclosed by it; that whatever may be deemed an innovation in the art is not of ideas or means, but is merely functional. According to defendants' views, the conical joint is very ancient and familiarly known. The record abounds with citations in anticipation showing a conical or tapered joint in wooden cider spigots, cigar holders, caustic holders, stovepipes, in hard rubber atomizers, and other merchantable articles. It also discloses various fountain pens, in which appear an interior tapered cap; also a cap having an annular lip and elastic mouth. The Lancaster fountain pen discloses an elastic progressive-wedge joint upon the tapered surface of the barrel. It does not appear when this pen was made. The evidence establishes, however, that fountain pens of a similar kind were made prior to the date of the Waterman invention. Many other fountain pens are in evidence, showing caps, the interior of which are tapered, fitting closely over the nozzle or reservoir of the fountain pen. Some of them rest upon a shoulder-boss. Other fountain pens—principally the Hamilton, No. 145,102, and the Copus British patent No. 3,936—show a tapered joint between the cap and lower end of the barrel. They are progressive-wedge joints, and have no stop or shoulder-boss. Demarest patent, No. 407,999, describes a noncapillary joint.

An examination of the testimony and the exhibits in evidence quite well satisfies me that what the patentee claimed as new is not entitled to the merit of invention. In the then state of the art a noncapillary progressive wedge joint was known—elastic tapered hard rubber substances, fitting tightly into each other, were known to produce a noncapillary jointure. Improvements over fountain pens then extant were undoubtedly made by complainant. But every improvement is not patentable. The Supreme Court has stated the rule to be that the improvement must be the product of an original conception. *Burt v. Ivory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; *Pearce v. Mulford*, 102 U. S. 112, 26 L. Ed. 93; *Slawson v. Grand St. Ry.*, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576. Such was not the invention in suit. Irrespective of the existence of a similar joint in fountain pens, the citations of hard rubber atomizers, cigar holders, blowers, etc., having conical joints, are in analogy to the tapered exterior and interior members described by the complainant. The mere duplication of the joint does not import to complainant's device inventive skill. No new result was produced and no change was required to adapt the well-known noncapillary joints to the use designed by the patent in suit. *Pennsylvania R. Co. v. Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; *Mann's Boudoir Car Co. v. Monarch Co. (C. C.)* 34 Fed. 130; *Holmes Elec. Protective Co. v. Alarm Co. (C. C.)* 33 Fed. 254. The adaptation, therefore, of the conical or tapered joint to the use of the fountain pen, belonged to the domain of the skilled mechanic. To any one acquainted with a tapered joint as used in the exhibits herein referred to, it must have been a most obvious thing to apply the same joint to hard rubber fountain pens, and to thereby enhance their usefulness and durability.

The Waterman patent, No. 604,690, is therefore held to be invalid, and the bill may be dismissed, with costs.

L. E. WATERMAN CO. v. FORSYTH et al.

(Circuit Court, S. D. New York. January 7, 1903.)

No. 7,335.

1. PATENTS—INFRINGEMENT—FOUNTAIN PENS.

The Waterman patent, No. 293,545, for a fountain pen, embodies a device which must be conceded patentable novelty and utility, taking into consideration its commercial success; but, in view of the prior art, it must be limited to the feature of the claims which describes fissures in the bottom or sides of the ink duct, designed to facilitate the flow of ink to the pen when in use, which were an improvement on any prior construction. As so limited, the patent is not infringed by a pen in which a reed is placed within the duct to perform the function of the fissures in securing capillary attraction.

In Equity. Suit for infringement of letters patent No. 293,545, for a fountain pen, granted to Lewis E. Waterman February 12, 1884. On final hearing.

Walter S. Logan (Fred C. Hanford and Samuel S. Watson, of counsel), for complainant.

William B. Whitney, for defendants.

HAZEL, District Judge. This action seeks an injunction and accounting because of alleged infringement of United States letters patent No. 293,545, granted February 12, 1884, to Lewis E. Waterman, for improvements in fountain pens. Subsequently, by mesne assignments, the title to the patent was conveyed to complainant corporation. The suit is against dealers selling the fountain pens manufactured by the Parker Manufacturing Company of Janesville, Wis., which company has defended the suit, and may therefore be regarded as the real party defendant. Numerous other suits have been brought and are now pending against dealers for infringement of the patent in controversy.

The improvement described in the patent refers to mechanism which controls the supply of ink to the writing pen from the reservoir or barrel. The usual defenses—anticipation, lack of novelty, and non-infringement—are in issue. The claims—three in number—read as follows:

"(1) An ink duct for a fountain pen, consisting of a bar having a longitudinal groove formed in its surface and one or more longitudinal fissures in the side or sides of said groove, substantially as set forth.

"(2) In a fountain pen, the combination, substantially as hereinbefore set forth, of a barrel or ink reservoir, a tube connected therewith, an ink duct supported within said tube, and consisting of a bar having one or more longitudinal grooves formed in that portion of its surface which is in proximity to the pen, with one or more longitudinal fissures in the side or sides of said groove or grooves of the pen, secured between said tube and ink duct.

"(3) A fountain pen having an ink duct provided with one or more longitudinal fissures formed in its walls for facilitating the passage of the ink through said duct."

The specification says that the object of the patent is "to secure and automatically regulate a certain and uniform flow of ink to the pen, and also to prevent the excessive discharge of the ink when the

pen is in use," and further to simplify the construction of this class of pens by having it composed of comparatively few parts.

The patentee proposes to accomplish the essential features of the patent by the formation of a simple channel with slits or fissures in the bottom or sides, extending longitudinally through the entire length of the feed bar, which is inserted in the nozzle of the pen. The feed bar or ink-feeding device serves as a conductor of the ink from the reservoir or barrel to the nib of the pen. The ink is drawn from the reservoir by gravity and through the action of capillary attraction in the act of writing. The novel features of the claims consist in the slits or fissures by which the ink is conveyed from the barrel or reservoir to the nib of the pen. The validity of the patent depends squarely upon the question whether the use of fissures extending lengthwise through the ink duct of the fountain pen is new and patentable. Defendants vigorously challenge the novelty of the claims, and cite numerous prior patents in support of the contention. The experts of complainant and defendants differ very materially as to the novelty of the claims.

I have found the greatest aid by a study of the exhibits and patents in evidence as to the state of the art at the time of the conception of the Waterman fissure patent. A considerable portion of the evidence was offered to show that the Waterman patent has been generally recognized throughout the United States, and that other manufacturers and dealers in fountain pens and the defendants have adopted equivalent infringing ink-feeding devices. I am well satisfied that Waterman, by his method of grooving and placing fissures in the bottom or sides, has improved the fountain pen, which fact the public has not been slow to appreciate. In view, however, of the disclosures in prior fountain pens, the patent in suit must be narrowly interpreted, and the monopoly restricted to the particular differentiating parts described. This conclusion is reached after an examination of the evidence and multitudinous exhibits in the case, although the decision of Judge Lowell, considering and interpreting the scope of the claims in *Waterman v. Lockwood* (decided Jan. 16, 1902) 122 Fed. —, is strongly persuasive. In that case the patent here involved and the earlier Waterman patent, No. 307,735, were before the court. The latter patent was merely for a groove for carrying ink from the barrel or reservoir to the point of the pen. Judge Lowell held there was no novelty in this, and doubted its utility. He directed attention to the Lewis patent, No. 272,066, Figure 4, and the Holland patent, No. 276,692, in which are described grooves or ink ducts of gradually decreasing depth, such as described in claim 2 of the Waterman patent, No. 307,735. Is the patent valid which describes grooves or channels having fissures in the sides or bottom, carrying the ink to the pen, in combination with the ink nozzle and barrel? A "fissure" is defined by Webster as a "narrow opening made by the parting of any substance; a cleft, as a fissure of a rock." The definition, taken literally, is circumscribed in its meaning, and the patentee's undoubted intent was that the term "fissures" should be understood as an indentation in the fountain-pen groove or ink duct. The evidence of complainant tends to show that by the employment of fissures a de-

cided advantage over the prior art is obtained. The flow of the ink to the pen is facilitated. The specification says:

"The downward flow of the ink by gravity and through the action of capillary attraction in the act of writing causes it to pass through the groove, d, and tends to create a vacuum within the reservoir, which is met by the influx of air passing upward through the groove. The direction of the current of air entering the ink reservoir being opposite to that of the outflowing ink, the volume of the latter is somewhat lessened, and excessive discharge prevented."

Complainant's testimony tends to show that, when the pen of the prior art was inverted in the pocket of the user, the ink was liable to leak out of a small hole or opening in the barrel. Such an opening was necessary to permit air to enter the vacuum in the barrel caused by the outflowing ink. Fissures in the groove simultaneously permit the downward flow of ink and the upward flow of air into the barrel or reservoir. This makes it unnecessary to have an opening in the barrel for the admission of air. Defendants contend that fissures, slits, tongues, and reeds in fountain-pen ducts were employed many years prior to the patent in suit. I agree with the contention that ink ducts or grooves having tongues and reeds were old, and that a slit or fissure is found in a tube tapering to a point in the Slayton fountain pencil, No. 15,622, dated August 26, 1856, and in the Sackett patent, No. 353,162, of April 23, 1893. But I am unable to find that the slits and fissures employed in these patents facilitated the flow of ink to the pen. Tongues or removable reeds are found in the Prince patent, No. 12,301, of 1855; Holland patent, No. 276,692; Stewart patent, No. 253,953; Shaw British patent, No. 2,411 of 1853; Jordan patent, No. 6,883, November 20, 1849; Lewis patent, No. 272,066; Purdy patent, No. 279,104; Ewer British patent, No. 800 of 1860; and Cleveland patent, No. 10,469. True, in some of them the ink duct is tubular, and it is manifest from a cursory examination that the earlier patents were crude in their construction. The necessity for capillary spaces to regulate the flow of ink was also recognized long before Waterman. Judge Lowell, in passing upon complainant's contention that by the means employed in its device the downward flow of ink through the groove, owing to capillary attraction, was functionally different from the prior art, quoted from the patent of Latourette, No. 147,333, dated February 10, 1874. An inspection of this patent shows that capillary attraction as a force to bring ink into the pen was old. The quotation is apt, and may with propriety be repeated:

"The capillary feeder is an important element to the successful operation of the fountain pen, in that it insures a feeding of the ink, and at the same time prevents the escape of it intermittently in globules as it does in other arrangements. A piece of wire or a fine chain or a hair will serve well for a feeder, but a thread of fibrous material is the best."

It is doubtful whether the fissure in complainant's device performed any function other than was performed in the prior art by wire, reed, or tongue in aid of the feeder, except to facilitate the flow of ink to the nib of the pen. The alleged infringing pen uses a removable reed, placed in the bottom of a square groove, for a feeding device, where it is held in place by friction with the side of the groove.

Long, narrow spaces are formed, securing the required capillary action. No fissures are made in the walls or bottom of the groove, as in complainant's patent, although the narrow spaces undoubtedly functionally carry the ink to the nib of the pen and into the barrel when it is unemployed. I think the reed employed by defendants, or its equivalent, is found in the prior art to which reference has already been made. The defendants' device is not like that of complainant. In *Waterman v. Lockwood*, *supra*, the spaces in the ink duct were made by a slender, removable reed, tapered to a point. Such spaces were made between the walls or sides of the groove. There is no material difference in the *Lockwood* and *Parker* devices. The *Waterman* device is stable and generally more durable. I think the pen is an improvement over the prior art, and that the alteration was more than a mere change of form or detail of construction, which an ordinary mechanic, skilled in the art, had made superior. The patentee chiefly desired to facilitate the flow of ink to the pen when in use. This result he has accomplished. The advantage attained over the prior art doubtless is owing to the alteration of the ink duct and the fissures in the bottom or sides of the groove. To this advantage I think the complainant is entitled. The commercial success of the invention should be considered when the novelty or utility of the patent is in great doubt. The success achieved, therefore, overcomes whatever doubt I may have as to the patentability of the device. I am not prepared to say that the patentee has in no practical way advanced the art. *Washburn v. Gould*, Fed. Cas. No. 17,214; *Simonds v. Hathorn*, 36 C. C. A. 24, 93 Fed. 958. In view of the prior art, however, the patent cannot be accorded a high degree of merit, and therefore it must be interpreted to cover merely the feature of the claims which describe fissures in the bottom or sides of the ink duct. As thus construed, the defendants do not infringe.

Bill dismissed, with costs.

**MAYO KNITTING MACHINE & NEEDLE CO. v. JENCKES MFG.
CO. et al.**

(Circuit Court, D. Rhode Island. March 12, 1903.)

No. 2,561.

1. PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Mayo patent, No. 363,528, claim 2, covering a mechanism for "widening" in a circular knitting machine, the essential feature of novelty being its needle depressing pickers, is limited to the particular construction shown and described, in which the depressing pickers slide in the guide-plates. As so construed, *held* not infringed.

2. SAME—COMBINATIONS—OMISSION OF PARTS.

While it is unnecessary in a claim of a patent to specify ordinary means for applying power or causing motion, it is necessary to specify the parts whose co-operative action is essential to the performance of the function specified in the claim, and each of such parts is an essential element of the combination, so that infringement cannot be charged of a machine so constructed as to eliminate one of such parts without using an equivalent part.

3. SAME—KNITTING MACHINES.

The Mayo patent, No. 461,357, for a circular knitting machine, embodies only mechanical improvements on the machines of the prior art, and is not entitled to a broad construction as against other subsequent improvers. Claims 4 and 6 construed, and *held* not infringed by a machine made in accordance with the Eck patent, No. 592,134. Claim 11 *held* void for lack of novelty in view of the prior art.

4. SAME—WINDERS.

The Johns patent, No. 600,788, for a winder for introducing an extra or re-enforcing thread in knitting, was not a pioneer patent, the idea of twisting the free end of one thread about the other by the use of a rotary winder having been disclosed in prior patents, notably the Marshall & Hewitt English patent, No. 4,293 of 1875, and it must be limited to the specific mechanism shown for carrying out such idea. As so limited, claims 1, 2, 3, 4, and 5 are not infringed by the winder of the Rowe patent, No. 581,887, which embodies an essentially different combination.

5. SAME.

The Ames patent, No. 600,671, for a winder for introducing an extra thread in knitting, being an improvement on that of the Johns patent, No. 600,788, claims 8, 10, and 11 construed, and *held* not infringed by the winder of the Rowe patent, No. 581,887.

6. SAME—MECHANICAL IMPROVERS.

As between mechanical improvers in an advanced art, mere priority in the production of a commercial machine or commercial success affords no reason for excluding other and independent improvements.

In Equity. Suit for infringement of letters patent No. 363,528, issued May 24, 1887, and No. 461,357, issued October 13, 1891, each for a circular knitting machine, and granted to William H. Mayo and George D. Mayo; and No. 600,788, granted March 15, 1898, to Will R. Johns, and No. 600,761, granted March 15, 1898, to Arthur N. Ames, each for thread-feeding mechanism for knitting machines. On final hearing.

W. K. Richardson and A. D. Salinger, for complainant.
Wilmarth H. Thurston, for defendants.

BROWN, District Judge. The four patents sued upon are: Mayo, No. 363,528, May 24, 1887; Mayo, No. 461,357, October 13, 1891; Johns, No. 600,788, March 15, 1898; Ames, No. 600,761, March 15, 1898.

The Mayo patents relate to circular knitting machines. The Johns and Ames patents are called the "Winder" patents, and relate to means for introducing an extra thread in knitting. In a circular knitting machine, the leg of the stocking is knitted in tubular form by means of a needle-cylinder and a cam-cylinder, the cams acting upon the needle-butts. To knit the heel, tubular knitting is suspended, about one-half of the circle of needles is thrown out of operation, and, instead of a circular movement, a reciprocating movement is used. In the operation of narrowing, at each reciprocation one of the remaining needles is thrown out of action, first at one end and then at the other, gradually narrowing the courses. When the narrowing operation is complete, one needle is thrown back into operation at each reciprocation, first at one end and then at the other, thus gradually widening the courses. The widening corresponds to the previous narrowing. In widening, the widened portion is joined

to the narrowed portion, thereby forming the heel pocket. This done, circular knitting is resumed to form a tube for the foot. The toe is knit in the same manner as the heel, the toe being closed on another machine. Originally the needles were shifted, i. e., lifted from a working to an idle position, or depressed from an idle to a working level, by a hook or pick in the hand of an operator. The Mayo patents relate chiefly to automatic pickers, or mechanical means for lowering and raising the needles, thus shifting them into and out of operative position during narrowing and widening. To those parts which engage the needle-butts and shift the needles we may apply the generic names "pickers" or "shifters," since they pick off and shift the needles; and, to distinguish between pickers, we may call those pickers which, in widening, depress the needles from the higher or idle level to the lower or working level, "depressing pickers" or "droppers," and those which, in narrowing, raise the needles from the working to the idle level, "lifting pickers." These "pickers" are the chief subject-matter of the Mayo claims. The claims of Mayo in issue are claim 2 of the 1887 patent, and claims 4, 6, and 11 of the 1891 patent.

Claim 2 of the Mayo 1887 patent is:

"2. The cam-cylinder, its attached annular ledge, and the needle-elevating and stitch-cams combined with guide-plates G^1 G^2 , and with the needle-depressing latches 1^1 , 1^2 , arranged to slide in the said guide-plates, to operate substantially as and for the purposes described."

This claim relates to the widening operation; and the complainant's brief says that the sole element of novelty is the "needle-depressing latches," i. e., the "depressing pickers" or droppers, and, further, that the only material thing is that the picker should slide diagonally in the guide-plates and itself get out of the way of the following in-operative needles.

The prior patent to Branson, No. 333,102, December 29, 1885, discloses both lifting and depressing pickers which are engaged by the needle-butt, so that the needle-butt moves the picker while the picker moves the needle-butt. The chief distinction is that in Branson the diagonal movement of the picker is guided by a pivot from which the picker is suspended, while with Mayo and with the defendants the picker is guided within inclined walls. Mr. Livermore, complainant's expert, says:

"A movement in a very short arc of a circle does not differ widely from a straight line movement of equal extent, and, where the difference between the slightly curved and straight movement in no wise affects the operation desired to be produced by the movement, I should generally regard the use of a pivot or of a guideway to support and guide the object moved as being well known mechanical equivalents of one another, and should consider, in general, that no substantial novelty would be involved in the substitution of either form of guideway for the other."

This is a concession that, so far as the diagonal movement of the picker in shifting the needle-butt from the upper to the lower level is concerned, the complainant's device is substantially similar to Branson's, the difference being merely in the substitution of a mechanical equivalent.

Mr. Livermore seeks to avoid the evidence of the defendants' expert as to the practical equivalency of both defendants' and complainant's diagonal movement in the shifting process to that of Branson by pointing out that the sliding pickers of the Mayo patent—

"Do not have to follow their needle shifting movement with any further movement, in the same or in a different direction, to get out of the way of the following needle-butts, and this is possible because of their operation with a sliding movement, as distinguished from the operation of all prior pickers of this general class."

If we consider that the substance of Mayo's 1887 invention was his means for avoiding contact with the following needle-butts, it is apparent, I think, that there is a substantial difference between the Mayo device and the defendants' device; for Mayo's sliding pickers, having a downward and an upward movement in a fixed plate, require locking devices to hold them out of contact with the needle-butts at each reciprocation. The defendants, instead of devices of this character, employ a pivoted carrier to give a swinging movement, which, while it does not entirely avoid contact with the following needle-butts, so diminishes the friction of the contact that it does not impede the working of the machine. Like Branson, the defendants follow the needle-shifting movement by a swinging movement of the picker. A pivoted carrier to effect this movement is novel with the defendants.

If, therefore, we consider that the prior art discloses equivalent means of moving the depressing pickers in a diagonal path from the idle to the working level, and that the important thing to be accomplished was to avoid contact with the needle-butts, I am of the opinion that the defendants do not infringe, since they employ substantially different mechanism for this purpose. It should be remarked that the Mayo 1887 patent has never gone into commercial use, and that it is proven that the pivotal movement permits of a better mechanical construction than the sliding movement.

The complainant attempts to lessen the anticipatory effect of the Branson patent by showing that the machine of Branson was not efficient for performing the full function of a knitting machine. Such an argument is unsound, since it shifts from an examination of a machine part to an examination of a completely organized knitting machine. Claim 2 is admittedly only for special machine parts which in themselves are incapable of operation, or of performing the full functions of a knitting machine. Complainant's expert says:

"I should say that the elements of claim 2 of the 1887 patent did not constitute a complete operative combination in the sense of one that is capable of especially performing its full service in the machine, without some means or provision for preventing them from interfering with the needle-butts except at the time when they are intended to co-operate therewith; or, in other words, without something that might be regarded as an equivalent for the latches or locking devices that perform this function in the complete construction shown in the Mayo 1887 patent. Of course, the combination recited in claim 2 of the patent, as it stands, is operative for the purpose of shifting the needle-butts at the time required; but some further provision is necessary in order to enable the combination to perform this office in the regular working machine, and such provision is shown and described in the patent, being the locking devices and means for tripping or disengaging them at the proper time."

The case of *Branson v. Kutz*, 47 C. C. A. 421, 108 Fed. 391, is cited as a decision that Branson's machine was inoperative; but it was said in that case, "This question largely turns on whether the needle-lifting lever, when set, is depressed and raised by virtue of a torsional tension exerted through the end;" and that decision shows that the controversy was principally over the operation of the lifting pickers. It is not a decision to the effect that the depressing pickers of Branson were inoperative, or that the machine of Branson was inoperative by reason of the construction of his depressing pickers. Mr. Livermore testifies that the operation of the depressing pickers of Branson is substantially different from that of his lifting pickers, and that Branson's depressing pickers are operative, although he characterizes the construction as poor.

Upon consideration of the arguments and the testimony of experts as to the substantial character of Mayo's 1887 invention, I am of the opinion that claim 2 is limited to the particular construction shown and described, to wit, a construction in which the depressing pickers slide in the guide-plates; that the proceedings in the Patent Office require such a limitation; and that the prior art prevents any broader construction of the claim.

Claim 4 of the Mayo patent of 1891 is as follows:

"4. In a knitting-machine, the needle-cylinder and the needles carried thereby, combined with a cam-cylinder provided with stitch-cams and needle elevating and depressing cams having fingers or hooks, the fingers of the elevating cams engaging but a single needle and the fingers of the depressing cams being of such length as to engage two needles, latches to normally hold the said elevating and depressing cams in inoperative position, and devices through which the cam-cylinder may be reciprocated, whereby in the operation of the machine two needles may be returned into action at each reciprocation of the cam-cylinder, and one of said needles carried out of action at the next reciprocation thereof in the opposite direction, and so on, to effect the widening of the fabric, substantially as and for the purpose specified."

The defendants deny infringement on the ground that their machine does not contain "latches to normally hold the said elevating and depressing cams in inoperative position." By "elevating and depressing cams" is meant lifting and depressing pickers. These latches are essential elements of the combination of claim 4, not only because the patentee by enumerating them, and by his action in the Patent Office, has made them so, but also because they are essential to the performance by the machine of the patent of the functions set forth in the claim, to wit, returning two needles into action at each reciprocation of the cam-cylinder, and carrying one of said needles out of action at the next reciprocation in the opposite direction, to effect the widening of the fabric.

While claim 2 of the 1887 patent may, perhaps, be regarded as a claim for a subcombination, or for machine parts, and thus escape the objection of inoperativeness, though the latches which are necessary are not included (*Deering v. Winona Harvest Co.*, 155 U. S. 302, 15 Sup. Ct. 118, 39 L. Ed. 153), claim 4 of the 1891 patent is for a combination which can effect the widening of the fabric, and requires the enumeration of the mechanical parts which co-operate to

this result. While it is unnecessary to specify ordinary means for applying power or causing motion, it is necessary to specify the parts whose co-operative action is essential to the performance of the function specified in the claim. It is proved that the machine described in the 1891 patent cannot perform the specified function without the co-operation of the latches, which at appropriate times clutch and hold the picker out of the path of the following needle-butts, and at appropriate times releases the picker so that it may come into engagement with the needle-butt. A combination of elements which does not employ, to hold and control the pickers, any latches or equivalents therefor, would not infringe claim 4. I am clearly of the opinion that the defendants' machine has no elements that fairly can be called the equivalent of complainant's latches for holding the lifting pickers in inoperative position. Because of a different construction and arrangement of lifting pickers and stitch-cams, and of a different relation of lifting pickers to stitch-cams, it follows, to use the language of complainant's expert:

"In defendants' machine the lifter which operates in, say, the right to left movement of the needle, is never in the path of movement of the needles traveling from left to right, as they follow a different path in the cams in the movement in one direction from that followed in the other direction."

What Mayo accomplishes by stitch-cams, lifting pickers, latches, and trippers, the defendants accomplish by stitch-cams and lifting pickers in a new relative location. It is unnecessary to hold the lifting picker out of the path of the needles at the next reciprocation, because the lifting picker travels in a path which takes it out of the way. This feature has been adopted, in substance, by the complainant's expert in constructing the Livermore illustrative model, which is presented to establish the irrelevant proposition that an operative combination of the other elements of claim 4 might be made without the use of latches. While a considerable amount of testimony has been devoted to it, this model seems to be of no value in the case, for the reason that it adopts a material feature of the defendants' machine, and tends to prove a fact which, if true, is irrelevant.

Mr. Livermore, complainant's expert, testifies that he should regard a change of location of the pickers relative to the stitch-cams as an equivalent for the locking devices and trippers of the Mayo machine, since this change of location performs the same office as the locking devices and trippers. But this is an erroneous view of equivalency, for a combination of stitch-cams and pickers which renders the use of latches unnecessary, obviously does not contain "latches," nor a mechanical equivalent for "latches." The mere fact that the same function is accomplished in the two machines does not make a case of equivalency. *Westinghouse v. Boyden*, 170 U. S. 537, 569, 18 Sup. Ct. 707, 42 L. Ed. 1136.

I am also of the opinion that the defendants' machine has no latches for the depressing pickers, nor any equivalents therefor. With Mayo, the depressing pickers are controlled and timed in their action by the spring latches and trippers, which operate at each reciprocation of the machine in widening. When the picker has carried down a needle, the picker is grasped and held until, at the proper time, it is tripped.

and released. In the defendants' machine, the pickers and needles are so arranged that the needle-butts will both depress and release the pickers.

The defendants' picker, after it has carried down a needle, is not, like Mayo's, locked in inoperative position, but, as soon as it is disengaged from the needle-butt, springs up under the following needle-butts, which hold it down during the movement in one direction. Upon reversal, the needle-butts on the return stroke would themselves depress the pickers, this being possible because the picker is mounted upon a pivoted carrier, which turns on its pivot and allows the needle-butts to travel over the top of the picker. With Mayo, the needle-butts cannot depress the picker on the return stroke, therefore the picker must then be latched out of the way.

The defendants' machine would be operative, if only the needle-butts were used to hold down the pickers. Instead, however, of giving to the needle-butts the function of depressing and holding down the pickers on the back or return stroke, a pair of cams called "hold-down cams" are employed to perform the function of depressing the pivoted carriers. These hold-down cams are not the equivalents of Mayo's latches and trippers. They do not in themselves perform the function of Mayo's latches, to hold and release the picker. They merely swing down the pivoted carrier at the beginning of the return stroke, hold it down during that stroke, and release it at the forward stroke; so that the picker rides along the under side of the needle-butts during the forward stroke. The principal function of the hold-down cams and pivoted carriers is to avoid friction between the needle-butts and pickers. They are not essential to the operation of the defendants' machine.

If we are to make a comparison between the means whereby Mayo and the defendants hold the pickers out of engagement, we must compare Mayo's latches and trippers with the defendants' hold-down cams and pivoted carrier and needles combined. But these could not be substituted for Mayo's latches in Mayo's machine. It would be necessary to go still farther; to change the construction of the parts, and to give to the pickers of Mayo new movements in addition to their present movements. In other words, the parts which the complainant's expert regards as equivalents could not be used in Mayo's machine without starting practically anew from the old cam-cylinder and needle-cylinder, and making new parts and a new combination of parts.

In dealing with the 1887 patent, we have already expressed the opinion that the means for avoiding contact with the following needle-butts are substantially different in Mayo's 1887 machine and in the defendants' machine, and this is equally applicable to Mayo's 1891 machine, which employs substantially the same latches as the 1887 machine.

The complainant's method of showing that the defendants' machine has the equivalent of the complainant's latches is by showing that the machine of the defendants has means for performing the same function, namely, keeping the pickers out of the way of the following needle-butts. But every operative picker machine must do this in

some way; and the complainant's brief admits that one principal difficulty with the machines of the prior patents was that the pickers did not get out of the way of the following needle-butts. Special means for doing this form the subject-matter of claims of both of Mayo's patents.

There is seeming inconsistency in the complainant's case, which presents claims of patentability for particular means of solving a principal difficulty in the prior art, and also the contention that, when construing claim 4, any appropriate means for controlling the pickers are to be regarded as mere mechanical equivalents. Thus, the complainant's expert contends that any means of accomplishing this function are equivalent; that an arrangement of stitch-cams and pickers containing no latches at all is the mechanical equivalent of latches; that an arrangement of needle-butts and pickers, whereby the butts hold down the pickers, is the equivalent of latches; that cams which give a swinging movement to the carrier and hold the carrier, and thereby diminish the friction between the needle-butts and pickers, are latches in the sense of Mayo's claim. The mere fact that two combinations perform the same functions does not prove that they contain the same mechanical elements.

I find, therefore, that the machines of Mayo and of the defendants employ substantially different means for controlling the pickers; that the defendants' machine does this, not by means to hold and release the pickers, which are a mere substitution for latches, but by novel combinations and novel parts. The new combination involves a reconstruction of the stitch-cams, and the arrangement of lifting pickers in such a way that they are independent of controlling devices, novel construction and mounting of both lifting and depressing pickers, and novel paths of movement for both pickers and picker carriers, as well as novel means for imparting and controlling the movements.

The defendants construct their machine by license under the Eck patent, No. 592,134, which seems to me to be for combinations quite different from that covered by claim 4 of the Mayo patent. It is quite true that Mayo was first to perform what is known as the "two and one" operation on a machine of the cam-cylinder and picker type, and that this involved features not in the prior art: First, depressing pickers with fingers long enough to take down two needles, and the use of both lifting and depressing pickers in the operation of widening; and that he effected the object of closing up the loose loops in the seams in a manner somewhat different from that of the prior art. In these particulars, the defendants' machine adopts features which were new with Mayo.

In the cam-cylinder machines of the prior art, the lifting pickers were used only for narrowing, and the depressing pickers only for widening; in Mayo's 1891 patent, both lifting and depressing pickers take part in the widening operation. From the employment of the old, or "one and one," method in both narrowing and widening, there results an imperfect juncture at the heel seam, a series of small holes being left along the seam where the narrowed and widened fabrics were joined. Mayo's junction between the narrowed and widened portions of the heel pocket is effected not simply by the fact that he

widens by the "two and one" method, but also because his machine has lifting pickers which engage but a single needle. His machine, therefore, must narrow by the one and one method. It is the combination of the one and one method of narrowing with the two and one method of widening which, in the Mayo machine, effects the closing of the series of small holes which had existed when both narrowing and widening were effected by the one and one method.

While Mayo was the first to employ the two and one operation for widening in a cam-cylinder and picker machine, he was not the first to employ, in a knitting machine, and for the purpose of closing up the loose loops, that method of manipulating the needles which is known as "two and one." The patent to Shaw, No. 228,480, discloses a pattern chain or Jacquard mechanism for automatically controlling the needles, which will cause two needles to be returned into operation, and will cause one of said needles to be carried out of operation. Mr. Livermore testifies:

"So far as appears from the Shaw specification, he attains the result of closing up the loose loops formed on the edge of the narrowed portions by using the two and one operation in throwing the needles out of operation, so that the narrowing courses end differently from those of the Mayo fabric, and in then knitting on a continuous row or two, and then widening with the two and one operation, with the ends of the widening courses running into the intermediate continuous courses made after the narrowing was completed. Whether or not the advantages resulting from this operation are equal to those resulting from the Mayo two and one operation, so far as the character of the fabric is concerned, it is clear that they are not the same advantages, and that they are not produced in the same way, and that the resulting fabrics are not the same."

The difference between Mayo and Shaw, in the method of closing up the holes, is not in the use of the "two and one" method for the widening operation (to which claim 4 relates), since both use it; but it is in the operations which precede widening. Mayo's widening courses are attached to the narrowed courses which have been knitted by the one and one method. Shaw's narrowing is performed by two and one; he then knits his straight courses, and then proceeds to widen exactly as Mayo proceeds to widen, by two and one. It has not been made to appear that Mayo's method of knitting, first by one and one, and next by two and one, is superior to Shaw's method of knitting by two and one, straight courses, and two and one; or that his seams are substantially different from those shown in the defendants' "Exhibits Sample Heels." The function of claim 4, "Two needles may be returned into action at each reciprocation of the cam-cylinder, and one of said needles carried out of action at the next reciprocation thereof, in the opposite direction, and so on, to effect the widening of the fabric," is limited to the widening operation; and there is no distinct claim which covers Mayo's entire process in forming the heel.

The patent cannot be construed as covering a method of knitting, consisting in joining to the one and one narrowed portion the two and one widened portion. The same process, therefore, may be performed by other machines, provided they are not substantially similar to Mayo's. Thus, there is nothing in the Mayo patent which

would prevent performance of one and one, followed by two and one, upon Shaw's Jacquard mechanism, or upon various other machines in which the needle-butts are controlled by means other than a cam-cylinder.

I am unable to find, in what Mayo did, any conception so broad as to require us to regard all cam-cylinder machines as substantially the same, regardless of their differences in the very important mechanical features for controlling the pickers. The manner of handling the needles by two and one was old in Shaw, and the broad idea of automatic mechanism which should bring two needles into operation and take one out was old with Shaw. The general conception of using two and one for closing up seams was old with Shaw. The broad idea of perfecting a cam-cylinder machine so that it could perform all known knitting operations, and handle the needles in all known ways, was one that was open to all inventors of specific types of knitting machines. The rule for handling the needles, known as the "two and one," prescribed the general law for all mechanisms. They must be such as to operate upon the needles in this particular way.

I agree with the defendants' counsel that, after Shaw, there was no invention in the idea of doing "two and one" on a picker machine, and that all one could claim after Shaw was the particular construction and combination of parts which he should devise for that purpose. I disagree with the complainant's expert, who attributes to Mayo the novel conception that a benefit could arise from "employing the net result of two antagonistic but unequal agencies," and with his illustration, "It is as if some one should discover that the best way to get a hod of coal upstairs would be to carry up two and then carry one of them downstairs again."

This broad conception is in Shaw's patent, and was not Mayo's. Mayo's was the narrower conception of means to do it. How to make a cam-cylinder machine take down two needles and put out one was his problem. The taking down of two needles involved the mechanical change of a longer picker finger; the taking out of one needle involved the use of the lifting pickers in widening, and this was new, though necessarily involved in the idea of doing two and one on a picker machine. But after this, it was necessary to control the pickers in order to make the machine operative. Mayo disclosed nothing in his patents which anticipated the defendants' devices for controlling the pickers.

Mayo's completed conception was a combination which included, as an essential part, specific means for controlling the action of his pickers. Leave these out, and he had merely a novel machine part—a picker with a finger of double length—and a conception of a mode of operating his pickers which was not embodied in mechanism. This was not enough to secure a patent for a machine which would carry down two needles and take out one. He was required by the Patent Office to include locking devices, "in order to render complete and operative the combination." His acquiescence was an admission that locking devices or latches were essential to make an operative combination of the parts shown. A like admission was made by the com-

plainant's expert. The force of this admission as to the machine of the patent is not lessened by evidence that the elements enumerated in the claim can be combined in a different way, or brought into a new combination with other elements, so as to be operative. That Mayo or his expert could make a different machine from that of the patent, and read the claim upon that machine, would not alter the fact that Mayo conceded that his invention was one of certain mechanical limitations.

Upon a somewhat laborious examination of the extended discussion of this claim by counsel and experts, I am of the opinion that Mayo's claim 4, when restricted to include latches of substantially the same mode of operation as those shown in the patent, is fairly commensurate with his actual invention, and is not infringed.

Claim 6 of the Mayo 1891 patent is as follows:

"In a knitting machine, a needle-cylinder and needles carried thereby, and cam-cylinder provided with a slot, combined with a needle operating cam pivoted outside the said cam-cylinder, and extended through the said slot to operate upon the said needles and be operated thereby, substantially as described."

The pickers are pivoted outside the cam-cylinder, and their hooked ends project inwardly through diagonal slots in the cam-cylinder. The complainant's brief says:

"The body of the shifter is thus entirely out of the way of the succeeding needles, and, as the hooked end retreats with the needle to be shifted, it is removed from the path of the butts of the following needles."

The inward and outward movement of the end of the picker, which is the important feature, is due to a particular mode of pivoting. The pivotal axis, about which the picker swings, extends in an inclined direction on the outside of the cylinder, and the slots are inclined slots. The picker swings radially in and out of the cylinder in an inclined direction, and has only a swinging or pivotal movement. This radial movement is essential. This feature is not found in the defendants' lifting pickers, which alone are said to infringe claim 6, and which are not so pivoted as to move in and out of the cam-cylinder by a pivotal movement. The defendants' pickers proper are not pivoted, but are sliding pins which slide in a pivoted carrier. Though this carrier gives to the pickers a swinging movement, this movement does not carry the picker ends in and out of the slot. Both a pivotal movement of the carrier and a sliding movement of the pickers are necessary to the operation of the defendants' device. As the operativeness of the complainant's pickers depends upon a particular mode of pivoting which permits a radial movement in and out of the cam-cylinder, the claim must be limited to a construction having that mode of pivoting which will permit the necessary movements of the pickers.

The remaining feature, of putting the body of the picker outside the cam-cylinder and only its working end through a slot, so that the body of the picker will be out of the way, did not, in my opinion, involve patentable invention. The idea of bringing only the working end of a mechanical part through a hole or slot in such manner as not to interfere with other working parts is one so common to the mechanical arts, as well as to this art, that only a specific and

novel application of this idea could be patentable. The art is full of examples of sliding parts whose working ends project through slots in the cam-cylinder, and whose bodies are outside and out of the way. Whether the body of the part is supported by a pivot or a guideway would seem to be entirely immaterial. Mr. Livermore concedes, as we have seen in connection with the 1887 patent, that no substantial novelty would be involved in substituting a pivot for a guideway.

The sliding constructions are a complete anticipation of the idea of putting the body outside and out of the way, and the working end through a slot, and would anticipate Mayo's claim, if we should disregard the special mode of pivoting and the special movement of the pickers resulting therefrom. But, aside from any question of anticipation, the patents to Kelly, No. 372,374, and to Lippitt, Nos. 396,578 and 394,587, show that the broad feature of a part pivoted outside and having its working end extended through a slot was a feature of mechanical construction that would readily suggest itself to the mechanic, and a feature which did not in itself offer a solution of the real problem of making the working ends of the pickers get out of the way of the following needle-butts.

It is clear, I think, that the substance of the invention disclosed by Mayo's pickers, and covered by claim 6, was in the use of a special mode of pivoting which permitted a radial movement into and out of the cam-cylinder. This was an ingenious and patentable feature of construction. If we should disregard this feature, claim 6 would, in my opinion, be invalid. This feature is not used in the defendants' lifting pickers, which, as we have already seen, are essentially different in construction and mode of operation. There is no contention that the defendants' depressing pickers infringe this claim.

I am of the opinion that claim 6, when properly construed, is not infringed. The construction for which the complainant contends seems so untenable as to make it unnecessary to consider the questions of prior use and priority of invention. If the special mode of pivoting is to be disregarded, and claim 6 construed to cover all constructions having pickers pivoted outside and slots in the cam-cylinder for the pickers, there then remains a serious question of fact as to whether Kelly or Mayo was first to construct a knitting machine having these features, and also the defense of two years' public use by Kelly.

Claim 11 is as follows:

"In a knitting machine, the needle-cylinder grooved for the reception of jacks, a series of jacks, a surrounding ring correspondingly grooved for the reception of jacks, and a cam-ring, as a ¹⁴, to act upon and move the said jacks, combined with an independent ring, b, overlapping the inner ends of the jacks, the hooks or portions of the jacks engaging the yarn being at the proper space thereof between their ends, substantially as described."

The validity of this claim is disputed. Infringement is conceded if the claim is valid. The feature of novelty is "an independent ring, b, overlapping the inner ends of the jacks." The jacks or sinkers are thin blades which extend inward between the needles, and are provided with hooks to engage the fabric. They are subject to an upward pull.

It was old to employ a ring at the outer end of the sinkers to hold them down against an upward pull. The Mayos put an additional ring at the inner end of the jack, thus making at each end points of resistance to the upward pull. There are said to be two functions of this ring: It acts as a smooth cover to the inner end of the sinkers. It confines the sinkers at the inner ends.

In the patents to Shaw, No. 228,870, and to Gifford & French, No. 438,685, the sinkers are held down at two points by two rings, but both rings are outside the hooks, while with Mayo one is outside and the other inside. The patent to Huse, No. 331,401, and to Aiken, No. 214,744, show respectively sinkers held at each end and on opposite sides of the hooks, and sinkers held on opposite sides of the hooks, by means of plates which overlie the sinkers at opposite ends.

The complainant's expert points out many differences in structure between the devices of Mayo and those of the prior art, which seem, however, generally irrelevant to the function of holding the jacks firmly in position, which is the main point. The testimony of the defendants' expert seems to deal more closely with the exact points involved, and I agree with his opinion that the construction referred to in claim 11 does not embody any substantial novelty in view of the state of the art. I am therefore of the opinion that claim 11 is invalid.

While the Mayo machines exhibit invention, and are useful and practical to a high degree, it must be remembered that they were constructed at a stage of the art when conceptions of a needle-cylinder having needles whose butts should be operated upon by pickers controlled by a cam-cylinder, and of pickers which should be pivoted and should act on the needle-butts while the needle-butts acted upon the pickers, were all old and clearly explained; and that commercial success cannot be invoked to broaden the Mayo claims so as to prevent subsequent inventors from using all that was known in the prior art as to the construction of pickers and methods of handling the needles. The Mayos were not pioneers, but mechanical improvers; and, if they were first to achieve commercial success in this type of machine, this fact does not entitle them to treat as equivalents distinct mechanical improvements of others. That the defendants' machines depend for their operativeness upon novel conceptions not borrowed from Mayo is clear. It appears also that the argument to show infringement of claim 4, upon which principal stress has been laid, involves an erroneous standard of equivalency, and the erroneous legal proposition that two mechanical combinations, though differing substantially in elements, are to be regarded as the same if they perform the same functions.

The Winder Patents.

These relate to means for introducing an extra thread in knitting, so that parts of the fabric may be re-enforced by using two threads of yarn instead of one. To do this was old. The free end of the thickening thread had been brought into contact with the moving main thread, and by the friction of contact led to the needles. Devices for twisting the free end of the thickening thread about the main thread were also old. The Marshall & Hewitt English patent,

No. 4,293 of 1875, shows a device intended to twist the thickening thread about the main thread by passing both threads into a tube, which is given a rotary movement. The efficiency of this device is questioned. The patent, nevertheless, is a full disclosure of the idea of twisting the end of the extra thread about the main thread, and of the use of a rotary part for that purpose. The patent to Swinglehurst, No. 459,260, September 8, 1891, also shows a rotary winder for this purpose. In considering the winder patents, therefore, we must remember that there was no novelty in the idea of using a rotary winder for the purpose of twisting the free end of the thickening thread about the main thread.

The Johns patent, No. 600,788, March 15, 1898, is the principal of the complainant's winder patents. Claims 1, 2, 3, 4, and 5 are in suit. It is extravagant to call this patent a primary patent, or to treat it as a first disclosure of the idea of twisting the free end of one thread about the other by the use of a rotary winder. This idea was common property, and the Johns patent discloses simply specific means for carrying it out. The free end of the extra thread is held in a clamp affixed to a rotary part. To introduce the extra thread, the clamp, still holding the thread, is rapidly rotated; the clamp holds the end of the thread during the winding; upon its completion the clamp is opened, and the extra thread is free to follow the main thread to the needles. To withdraw the extra thread, the clamp seizes it, and carries it against a knife, which severs it, leaving the free end in the clamp ready to be again attached to the main thread. The substance of Johns' invention is a clamp which seizes and holds the free end of the extra thread while the rotation of the clamp carries the end about the main thread.

The defendants' mechanism is said to infringe because it has Johns' leading feature of a rotary winder, which will effect the desired result. This is either a mere appropriation by the complainant of the field of the prior art, or a claim that performance of the function is a proper test of the identity of two combinations when the function is old.

Each of the claims of the Johns patent calls for a "rotary winder." What distinguishes Johns' rotary part from Marshall & Hewitt's is, not the rotary movement, but that the rotary part is made a clamp which positively seizes the thread and carries it around the main thread. What makes the rotary part an efficient winder is the fact that it is a rotary clamp. If we leave this out of the Johns patent, there is substantially nothing left but the mere suggestion of the use of a rotary part, and this certainly was in Marshall & Hewitt. It follows that, unless the claims are limited to a rotary winder which is a rotary clamp, they are invalid; since, read as the complainant reads them, they are for an invention not sufficiently described in the specification, and are anticipated by Marshall & Hewitt and Swinglehurst. Moreover, if the claims should be given a construction broad enough to include the defendants' winder, there would remain a grave doubt whether they are not invalid for the reason that they were introduced by amendment in such manner as to bring them within the doctrine of *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053.

The defendants' rotary part is not a clamp, but a cylinder having a large opening or slot on the side. Independent clamping jaws carry the free end of the extra thread across the edge of this slot, causing a length of thread to project outside; the thread is struck by the edge of the slot in the rotating cylinder; the jaws open to release this thread, which is thrown or whipped loose around the main thread. The defendants' clamp does not rotate, and the end of the thread is not clamped or held by the winder while it is being wound round the main thread. The thread is not closely wound, as in Johns, but loosely thrown around the main thread. The means for severing are also substantially different. The defendants' mechanism is shown in the patent to Rowe, No. 581,887, and is, in my opinion, a combination substantially different from that of Johns. Claims 1, 2, 3, 4, and 5, therefore, if valid, are so limited that they are not infringed.

The Ames patent, No. 600,671, March 15, 1898, is conceded to be merely for an improvement upon Johns, and to have the same mode of operation in carrying the end of the extra thread around the main thread. Claims 8, 10, and 11 are in issue.

Ames, like Johns, employs a rotary clamp, but a clamp of different construction. The rotary part is a sleeve having on one end a series of projections or wires forming a ring-like brush. Means are provided for bringing the extra thread into engagement with the brush. The extra thread is held between the projections only by friction, and is readily pulled out from between the projections by the main thread after sufficient winding has taken place. The projections hold the extra thread during the time that only the main thread is passing to the needles.

Marshall & Hewitt's rotary tube had no provision for positively grasping the extra thread. Johns' rotary winder had a clamp which closed to grasp the extra thread and opened to release it. The Williams patent, No. 491,327, February 7, 1893, shows a winder somewhat similar to Johns, and in which the free end of the extra thread is held in clamping-jaws which form a part of, and are rotated with, the winder. When the extra thread is not in use, its free end is clamped between two jaws on the end of a rotary sleeve. When the extra thread is to be introduced, the clamp is rotated, carrying the end of the extra thread around the main thread by a positive clamping device, which must be unclamped to release the thread. The Ames rotary clamp does not require means for unclamping it.

The point of novelty which the complainant points out in the Ames device is that the Ames holder and clamp does not have to be unclamped.

The defendants' rotary part has no device for positively clamping the extra thread. It is not a rotary clamp. It does not act as a holder when the extra thread is not in use, and has no provision for unclamping, because it has no provision for clamping. The extra thread is drawn out from the interior of the rotary cylinder, through a large slot in the side, by an independent arm which grasps the end of the thread and holds the thread across the edge of the slot in the cylinder. Upon rotation, the edge of the slot engages the extra thread, not at the end, but at a considerable distance from the end,

which end is held by clamps on the arm during nearly the whole of the first revolution. The clamps are then opened, releasing the thread, which is, by engagement with the side of the slot, thrown forward and loosely whipped around the main thread.

The complainant concedes that the defendants' rotary part has no clamping or holding function like that of Ames' ring-like brush. Reference is made, however, to the fact that the holding function is performed by the clamps upon the defendants' independent arm. But these clamps, like those of Johns and Williams, do require to be unclamped in order to release the thread, and therefore it makes little difference whether we look at the rotary part itself or at the combination as a whole. The defendants' rotary part has no clamp which need not be unclamped, because it has no clamp at all; and the clamp used on the independent thread arm is a clamp that, like that of Johns and Williams, requires to be unclamped. The defendants' combination is the subject of letters patent to Rowe, No. 581,887, and, in my opinion, is substantially different from that of Ames in its mechanical elements, the method of combining them, and in the method of handling the thread.

Upon the whole case, it may be said that the defendants' devices have been recognized by the Patent Office as patentably different from the complainant's, and that they display quite as much inventive skill and originality as do the devices made according to the patents of the complainant. Both complainant and defendants are mechanical improvers in an advanced art; and mere priority in the production of a commercial machine, or commercial success, affords no reason for excluding from the field other independent improvements. The first commercial success in practically developing a machine may stimulate other mechanics to enter the field as competitors. They do not, however, become infringers merely because they become competitors.

The bill will be dismissed.

EDISON GENERAL ELECTRIC CO. v. NEW ENGLAND ELECTRIC
MFG. CO. et al

(Circuit Court, S. D. New York. January 5, 1903.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The mere cessation of infringement is not always sufficient to defeat a complainant's right to an injunction; but where it is shown that defendant abandoned the manufacture of the articles complained of some time before the commencement of suit, without any intention to resume, and there is no reason to doubt his good faith, a preliminary injunction will not be granted.

In Equity. Suit for infringement of patents. On motion for preliminary injunction.

Dyer, Edmonds & Dyer, for the motion.

Edw. P. Payson, opposed.

LACOMBE, Circuit Judge. Three devices made by defendants are complained of: (a) Wall-sockets A 9,187; (b) receptacles 9,171; and (c) keyless sockets C 9,329.

As to (a), defendants consulted counsel, and, being advised it was an infringement, abandoned it before this suit was brought.

As to (b), defendants aver that because of disapproval by underwriters and small profits they finally abandoned manufacture some months ago, and had sold out all their stock before plaintiff's bill was filed.

As to (c), defendants aver that they ceased manufacturing them about August, 1902, and since that time have manufactured only keyless sockets, such as Exhibit C 2, against which this motion is not directed.

The mere cessation of infringement is not always sufficient to defeat complainant's right to an injunction. He is entitled, in a proper case, to greater assurance against future infringement than the mere declaration of a former infringer's intent. But it is thought that on the facts above set forth complainant is not entitled to a preliminary injunction. There is nothing to indicate any suspicion of bad faith, nothing to show that between now and final hearing defendant proposes to manufacture or sell. There is nothing threatened which would work any irreparable injury to complainant. For these reasons the construction of the patent is a question which may safely be left till final hearing, and the present motion denied, with leave, however, to renew should it be shown that articles of the three types, "a," "b," or "c," are manufactured or sold by defendants.

FRANK et al. v. GEIGER et al.

(Circuit Court, S. D. New York. January 6, 1903.)

1. PATENTS—DESIGNS FOR BEDSTEADS—INFRINGEMENT.

The Frank design patents, Nos. 33,961, 33,962, and 33,963, for designs for end frames of bedsteads, and No. 33,964, for a design for a corner post of bedsteads, *held* valid, and defendants *held* subject to the penalty imposed by section 1 of Act Feb. 4, 1887, 24 Stat. 387 [U. S. Comp. St. 1901, p. 3398], for making a single exposure for sale of bedsteads to which the designs had been applied, after notice in general that the designs had been patented, but which did not distinguish between the several patents, or the design covered by each.

In Equity. Three suits for infringement of design patents Nos. 33,961, 33,962, and 33,963, all for designs for end frames of bedsteads, and No. 33,964, for a design for a corner post of bedsteads, all issued to David Frank January 22, 1901. On final hearing.

Charles C. Gill, for plaintiffs.

John Dane, Jr., for defendants.

WHEELER, District Judge. The patents, although somewhat objected to, seem to be well enough; and infringement by sale, although denied, seems to be fairly made out. The plaintiffs made and sold their bedsteads to the defendants and other jobbers for resale,

and first procured decalcomanie labels for marking them as patented, with the date of these patents, February 19th; and two of the bills of complaint were sworn to February 21, and the other February 26, 1901. The labels are not shown to have been affixed to many of the bedsteads or posts, nor to any that reached the defendants before the suits were brought. The plaintiffs appear to have informed the defendants of the patents and of the infringement, but not till after February 7th; and the defendants appear to have made sales to two persons procured by the plaintiffs to buy, after that and before suit. Such sales to the use of the plaintiffs would not involve or result in any damages to or recoverable by them. The sales would not take the places of any the plaintiffs would have made, or otherwise injure their trade. They merely show an intent to infringe. The act of 1887, 24 Stat. 387, 3 U. S. Comp. St. 1901, p. 3398, makes those who sell or expose for sale any article of manufacture to which a patented design has been applied, without license from the owner, "knowing that the same has been so applied," "liable in the amount of \$250," recoverable by the owner of the patent. The proofs do not satisfactorily show that the several patents and infringements were severally distinguished when the defendants were informed by the plaintiffs concerning them, but only that there were patents which the sales of these articles would infringe. These sales procured by the plaintiffs well show one exposure for sale, knowingly, of patented designs, but not of each of the designs of the several patents. Upon this finding, the defendants appear to be liable for \$250 for one exposure in all three of the cases, but not in one more especially than in either of the others. The cases are, however, of like nature, between the same parties, and might have been joined in one, and may be consolidated, it appearing reasonable, under Rev. St. § 921, U. S. Comp. St. 1901, p. 685. When consolidated, one recovery on that liability can be decreed.

Causes consolidated. Decree for plaintiffs for \$250, with costs.

AMERICAN STEEL & WIRE CO. v. MAYER & ENGLUND CO.

(Circuit Court, S. D. New York. December 29, 1902.)

1. PATENTS—SUIT FOR INFRINGEMENT—RIGHT TO DISCONTINUE.

A complainant in a suit for infringement will not be granted leave to discontinue after the proofs have been taken and closed at large expense to the defendant, beyond his taxable costs and disbursements, where no other ground is shown than the desire of complainant to re-litigate the questions involved in a new suit.

In Equity. Suit for infringement of patent. On motion for leave to discontinue.

Hillary C. Messimer, for plaintiff.

W. C. Strawbridge, for defendant.

WHEELER District Judge. This suit is brought for infringement of a patent. Issue was joined February 5, 1901. Proofs were closed

in June, 1902, at large expense beyond taxable costs and disbursements to defendant, it was placed on the calendar for hearing at this October term, and stood over for hearing December 9th. The plaintiff's counsel wrote December 3d to defendant's counsel:

"Dear Sir: I have yours of the 2nd. We intend discontinuing the case of American Steel & Wire Co. vs. Mayer & Englund Co., when it is reached for argument on the call of the present calendar, and immediately thereafter we shall bring a new suit, as it is our intention to relitigate this question, in view of what has developed subsequent to the closing of the proofs in this case. We do not think the purpose we have in view could be accomplished by the opening up of the present case; therefore, we prefer discontinuing and starting de novo, and that we shall do."

On the call of the day calendar December 9th, the plaintiff asked leave to discontinue; showing no cause beyond the desire expressed in the letter. Under these circumstances, the defendant appears to have a substantial right to the benefit of its testimony upon the issue joined. A condition saving the right to the testimony as if perpetuated is suggested, but that would be uncertain and of doubtful advantage, and not an adequate substitute for its use now.

Leave denied.

ROYAL METAL MFG. CO. v. ART METAL WORKS.

(Circuit Court, S. D. New York. January 9, 1903.)

1. PATENTS—DESIGNS—SUBJECT OF DESIGN PATENTS.

A design patent cannot be made to cover a mechanical construction by which the shape of the article, which is the principal feature of the design, is produced.

2. SAME—INFRINGEMENT—DESIGN FOR BELT.

The Lewenthal design patent, No. 34,357, for a design for a belt to be worn, *held* not infringed by a belt which resembled the design only in having a downward dip in front; such feature being neither novel, nor patentable as a design.

In Equity. Suit for infringement of letters patent No 34,357, for a design for a belt, granted to Isaac Lewenthal April 9, 1901. On final hearing.

Joseph L. Levy, for plaintiff.

Charles G. F. Wahle, for defendant.

WHEELER, District Judge. This suit is brought for alleged infringement of patent No. 34,357, dated April 9, 1901, and granted to Isaac Lewenthal, for a design for a belt, to be worn. The drawings show an oval back piece, marked i, connected by links, 8, and bars, 7, to intermediate bands, 2, connected diagonally with triangular-shaped front pieces, 3, having vertical meeting edges, 4, converging sides, 5, and curving top edges, 6. Here are the specification and claims:

"My invention relates to a design for a belt, and its essential features reside in the shape or configuration of the parts combined to produce a pleasant entirety. Reference is had to the accompanying drawings, in which figure 1 is a front elevation of the belt, substantially as it appears in use; and Fig. 2 is a side elevation of the same, showing it at full length. The essential

features of my design reside in the central, panel-like part, 1, the intermediate bands, 2, and the end triangular-like parts, 3, having substantially vertical meeting edges, 4, disposed, as in Fig. 1, in line with the part, 1, converging sides, 5, and downwardly and inwardly curving top edges, 6. At 7 are bars from which extend links, 8, to the part, 1. The belt is so shaped or designed that when the parts 3 are placed together, as in Fig. 1, the central front portion will have a dip downward, the outer ends of the bands, 2, being secured to the parts, 3, at an angle to the edges, 4. Having described my invention, I claim the design for a belt, substantially as herein shown and described."

The principal things are the downward dip in front, which appears to have been old, and the shape of the triangular front pieces to produce it by the angular attachments to the bands. This effect is mechanical. Design patents cover appearances only. A monopoly of operating devices can be secured only by a mechanical patent. The belt complained of does not have the bars and links at the back, nor anything in common with the patent in front, but the downward dip produced by the triangular pieces and their diagonal attachment to the bands. So there is nothing in controversy here but the appearance of the belt as a whole, due to the downward dip in front, which is not novel or patentable. As now considered, there is no ground for equitable relief.

Bill dismissed.

FULLER v. GILMORE et al.

(Circuit Court, S. D. New York. December 23, 1902.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The rule of practice that a preliminary injunction will not be granted against infringement of an adjudicated patent, unless long acquiescence is shown, applies only in cases where there is some question as to the validity of the patent. When it appears to be novel, useful, and ingenious, and there is no evidence at all assailing its validity, or where the evidence of the prior art is wholly unpersuasive, the presumption arising from the issue of the patent is sufficient to warrant injunctive relief.

2. SAME—STAGE APPLIANCE.

The Fuller patent, No. 643,493, for a stage appliance to simulate a fire, held valid, on a motion for a preliminary injunction.

In Equity. Suit for infringement of letters patent No. 643,493, for a stage appliance, granted to Ida M. Fuller November 10, 1899. On motion for preliminary injunction.

Clifton V. Edwards, for the motion.

Louis C. Raegener, opposed.

LACOMBE, Circuit Judge. Suit is brought to enjoin infringement of complainant's United States letters patent for a theatrical appliance—No. 643,493; February 13, 1900; application filed November 10, 1899. The claims relied on are:

"(1) In stage appliances, an open-work base, streamers attached to said base, and means for directing currents of air to the base and for illuminating streamers through the base.

"(2) In stage appliances, a foraminated structure, streamers connected thereto, fans beneath the foraminated structure, arranged to concentrate air—

currents thereon, and an illuminating device, the delivery whereof is directed to the aforesaid foraminated structure."

By this appliance, as the specifications point out, "the effect of a fierce fire may be produced upon a stage, or wherever else desired, without the possibility of injury to the surroundings, or to any person appearing to be in the midst of the flames and apparently handling the tongues of fire, or moving in close proximity thereto." "The stage is provided with an opening, at which opening a gridiron or screen is secured, serving as a partial cover for said opening." Strips of a translucent or a transparent fabric are fastened at their lower ends so as to come over the meshes of the gridiron. They are "preferably tapering, although they may be given any desired shape." They are of colors approximately the color of flame, are entirely free above the point to which they are attached, and are capable of waiving, fluttering, or curling when subjected to a suitably directed blast of air. This blast of air is produced through the medium of fans, whose position may be changed as may be found necessary to direct the streamers in a proper direction. The streamers are placed sufficiently close together to collectively form a column or volume of strips when the strips are under the influence of the air-supply, but the spaces between the said strips are sufficiently great to permit each individual strip to wave independently in front of or at the back or side of an adjacent strip. The illusion of fire is produced by directing rays of light upward through the screen or gridiron, and upon and through the mass of waving strips. Various colors or shades of color may be imparted to the light supplied to the strips or streamers, thus indicating the changes of colors in a leaping flame. The effect of sparks is obtained by introducing small bits of paper, cardboard, or the like, suitably colored, between the currents of air and the screen or gridiron, whereupon the said currents of air will carry these small pieces of colored material up through the meshes of the gridiron, and as soon as they are freed from the influence of the air blast the said pieces will fall to the stage, where their smooth surfaces and glittering color will continue to sparkle when the light is turned on or changed on the screen.

Defendant calls attention to the circumstance that the patent has never been adjudicated, and is of such recent date that long acquiescence cannot be shown, as sufficient ground for refusing preliminary injunction. The practice referred to is followed in this circuit, but only in cases where there is some question as to the validity of the patent. When the specification shows that, assuming facts of common knowledge, it will probably need some affirmative evidence to indicate the presence of invention, or when some testimony put in by defendant as to the prior state of the art, slight though it be, indicates that there may be some arguable question as to validity, or as to a construction of the claims broad enough to cover the device complained of, then preliminary injunction on affidavits is refused. But where the patent appears to be novel, useful, and ingenious, and there is no evidence at all assailing its validity, the presumption arising from issue of letters patent will be sufficient to warrant injunctive relief. The same rule should apply where the sole evidence as to prior art is wholly unpersuasive.

It seems manifest from the patent itself that the device of complainant must produce a highly realistic simulation of a raging fire. The avidity with which it has been seized upon by defendants and by others confirms this inference. It is common knowledge that those who produce theatrical representations are solicitous to effect such simulations. For years it has undoubtedly been a desideratum to find appliances which would impress an audience with a belief that they were looking at a real fire, and at the same time be wholly without risk of causing a conflagration. Other appliances have been tried for years, some more effective than others, but never before, so far as the record shows, has the illusion of leaping flames been effected by a combination of colored streamers, an air blast, and appropriately applied illumination. In the device employed by an earlier "fire dancer," which was before this court in *Fuller v. Bemis*, 50 Fed. 926, the waving draperies of the performer, agitated solely by her own movements, were illumined, as in the device in suit, by colored lights cast up from beneath the stage; but there was no air-blast, the aperture for light being covered with a plate of glass. An English patent to Plunkett (No. 24,807 of 1893) describes apparatus for producing "an effect of dancing upon water or in space." A mirrored floor is employed, properly lit and curtained; and, when wind effects are desired, air is introduced at the side of the apparatus, "blown in upon or underneath the drapery of the dancing figure, so as to give a floating effect in space. This air will, for preference, be warm, and forced in by gentle pressure through the agency of a descending cylinder, with a weight attached." All these appliances are very far removed from that of the patent in suit, and the circumstance that during the years since they were introduced they indicated to no one the complainant's method of securing an effective and safe simulation of fire, while during the same period representations of a conflagration were being constantly produced on the stage, is most persuasive as to the patentable invention involved in complainant's simple, effective, and ingenious appliance.

The patents to Sherwood (661,426) and to Carter (662,708) are both subsequent to complainant's; the respective dates of application being July 31, 1900, and January 22, 1900. There is no evidence produced on this motion of knowledge and use prior to the date of complainant's application, and the circumstance that one or both of the subsequent patentees last above named has brought or threatened suit against defendant is no answer by him to the present application. Infringement is entirely clear, and a preliminary injunction should issue. In view of the circumstance that defendants have invested a great deal of money in the production of a play in which the representation of a raging fire is a prominent feature, a reasonable time should be allowed them to substitute some of the earlier appliances for those of the complainant as the means of producing such effect. The operation of the injunction will therefore be suspended 10 days from the signing of the order. This decision is without prejudice to a motion to dissolve the injunction should defendant be able to produce any prior patents or publications which may indicate that the novelty or patentable invention of the complainant's appliance is fairly questionable.

MORTON TRUST CO. v. AMERICAN CAR & FOUNDRY CO

(Circuit Court, D. New Jersey. February 24, 1903.)

1. PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

While a bill for infringement of a patent is sufficient in form, on demurrer, if infringement is alleged in general terms without specifying the particular claims supposed to be infringed, yet where the patent sued on contains a large number of claims relating to different details of construction, the court, on motion, may properly require the complainant to specify the particular parts of defendant's structure claimed to infringe, and the claims upon which the allegation of infringement is based.

In Equity. Suit for infringement of patent. On motion by defendant to have the charge of infringement in the bill made more specific.

Paul Bakewell, for the motion.

W. C. Strawbridge, opposed.

ARCHBALD, District Judge.* A bill for the infringement of a patent is undoubtedly sufficient in form, on demurrer, if infringement is alleged in general terms, without specifying the particular claims against which the defendant is supposed to offend. 3 Robinson on Patents, 430; American Bell Telephone Company v. Southern Telephone Company (C. C.) 34 Fed. 803. This is a long-established practice, and is not now open to question, although it has been reluctantly followed in several cases. It probably comes down to us as a precedent from the day when patents were general in form, and no specific claims, as now, were formulated. But this is not a demurrer, but simply a request for more particulars. The patent in suit is made up of 28 separate claims, each of which has to do with details of construction in a metallic railway car. The defendants may infringe them all if they infringe any, but it is not likely, nor to be assumed; and to prepare for defense to such an omnibus charge is necessarily burdensome. On the other hand, it is no hardship on the plaintiffs to compel them to specify. They are supposed to have definite information as to the extent and character of the defendants' infringement, and are not entitled to begin proceedings without it. Every patent suit, as a rule, comes down to the assertion of some one claim or group of claims, and where, as in the present instance, the claims are exceedingly numerous, the narrowing process ought to begin as soon as possible. Not only is this for the relief of the defendant, but it operates to prevent the accumulation of a voluminous and unnecessary record for the court to labor with. Nor is the present motion without authority to sustain it (Russell v. Winchester Repeating Arms Company [C. C.] 97 Fed. 634); and, while the practice may not have been adopted in this circuit (Johnson v. Columbia Phonograph Company, 106 Fed. 319), the present seems an appropriate time in which to do so.

It is therefore ordered that the plaintiffs within 30 days from this date specify the particular parts of the defendants' car or car construction that are relied upon as infringements of the patent in suit, and

* Specially assigned.

the several claims which they are alleged to infringe, the defendants to be allowed 30 days thereafter to make answer; and if the plaintiffs subsequently, and before their evidence in chief has been closed, shall ascertain that other claims than those so specified have been infringed, and should have been included, they may apply to the court for leave to enlarge and amend accordingly.

EVANS v. NEWARK RIVET WORKS et al.

(Circuit Court, D. New Jersey. August 27, 1902.)

1. PATENTS—INFRINGEMENT—FERRULE FOR UMBRELLAS.

The Evans patent, No. 410,828, for a ferrule and point united by a dovetailed joint, for use on umbrellas, canes, etc., is entitled only to a narrow construction, limiting it to the specific device shown and described, both the ferrule and tip for such purpose being old in the art; and it is not infringed by a tubular metal umbrella stick having a tip or plug swaged into its lower end, such stick not being the equivalent of the ferrule of the patented combination.

In Equity. Suit for infringement of letters patent No. 410,828, for a ferrule and point granted to Samuel W. Evans, Jr., September 10, 1889. On final hearing.

E. Hayward Fairbanks, for complainant.

Francis C. Lowthorp, for defendants.

KIRKPATRICK, District Judge. The complainant in this suit files his bill charging the defendants with infringement of letters patent of the United States, No. 410,828, granted to him September 10, 1889. The patent relates to a new and useful improvement in ferrules for umbrellas, canes, etc., and the invention is said to consist of a "ferrule having a point or tip connected with the same by means of a dovetailed joint, the same being formed by a neck on said point and the metal of the ferrule embracing said neck." The claims of the patent are three in number: (1) "A ferrule and point connected by a dovetailed joint, substantially as described;" (2) "a ferrule in combination with a point, the latter having an inverted tapering neck and the former embracing said neck, substantially as described;" (3) "a ferrule in combination with a point, the latter having an inverted tapering neck and a shoulder at the narrow part thereof, the lower end of the ferrule resting against the neck, and the adjacent portion thereof bent upon said neck, substantially as described." The completed device consists then of two parts, both of which were old and well known in the arts—the ferrule and the point. The invention consists of the manner in which the elements are put in combination and applied to the purpose intended, viz., of affording a simple, inexpensive, and durable device for protecting the ends of umbrella sticks, canes, etc.

While the claims of the patent are three in number, they all refer to one and the same subject-matter of invention, and are comprised in the first claim, "a ferrule and point connected by a dovetailed joint."

It is apparent, from an inspection of the record and the patents therein offered in evidence, that the patent in suit is not in any sense a pioneer patent, and that, in view of the state of the art, it is not entitled to a liberal construction, but should be limited to the specific device shown in the drawings and described in the claims.

As early as 1880 one Muller obtained, in Germany, German letters patent No. 11,347, for an improvement in cane-ferrules, which consisted of the "setting in of a forged steel bottom, provided with a groove, into a cane-ferrule, by pressing the ferrule band into the groove." And in the same year British patent No. 4,641 issued to one Lusher for improvements in ferrules for umbrellas, parasols, and walking sticks, which was a combination of a ferrule consisting of a hollow cylindrical tapering tube extended beyond the barrel of the ferrule. This tip was held firmly in place, "its descent in the tube being prevented by the conical figure of the tube and tip, and its rising prevented by the internal shoulder above the tip." Ferrules for umbrellas and canes were well known to the trade long before the complainant's new and useful improvement was devised. They were also made in combination with an iron tip, as we have seen by the reference to the British patent No. 4,641.

At the time of the complainant's invention, ferrules for umbrellas and canes had a well-recognized meaning in the trade. The handles of umbrellas, as well as of canes, were for the most part made of wood, and the ferrule was the metal cap or attachment placed on the end, which came in contact with the ground, and was intended to prevent the wear and splitting of the stick. This meaning is in accordance with the definitions given by the various lexicographers. I quote from the Century Dictionary: "A ring or cap of metal put on a column, post, or staff, as on the lower end of a cane or umbrella, to strengthen it or prevent it from splitting." That this was the sense in which the word ferrule was used by the patentee is apparent from the drawings which accompany the application for the patent, and which became a part of the specification.

I, therefore, am of opinion that the subject-matter of the patent is a ferrule of a kind adapted for use on umbrellas and canes, and of the precise form described in the specification; a ferrule composed of a hollow metallic tube adapted to fit over and be attached to the end of an umbrella or cane, together with the metallic or steel point or tip which is inverted in one end.

The defendants' structure consists of a tubular metallic rod, suitable in length for an umbrella stick, one end of which is finished in a manner adapted to have attached thereto a suitable handle, and the other has inserted therein a neatly fitted steel wire plug, which, when fastened, constitutes the point of the stick. These plugs or "bullets," as they are technically termed, inserted in the sticks, are taken to a swaging machine, where the end of the tube is closed so as to securely fasten the shank of the plug within the swaged-down end of the tube. This swaging operation, as conducted by the defendants (I quote from the brief of defendants' counsel), "upon a tube of harder and a plug of softer temper, very naturally produces more or less of a taper in the shank of the plug, and that taper gives to the plug a conical neck

differing only in degree of taper from the conical neck of the point of complainant's patented ferrule."

When finished, the defendants have not a ferrule, but a completed umbrella-rod, for which no "ferrule" is required. True, the rod has a steel or iron point at the end to prevent wear thereof, but it is not attached to the rod in combination with a ring or cap of metal, which is one of the elements of the complainant's combination. It is clear to my mind that the structure used by the defendants was not in the contemplation of the complainant when he made application for an improvement in ferrules for umbrellas and canes. The complainant obtained a patent for an improved ferrule which consisted of a ferrule such as was and had been well known in the art, having in combination therewith a steel point connected to the ferrule by a dovetailed joint. This ferrule, when so made, was a complete entity, and was serviceable only when attached to the stick of an umbrella or cane.

Inasmuch as the umbrella-rod of the defendants has no such attachment, I am of opinion that it does not infringe any of the claims of the complainant's patent, and that for that reason the bill should be dismissed.

DADE et al. v. BOORUM & PEASE CO.

(Circuit Court, S. D. New York. January 2, 1903.)

1. PATENTS—SUIT FOR INFRINGEMENT—SUFFICIENCY OF SPECIFICATION.

Whether the specification and drawings of a patent are sufficiently full, clear, precise, and exact to enable persons skilled in the art to understand them is a question of fact which cannot be determined on a demurrer to a bill for infringement.

2. SAME—MARKING ARTICLES AS PATENTED.

Under Rev. St. § 4901 [U. S. Comp. St. 1901, p. 3388], which prohibits the marking of articles not patented as patented under a penalty, the fact that such mark is placed on a part of the patented article which is not covered by the patent does not render the patent invalid.

In Equity. Suit for infringement of patent. On demurrer to bill. Nicholas M. Goodlett, Jr., for plaintiffs.
A. Parker Smith, for defendant.

WHEELER, District Judge. This bill is brought upon patent No. 555,930, dated March 10, 1896, for a "binder and sheets therefor," consisting of a back and peculiarly constructed posts and fastenings for sheets, with open and closed perforations for the posts, arranged for convenient removal of single sheets from anywhere in the pile. It alleges marking the binders, and printing "Pat. March 10, 1896, for Dade Binder," upon the sheets. The defendant has demurred, assigning in substance, for cause, that the specification is not sufficiently "full, clear, precise, and exact," and that this marking of the leaves is illegal.

The arrangement of posts and fastenings is somewhat complicated, and some of the letters of reference to the drawings are misplaced, causing literal confusion; but careful reading and examination would or might show persons skilled in this art, and perhaps others, that

these were mistakes, and what was actually intended; and that would be all that is required. At least, the specification and drawings are not so meaningless that it can safely be assumed that persons skilled in the art cannot understand them; and whether they can or not is a question of fact which cannot be determined on demurrer.

The sheets are mentioned in the title at the head of the patent, in the specifications, and as parts of the combinations of several of the claims. The prohibition of marking articles not patented as patented, with penalty, is limited to "the purpose of deceiving the public." Rev. St. § 4901; 3 U. S. Comp. St. 1901, p. 3388. It does not provide for invalidating the patent by the marking. If it did, the bill does not allege any purpose of deceiving the public, and that cannot be inferred on demurrer. This is, as alleged, all subsequent to the patent, and would not of its own effect invalidate that.

Demurrer overruled; defendant to answer over by February rule day.

HUNTINGTON DRY PULVERIZER CO. et al. v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court, D. New Jersey. September 22, 1902.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement will not be granted where, before the determination of the motion therefor, the patent sued on has expired.

In Equity. Suit for infringement of patents. On motion for preliminary injunction.

Frederick S. Duncan, for complainants.

Hoke Smith, for defendant.

KIRKPATRICK, District Judge. The bill of complaint in this cause, filed June 11, 1902, seeks injunctive relief against the defendant on the following statement of facts: Frank A. Huntington, on or about May 8, 1883, obtained United States letters patent No. 277,134 for a new and useful improvement in crushing mills, and afterwards, on or about September 8, 1885, obtained another patent, No. 325,804, for a further improvement in crushing mills, said improvements being capable of joint use. Machines known as "Narod Mills," embodying the devices of both of the Huntington patents, were manufactured and extensively put upon the market. On or about November 20, 1898, a bill of complaint was filed in the United States Circuit Court for the First Circuit by the patentee above named or his assigns against the manufacturers of the said Narod Mills, and upon a final hearing of the cause (*Huntington Dry-Pulverizer Co. v. Newell Universal Mill Co.* [C. C.] 109 Fed. 269), and on about April 26, 1901, a decree was entered in said suit adjudging the complainants' patents to be good and valid, and decreeing the Narod Mills to be infringements thereof. Before and at the time the said decree was rendered the defendants herein were users of a large number of the infringing Narod Mills, and the allegation was that at the time of filing

¶ 1. See Patents, vol. 38, Cent. Dig. § 491.

this bill of complaint they were still users of the same. The court thereupon granted a rule to show cause why the preliminary injunctive relief prayed for in the bill should not be granted, and upon the return of this rule an adjournment was had by consent of parties, and further time granted within which brief might be filed, so that before the briefs were received by the court and time had for consideration of the same the exclusive right granted by the patents to use the devices described therein had expired.

The defendants, on the hearing, submitted answering affidavits in which they allege that, so soon as the decree above referred to was entered, they set about stripping their Narod Mills of the devices adjudged to be infringements of patent No. 325,804 (the only one then in force), so that at the time of the filing of this bill the Narod Mills used by them did not infringe the claims of the complainant's patent. But if this were not so, and the facts were as outlined above and stated in the bill, the court would feel constrained to refuse the preliminary injunction prayed for, because both the patents upon which the complainants rely have expired and ceased to be operative.

Let an order refusing the preliminary injunction be entered.

SCHLICHT HEAT, LIGHT & POWER CO. v. ÆOLIPYLE CO.

(Circuit Court, S. D. New York. January 2, 1903.)

1. PATENTS—VIOLATION OF INJUNCTION—PROCEEDING FOR CONTEMPT.

On a motion to punish for contempt in violating an injunction against infringement, doubtful questions are not to be resolved against the respondent.

In Equity. On motion to punish for contempt in violating an injunction issued under opinion at final hearing. 117 Fed. 299.

Kenyon & Kenyon, for the motion.

Betts, Betts, Sheffield & Betts, opposed.

LACOMBE, Circuit Judge. A large part of the affidavits and of the argument seems to be directed to a rediscussion of the questions passed upon at final hearing, which need not now be re-examined. The decree forbade infringement of the patent, with the proviso that it was "not intended to restrain the use of defendant's device, apparatus or æolipyle, when placed at the smoke-collar of a furnace or stove or within six inches therefrom." Judge Coxe interpreted this clause as meaning—it seems not susceptible of any other interpretation—that "if defendant uses the æolipyle at the smoke-collar of a stove or furnace or within six inches of such collar it does not infringe; if, on the other hand, it uses the æolipyle at a greater distance than this, it does infringe."

The only questions here presented are: What is the æolipyle? What is the smoke-collar? Within what distance of each other are they placed?

Dealing only with the concrete case now presented, the solution of the problem is simple; but the expressions of opinion on this mo-

tion are to be read as confined only to the concrete case now under discussion.

The æolipyle is a complete structure adapted to be inserted in a smoke-pipe or at the lower end of a smoke-pipe. The shell or jacket in which the perforated damper works is part of the apparatus. This statement does not import that the shell may be elongated arbitrarily on the combustion side. In the devices as made up and sold before suit was brought, the shell extended in that direction $1\frac{3}{4}$ inches—not an unreasonable amount to secure their affixing and allow free play to the perforated damper—and no change has been made in that length. The Zucker installment complained of does not exceed that limit.

The smoke-collar of a furnace, for the purposes of this motion, may be taken to be located at the place where the products of combustion have ceased to do work as useful heat producers, and are passing forth as waste products to be eliminated. Complications of the problem resulting from structural details of brickwork, etc., are out of this concrete case, for here that line of demarkation is readily accessible and easily located. The complainant does not claim that such line, in this case, lies any nearer the combustion chamber than the shell of the boiler. In making this statement the court has not overlooked the argument of complainant that the æolipyle must, if it would escape infringement in the case of a furnace, be located much nearer the combustion chamber; but when the court held that infringement could not be predicated of the device when placed on the smoke-collar of a furnace, with long and tortuous radiating flues between it and such chamber, that point was eliminated from the problem now before us. The place where the products of combustion pass out from their field of useful activity to the conduit which discharges them is a hole. Through that hole in the structure complained of there projects a short section of pipe, fastened to the shell which encases the structure in which heat is generated by combustion and accomplishes its work. This short stub of pipe—it is six inches long—was not devised with any regard to the patent nor with any intent to evade the injunction. Manifestly, it is a collar—much more of a collar than the hole is—adapted to have a pipe applied to it, and seems fairly to be such a smoke-collar as the court had in mind. To what extent such a stub would have to be elongated in order to escape classification as “collar” we need not now inquire, no such question is presented in this case.

Upon motion to punish for contempt, doubtful questions are not to be resolved against the respondent, and, when it appears that the distance from the furthest end of the collar to the nearest end of the æolipyle is not greater than the six inches allowed by the injunction, such motion should be denied.

In re H. J. QUIMBY FREIGHT FORWARDING CO.

(District Court, D. Massachusetts. February 14, 1903.)

No. 6.615.

1. BANKRUPTCY—CORPORATIONS—PURSUITS—TRADING.

The purchase by a freight forwarding company of horses, hay, wagons, harnesses, etc., necessary to carry on its business, and the occasional incidental sale of horses and wagons, does not transform it into a trading or mercantile company, within the meaning of section 4 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), providing that "corporations principally engaged in * * * trading * * * or mercantile pursuits" shall be susceptible to bankruptcy.

2. SAME—STATUTORY PROVISIONS—INTERPRETATION—FORMER PROVISIONS.

The difference in language between the act of 1867, which provided for the bankruptcy of "all monied business or commercial corporations," and section 4 of the act of 1898 (act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), providing for the bankruptcy of corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," implies an exclusion of some corporations under the act of 1898, which were within the purview of the former act.

3. SAME—CHARTER PROVISIONS.

While the susceptibility to bankruptcy of a corporation does not depend wholly on its charter, yet it can hardly be brought within the scope of the act by a principal business outside its charter; and therefore a company whose only authorized business is that of a carrier, is not susceptible to bankruptcy on the ground that its principal business is in fact that of a trader.

4. SAME—PRINCIPAL BUSINESS.

A corporation whose business was chiefly that of a carrier, and to a less degree that of letting teams by the hour, day, or week, with a subordinate business of taking horses to board, cannot be held to have been principally engaged in trading, within the meaning of section 4 of the bankruptcy act of 1898 [U. S. Comp. St. 1901, p. 3423].

5. SAME—AMENDMENT TO ACT.

The interpretation of the bankruptcy act of 1898 [U. S. Comp. St. 1901, p. 3418], giving the words "trading" and "mercantile" a narrower meaning than "monied business or commercial," as used in the act of 1867, is strengthened by the adoption of the recent amendment, wherein by specific language "mining" is added to the "pursuits" rendering corporations susceptible to bankruptcy.

In Bankruptcy.

Allin & Thompson and B. Marvin Fernald, for petitioning creditors.

Frank H. Stewart, for objecting creditors.

LOWELL, District Judge. The respondent in this case was incorporated as a "common carrier of property or persons." Some of its officers testified that a large part of its business was the buying and selling of horses, hay, grain, wagons, harnesses, etc., and that most of its business was outside the usual business of a common carrier. An examination of the books, which were not produced before the referee, leaves little weight in this testimony. The cor-

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

poration bought the articles above mentioned, as every express company and every carrier of this sort must do. These purchases do not make a carrier into a grain merchant any more than the necessary purchases of a hotel make it into a grocery or a dry goods store. Horses and wagons were sold now and then, but only as an incident of the general business. No sales of grain have been pointed out. The corporation did board a good many horses not its own, and let out teams on hire by the day or week, apparently as a part of its regular business. The court has to consider if a corporation, chartered as a carrier, but which also lets teams for hire, and takes horses to board, is within the terms of section 4 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]).

Section 4 of the bankrupt act speaks of corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits." The respondent corporation is not principally engaged in manufacturing, printing, or publishing pursuits. If it is within the act at all, this is because its pursuits are trading or mercantile; and for the purposes of this case, the word "mercantile" adds very little to the word "trading." Is the respondent principally engaged in trading pursuits? Is it a trading corporation? In interpreting the words "trading" and "trader," regard must be had both to the history of the present bankrupt act and to the law of bankruptcy in general. The act of 1867 was wider in its scope than the act of 1898 [U. S. Comp. St. 1901, p. 3418], and provided for the bankruptcy of "all monied business or commercial corporations and joint-stock companies." The marked difference of language in the two acts should be given some effect, and some corporations within the purview of the earlier act are without the purview of the latter.

The present respondent was incorporated to carry on the business of a common carrier of persons and property. The susceptibility to bankruptcy of a corporation does not depend wholly upon its charter. This is clear, both from the language of the act, which speaks, not of a corporation's charter powers, but of the business in which it is principally engaged, and also from the decided cases. A corporation may have charter power to do that which is not its principal business, but a corporation can hardly be brought within the scope of the bankrupt act by a principal business which is beyond the authority given by its charter. No case and no theory has ever treated the business of a common carrier as that of a trader, and the only authorized business of this respondent was that of a common carrier. This consideration may be sufficient to dismiss the petition, but the same result will be reached if the actual principal business of the corporation is considered. This has been already stated. Its actual business was chiefly that of a common carrier, and in less degree that of letting teams by the hour, day, or week, with a wholly subordinate business of taking horses to board. All the other transactions proved were purely incidental. Bearing in mind that the act of 1898 was intended to exclude from bankruptcy some corporations susceptible of bankruptcy under the act of 1867,

and that "trading" is a technical word, this respondent cannot be held to have been principally engaged in trading. In re Surety Guarantee & Trust Co., 9 Am. Bankr. R. 129, 121 Fed. 73.

Mining comes much nearer to trading than does the business of the respondent, but a mining company has generally been held to be excluded from the scope of the present bankrupt act. In re Woodside Coal Co. (D. C.) 105 Fed. 56; In re Chicago-Joplin Co. (D. C.) 104 Fed. 67; In re Elk Park Mining Co. (D. C.) 101 Fed. 422; In re Keystone Co. (D. C.) 109 Fed. 872. This interpretation of the act is rather confirmed by the amendment just adopted by Congress. Mining companies are there brought within the act, not by the use of broad general language, but by the addition of "mining" to the "pursuits" mentioned in the original act. "Expressio unius est exclusio alterius." The positive inclusion of mining companies, and mining companies alone, indicates a recognition by Congress that the words "trading" and "mercantile" in the original act were not intended to be the equivalent of "monied business or commercial" in the act of 1867. The decided cases are to the same general effect. A theatrical company has been held not susceptible of bankruptcy. In re Oriental Society (D. C.) 104 Fed. 975. Nor is a water company, which buys and sells water as a part of its regular business. In re New York Water Co. (D. C.) 98 Fed. 711. A saloon is excluded. In re Chesapeake Oyster Co. (D. C.) 112 Fed. 960. And a club. Fulton Club (D. C.) 113 Fed. 997. Almost directly in point is the decision of the District Court of the Eastern District of Pennsylvania in Philadelphia Transportation Co., 114 Fed. 403.

It is true that there are some cases which take a broader view of the act. San Gabriel Sanatorium Co. (D. C.) 95 Fed. 271, holds that a sanatorium conducted for profit is within the meaning of the act; but this case has been frequently disapproved. In re Morton Boarding Stables (D. C.) 108 Fed. 791, expressly follows In re Odell, Fed. Cas. No. 10,426, in holding a livery stable keeper a trader. Evidently the learned judge yielded to authority rather than was convinced as a matter of principle. The authority in this district is the other way. See In re Smith, 2 Low. 69, Fed. Cas. No. 12,981. In Re Mutual Mercantile Agency (D. C.) 111 Fed. 152, a mercantile agency was held to be within the scope of the act, apparently because its principal business was printing and publishing a book of ratings. While this court may think it advisable that corporations like the one here in question should be brought within the scope of the bankrupt act, it must be guided by what Congress has said, and not by its own view of public policy.

The petition is dismissed, with costs.

In re JOSEPHSON.

(District Court, S. D. Georgia, W. D. February 17, 1903.)

1. BANKRUPTCY—LIFE INSURANCE POLICY—ASSETS—EXEMPTIONS.

Where an ordinary life insurance policy of a bankrupt has been pronounced valueless by the trustees in bankruptcy, and turned over to him without an order of the court, and he thereafter, by himself or his wife, pays the premiums thereon for about 15 months, and dies at the expiration of that time, the court will not require that the proceeds of the life policy be paid over to the trustees. The rule might be otherwise with endowment or tontine or other investment policies which have a determinable value.

2. SAME.

By section 70a, cl. 5, Bankr. Act 1898 (30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]), Congress expressed the purpose that after the payment of the cash surrender value of a policy, or, where there is no cash surrender value, the bankrupt may be entitled to hold, own, and carry such policy free from the claims of creditors.

8. SAME—SURRENDER TO BANKRUPT.

Where trustees have recognized that there is no cash surrender value, and have turned over the policy to the bankrupt without an order of court, the court, when that is made to appear, will approve such action *nunc pro tunc*.

4. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

By Bankr. Act 1898, § 21, cl. "a" (30 Stat. 551 [U. S. Comp. St. 1901, p. 3430]), the competency of a witness before the bankruptcy court must be determined by the laws of the state in which the proceedings are pending. By this test, under the law of Georgia (Code, § 5269), the trustees in this case cannot testify to give their personal recollection of transactions or occurrences with the bankrupt on the trial of a suit brought by them against his widow.

(Syllabus by the Court.)

In Bankruptcy. Petition of Rosa Josephson, executrix, for review of referee's finding relative to insurance policies of deceased bankrupt.

John P. Ross and Walter J. Grace, for executrix Rosa Josephson.
F. C. Foster and George S. Jones, for trustees.

SPEER, District Judge. The bankruptcy act provides:

"That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." Bankr. Act 1898, § 70a, cl. 5 (30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]).

Josephson was a bankrupt. He had two insurance policies. They were ordinary life policies, payable to his legal representatives. It does not appear from the face of the policies that they had a cash surrender value, but, on the contrary, it appears from the testimony of the agent of the insurance company that at the time of bankruptcy these policies were wholly valueless. They were, therefore, not to be regarded as an asset for creditors, and the trustees (it is true, without an order of the court) turned over these policies to Josephson. One of the trustees has testified that the estate was insolvent; that he had

no means of paying the premiums upon the policies; that it would have been onerous, and, in his judgment, unwise, to do so; and the court therefore has the right to conclude that the trustees would not have been justifiable, in any sense, in attempting to hold these policies, and to pay these premiums. If application had been made to the court at the time to ratify the delivery of these policies to Josephson, there is no doubt that the court would have approved it. They were turned over to Josephson, and this action of the trustees is now approved and sanctioned. There had been two appraisements of the values of this estate; and, although they had been placed in the schedules by the bankrupt, in neither appraisement were these policies mentioned. The trustees therefore must have regarded them as worthless. The fact that they were turned over to Josephson raises the strong presumption that they were regarded by the trustees as valueless, and unworthy of consideration as a part of the assets to be distributed to creditors. Thereafter (pending the bankruptcy, it is true) Josephson, or more probably Mrs. Josephson, continued to pay the premiums on these policies, and then Josephson died. After his death it is now discovered that these policies are an asset of the estate, and this proceeding is brought to compel his widow and executrix to pay over the amount recovered on these policies to be distributed to the creditors. The court is not able to agree with the conclusion of the referee that this ought to be done. We think that by a fair construction of this act it was clearly the intention of Congress to exempt, under the conditions stated, the interest which the bankrupt and his family or legal representatives have in his insurance policies, and in a proper way to protect that as against the demands of creditors. That is particularly true with regard to an ordinary life policy of this character, which can have no value at all, except that which is dependent upon the continued payment of premiums by the bankrupt. He may decline to pay premiums, and that would end the matter. If he continues to pay premiums after adjusting the cash surrender value, if there be such value, that being entirely optional with him, he is in that event saving a remnant of his estate, which Congress intends he shall be permitted to do in general furtherance of the policy for which a discharge is granted. If there be no cash surrender value, he is, a fortiori, entitled to keep his life policy. The proceeds of such an insurance policy, especially when it has been redelivered to him by the trustees, on his death should redound not to his creditors, but to his family. The fact that there is no cash surrender value to these policies does not then alter this rule at all. If, however, the trustees will now undertake to show that there is a cash surrender value, the court will permit them to do so, and will, if they succeed in this, require the cash surrender value to be paid out of the proceeds of the policy; otherwise, in the opinion of the court, the whole proceeds must be paid to Mrs. Josephson as executrix.

Upon the hearing before the referee the trustees were permitted to testify that Josephson, when in life, had told them that the policies had lapsed, and were, therefore, valueless, and that on account of this assurance they were surrendered to him. They confess that they made no further inquiry as to this statement, although the office of the agent

of the insurance company was easily accessible. The competency of these witnesses was objected to by the counsel for Mrs. Josephson. The law upon this subject is stated in section 858, Rev. St. [U. S. Comp. St. 1901, p. 659]:

"In the courts of the United States no witness shall be excluded in any civil action because he is a party or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

In *Mutual Life Insurance Company of New York against Watson*, administratrix, and another, decided in this district in 1887, and reported in 30 Fed. 653, the rule is announced that:

"In a trial between a life insurance company, the administratrix of a deceased policy holder, and a claimant of the fund due on the policy under an alleged assignment, the assignee is incompetent to testify to any transactions with the insured in the lifetime of the latter, either by the law of Georgia (Code, § 3854) or Rev. St. U. S. § 858" [U. S. Comp. St. 1901, p. 659], above cited.

That case was extensively annotated by the editor of the valuable publication in which it appears. It is true that the witness held to be incompetent there was not an assignee in bankruptcy, and the Supreme Court of the United States, in the case of *Hobbs v. McLean*, 117 U. S. 579, 6 Sup. Ct. 870, 29 L. Ed. 940, held that section 858, Rev. St., did not apply to suits by or against assignees in bankruptcy under the act of 1867. It is, however, true that in that case the court seemed of the opinion, under the circumstances, that the privilege of persons otherwise incompetent to testify in a suit brought by or against an assignee was anomalous and improper. "We cannot," said Justice Woods for the court, "insert the exception. When a provision is left out of a statute either by design or mistake of the Legislature, the courts have no power to supply it. * * * Mr. Justice Story, in *Smith v. Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100, observed 'it is not for courts of justice proprio Marte to provide for all the defects or mischiefs of imperfect legislation.' " There is, indeed, no reason in principle why an assignee or trustee in bankruptcy should not stand upon the same plane, as to competency, as witnesses, upon issues of this character with any other legal representatives of an estate. The trustee has a pecuniary interest in suits like that before the court. He has an additional interest in the successful conduct of his trust, always largely estimated by the amount gathered in for the benefit of creditors. He is not less interested, therefore, than an executor or administrator.

The Bankruptcy Act of 1898, § 21, cl. "a" (30 Stat. 551 [U. S. Comp. St. 1901, p. 3430]), seems to have supplied the exception indicated as proper by the decision of the Supreme Court in *Hobbs v. McLean*. This reads:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person including the bankrupt, who is a competent witness under the laws of the state in which the proceedings

are pending, to appear in court or before a referee or judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

It seems, therefore, that the test of competency of witnesses before a court of bankruptcy is the test afforded by the law of the state in which the case is pending. It is equally clear that under the statute of Georgia (Code, § 5269) the trustees in this case could not be heard in their suit against his widow to give their personal recollection of transactions or occurrences with the bankrupt. The argument of counsel for the trustees that the witnesses were competent because they were called upon to testify by the court is not maintainable. They were called by the attorney, as any other witness. There was no special order by the referee. This provision of section 858 was inserted to provide for extreme and special cases which might arise, in which it would be a great hardship not to take such order. It is for the court to suggest that a party be called under such special circumstances. *Eslava v. Mazange's Adm'r*, 1 Woods, 628, Fed. Cas. No. 4,527. The court will not require a person to testify where the state law forbids it. *Robinson v. Mandell*, 3 Cliff. 169, Fed. Cas. No. 11,959.

However, the testimony of the trustees, even if competent witnesses, is not regarded as controlling. After the lapse of 15 months, and after the death of Josephson, it does not matter what the trustees may recall that he said upon this subject. The policies would not have been more valuable to the estate, unless, indeed, Josephson had died, and the policies had matured before the next premium was due and payable. There is no provision of the bankruptcy act which authorizes the trustees to pay premiums on ordinary life policies from the funds in their hands; otherwise such policies would usually constitute a liability of the estate, rather than an asset. This may be different with endowment or tontine policies, which have a determinable value. These are not strictly life insurance policies, but are also investments, and may, therefore, be assets. The trustees, therefore, were quite right in regarding these policies as not an asset, and, since Josephson had the right to demand it, their delivery to him was altogether appropriate.

The unexpected maturity of the policies by which his widow is enabled to secure from the wreck of his fortunes a pittance for herself and her child is not regarded by the court as a favorable occasion for resuscitation of the long dormant activities of these trustees, and for the deprivation of the wife and child of that slender provision for their support, the contemplation of which may have afforded solace to the last moments of the unfortunate husband and father.

Order will be taken accordingly.

In re JOSEPHSON.

(District Court, S. D. Georgia, W. D. March 14, 1903.)

1. BANKRUPTCY—DECISION ADVERSE TO TRUSTEES—PETITION FOR REVIEW—COSTS.

Where the trustees of a bankrupt surrendered a life policy to him as valueless, and he or his wife paid the premiums thereon until his death, such trustees will not be authorized, on application of a majority of the creditors, to pay the costs of a petition to review a decision adjudging that the wife was entitled to proceeds of the policy.

F. C. Foster and George S. Jones, for trustees.

SPEER, District Judge. This is an application on the part of counsel representing what is stated to be a majority of the creditors of the late Simon Josephson, bankrupt. It seeks an order of court to authorize the trustees to pay the cost of a petition to be presented to the Circuit Court of Appeals to review a decision of this court. 121 Fed. 142. That decision, by which certain creditors esteem themselves aggrieved, will be found in the record, and is to the effect following: Where the trustees had surrendered to the bankrupt, as valueless, an ordinary policy of insurance on his life, and he or his wife had paid the premiums thereon for 15 months, at the expiration of which time he died, the wife, who is also executrix, was adjudged entitled to the proceeds of the policy. It appears that the sum of the costs necessary for the petition for review amounts to some \$118.

This does not appear to be a case in which the trustees should be encouraged to protract a litigation which seems to the court as unfounded as it is oppressive. The insurance policies had been frankly scheduled by the bankrupt. In more than one appraisal made by these trustees they were treated as of no value whatever. If the matter had depended on the trustees, who paid no premiums, the policies would long ago have lapsed. They were delivered to the bankrupt, and the trustees paid no further attention to them until they had been made valuable as the result of Josephson's death. It is true that they testified before the referee that Josephson told them that the policies, while in his hands, had been permitted to lapse. This reminiscence had not been offered or suggested until the voice of the bankrupt had been silenced by death, and the court, for the reasons stated in the opinion, regarded this testimony, under the provisions of the present bankruptcy act, as incompetent.

The widow of the bankrupt has been in no sense litigious. Since the policies were payable to the legal representatives of Josephson, and since, at the time of his death and her appointment as executrix, they were found in her hands, placed there, as we have seen, by the voluntary action of the trustees, after Josephson had turned over the policies to them, prima facie the title to the proceeds was in her. She, however, readily consented that the insuring company should pay the fund into court, thus submitting herself to a jurisdiction which might well have been contested. She might well have relied

¶ 1. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

upon her adverse claim. No matter how the case may eventuate, certainly costs cannot be assessed against her.

Nor can it be held, we think, that the insurance company, which also submitted itself to the jurisdiction, should be mulcted with any portion of the cost. This is true also of the creditors who do not join in this application. If the creditors have lost any valuable rights because of these transactions—which, however, we do not think to be the case—it can only be ascribable to the laches or mistaken judgment of these trustees. Since, also, coincident with the death of Josephson, these trustees have undergone a change of heart as to their duty, they should now advance at least the cost necessary to obtain a final determination. Should they prevail in their contention, it will doubtless be competent for the Circuit Court of Appeals or for this court to assess the costs against the assets of the estate.

For these reasons the application of the trustees to be allowed to pay the cost from the assets of the estate now in their hands is denied.

HORSTMANN, VON HEIN & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 13, 1903.)

1 CUSTOMS DUTIES—COTTON VELVET FABRIC TRIMMINGS.

Trimmings cut out of cotton velvet fabric, in various open and scroll work designs and colors, are dutiable as pile cotton fabrics, under the second proviso of paragraph 315 of the tariff act of July 24, 1897 (30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]), and not as cotton trimmings, at 60 per cent. ad valorem, under paragraph 339 (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]).

Albert Comstock, for appellants.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. These are trimmings cut out of cotton velvet fabrics, in various open and scroll work designs and colors, and were assessed as cotton trimmings, at 60 per cent. ad valorem, under paragraph 339 of the act of July 24, 1897 (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]), relating to cotton fabrics, against a protest that they come under the second proviso of paragraph 315 (30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]), relating to cotton pile fabrics. The articles covered by these paragraphs seem to be divided on the line between those that are and those that are not pile fabrics. These trimmings are clearly in the pile fabric class, and not in the other. That proviso covers "manufactures or articles in any form * * * made or cut from plushes, velvets, velveteens, corduroys or other pile fabrics composed of cotton." They seem to fall exactly within that description.

Decisions reversed.

RINEHART v. SMITH et al.

(Circuit Court, E. D. Pennsylvania. March 18, 1903.)

No. 82.

1. COPYRIGHTS—FORFEITURES—ENFORCEMENT—REPLEVIN.

The common-law action of replevin, as it is practiced in Pennsylvania, is not an appropriate remedy by which to enforce the forfeiture provided by Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], which declares that, if any person shall sell or expose for sale any copyrighted article without the consent of the proprietor first obtained, he shall forfeit all the plates on which the same shall be copied, etc., and the legislation supplementary thereto.

Demurrer to Statement.

Henry E. Everding, for plaintiff.

Hector T. Fenton, for defendants.

J. B. McPHERSON, District Judge. For reasons given in *Falk v. Curtis Pub. Co.* (C. C.) 102 Fed. 967, I do not think that the common-law action of replevin, as it is practiced in the state of Pennsylvania, is an appropriate remedy to enforce the forfeiture provided by section 4965 of the Revised Statutes [U. S. Comp. St. 1901, p. 3414], and the supplementary legislation relating to copyright. This is such an action, in which the defendant has given a claim-property bond, and retained the offending articles; and these have thereby become, according to the Pennsylvania law, his indefeasible property. They cannot be forfeited now, even if such a result had ever been attainable in an action of replevin; and therefore, as it seems to me, the suit should be dismissed, because its only object cannot possibly be reached. The act of Congress gives no right to sue for the value of the articles, or damages for their detention, and in Pennsylvania nothing else can now be recovered.

The subject should be dealt with by Congress, so that an adequate and uniform remedy might be provided, and the doubts now existing, concerning the proper method of enforcing the forfeiture, be dispelled. As the matter stands, there is no form of action in Pennsylvania that can be applied without serious modification. The court's power over its own writs may be broad enough to authorize the necessary changes, but federal legislation is obviously the source from which the remedy would come most speedily and satisfactorily.

The seventh and eighth grounds of the demurrer are sustained.

GARRISON, WRIGHT & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 19, 1903.)

No. 2,933.

1. CUSTOMS DUTIES—MANUFACTURES OF SILK.

Garnitures and hussar sets in designs of silk cord and braid, stitched in place in extremes about 16 inches long and 10 or 11 inches wide for the fronts of dress waists, and 24 to 26 inches long and 20 to 24 inches wide for dress skirts, and bought and sold by the piece, are not dutiable as silk trimmings, under Tariff Act 1897, par. 390 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), but as manufactures of silk not specially provided for, under paragraph 391 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]).

Albert Comstock, for appellants.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. These articles, except blouses withdrawn, are garnitures and hussar sets in designs of silk cord and braid, stitched in place in extremes about 16 inches long and 10 or 11 wide for the fronts of dress waists, and 24 to 26 long, and 20 to 24 wide for dress skirts. They have been assessed for duty as silk "trimmings," at 60 per cent. ad valorem, under paragraph 390 of the act of 1897 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), against a protest that they are dutiable at only 50 per cent., as manufactures of silk not specially provided for, under paragraph 391 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]). They appear to be bought and sold at so much apiece, and trimmings as such by measure. Some evidence before the board showed that, in a broad sense, they might be called trimmings. Other evidence there, with all that taken in this court, shows that in trade they are known by their more specific names, and not as trimmings. The division between narrow goods of various kinds sold by measure for elaboration, and those made up and sold separately for ornamentation, seems to prevail in trade; leaving the former as trimmings, and the latter not. The dropping of the word "ornaments" from the act of 1897 [U. S. Comp. St. 1901, p. 1626], does not indicate that what would be ornaments are to be trimmings, rather than manufactures or anything else, for which apt words are retained, or otherwise seem to show that the well-established distinction between trimmings and other articles was intended to be removed.

Decision reversed.

THE C. J. RENO.

(District Court, N. D. New York. February 27, 1903.)

1. COLLISION—STEAMER AND FERRYBOAT CROSSING—VIOLATION OF RULES.

A ferryboat was crossing the Hudson river to Albany on her usual course, which was slightly down the river, when a steamer with tows was coming up near the west side. The ferryboat gave a signal of one whistle, indicating her intention to keep her course, which she had a right to do as the privileged vessel, and after stopping and receiving no answer she proceeded. The steamer neither saw the ferryboat, although in plain sight, nor heard her signal, and kept her course until it was too late to avoid collision. *Held*, that the steamer was in fault for

negligent navigation, and the violation of rule 2 of the navigation rules, which required her, having the ferryboat on her own starboard side, to keep out of the way and direct her course to starboard; that the ferryboat was not in fault, being the privileged vessel, and required by the same rule to keep her course and speed.

In Admiralty. Suit for collision.

Worthington Frothingham, for libellant.

J. M. & J. A. Lawson, for respondent and claimant.

RAY, District Judge. The libel in this case was filed April 9, 1902. On the 3d day of April, 1902, the libellant, Edward C. White, was the owner of a ferryboat, the Maid of Perth, and engaged in making regular trips across the Hudson river from Bath on the Hudson, or Rensselaer, to the city of Albany. Bath is on the easterly side of the river, and Albany on the westerly side. The ferry slips at these points were nearly opposite, the slips at Albany being in the neighborhood of 300 feet southerly of that at Bath, or Rensselaer. At this place the river is about 1,255 feet in width, and the trip across the ferry occupies about $2\frac{1}{2}$ to 3 minutes under ordinary circumstances; on this occasion, owing to a flood, probably about 5 minutes. The ferryboat Maid of Perth took her usual course across the river, and the tug, being on its way up the river with its tows, three canalboats, and on the west side, was in, or soon would be in or across, her course. The ferryboat blew one blast of her whistle, when about half way across, and this signal indicated that the ferryboat had the right to and intended to keep her course. Her engine was then stopped awaiting the signal of the Reno as to what it would do. No signal was given by the Reno, and this indicated it would pass astern the ferryboat. The Maid of Perth then resumed her course.

There is much conflict in the evidence as to what occurred after this. It is asserted, on the one hand, that the Reno did nothing to indicate that she would keep on her course up the river on the westerly side, and that the Maid of Perth had every reason to believe that the tug would go to the right and allow her to pass on her course to her berth or slip on the Albany side, and that, therefore, she kept on her course, and only discovered the danger, and that the Reno was not intending to change its course, when too late to avert the collision, although she did everything in her power to do so. On the other hand, the Reno claims that she was misled, by the stopping of the Maid of Perth, into the belief that it (the Reno) would be allowed, and was expected to continue, on the course it was pursuing, and that, therefore, it did so, but stopped and backed at the earliest possible moment, when the danger was discovered, and did all it could to avert the danger and the collision. Much of the evidence given in its behalf is, however, confused and contradictory.

When the Maid of Perth gave her signal, it was the duty of the Reno to answer promptly, and, if it intended to keep its course, to plainly indicate the fact. This it did not do. Considering the distance to be traveled, both boats were moving rapidly, but not at an improper or an unusual rate of speed. The Reno is not excused because those in charge of her did not see the Maid of Perth or hear her

signal. The signal could have been heard by them if paying attention, and the vessel was in plain view of all observers. The Reno knew her usual course across the river. Those in charge of her were bound to be observant and diligent at this place.

The Reno had abundant time, opportunity, and space to avoid the Maid of Perth, but failed to exercise and use reasonable care and diligence so to do. The Reno could see and must have seen that the Maid of Perth was on her own course, was being forced by a rapid and unusual current down the stream against which she was making head, and at the same time making direct for her Albany slip. The Reno had no right to believe, and could not have believed, that the ferryboat would turn aside unless forced to do so or warned to do so in time. The warning was not given, at least until the ferryboat and tug were nearly in collision, and then it was too late for either party, do what they would, to avert coming in contact.

The evidence preponderates quite strongly in favor of the libellant, and on the whole evidence I am convinced and compelled to find, and do find, that the Maid of Perth was free from wrong or negligence contributing to the collision and consequent damage, and that same was caused by the negligence and improper and careless management, if not willful wrong, of the Reno or those in charge of it. The Reno did nothing, or substantially nothing, to denote that it was confused or uncertain as to the purpose of the Maid of Perth, as indicated by her keeping a direct course for her Albany slip. It is evident the Reno desired to hug the westerly shore, and keep out of the current near midstream, but negligently failed to give proper or timely warnings of her purpose, and that, as a result, the Maid of Perth was run into and sunk. The Reno acted in plain violation of the rules of navigation applicable in such a case. Rule II:

"When steamers are approaching each other in an oblique direction, as shown in the diagrams of the fourth and fifth situations, 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, which latter vessel shall keep her course and speed; the stream vessel having the other on her starboard side indicating by one blast of her whistle her intention to direct her course to starboard, so as to cross the stern of the other steamer; and two blasts, her intention of directing her course to port, which signals must be promptly answered by the steamer having the right of way, but the giving and answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels. When steamers are approaching each other in an oblique direction, as indicated in the diagrams of the fourth and fifth situations, so that a continuation of their courses would involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, and shall, if necessary to do so, slacken her speed, or stop and reverse, indicating her intention by either one or two blasts of the whistle, as the circumstances may require."

The value of the ferryboat was in the neighborhood of \$2,000, but no finding is made as to value.

It follows that the libellant is entitled to a decree that the damages, when ascertained, be paid by the tug Reno or its owner, and that said steam tug be condemned and sold to pay the same. An interlocutory judgment will be prepared in accordance with these findings, and it will be referred to a commissioner to take proof of the amount of damages.

Newton B. Van Dorzee is named as such commissioner, unless there be serious objections. Let the proper findings and judgment be drawn, and submitted to me for signature.

HAHN v. UNITED STATES.

(Circuit Court, S. D. New York. February 7, 1903.)

No. 3,276.

1. CUSTOMS DUTIES—NONENUMERATED ARTICLES—DUTIABLE BY SIMILITUDE.

Articles, such as paper cutters, paper weights, knife handles, and pen or pencil holders or handles, made wholly or chiefly of agate or onyx, are dutiable by similitude to "precious stones cut, but not set," under Act Oct. 1, 1890, § 5 (26 Stat. 613; Rev. St. § 2499), laying on "every nonenumerated article which bears a similitude * * * to any article enumerated" "the same rate of duty which is levied and charged on the enumerated article which it most resembles," etc.

Albert H. Comstock, for appellant.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The question here is whether "various articles, such as paper cutters, paper weights, knife handles, and pen or pencil holders or handles made wholly or chiefly of agate or onyx," are dutiable by similitude to "precious stones, cut, but not set," under Act Oct. 1, 1890, par. 454 (26 Stat. 601), as they were finally held to be by similitude to "precious stones of all kinds," under Act 1883 (22 Stat. 488), in *Hahn v. U. S.*, 40 C. C. A. 622, 100 Fed. 635, between these same parties. These similitude provisions, respectively, lay on "every nonenumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied to any article enumerated," "the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned." Rev. St. § 2499; Act Oct. 1, 1890, § 5 (26 Stat. 613).

Agate and onyx are precious stones that may be and are cut not for setting, cut for setting, and cut for setting but not set, and cut and set. In either case the material is that of the precious stone, and resembles it in quality and texture. These articles are precious stones cut, but not cut for setting; and are of the same material, quality, and texture which are not altered by cutting, as if they were cut for setting, or were set. In these three particulars they bear the same similitude to precious stones cut for setting that they do to precious stones that may be cut for setting, and are or are not so cut, or are not cut at all. As they are of precious stones that are cut and might be cut for setting, the resemblance between them and those that are cut, but not set, is in these respects very exact. Articles do not have to be at the same stage of manufacture, nor in the same state of preparation or existence, to be in the similitude of tariff laws. If they did, they would always or often be more than similar and the same, and be taken from the nonenumerated into the enumerated class. The difference between the clauses enumerating precious stones for duty in the

Acts of 1883 and 1890 does not seem to distinguish this case from the former one, and the determination of that controls this.

Decision reversed.

In re GUGGENHEIM SMELTING CO.

(Circuit Court, D. New Jersey. February 28, 1903.)

1. STATUTORY CONSTRUCTION—DERIVATIVE STATUTE—COLLOCATION OF WORDS.

The construction necessarily given to a previous statute must be regarded as impressed upon one which follows and is derived from it, in which the same collocation of words in the same connection is employed.

2. SAME—CUSTOMS DUTIES—IMPORTATION OF ORES FOR SMELTING UNDER BOND—ACT JULY 24, 1897, § 29.

Section 29 of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 210 [U. S. Comp. St. 1901, p. 1957]), which permits ores or metals in any crude form, requiring smelting or refining, to be imported under bond for the purpose of being smelted or refined in this country, to be then exported again, depends for its construction on Act Oct. 1, 1890, § 24, and Act Aug. 27, 1894, § 21, which precede it; and as the practical construction to be given to these acts required that the quantity of refined metal there directed to be set aside each day for subsequent export, equal to that smelted or refined that day, should not be an equality numerically, ton for ton, but an equality according to which the actual yield stood for the crude ores or metal from which it was derived; allowing for wastage in the process, the same construction is to be given to the act of 1897, which calls for the setting aside and subsequent exporting of 90 per cent. of the refined metal. It is therefore sufficient, under the said section, to set aside and export 90 per cent. of the actual yield of the ores or metals imported and smelted or refined under its provisions; and it is not necessary that the quantity should be 90 per cent. of the government assay.

3. SAME—WASTAGE OF METALS.

The section referred to does not seek to provide a duty. It is simply concerned with devising a way by which, without evasion, the crude material can be allowed to come into the country without duty for the single purpose of being smelted or refined here. The case of *Collector v. Balbach Smelting Co.* (C. C.) 81 Fed. 950, which decides that no deduction is to be made on dutiable ores on account of wastage in process of smelting or refining, does not, therefore, apply.

4. SAME—TREASURY ALLOWANCE—SUBSEQUENT ENACTMENT.

An arbitrary allowance of 10 per cent. for wastage having been made by the treasury department under the act of 1890, and continued under the act of 1894, subsequently passed, in calculating the amount of refined metal required to be set aside and exported in satisfaction of the bonded smelter's bond, the act of 1897, calling for the setting aside and exporting of 90 per cent. of the refined metal, is not to be regarded simply as legalizing this deduction, nor yet as adopting it, but as a substantive enactment giving the bonded smelter of right just so much more than the previous act accorded him.

Appeal from Decision of the Board of General Appraisers Confirming the Action of the Collector at Perth Amboy.

The opinion of the board was delivered by DE VRIES, General Appraiser:

The issue raised here is the proper interpretation of parts of section 29 of the act of July 24, 1897, c. 11, 30 Stat. 210 [U. S. Comp. St. 1901, p. 1957], which, so far as pertinent, reads:

"Sec. 29. * * * Ores or metals in any crude form requiring smelting or refining * * * imported into the United States to be smelted or refined and intended to be exported in a refined but unmanufactured state, shall, under such rules as the Secretary of the Treasury may prescribe, * * * be removed * * * into the bonded warehouse in which such smelting or refining or both may be carried on, for the purpose of being smelted or refined, or both, without payment of duties thereon, and may there be smelted or refined, together with the other metals of home or foreign production: Provided, that each day a quantity of refined metal equal to ninety per centum of the amount of imported metal smelted or refined that day shall be set aside," etc., "* * * and the exportation of the ninety per centum of metals hereinbefore provided for shall entitle the ores and metals imported under the provisions of this section to admission without payment of duties thereon."

Rules and regulations for the enforcement of this section were duly prescribed by the Secretary of the Treasury; those in force, with appropriate forms, being articles 1074 to 1089, inclusive, of the "Customs Regulations of 1899." They provide in detail for the removal of such merchandise from the vehicle of its transportation into the bonded, smelting, or refining warehouses; for the ascertainment by assay and registry of the amount of dutiable metals in the ores or crude metals; for the deposit of bonds by the importer covering each kind of dutiable metal ascertained as contained in each importation of ores or crude metals, conditioned upon the exportation of 90 per centum of the same or payment of the prescribed duties thereon; the delivery of the latter for actual smelting or refining; the setting aside each day from any stock of metal or metals which may be in the works of an equivalent quantity of refined product equal to 90 per centum of the dutiable metal as determined aforesaid, to be contained in the ore or crude metal smelted or refined that day; and for the cancellation of said bonds upon actual exportation of this 90 per centum, or upon the production of the proper certificate to that effect.

Where two or more smelted or refined products are recovered from the same ore or crude metals, these regulations and the practice thereunder require a separate account of each to be kept by the government agent in charge, and before the bond given to cover that or an equivalent importation is canceled there must have been exported 90 per centum of each of the kinds of metal thus ascertained to be contained in the material, and this 90 per centum must be estimated upon the basis of the dutiable metal, or metal contained in such material, as determined by assay prior to smelting or refining, in the manner prescribed in said regulations. Such was the requirement in this case.

The protests in each case are similar. The metals contained in the material were lead and antimony, and each protest states: "We protest against your decision in exacting a deposit or setting aside 90 per centum of the total amount or weight of antimony contained in the lead bullion. * * * We claim under the conditions of section 29 of the tariff act of July 24, 1897, that we should be required to set aside a quantity of antimony equal only to 90 per centum of the quantity of refined antimony produced from the total lead bullion or lead base bullion as imported. And we protest against your decision as to such exactions, and against any liquidation upon the 90% of the total amount or weight of antimony in the lead base bullion."

The issue, epitomized, is: The regulations require that the 90 per centum of metals to be exported shall be estimated upon the amount of each metal found in the ores or base bullion by assay prior to smelting or refining. The protestant claims that section 29 does not require this; but does require that 90 per centum of metals to be exported shall be estimated upon the amount of each refined or smelted metal actually recovered after these processes are completed. In brief, the issue, and the only issue, made by the protest, is, shall the 90 per centum of metals exported in order to cancel the bond be estimated upon the basis of the quantity of pure metal determined by assay to actually be in the imported ore or bullion metal as

and when imported, or shall it be estimated upon the basis of the refined metal recovered by and after the smelting or refining process is applied to the base or imported bullion or ore? Testimony was introduced at the hearing, and counsel have submitted exhaustive briefs upon the subject. It is admitted on both sides the question is one solely of interpretation or construction to be placed upon said section 29. We believe that the statute is plain and unambiguous in terms, and where such is the case there is no room for construction or latitude for any of the incidents affecting construction. Sutherland on Statutory Interpretation, § 238.

Moreover, the evidence adduced and rules of construction invoked rather conduce to the interpretation contended for by the government than any other, and, in our judgment, militate strongly in favor of the plain and unambiguous words of the act.

Congress, in speaking of the 90 per centum to be exported, said: "Each day a quantity of refined metal equal to 90 per centum of the amount of imported metal smelted or refined that day shall be set aside, * * * and the exportation of the 90 per centum of metals hereinbefore provided for shall entitle the ores and metals imported * * * to admission," etc. But one 90 per centum of metal is mentioned in the statute, and that is expressly qualified by the word "imported." "Ninety per centum of imported metal smelted or refined that day shall be set aside." Certainly this does not mean, as counsel contends, ninety per centum of the "smelted or refined" metal smelted or refined that day. In order to adopt the construction contended for, we would have to read out of the statute the word "imported"; and even then counsel's contention would fail, for it is not only 90 per centum of "imported" metal, but it is imported "metal smelted or refined that day." Certainly it was not smelted or refined metal that was "smelted or refined that day." It must have been crude or bullion metal that was "smelted or refined that day." So, without the modifying word "imported" used by Congress, the plain meaning of the remaining words is the same. The term "metals smelted or refined that day" embraces more than the recovered product after the processes were had upon the metal—it embraces the whole material subjected to the processes, to wit, the metal as determined to exist in the ores or crude bullion as it went into the smelter, every portion of which has been subjected to the particular process employed that day. The recovered product is not "smelted or refined that day" or any other day, but it is the result of the process or processes wherein the crude bullion is smelted or refined that day, and the crude bullion alone is the only material smelted or refined that day, the other being the result of such processes, and not appearing or having an existence as refined or smelted metal until after these processes are concluded. This conclusion is made indisputable when reinforced by the word "imported" modifying the term, and designating the metal referred to as refined or smelted that day.

It appears to us, therefore, that Congress has by plain, positive, and unmistakable terms declared the metals in the ores or crude bullion as and when imported, and before smelting or refining the basis of the 90 per centum estimation. When Congress subsequently speaks of the amount to be exported it is precise, saying: "The exportation of the 90 per centum of metals hereinbefore provided for." It did not leave the 90 per centum to be exported to be arrived at by inference, but fixed it in positive terms as that 90 per centum "hereinbefore provided for." The only 90 per centum "hereinbefore provided for" was the "ninety per centum of the imported metal smelted or refined that day"—not the "recovered" metal, as claimed, but the "imported metal smelted or refined that day." Concededly, the "imported metal," or dutiable quantity of the same, is that found by the government assay.

Again, the same conclusion is reached, as shown by counsel for the government, by a comparison of the acts of 1890, 1894, and 1897 in this particular. These provisos read, respectively, as follows:

Proviso, section 24, Act 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat. 617): "Provided that each day a quantity of refined metal equal to the amount of imported metal refined that day shall be set aside," etc.

Proviso, section 29, Act 1897 (Act July 24, 1897, c. 11, 30 Stat. 210 [U. S.

Comp. St. 1901, 1957]): "Provided that each day a quantity of refined metal equal to (90 per centum of) the amount of imported metal smelted or refined that day, shall be set aside," etc.

Proviso, section 21, Act 1894 (Act Aug. 27, 1894, c. 349, 28 Stat. 551): "Provided that each day a quantity of refined metal equal to the amount of imported metal (smelted or) refined that day, shall be set aside," etc.

Counsel for importers in his brief admits as follows: "The tariff act of 1890 required the setting aside of the entire amount of imported metal, and made no allowance for wastage to the smelter or refiner. The tariff act of 1894 was the same as that of 1890, with the amendment that smelting was taken into account as well as refining." This admission is true, and carries counsel out of court. The act of 1897 only amends the acts of 1890 and 1894 by adding the words, "90 per centum of," before the words, "the amount of imported metal smelted or refined that day shall be set aside." There can be no question, as counsel admits, under the acts of 1890 and 1894, that the words, "the amount of imported metal smelted or refined that day shall be set aside," required, "the setting aside of the entire amount of imported metal and made no allowance for wastage." The basis of estimation in all these acts is fixed by Congress in identical words. In the acts of 1890 and 1894, Congress required to be exported "the" amount, etc., and in 1897 90 per cent. of "the amount," etc., using identical words as the basis of estimation for exportation; yet counsel, so admitting that "the amount" meant the whole imported amount, now contends that a reduction in express terms to 90 per cent. of "the" amount means much less than that, and, in the case of antimony, but about 52 per centum of the whole. The intent of Congress in this statute is clearly shown by a recital of these several changes, which shows that no change was intended to be made in the act of 1897, as to the basis of estimation of the amount of ore to be exported, and that the sole change was that 90 per centum instead of the whole of the imported metal as found in the imported material before smelting or refining should be exported to enjoy the privileges of said section 29.

Counsel for protestants in his opening statement before the board and in his brief lays great stress upon the alleged purpose of this section, and seeks thereby to support his claimed construction. He stated: "When this statute was passed we thought not only that it protected us, not alone against European hands, but cheaper labor and cheaper freight. We also thought that it protected us against wastage under the smelting process." On rejecting a tender of evidence, the exclusion of which counsel complained of in his brief, the board stated it only tended to prove that that act of 1897 was passed for protective purposes, and of that the board took judicial notice, as it was so declared by the terms of the title of the act itself. In his brief counsel states the government's construction of this section "gives us no protection whatever."

The board takes judicial notice that the act of 1897 was passed, as recited in its title, for protective as well as revenue purposes. In construing the act and every part of it the entire purpose and intent of each part and of the act as a whole is considered. Its protective features are accomplished by levying duties. In paragraph 173 [U. S. Comp. St. 1901, p. 1644] it levies a duty of three-fourths of 1 cent per pound on antimony metal. In paragraph 182 it levies a duty of 2½ cents per pound on lead in various conditions. An exception, however, was made in section 29, by providing, first, that when lead and other ores and bullion were imported to be refined or smelted, and then exported, these duties need not be paid, provided the treasury regulations thereunder were complied with. In the course of time and trade, it was found that a loss occurred in smelting and refining, and to equalize this loss, and for no other purpose apparent from the act, congress provided that but 90 per centum of the imported metal need be exported. Whether this 10 per centum allowance for wastage was sufficient or not need not now be considered. Congress we do not think ever intended to do more than to relieve such importers from the loss or wastage in smelting. Congress certainly did not intend to license them to import free of duty for the market whilst the same act charged all others with the duties stated. Counsel for importers in his brief admits that in this case the 10

per centum almost precisely covers the aggregate loss in smelting the ores in question, admitting thereby the adequacy of the act for the purpose of its enactment. But suppose, for example, counsel's contention be accepted; what follows? He demands that they export only 90 per centum of the refined product as it comes from the works, and thereupon their bond be canceled, and they, as the act then provides, be discharged from any obligation of duties as to the particular importation. Under that rule or basis of estimation the importer would not only be relieved of exporting the whole loss in smelting and refining, but would also have imported free of duty 10 per centum of all refined and smelted metal refined or smelted at his works. Not only would he have all the benefits Congress intended under this section, but he would have become an importer, free of duty, of 10 per centum of every cargo, or at 10 per centum less than the regular rate of duty on the whole of every such importation. A due observation of the fact invoked by counsel, that this act was passed for protective purposes, compels us to avoid adopting any construction such as this, tantamount to repealing its protective features in favor of a certain few.

Again, we believe the method of determination contended for by the importers is made impracticable, if not impossible, by the terms of the statute, and therefore cannot be said to have been in contemplation of the law-makers. The statute provides that after the ores are taken into the bonded smelter they "may there be smelted or refined, together with other metals of home or foreign production." If the basis of determination of the 90 per centum of the metals in the imported ores or metals is not determined before mixing, how can it be determined afterwards? Foreign and domestic bullion containing, as shown by the testimony, varying amounts of lead and antimony, are mixed, and result in a common refined product. It is then impossible to determine the proper amount for exportation. Moreover, it is to be remembered in this connection that Congress made no provisions for, and the department has no authority to require, the assaying of domestic ores or bullion so mixed, and therefore not only provides no means or method for a correct ascertainment of percentages after smelting or refining, but has so enacted that this cannot be practicably, at least, done. The importer's as well as the government's witnesses agreed at the trial that it was "practically out of the question to carry one particular lot through all the processes and preserve its identity throughout." We are justified, then, in the conclusion that the method contended for is not only impracticable, but impossible, and was not in contemplation by Congress when the law was enacted, and that they legislated with a contrary intent. We cannot assume that Congress legislated with an impracticable intent.

We have examined with care the law, regulations, and testimony to discover, if possible, in the record the foundation for protestants' statement in their brief that the government's regulations "require impossibilities," and cause them "great loss and detriment," and that that construction "nullifies the act," because we believe that were such the case any construction possible without doing violence to the express words of the act should be adopted. We are unable, however, to reach the conclusions reached by counsel, and believe the contrary demonstrable from the record.

We will illustrate with a ton of lead bullion—2,000 pounds. According to counsel's own witnesses, it contains on an average of 96½ per centum of dutiable lead—pure lead by assay; that 3 per centum of this is lost in refining; that ordinarily it contains about 2½ per centum of antimony; that refined lead is worth about four and antimony about five cents per pound; and that about 43 per centum or 45 per centum of antimony is lost in refining. In 2,000 pounds of lead bullion, then, there would be ordinarily determined by the government 96½ per centum of 1,930 pounds of dutiable lead. Deduct 3 per centum lost in refining, and it leaves 1,872 pounds of refined lead recovered. Under the regulations the importer must export 90 per centum of the dutiable amount, 1,930 pounds, which is 1,737 pounds. When this 1,737 pounds is exported, the lead bond or account is canceled. But there was recovered 1,872 pounds of refined lead, which leaves in the works, duty and bond free, 135 pounds of refined, or, its equivalent, at least

138 pounds of lead bullion, of the value of about \$5.52. Had the protestant been required to pay duty on this, as required in said paragraph 182, at 2½ cents per pound, it would have cost him for duty \$2.93. Perforce these regulations he saves and the government loses this amount on every short ton of imported lead bullion smelted at these works.

The claimed burden, however, is on the antimony or antimonial ore account. It appears by the record that ordinarily there is about 2½ per centum of such in lead bullion, or in such a ton 50 pounds. This is the dutiable quantity or weight ascertained by assay before refining. If, as claimed, 45 per centum of this is lost in refining, there is recovered after such 27½ pounds of refined metal and lost 22½ pounds. It is required to export this, that it be made up to equal 90 per centum of the dutiable metal, or 45 pounds, which requires the addition to the 27½ pounds recovered of 17½ pounds more of antimony. If the importer were compelled to go into the market, purchase and export this at a total loss, it would, at 5 cents per pound, cost him only 87½ cents. But it is not necessary, as claimed, that the "importer gives this up to the government at a great loss." He gives nothing to the government. He simply adds this 17½ pounds of antimony, valued at 87½ cents, to the 27½ pounds recovered, and exports the whole, and sells it abroad. The foreign price and sale amount should be deducted from this to show any loss whatsoever; but that was not shown—presumably it was but a few cents. Moreover, he need not, under the regulations, export any antimony to cancel his antimonial bond or account. At his option, he can pay the duty on the dutiable amount of such metal determined to be in the bullion, to wit, 50 pounds, at three-quarters of one cent per pound, or 37½ cents, on the quantity contained in the ton, and then have in his possession to sell in our markets 27½ pounds of antimony. Estimated, then, on the averages, percentages, and values shown by the importer in the record, the importer on a single ton of lead bullion, perforce of the regulations complained of, makes \$2.98, which the government loses in duties, and the importer loses in the one case 87½ cents, less the value of 17½ pounds of antimony abroad, or pays 37½ cents duty on antimony of the value of 27½ pounds in this country, which he recoups on its sale. In the presence of these figures, we are unable to agree with counsel in any of the particulars claimed.

But let us pursue the inquiry on the basis contended for by counsel. He desires to export 90 per centum of the refined product only. He gains, then, the loss in smelting, of course, because the ascertainment would not commence until the smelting was completed, and could cancel both the lead and the antimonial bond accounts, and still have, duty and bond free, 10 per centum of the refined lead, or 137.3 pounds, the equivalent of at least 194 pounds of lead bullion, and 10 per centum of the refined antimony, or 2½ pounds, the equivalent of at least 3½ pounds of antimonial bullion. By this process the importer would not only be relieved from exporting other than the exact loss in refining, but also on each ton could import, free of duty, 194 pounds of lead bullion, and 3½ pounds of antimonial bullion, an aggregate loss to the government in duties of \$4.12 on the lead, and about 2½ cents on the antimony, or about \$4.15 per ton; on the most conservative basis, this would amount to three or four dollars per ton.

It seems idle, however, to pursue the matter further, in view of the admission of counsel in his brief, first, that the act of 1897 is identical with the acts of 1890 and 1894 in respect to the words fixing the basis of estimation of the said 90 per centum; and, second, of the admission of counsel and the superintendent of the works of protestant that "the loss in the antimony was offset by the lead." In our judgment, Congress never intended by section 29 to allow more than this. The regulations and practice of the department amply allow this, and work no hardship or loss in so doing.

The protests are overruled, and the decision of the collector in each case is affirmed.

Peter Zucker, for appellant.

Courtlandt Parker, Jr., Asst. U. S. Atty.

ARCHBALD, District Judge.¹ This case arises under section 29 of the act of July 24, 1897, 30 Stat. 210 [U. S. Comp. St. 1901, p. 1957], commonly known as the "Dingley Law." The general provisions of the section are not new, having been brought forward from the "McKinley Bill," where they first appear (Act Oct. 1, 1890, c. 1244, § 24, 26 Stat. 617), and being also found in the "Wilson Bill," which succeeded it (Act Aug. 27, 1894, c. 349, § 21, 28 Stat. 551). The conceded purpose in each of these statutes was to encourage the establishment in this country of works where crude imported metals could be smelted or refined for export trade. In the act of 1890 metals only are spoken of, but in the act of 1894 ores as well as metals are included, and in the act of 1897 it is the same. By bringing these foreign ores and metals into the United States, and smelting or refining them here, and then exporting them again, the country has the benefit of the industry, without the refined product coming in competition with that of our domestic make, which still remains protected according to the general policy of the tariff law. According to the scheme devised to carry out this idea as set forth in the statute, the owners of works engaged in this business give bonds to the Secretary of the Treasury, and, under such regulations as he may prescribe, the works assume the character of bonded warehouses and are so designated. Ores or metals in any crude form requiring smelting or refining to make them readily available in the arts, imported for the purpose of being smelted or refined, and intended to be exported again in a refined but unmanufactured state, are permitted (under such treasury rules as may be prescribed and under the direction of the proper officer of the government) to be removed in bulk or original package from the vessels or vehicles in which they are brought into the country to the so-called bonded warehouses, where, either by themselves or in conjunction with other metals of home or foreign production, they are to be smelted or refined. On account of their ultimate destination out of the country, no duties are required to be paid on these imports, the law being satisfied if the refined product is exported again. The question which is here involved is as to the amount that must be so exported, the collector holding that no allowance is to be made for wastage in the process of refining, and the board of general appraisers taking the same view; the contention of the appellant being, however, that it is the net product that is to be taken, after the wastage has been deducted. The case turns on the construction to be given to the terms of the statute in the section referred to. That section, after declaring that the imported ores or metals may be taken without payment of duty to the bonded works where they are to be smelted or refined, goes on to provide—

"That each day a quantity of refined metal equal to ninety per centum of the amount of imported metal smelted or refined that day shall be set aside, and such metal so set aside shall not be taken from said works except for transportation to another bonded warehouse or for exportation, under the direction of the proper officer having charge thereof as aforesaid, whose certificate, describing the articles by their marks or otherwise, the quantity,

¹Specially assigned.

the date of importation, and the name of vessel or other vehicle by which it was imported, with such additional particulars as may from time to time be required, shall be received by the collector of customs as sufficient evidence of the exportation of the metal, or it may be removed under such regulations as the Secretary of the Treasury may prescribe, upon entry and payment of duties, for domestic consumption, and the exportation of the ninety per centum of metals hereinbefore provided for shall entitle the ores and metals imported under the provisions of this section to admission without payment of the duties thereon."

The manifest purpose of requiring a certain quantity of the refined product to be set aside is to see that the condition on which the crude metal was allowed to come into the country is complied with, to wit, that it shall be taken out of the country again in its refined form. As often, therefore, as any of the crude, under bond, is put into the smelter, its place must be supplied by a corresponding portion of the refined, derived from the same source. It is not left as a mere matter of bookkeeping; the refined metal must be actually there. Neither is there any provision for the substitution of an equivalent derived from some other source. With extreme particularity and care each lot of imported ore or metal is followed, either in its original form or the equivalent, from the time it is admitted by the collector into the country until it passes him again on its way out. As, then, it is this refined product of the crude, set aside from day to day, that is to be exported, both under the acts of 1890 and 1894; and as the act of 1897 is in this respect identical with the other two, differing only as to the quantity required—whatever of the refined metal was to be set aside and exported under the earlier acts is to be set aside and exported under the existing act, to the extent of 90 per centum, no less and no more. It is upon this that the case depends, and it does not seem to me to be involved in serious difficulty. According to the construction contended for by counsel for the government, the quantity of refined metal set aside from day to day to replace the imported crude from which it has been produced would, under the earlier acts, have had to exactly equal it, ton for ton, as determined by the government assay. But upon the slightest consideration it will be seen that this was impossible. There is always an unavoidable waste on the figures of the assay, no matter what the metal, greater in some than in others, but always something; and as there is no provision for the substitution of refined metal derived from another source to make up the quota, in order to comply with the statute, the smelter would be compelled to pay duty on the waste, although not a pound of the refined product but what had been sent out of the country by him. Clearly, this was not what was intended by the framers of the law. Their desire was to encourage the business of smelting and refining foreign ores and metals; the supposed inducement held out to those who went into it being that these ores and metals should come in free, provided they were taken out again after being treated. But, if the construction contended for should prevail, the smelter, instead of receiving encouragement, would actually be called upon to pay as for a privilege. The statute in terms requires that the refined metal to be set aside shall equal the crude of which it takes the place. This is not an equality, numerically, ton

for ton; for that, as we have seen, would be an inequality, but an equality based on the existing conditions according to which the actual yield stands, and must stand, for the crude from which it is derived. The Treasury Department very quickly recognized the necessity for some such construction, and soon after the first act was passed directed that when the refined metal was presented for export credit should be given on the warehouse bond which had been put up, not only for the duties on a corresponding quantity, ton for ton, of the imported crude, but for an additional 10 per cent. Customs Regulations 1892, art. 708. It is said that this allowance was wholly unauthorized, and the case of *Collector v. Balbach Smelting Company* (C. C.) 81 Fed. 950, is relied upon, where it was decided by this court, Kirkpatrick, J., that no deduction is to be made on dutiable ores for waste in the process of smelting or refining, the duties being collectible according to the quantity shown by the government assay at the time of importation. There can be no question as to the correctness of this decision, nor is there any intention of departing from it. But that was a withdrawal from bond for domestic consumption, and by the express requirement of the law as well as of the treasury regulations referred to the duty was to be calculated on the basis suggested. Act Aug. 27, 1894, c. 349, par. 165, 28 Stat. 520. As is well pointed out in the opinion, any other construction would result in a discrimination in favor of the bonded as against the domestic smelter, the entrance duty, whether paid at the time of importation or when taken out of bond, being necessarily the same. But in the case before us there is no question of duty except in the alternative for the failure to export, nor did the act in the section under discussion seek to provide one. It was simply concerned with devising a way by which, without evasion, the crude material could be allowed to come into the country without duty for the single purpose named.

The 10 per cent. allowance conceded by the treasury was arbitrary. In some cases the loss would be less, while in some it would be greater, of which we have an instance before us where in one of the products, antimony, it is four times that amount. But it is chiefly significant because of the recognition by that department of the government specially charged by the statute with the supervision and regulation of the subject that there could not be what we may call a strict adherence to the letter of the statute, and that, whether exact or arbitrary, there must be a deduction from the amount imported in calculating the product of the refined metal required to be exported again. With this particular construction put upon the existing law, the act of 1894 was passed, embodying its provisions in exactly the same terms; and three years later came the act of 1897, with the same provisions again, differing only in the quantity required. It is contended with regard to the latter act that it does no more than legalize the treasury regulation, the same allowance of 10 per cent. being made; the only basis for this, however, being the similarity of amount in each. But, if that be so, what is to be said of the intervening act of 1894? By permitting the law to stand unchanged as it did, it can hardly be regarded as superseding the treasury construction, but

rather as allowing it to go undisturbed. If, then, as I have endeavored to show, the correct construction to be given to the act of 1890, as well as that of 1894 following it, only required that the derived product to be set aside for export should be that which was actually produced from the crude material, of which the treasury regulation was an incomplete and imperfect expression, the same collocation of words, employed in the same connection in the act of 1897, must be regarded as impressed with the same meaning; and the 10 per cent. allowance there given is not to be taken as the correction of a mistake, for there was none to be corrected, nor yet as the adoption or legalizing of a previous unauthorized practice, but as a substantive enactment giving to the bonded smelter of right just so much more than the previous acts accorded him. It was a bonus left in his hands to further encourage the industry, the former statute, although similarly actuated, not being adequate for that purpose, or at least not moved to the same generous degree.

It is said, however, that if only the actual yield is to be taken, we have a very uncertain problem to deal with, the product differing in different cases according to the skill employed and the processes made use of. This would be material if it were a question of customs duty, the amount payable to the government not being permitted to depend upon any such variable condition. But, as already pointed out, it is not a question of duty at all, except as provision is made to prevent the evasion of one. All that is demanded of the bonded smelter is that he shall export out of the country in refined form what he brings into it in the crude, or, according to the present form of the law, a definite percentage of it. The alternative by which a duty is required, so far as he does not, is simply to enforce this, and no more. Looking at the metal brought into the country as a dutiable import, no doubt it is the government assay which is to govern, regardless of what may be the recoverable contents; but the duty to be paid for not exporting is one thing, and the refined metal presented to the collector for export by which an import duty is avoided is quite another. In the one relation the smelter must pay whatever the law says, so that, if a quantity of the refined product equivalent to that of the crude brought into the country is not forthcoming for export, the government is entitled to the import duty on the corresponding crude. But that does not regulate nor determine the quantity of the refined required to be exported to satisfy the law, nor afford a basis for construing the statute with regard to it.

It is further said that, if the contention of the bonded smelters be sustained, they will be permitted to retain a quantity of refined metal not exported, which they will be able to bring into the country for domestic consumption, free of duty, to the detriment of others who are required to pay. This argument is easily disposed of. The fact is that, even under the construction conceded by the government, this is now the case, and the only difference is one of degree. For instance, with respect to the lot of bullion specially put in evidence by the smelting company, the government assay showed 91.24 per cent. of lead, out of which 97½ per cent. of refined metal was recovered, or 88.96 per cent. of the gross weight of the whole. Of this the

government claims that 90 per cent. of the 91.24 per cent., or 82.12 per cent., must be exported, leaving in the hands of the smelter in the shape of refined metal, undutiable, 6.84 per cent. of the total lot. On the other hand, if the position of the smelting company is correct, there must be forthcoming for export only 90 per cent. of 97 per cent. of 91.24 per cent., or 80.06 per cent., leaving 8.9 per cent. of refined in their hands, which is simply 2.06 per cent. more, a fractional advantage which is of no account.

It is urged, however, that what the smelting company loses on the antimony it more than makes up on the lead, so that the net result on the whole bullion is in their favor, and that they are not, therefore, entitled to complain. But, with regard to duty, each metal stands on its own bottom, that of lead being at one rate, and that of antimony at another, each being calculated according to the amount found by the government assay. Being independently treated in this way in one part of the statute, it is hardly consistent to intermingle them, or to set off one against the other as the basis for construing another part of it. The smelter is not permitted to do so when he comes to export them. He cannot set aside antimony for lead nor lead for antimony, but each after its own kind, according to the required quantum. But what is still more to the point, while it may be true in this particular instance that the smelter is not at a disadvantage, the statute has to do not with lead bullion only, such as was here imported, but with ores and metals of every kind and description that may be brought in under the act, and we cannot assume that there would be the same equitable result with regard to all of them. Until it is shown that this would be the case, I see nothing in the argument.

It is further and finally contended that as the crude ores or metals are permitted by the statute to be smelted or refined in conjunction with others of domestic or foreign production, and when this is done there is no way of determining what percentage of the product has been recovered from the one and what from the other, there is in this an insuperable, practical obstacle to the proposed construction. But I am not persuaded that there is any such real difficulty. In any case where it was claimed that the product was a mixed one, not only would the smelter be required to prove that such was its character, but also the proportions in which the bonded metal and that of domestic or foreign production were used, and, if there was a difference in the yield from either, just what that difference was. It would be fair to assume in the first instance that it was the same from both, and on this basis, in order to arrive at the product derived from the imported crude, the smelter would simply have to deduct from his total product a proportionate amount, according to the extent of the others used. The only chance for error or evasion would be where the yield from the domestic metal was in fact less than from that brought in under bond, and then only to the extent of a proportionate part of the difference. I cannot agree that the bonded smelter could not be required to keep account and make a showing that would be satisfactory to the Treasury Department, not only as to the percentage of yield where there was no mixture as where there was. The whole conduct of bonded works of this

character is expressly made subject by the statute to such regulations as the Secretary of the Treasury may prescribe, and are put under the supervision of such customs officer as he may appoint. This extends to and gives control of all necessary details, and I am not persuaded that an effective method cannot be readily devised that will meet the exigencies of the case. I do not lose sight of the statement of Mr. Conway, the government storekeeper, that so far as his experience goes he knows of no practical way of identifying the product; nor yet of that of Mr. Merriss, the office manager of the smelting company, that trace cannot be kept of any special lot of crude metal after it goes into the smelter or refinery. But the experience of Mr. Conway, as he himself says, only extends to the particular method in vogue with him of handling the bonded material; and, as to keeping track of any special part of the product, it does not seem to me to be necessarily involved in the problem. At all events, I am not prepared to hold upon these qualified statements that there is such an inherent impracticability in determining the percentage of the recoverable contents from the bonded metal as precludes the construction of the statute now adopted.

The finding of the board of general appraisers is therefore reversed, and the collector of the port of Perth Amboy is directed to allow to be set aside and to accept for export, in satisfaction of the bonds of the Guggenheim Smelting Company, appellant, 90 per centum of the lead and antimony as smelted and refined by said company from lead bullion imported under such bonds and covered by the protests in evidence.

GENERAL ELECTRIC CO. v. RE-NEW LAMP CO. et al.

(Circuit Court, D. Massachusetts. February 25, 1903.)

No. 1,664.

1. TRADE-MARKS—INFRINGEMENT—RECONSTRUCTED ARTICLES.

Defendant was engaged in the business of buying burned-out electric lamps—among others, lamps made by complainant, and bearing its trade-mark—cleaning and repairing them, and inserting new filaments, after which they were resold. *Held*, that such process was a reconstruction, and not merely a repairing, and defendant's lamps were a different product from those of complainant, and not entitled to be resold under its trade-mark.

2. SAME—RIGHT TO INJUNCTION—MANNER OF AFFIXING TRADE-MARK.

Complainant was a large manufacturer of electric lamps, and defendant had established quite a large and important business in renewing or remaking burned-out lamps bought from the public and reselling the same. It conducted its business in a fair and legitimate manner, removing the old labels from the lamps, and affixing its own labels to the reconstructed lamps. After it had been in business some two years, complainant began affixing its trade-mark "G. E." to each of its lamps, pasting the same in the interior of the leading-in tube in the process of manufacture, bringing it also within the bulb, and where defendant could not remove it, at least without increasing the cost of remaking the lamp, and it sold lamps of complainant's make after it had reconstructed the same with such trade-mark remaining therein, affixing its own labels on the outside. *Held*, in a suit to enjoin such sales as an infringement of complainant's trade-mark, that, in the absence of clear proof that

complainant placed its trade-mark where it did for legitimate trade-mark purposes, to identify its goods, and not with the ulterior purpose of preventing legitimate competition by the remaking and reselling of the lamps after they had been burned out, a court of equity would not grant a preliminary injunction, but would leave the rights of the parties to be determined on a full hearing.

In Equity. Suit for infringement of trade-mark. On motion for preliminary injunction.

William K. Richardson, for complainant.

Jesse C. Ivy, for defendants.

BROWN, District Judge. The General Electric Company has acquired a title to the trade-mark "G. E.," which is applied to electric goods of various kinds. It appears in the complainant's affidavits that its lamps have gradually become known as "General Electric" or "G. E.," as well as "Edison" lamps; and that all these terms to-day denote exclusively lamps of the General Electric Company's manufacture. It does not appear that the mark "G. E." had been used during the life of the Edison lamp patent as a generic name of the patented article in such manner as to authorize its use by the defendants as a common name of a lamp made according to the directions of the Edison patent. Complainant's counsel state that this patent expired in 1894, though, by its terms, it was to expire in 1897. In June, 1900, the General Electric Company began to affix labels bearing the trade-mark "G. E." to barrels and packages of lamps. Beginning in October, 1900, the letters "G. E." were affixed to each and every incandescent lamp, with the exception of lamps of odd and special shapes and designs. Some 24,000,000 lamps have been put out bearing the "G. E." trade-mark since October, 1900. There can be no reasonable doubt that the letters "G. E." might constitute a valid trade-mark.

The Re-New Lamp Company is a corporation organized in 1898, and since then engaged in the business of receiving and buying from the public burned-out electric lamps, including lamps of the complainant, and remaking or reconstructing them in substantially the following manner:

"The tip of the bulb is removed, and then the hole is enlarged, and the edge smoothed. The old burned-out filament is then removed, and the glass is cleaned. A new filament is then inserted, and its two ends are fastened to the leading-in wires (and generally its middle is anchored to the anchor wire) by means of carbon paste. The lamp is next inspected for defects. A glass tube is then welded to the opening in the top. The lamp is then exhausted by the aid of a pump, and the top of the lamp is then sealed."

While the grounds for a distinction between reconstruction and repair would probably differ in a case relating to a patented article embodying an inventive conception and in a case relating to the same article after the expiration of the patent when it has become a mere article of manufacture, I am of the opinion that this would not alter the conclusion that the defendant company does not merely repair the lamps, but reconstructs them so that its product of a renewed or refilled lamp is a different product from that of the General Electric

Company. Whether inferior or superior, it is unnecessary to determine.

The following cases, decided in this circuit, while not, perhaps, controlling, since these decisions were made concerning a patented article, and not a mere article of manufacture, are to some extent in point. *Davis Electric Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276; *Edison Electric Light Co. v. Davis Electrical Works (C. C.)* 58 Fed. 878; *Goodyear Shoe Machinery Co. v. Jackson*, 50 C. C. A. 159, 112 Fed. 147, 55 L. R. A. 692.

In the earlier stages of the manufacture of the Edison lamp, and prior to the expiration of the Edison patent, the burned-out lamps were generally thrown away. From about 1895 experiments were made with a view to utilizing and renewing the burned-out lamps. After the expiration of the patent, the business of renewing lamps was begun, and in 1898 the Re-New Lamp Company was organized for the purpose of remaking or reconstructing burned-out lamps. In view of the very large number of electric lamps put upon the market by the complainant and others, and of the fact that the defendants are able to sell their renewed lamps at from 10 to 13 cents each, while the complainant's price is 18 cents, it must be admitted that this business of saving a waste product is a legitimate business, which affords the public the opportunity of a reduction of price. While the renewed lamp comes upon the market in competition with the new lamp, this is a legitimate competition.

There is no evidence that in conducting their business up to October, 1900, the defendants in any way infringed upon the legal rights of the complainant. On the contrary, the evidence shows that the defendants carefully removed the label affixed by the General Electric Company to the outside of the lamp, and in their advertisements and wrappers stated the exact character of their lamps and of their business. Their corporate name itself affords an indication that the defendants had every desire to conduct their business fairly and honorably. It is in evidence that they have employed 100 hands, more or less, and at certain times have turned out 5,000 renewed lamps a day. To these lamps they have affixed their own labels, containing the words "Malden" and "Perfection." There is no charge of any intended or actual deception of the public by these defendants. The complainant stands strictly on its technical rights as the owner of a technical trade-mark.

In October, 1900, the complainant for the first time began to affix to each individual lamp the mark "G. E." The peculiar manner of the attachment of this mark raises new and interesting questions. The Edison label was affixed to the outside of the bulb. It was readily removable, and the defendants did remove it. When the mark "G. E." was affixed, it was not affixed in the same manner as the Edison label, but it was placed within the glass leading-in tube, and pasted to the interior of that tube during the process of manufacture. The defendants term it a "nonremovable label." The complainant says that it can be removed, although it is conceded that this would increase the cost of remaking the lamp. The defendants contend that this act of the complainant is not the affixing of a trade-mark for

the legitimate purpose of a trade-mark—to indicate the origin of the goods—but that it is a device resorted to with an ulterior purpose, namely, to destroy the utility of the burned-out lamp, and to place the defendants in this dilemma: either to discontinue the business of remaking burned-out lamps which have been manufactured by the Edison Company, or unwillingly to put their lamps forth bearing the trade-mark of the complainant. In support of this contention they say that an inspection of the lamps shows that the label “G. E.” is not intended as a guide to the buyer; and it must be admitted that this label, being partially curved, and placed within the leading-in tube, and also within the bulb, is by no means as conspicuous as an external label, though it is visible upon ordinary inspection. The complainant explains this location, saying that labels on the outside of the bulb are easily washed off or removed, but that the label in the stem is safe from accidental removal, and serves as a more permanent means of identifying the lamps. It has not been made to appear, however, that there was any difficulty in this respect with the large number of lamps supplied with external Edison labels; and it does not appear what inducement there would be to ordinary users or sellers of the lamps to remove a “G. E.” label if it were affixed to the outside. There certainly is ground for thinking that the complainant, in locating its label in this novel position, had in mind removals in the course of the remaking of lamps, rather than in the ordinary course of trade. Upon the present affidavits I should hesitate very much before arriving at a conclusion that the motive of the complainant was merely the ordinary motive of giving notice to a purchaser that the article is the original product of the maker.

The complainant's affidavits point out the fact that other manufacturers of lamps besides the General Electric Company have adopted the practice of placing a label in the stem of the lamp. Of course, if manufacturers generally adopt this expedient, the business of remaking and refilling lamps may be much impaired, if not destroyed. If we apply to the present case the doctrine of the bottle cases, which hold that a bottle into which is blown the trade-mark of the original bottler cannot be used by another bottler of the same class of goods, even though he affixes labels indicating that he is the manufacturer, there seems reason to believe that the defendants' business will be impaired. In ordinary cases of refilling bottles or packages there is a presumption that such a use has a deceptive tendency, and the courts therefore do not require actual evidence of deception. It is this doctrine which the complainant invokes in this case: that the article contains its trade-mark, and that to put it out without a complete obliteration of this mark would necessarily have a deceptive tendency.

I think, however, there is a very clear distinction between the present case and the ordinary bottle case, where there is usually no excuse or justification for an act which may tend to the deception of the public and to the infringement of the good will of the original bottler. The market is full of bottles without the special trade-mark. Here we find that there has grown up a peculiar business, and a legitimate business, which is useful to the public, as is shown by the reduced price of an electric lamp; a business started in good faith, and an example of one

of those collateral developments along the line of electrical progress. The utilization of by-products and saving of waste is a legitimate business, which should be encouraged. Courts which would be quick to enjoin an unnecessary use of a box or bottle bearing another's trade-mark would be slow to destroy a legitimate and useful business by the extension of the law of trade-marks beyond its proper sphere.

What the complainant seeks to protect is not a trade-mark simpliciter, but a trade-mark so disposed as to prevent or hinder the re-making of lamps, and competition based upon the use of the burned-out lamps. Courts of equity are bound to look to the substantial character of proceedings, and will not suffer the forms of law to be used to effect an ulterior and unavowed object. If the question whether the complainant has a right to apply a trade-mark in such manner as to destroy the usefulness of the burned-out lamp, and thereby extinguish or monopolize the business of making over lamps, is to be decided by a court of equity, it should be upon full hearing and proof and full argument. It may be that the complainant's exclusive property in the trade-mark is so extensive that the mark may be used properly to identify not only its trade product in the market, but its refuse manufactures in the junk heap. It may be that, under some circumstances, a trade-mark remaining upon a worn-out manufacture is a legitimate means of recalling it to the complainant, and of inducing people to send it back to it for a small price because it is of no use elsewhere. Trade-marks blown into glass bottles, or stamped upon metal boxes, are doubtless more or less useful in this way. But there seems to be a substantial difference between a mere receptacle like a box or bottle and an electrical machine or apparatus like an electric lamp. A user of boxes or bottles has a large market to choose from, and can get articles free from the marks of others. A repairer or remaker of electric lamps has no such choice. He can use only electric lamps. If the complainant, with the knowledge of the business of remaking lamps, has chosen to so apply its trade-mark as to prevent its removal in re-making lamps, we have then to consider whether it is entitled to the assistance of a court of equity to relieve it from the chance of a confusion of goods when it has voluntarily and without apparent necessity exposed itself to this chance. If the situation from which the complainant seeks relief is one of its own creation, and if the aid of a court of equity is invoked merely as an instrument for the accomplishment of a piece of business strategy, whereby the complainant is to acquire for itself the profits of a business now in the hands of another, a court of equity might well refuse to become an active agent in such a transaction.

The complainant says that it does not want others to use its trade-mark; but, with full knowledge of the way the business of remaking lamps is carried on, it puts its trade-mark in such a position that every remaker of lamps must use it, or be deprived of his business, or a portion of his profits. It is well settled that a man has not an unrestricted right to the use of his own name when damage to the established business of another will result, and upon like principles a court of equity might regard the use of a trade-mark in a manner unnecessarily injurious to others as a bar to equitable relief.

To repeat: Upon a motion for preliminary injunction the complainant presents the ordinary case of a trade-mark applied to goods sold by the defendants which are not in substance the goods of the complainant. The defendants show facts from which, together with the facts admitted by the complainant, arises a serious doubt whether this is an ordinary trade-mark case, and a doubt whether the complainant has not voluntarily brought about a situation where the defendants are confronted on the one hand with a loss of a legitimate business or a diminution of the profits, and on the other hand with involuntarily selling goods with the complainant's trade-mark visible thereon. I have no doubt that the defendants would very much prefer to leave these trade-marks off if they could do so without substantial loss.

I know of no case involving similar facts. The marked distinction between this case and the ordinary trade-mark case is that ordinarily the owner of the trade-mark is first in the field, while the defendant subsequently uses the mark of the complainant in such a way as to harm its owner, or to subject its owner to peril of harm. In the present case the defendants were first in the field, and the trade-mark is so applied as to do them harm. The complainant does not claim unfair competition of the defendants, but the usual state of things is reversed, and the defendants complain of unfair competition, and of the use of a trade-mark in a manner unnecessarily injurious to them, as a part of an ingenious scheme whose elements are a trade-mark, a novel location thereof which prevents removal, and an injunction to prevent the use of the article without a removal of the nonremovable trade-mark. It must be conceded, I think, that a manufacturer of goods is ordinarily under no obligation to competitors, and is entitled by contract or otherwise to prevent his worn-out articles from being made over and brought into competition with his articles. Whether he can do this by a trade-mark, and whether a court of equity, upon the present bill, can aid him to do so, I am in doubt. It may be that upon a full investigation of the facts it will appear that the complainant's use of its trade-mark in its present position is a natural use growing out of ordinary business considerations. If that fact be established, the doubts as to the complainant's title to relief would probably disappear. The complainant could hardly be required to forego an appropriate and proper application of its trade-mark merely for the reason that incidental business complications might result to the defendants. On the other hand, should it appear that the defendants' contention is well founded; that the peculiar use of this trade-mark was a mere device to place the defendants in a dilemma, and had no substantial relation to the ordinary uses of a trade-mark—there would then remain questions of great importance and novelty, which should be decided only on final hearing.

A further question suggests itself: That is, whether the bottle cases, which rigidly prohibit the use of bottles containing trade-marks, afford a proper guide in case of an electric lamp, which is not a mere receptacle for which substitutes are readily available, but a highly organized apparatus, for which there is no substitute. Certain precautions might well be adjudged insufficient in the case of a bottle on the ground that a defendant had no right to put himself in a

situation where precautions were necessary, while the same precautions of accompanying labels might be held sufficient in the case of an electric lamp on the ground that a defendant had done all that, in the nature of the business, reasonably could be done, and because he had not unnecessarily placed himself in a position where precautions were necessary. See *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847. That the defendants' trade-marks "Malden" and "Perfection" have become so well known in the trade as to indicate clearly the origin of the defendants' lamps, and thereby practically obliterate the evidence of origin offered by the complainant's mark within the leading-in tube, is not sufficiently established. It would seem entirely feasible for the defendants to affix to the exterior of their lamps marks which would explicitly indicate the exact character of the goods, and which would not, as do the present marks of the defendants, depend upon trade knowledge for their signification. While I do not at present decide that the defendants are under any legal obligation to change their labels, yet, in view of the suggestion of parties and counsel of their readiness to make all reasonable efforts to avoid confusion of goods, it may not be inappropriate for a court to suggest the course which will tend to do this.

Under all the circumstances, I do not think that the complainant's right is so clear as to warrant the issuance of a preliminary injunction. In *Browne on Trade-marks*, § 465, it is said:

"If the defendant show a belief that he has a just defense, and is not a willful pirate, then the case should be one of evident mistake of law or fact, or both, in the defense which he sets up, which will justify the festinum remedium."

That the defendants are not willful pirates, and are unwillingly putting forth lamps with the complainant's label therein, seems clear. If they are in the wrong, it is merely for their failure to surrender their profits at the demand of one who stands strictly on its rights as an owner of property.

There is much more in this case than in the ordinary trade-mark case. There is a question of the scope of the uses for which a trade-mark may be applied, and the question how far a court of chancery will lend its aid to relieve a complainant who has voluntarily forced the situation from which he seeks relief, or suffer itself to become an instrument in mere business strategy. I express no opinion upon the merits of this controversy. It is by no means clear that the complainant has done more than it is legally and equitably justified in doing. On the other hand, I am not satisfied that the defendants' case involves an evident mistake of law or fact. The case so far seems a doubtful one, justifying the refusal of a preliminary injunction. It would have been easy for the complainant to have avoided any risk of confusion of goods by so locating its "G. E." label that, like the Edison label, it could have been removed by the defendants. In choosing, for business reasons, to locate it within the inner tube, it voluntarily incurred the risk of confusion of goods, which is the basis of the present action. With full knowledge it assumed a new risk of confusion of goods, and the further risk of litigating novel

points of law. Under such circumstances, we think that a risk voluntarily assumed before litigation may be continued until the rights of the parties are established on final hearing.

Petition denied.

STEVENS LINEN WORKS v. WILLIAM & JOHN DON & CO. et al.

(Circuit Court, S. D. New York. February 23, 1903.)

1. TRADE-MARKS—LETTERS—USE TO INDICATE QUALITY.

For many years a manufacturer of crash toweling used letters of the alphabet stamped or printed thereon to indicate quality and width, some eight or more letters being so used, each representing crash of a particular grade and width. *Held*, that such use did not give him a trade-mark right in the letters so as to preclude their use for similar purposes by other manufacturers.

2. SAME—UNFAIR COMPETITION.

The fact that a manufacturer of crash used the same letters of the alphabet as a mark thereon to indicate the grade and width of the goods as were used by a competitor older in the business does not constitute unfair competition, where other distinctive labels and marks were used, and it does not appear that there was any intent to deceive purchasers as to the origin of the goods or that any one was so deceived.

In Equity. This cause, which is to restrain the infringement of a trade-mark and unfair competition, and seven others of like import were argued at the October term of this court, pursuant to a stipulation consolidating the eight causes and consenting that they be argued together as one cause.

Joseph C. Clayton and Henry W. Williams, for complainant.
George Wilcox, for defendants.

COXE, Circuit Judge. The bill in case No. 1 alleges that the complainant's predecessor, in or before November, 1865, originated, devised and adopted a certain trade-mark for "crash" consisting of the letter A printed, stamped or otherwise affixed upon said crash and that it has been used in the business ever since. The bill alleges further that the defendants have recently adopted and are using upon crash manufactured by them the letter A substantially identical in appearance with the complainant's trade-mark; that this action of the defendants was for the purpose of defrauding, misleading, confusing and deceiving the public and was intended to depreciate the value of complainant's trade-mark, all of which constituted unfair competition in business. The demand for relief is for an injunction and an accounting.

The answer denies all the material allegations of the bill and alleges that the letter A was adopted by the complainant to indicate grade, quality and dimension and until the alleged trade-mark was registered, in May, 1900, complainant never made any claim to the contrary; that the letter A had been used by defendants for 20 years prior to the commencement of the suit to indicate grade, quality and dimension, and for no other purpose, and that this use was known to and acqui-

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

esced in by the complainant. The pleadings in the other suits are, *mutatis mutandis*, similar, the only substantial difference being that they relate to other letters of the alphabet.

If a technical view were to be taken of the situation it might be said with considerable plausibility that in no event, in the circumstances developed here, can a charge of unfair competition be predicated of the use of the letter A upon a single line of crash. The court understands, however, that the defendants' counsel consents that the controversy be considered as if all the causes of action were united in a single bill.

There is no serious dispute regarding the principal facts. Over 30 years ago the complainant's house adopted eight letters of the alphabet and stamped them upon eight distinct crashes, used for toweling, manufactured by them. Over 20 years ago the defendants stamped similar letters upon similar crashes and have been doing so ever since. The complainant admits that it knew of these acts of the defendants several years before the actions were brought and the presumption is strong that it must have known of them for a much longer period, especially if their use, as claimed, had an injurious effect upon the sale of complainant's goods.

Although only eight of the complainant's alleged trade-marks are involved it appears that it asserts ownership in seven additional letters of the alphabet. In 1888 it registered as a trade-mark an artistic design for a label to be applied to its crash toweling; so that, if its present contention be sustained, it will have sixteen distinct trade-marks to distinguish a single line of merchandise.

The testimony is overwhelming that these letters indicate, and during all the times in controversy have indicated, quality and dimension. Mr. Stevens, the president of the complainant, testifies that "the quality is designated by the letter, and I cannot tell you any better about the quality than by the letter. The letters which I have indicated as seeing stamped upon the crash at the beginning indicated a width and a quality, and have ever since continued to represent a width and a quality." Other persons in authority in the complainant corporation testify to the same propositions. The sales cards issued to the trade show not only that this is the fact but that complainant so understood it and did not pretend that these letters indicated origin and ownership.

Take, for instance, the card dated January 15, 1901, found at page 181 of defendants' record, being a "Limited Net Price List of Stevens Crash." Opposite the letter A appear the figures "16 in. 7. $\frac{7}{8}$," under the words "Width," "Price. Brown. Bleached," respectively; indicating that A crash is 16 inches wide and costs 7 cents per yard if brown and $\frac{7}{8}$ cents per yard if bleached.

There is other evidence tending to show that for over 50 years letters have been used to designate the different grades of crash. Indeed, it is difficult to perceive how this could be otherwise.

When it is remembered that there are at least 15 different grades of crash toweling, what more natural than that they should be distinguished by letters or figures? But when it appears, further, that figures had already been appropriated to indicate length, it would seem that there was no simple and sensible system of designation left except to

use the letters of the alphabet. If one manufacturer may appropriate all the letters and another all the digits it is manifest that it will require more than ordinary intelligence for remaining manufacturers to present their goods intelligently to the trade.

The court has been unable to find a case where a trade-mark in a letter, much less in eight letters, has been sustained in circumstances like those appearing in the present litigation. Trade-marks in letters, and figures, usually in arbitrary combination, have in rare instances been upheld, but never in cases where the letters and figures were originally adopted for the primary object of indicating class, grade, style or quality. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Deering Harvester Co. v. Whitman Co.*, 33 C. C. A. 558, 91 Fed. 376, and cases cited.

The bill cannot be sustained upon the theory of unfair competition in trade. It must be admitted that there is a growing tendency in the courts to push this doctrine beyond what this court believes to be reasonable limits, and to introduce a spirit of paternalism into the administration of equity jurisprudence beyond the scope of its legitimate authority. The essence of the action is fraud, which here, as everywhere, should be proved and not inferred from every trivial and inconsequential similarity. Where two parties are engaged in selling goods of the same class it is inevitable that the competition will produce friction and that the agents of each in their zeal to secure customers will indulge in exaggerated laudation of their own goods and depreciation of the goods of their rivals. This is well understood and discounted by all who have the least familiarity with the customs of trade and should furnish no basis for the intervention of a court of equity. In the case at bar there is no evidence of fraud.

There can be no dispute that the defendants were at liberty to make the crash in question, and that they had the legal right to indicate the quality by the use of letters. What then is the accusation against them? There is no pretense that they have sold any of their crash as the complainant's crash or that any buyer has been deceived or misled. Attached to the complainant's goods is the trade-mark label with the words "Stevens Crash 1846" prominently printed thereon. The words "Stevens Linen Works" are stamped on the goods in large blue letters. On the other hand, the defendants' goods have a distinctive label on which the words "Absorbent Crash" is prominently printed and on every piece of crash sent to this country the words "Made in Great Britain," or "Made in Scotland" are stamped. No one with his faculties in a normal condition could possibly mistake the one for the other.

Two witnesses called by the complainant were asked if they should receive an order for crash, simply designating the letter and not the manufacturer, how they would fill it. They answered that they would send the Stevens crash. They did not pretend that they, or any one else, had ever received such an order and it is plain that they answered as they did because they dealt principally in the Stevens crash which was popular in their communities. But giving to the answers their full significance it is not easy to see how they establish fraud or deception or the existence of any confusion in the goods. If the answers had been that the order would have been filled by the defend-

ants' crash, or by either complainant's or defendants' indiscriminately, there might be more plausibility in the contention.

The complainant is surely not injured by an understanding which induces dealers to fill all orders of a general character with the Stevens goods. There is no evidence that the complainant's business has been injured; on the contrary it has, apparently, increased steadily. In 1866 the production was 4,000,000 yards annually and at the present time it is more than 12,000,000 yards annually.

The defendants' house has been engaged in business longer than that of the complainant and has achieved a deserved reputation for fair and honorable business dealing. It is quite improbable that such men would enter upon a course of petty deception and the court is unable to find any proof to sustain the charge.

The language of the Chief Justice in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, supra, seems peculiarly applicable to the present litigation. He says, page 551, 138 U. S., and page 402, 11 Sup. Ct., 34 L. Ed. 997:

"But the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances. If, in this case, the letters LL formed an important part of plaintiff's label, and the defendant had used them in such a way and under such circumstances as to amount to a false representation, which enabled it to sell and it did sell its goods as those of the plaintiff, and this without plaintiff's consent or acquiescence, then plaintiff might obtain relief within the principle of the cases just cited. But there is no such state of facts here. The brands are entirely dissimilar in appearance, and the letters have for years been understood generally as signifying grade or quality, and been so used by different manufacturers, and there is no proof justifying the inference of fraudulent intent, or of deception practiced on the plaintiff or on the public."

It is, of course, unnecessary to discuss the defense of laches.

The bills are dismissed, but as the cases have been tried together the defendants are entitled to but one bill of costs.

**KELLOGG SWITCHBOARD & SUPPLY CO. v. GLEN TELEPHONE
CO. et al.**

(Circuit Court, N. D. New York. March 9, 1903.)

No. 6,950.

**1. DISMISSAL — EFFECT OF ORDER DISMISSING AT COMPLAINANT'S COSTS —
WAIVER OF IRREGULARITY.**

An order, entered ex parte on complainant's motion dismissing a bill for infringement of a patent "at complainant's costs," without prejudice to the right of complainant to commence a suit for infringement of a reissued patent, obtained by complainant pending the suit by surrender of the patent sued on, is not conditional on the payment of the costs, nor is it void; if irregular because granted without notice, the only remedy of defendant is by motion to set it aside, in the absence of which the irregularity is waived.

2. SAME—DISMISSAL WITHOUT PREJUDICE—EFFECT OF FAILURE TO PAY COSTS.

Under Code Civ. Proc. N. Y. § 779, by rule made applicable to the procedure in the Circuit Court of the United States in the Northern District of New York, and which provides that when costs directed to be paid by an order, which fixes no time for their payment, are not paid

within 10 days, all proceedings on the part of the party required to pay the same are stayed without further direction of the court until the payment thereof, an order of a Circuit Court dismissing a bill at complainant's costs, without prejudice to a new suit, does not prevent complainant from commencing a new suit at once before the costs are paid, the only effect of the nonpayment of the costs in the former suit being to stay the second suit if they are not paid within 10 days.

In Equity. On plea.

On the 17th day of March, 1902, the complainant, Kellogg Switchboard & Supply Company, an Illinois corporation, filed in this court its bill of complaint against the defendants therein, Glen Telephone Company, a domestic corporation, and J. S. G. Edwards, E. D. Parkhurst, and Howard A. De Graff, its president, secretary, and treasurer, respectively, alleging, with all necessary and pertinent statements, an infringement by defendant company of letters patent numbered 689,953, dated December 31, 1901, being a patent relating to the operation of the telephone system, with the usual demands for judgment, etc., in such cases. July 7, 1902, the defendants filed their answer to such bill of complaint, and August 4, 1902, the complainants filed their replication. After the commencement of said action, and during its pendency, the complainants surrendered their letters patent, No. 689,953, having filed an application for reissue on the 17th day of June, 1902, and obtained reissued letters patent, numbered 12,031, dated September 16, 1902, being, of course, for same invention. On the 26th day of September, 1902, the complainants applied to and obtained from Judge Cox, ex parte, an order of which the following is a copy:

"United States Circuit Court, Northern District of New York.

"Kellogg Switchboard & Supply Co. v. Glen Telephone Company, J. S. G. Edwards, E. D. Parkhurst, and Howard De Graff. In Equity. No. 6,929. Patent No. 689,953.

"Upon motion of complainant in the above-entitled cause, and it appearing that the letters patent forming the basis of the above-entitled cause have been surrendered, and reissued letters patent No. 12,031 have been granted in lieu thereof, it is ordered that the bill of complaint herein be, and the same hereby is, dismissed at complainant's costs, without prejudice to the right of complainant herein to commence and maintain a suit or suits against the defendants herein, or either of them, for infringement of said reissued letters patent No. 12,031.

ALFRED C. COXE, U. S. J."

It will be noted that this order recites the surrender of the original patent and the reissue, and dismisses the complainant's bill, "at its cost," without prejudice to the right of said complainant to commence and maintain a suit or suits against said defendants, or either of them, for infringement of said letters patent No. 12,031. On the same day, September 26, 1902, said complainant, without a taxation or payment of defendants' costs, filed a bill of complaint against the said defendant Glen Telephone Company and J. S. G. Edwards, its president, alleging infringement of said reissued letters patent No. 12,031, with usual allegations and demand for relief, the alleged causes of action being substantially identical, except that in the last case the infringement alleged is of reissued letters patent No. 12,031, instead of an infringement of the original. These several matters are presented by plea in bar to complainant's present bill, and defendants demand judgment whether they shall be put to make any further or other answer to such bill of complaint herein, and pray to be hence dismissed, with their costs and charges in this behalf sustained. The complainant files an affidavit, with exhibits, showing that September 29, 1902, the defendants were notified of the entry of the order of discontinuance and of the filing of the new bill; that the last of October, 1902, defendants were requested to tax their costs, complainant offering to pay same; and that subsequently the complainant sent a money order for such costs as its solicitor supposed the defendants entitled to, same not having been taxed. The defendants claim that the order having been granted ex parte, and at "complainant's costs," and such costs not hav-

ing been paid, the first action, being for the same cause of action (it is claimed), is still pending, and is a bar to the present action.

Bradley & Fuller and Jones & Addington, for complainant.
Seward Davis, for defendants.

RAY, District Judge (after stating the facts). Assuming that this action is between the same parties (not strictly true, yet true in effect), and for the same cause and purpose, the present suit being for an alleged infringement of reissued letters patent, and the former action for alleged infringement (the same acts at same dates) of the original letters patent, the question is whether or not the order of Judge Coxe is effective prior to the payment of defendants' costs. If not effective, is such order a nullity, or one that may be invoked for the purpose of staying the further prosecution of the present action until the costs of the former action are paid?

It will be observed that the order of dismissal does not make the payment of costs a condition of dismissal, but states that the action "is dismissed at complainant's costs"; that is, the defendants recover costs, but the action was not dismissed "on payment of costs," or on condition that the costs of the former action are paid.

In *White v. Smith*, 4 Hill, 166, it was held:

"A suit having been commenced and an attorney employed for the defendants, the plaintiff, before receiving notice of retainer, entered a rule to discontinue, and commenced a second suit against the defendants for the same cause, to which they pleaded the pendency of the first suit in abatement. Held that, the plaintiff having omitted to pay the costs of the first suit, the rule for discontinuance was a nullity and formed no answer to the plea. Had the plaintiff, in receiving the plea in abatement and before replying, paid the costs of the first suit, the payment would have related back to the time the rule for discontinuance was entered, and thus rendered it effectual."

On appeal (*Smith v. White*, 7 Hill, 520) it was held, modifying the first decision:

"A suit having been commenced and an attorney employed by the defendants, the plaintiff, before receiving notice of retainer, entered a rule for discontinuance, without paying or tendering any costs, and commenced a second suit against defendants for the same cause, to which they pleaded the pendency of the first suit in abatement. Held, that the defendants, not having appeared in the first suit until after the second was commenced, were not entitled to costs, and that the rule formed an answer to the plea; otherwise had the defendants appeared in the first suit before the entry of the rule for discontinuance."

It will be noted that the effect of the first decision was that the order of discontinuance was not a nullity, but operated only as a stay of the second suit until the costs of the first were paid.

In *James v. Delevan*, 7 Wend. 512, held:

"A rule for discontinuance, after appearance, is effectual without payment of defendant's costs; and if such costs, when taxed, are not paid, the defendant may proceed in the suit notwithstanding the rule for discontinuance, and is not bound to make up a record of discontinuance and collect his costs, as on a judgment of non pros."

In Daniell's *Chancery Pleading and Practice* (6th Amer. Ed.) p. 791, the rule is thus stated:

"Where a plaintiff has made a default in payment of the costs of a former suit against the same defendant, or the person whom he represents, for the same purpose, the defendant may obtain an order, on motion, with notice to the plaintiff, staying all further proceedings until the plaintiff has paid such costs; and where, after great delay, the costs still continue unpaid, the court will order the plaintiff to pay them within a limited time, or, in default, that the second bill stand dismissed."

Pikett v. Loggon, 5 Ves. 706; Altree v. Hordern, 5 Beav. 623-628; 7 Jur. 247; Lautour v. Holcombe, 10 Beav. 256; Spires v. Sewell, 5 Sim. 193; Long v. Storie, 13 Jur. 1091; Sprye v. Reynell, 1 De G., M. & G. 712.

This is the effect of the rule now incorporated in the Code of Civil Procedure of the state of New York, and which controls this case, as we shall see.

In 8 Paige, 81, note, the rule is thus stated:

"Where the complainant enters a common order to dismiss his bill upon payment of costs, the order is conditional; and if he commences another suit before such costs are paid, or at least before payment thereof has been tendered, the pendency of the former suit may be pleaded in abatement of such new suit. Saxton v. Stowell, 11 Paige, 526; Simpson v. Brewster, 9 Paige, 246. But where the complainant enters an absolute order to dismiss his bill, with costs to be paid to the defendants, the defendants may treat it as a valid decree, and may proceed to collect their costs thereon, as if such a decree had been entered by order of the court, or they may treat it as irregularly entered, and may apply and have it set aside on that ground."

In the case at bar, the complainant applied to Judge Coxe for an order dismissing the bill of complaint on a showing that during the pendency of the action he had surrendered the letters patent sued on and obtained a reissue, and the order was made without prejudice to a new suit for infringement of the reissued patent. The prior action was dismissed "at complainant's costs," which means with costs to the defendants to be recovered of the complainant in the usual course. The dismissal was not conditional. If defendants were not satisfied with this order, they should have moved to set it aside or for a modification thereof. It appears from the affidavit of W. Clyde Jones and the letters annexed that, so soon as the complainant's attention was called to the matter of costs, it asked for a statement of the amount and offered to pay same, and, no statement having been rendered, later tendered by money order such costs as it supposed the defendants entitled to. This practice is not strictly correct, but it demonstrates the inequity of applying a harsh rule. The true remedy of defendants in this case would seem to be to move for a stay of all further proceedings in this action until the costs of the former actions are paid.

The rules of the Circuit Court of the Northern District of New York provide:

"Rule 5. In cases not provided for by the rules of this court, the rules of the District Court of the Northern District of New York, so far as the same are in their nature applicable, are to be considered as rules of this court."

The rules of the District Court of the Northern District of New York provide:

"Rule 83. In all cases not provided for by the rules of this court or by law the practice of the Supreme Court of this state, as prescribed by the Revised

Statutes of this state and by the rules of the said court, shall regulate the practice in this court, so far as the same may be applicable."

On this subject, section 779 of the Code of Civil Procedure of the state of New York provides as follows:

"Where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or if no time is so fixed within ten days after service of a copy of the order, due * * * execution * * * may be issued, * * * and all proceedings on the part of the party required to pay same, except to review or vacate the order, are stayed without further direction of the court until the payment thereof."

In this case no time was fixed by the order dismissing the former action for the payment of the costs of that action, and the complainant had 10 days at least in which to pay them before being stayed; it could not be in default before that time had elapsed. The stay does not operate until default in payment, and therefore not until 10 days from the service of the order or the time fixed in that order. *Pettibone v. Drakeford*, 1 How. Prac. (N. S.) 141; *Marks v. King*, 13 Abb. N. C. 374.

The order was without prejudice to the bringing of another action on reissued letters patent No. 12,031, and another action was at once commenced, not in violation of, but by express authority of, the order of the court. The complainant notified defendants of the order, called on them for a statement of their costs, and stated their readiness to pay same. It was the duty of defendants to furnish such statement or procure them to be taxed.

It has been expressly adjudicated by the Court of Appeals of the state of New York that the nonpayment of motion costs awarded in a former action does not prevent the bringing of a second action for the same cause, the only effect being to stay proceedings in the second action. *Wessels et al. v. Boettcher*, 142 N. Y. 212, 36 N. E. 883. In that case plaintiffs brought an action as assignees of the claim set forth in the complaint. The assignors had previously brought suit thereon and obtained an attachment, which was vacated on motion, "with costs," and before such costs were paid the second action was brought by the assignees of the demand. The defendants in the second action claimed the plaintiffs were stayed (section 779, Code Civ. Proc.) from bringing the action, such costs not having been paid, and that all proceedings were not merely voidable, but void; citing *MacWhinnie v. Cameron*, 19 Civ. Proc. R. 168, 11 N. Y. Supp. 20; *Gardenier v. Eldred*, 21 Civ. Proc. R. 221, 15 N. Y. Supp. 819; *Barton v. Speis*, 73 N. Y. 133. But the Court of Appeals held otherwise, and said:

"The stay of proceedings, under section 779 of the Code, has no such effect, and does not deprive the court of jurisdiction when set in motion by the party resting under the stay. The only effect is to render the proceedings irregular, and when brought to the attention of the court the party violating the stay will be dealt with as may be proper."

See, also, *Fuller v. Read*, 15 How. Prac. 236; *Jackson v. Edwards*, 1 Cow. 138; *Griffin v. R. L. C. M. A.*, 26 Hun, 314; *Baylies' Trial Prac.*, 82, 84, and cases cited.

This is the settled rule under the Code of Civil Procedure (New York) conceded to apply in this case. It is not necessary to go into other adjudications on the same subject. *Barton v. Spies*, 73 N. Y. 133, is not in conflict with, but in confirmation of, these views.

The first action did not die with the surrender of the letters patent for reissue, although the cause of action therein was by such surrender extinguished. The action until dismissed was pending. It is not necessary to the pendency of an action that the complainant have a cause of action. It may be that the order of dismissal was irregular; that the order should only have been made on notice to the defendants; but, if so, the order was not void, only irregular, and if the defendants objected to the same for want of notice they should have moved to set it aside. It will not do to hold that orders of the court, irregularly obtained, are void. Such orders, if not objected to (in the absence of a rule or statute to the contrary), are acquiesced in, and the irregularity waived. This is a rule of common sense as well as of law and practice. It follows that no discussion need be had of the question whether the causes of action in this and the former suit are the same.

The plea of the defendants must be overruled, and it is so ordered.

DURHAM PAPER CO. et al. v. SEABOARD KNITTING MILLS.

(District Court, E. D. North Carolina. February 28, 1903.)

1. **BANKRUPTCY—PETITION—PRESENTATION—RIGHTS OF CREDITORS—ESTOPPEL.**
Where a creditor participated in a general assignment by the debtor under state assignment laws, he is estopped from subsequently filing or becoming a party to an involuntary bankruptcy petition to avoid the assignment.

In Bankruptcy.

Victor S. Bryant, for petitioning creditors.

Jas. H. Pou, for bankrupt.

PURNELL, District Judge. A petition asking for an adjudication in bankruptcy of the Seaboard Knitting Mills was filed, alleging, as the act of bankruptcy, a general assignment. The answer admits the assignment, made nearly four months before the filing of the petition, and that the corporation is insolvent. As a defense the answer alleges petitioners have filed their verified claims with the clerk of the superior court, as required by the state assignment law, and permitted the property to be sold and a large part of the proceeds disbursed; hence have made themselves parties to the assignment, acquiesced therein, and are estopped from joining in a petition to have defendant corporation adjudged a bankrupt. The material allegations of the answer are proved by letters and exhibits filed therewith and not denied.

In a proceeding, the facts of which were very similar, almost identical, with those here presented (*Simonson v. Sinsheimer*, 37 C. C. A. 337, 95 Fed. 948), Judge Taft, delivering the opinion of the Circuit Court of Appeals of the Sixth Circuit, held:

"Where a debtor makes a general assignment for the benefit of his creditors, and judicial proceedings are instituted to enforce and carry out the assignment, creditors who, on being made parties to such proceedings, do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims under the assignment, and participate in the administration of the estate, and suffer the assignee to sell the property and collect the proceeds, involving a delay of several months, and the incurring of costs and expenses, are estopped thereafter to file a petition in involuntary bankruptcy against the assignor, based solely on the ground of the assignment."

There are other decisions to the same effect. The reasoning and authorities cited seem to be conclusive. True, the Circuit Court of Appeals of the Seventh Circuit, in *In re Theodore E. Curtis et al.* 2 Am. B. R. 226, 94 Fed. 630, held, under somewhat similar circumstances, the petitioners were not estopped; but the distinction lies in the fact that in the latter case the petitioning creditors had simply filed their claims as required by the state law, but had not by any other act assented to or participated in or made themselves parties to the assignment complained of as an act of bankruptcy.

A general assignment is per se an act of bankruptcy, and ipso facto void under the bankrupt act on the filing of a petition, but a petitioner who participates in, receives benefit under, or assents to a general assignment, valid under the laws of the state, is estopped from afterwards filing or becoming a party to a petition in bankruptcy to avoid such assignment.

It is therefore ordered that the petition herein be dismissed.

UNITED STATES v. ROSENBLUM.

(Circuit Court, S. D. New York. March 9, 1903.)

1. **MAILS—LOTTERIES—PRIZES—ADVERTISEMENT—CONSTRUCTION.**

A circular offering prizes to persons who should estimate nearest to the number of cigarettes on which tax is paid during a certain month, as shown by the total sales of stamps by the United States Internal Revenue Department during that month, each estimate to be accompanied by 10 cigarette coupons inclosed in boxes of a particular brand of cigarettes, is not a lottery within Rev. St. § 3894, amended 1 Supp. Rev. St. 803 [U. S. Comp. St. 1901, p. 2659], prohibiting the sending of any lottery, etc., through the mails.

Henry L. Burnett, U. S. Atty., and William S. Ball, Asst. U. S. Atty.

Ingraham, Root & Massey and Harrison J. Barrett, for defendant.

THOMAS, District Judge. The information charges that one Rosenblum, president of a corporation known as "Mozle Brothers," has violated section 3894, Rev. St., as amended 1 Supp. Rev. St. 803 [U. S. Comp. St. 1901, p. 2659], which, so far as here involved, is as follows:

"No letter, postal card or circular, concerning any lottery, so-called gift-concert, or other similar enterprise, offering prizes dependent upon lot or

¶ 1. Nonmailable matter relating to lotteries, see note to *Timmons v. U. S.*, 30 C. C. A. 90.

chance * * * shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter-carrier."

The brief of the government states:

"The question seems to be whether or not the sending out of the circular is an enterprise offering prizes dependent upon lot or chance."

The circular in question is as follows:

"Mozle Bros.,
[Cut.] "Makers of Highest Grade Turkish Cigarettes [Cut.]
Possible.

"How many paper-wrapped cigarettes will the United States Internal Revenue Department collect taxes on during the month of October, 1902?

"\$250.00 will be given to the persons whose estimates are nearest to the number of cigarettes—all kinds of paper-wrapped cigarettes (no matter what rate of tax they pay)—on which tax is paid during the month of October, 1902, as shown by the total sales of stamps made by the United States Internal Revenue Department during October, 1902.

"Distribution will be made in cash as follows:

To the person estimating the closest.....	\$ 50 00
To the two persons whose estimates are next closest, \$25 each....	50 00
To the five persons whose estimates are next closest, \$10 each....	50 00
To the ten persons whose estimates are next closest, \$5 each.....	50 00
To the fifty persons whose estimates are next closest, \$1 each....	50 00

Total \$250 00

"In order to entitle you to make an estimate, your estimate must be accompanied by ten Mozle Bros. cigarette coupons (which will be hereafter packed with Mozle and Turkish Run cigarettes, and are themselves valuable for presents), and you are entitled to make one estimate for each ten Mozle Bros. cigarette coupons sent in. By sending in Mozle Bros.' cigarette coupons, in order to participate in this contest, you do not give up the value of these coupons as indicated on their faces.

"As information which may be of value in making estimates, the number of cigarettes for which stamps were purchased appears below: In October, 1900, 242,164,790 cigarettes; in October, 1901, 221,633,840 cigarettes; in January, 1902, 229,214,905 cigarettes; in February, 1902, 133,864,390 cigarettes; in March, 1902, 162,376,975 cigarettes; in April, 1902, 208,278,240 cigarettes; in May, 1902, 259,334,000 cigarettes.

"In case of tie estimates, the amount offered will be divided equally among those entitled to it. Distribution of the awards will be made as soon after November 1st, 1902, as the figures are obtainable from the Internal Revenue Department of the United States. \$250, to make good this offer, has been this day deposited with the 11th Ward Bank, New York City.

"Write your full name and street address, plainly, on package containing coupons. The postage charges on the packages must be fully prepaid in order for your estimate to participate.

"All estimates under this offer, together with the coupon, must be forwarded before October 1st, 1902, to Mozle Bros., 104 Second Avenue, New York City.
Mozle Bros."

The question whether such an enterprise is dependent upon lot or chance was, upon similar states of fact, answered in the negative by Attorneys General Miller, Griggs, and Knox, and the ruling has been followed in numerous cases by the Assistant Attorneys General for the Post Office Department, to wit, by Assistant Attorney General Tyner in 1898, 1901, and 1902, and Assistant Attorney General Christiancy on two occasions in 1901. Of course, the original opinion of Attorney General Miller furnished a precedent for the guidance of the department of justice, and was observed by the assistants connected

with the Post Office Department. Such ruling is in accordance with the decisions in this country and England, with the single exception of *Hudelson v. The State*, 94 Ind. 426, 48 Am. Rep. 171. Such decisions are *Hall v. Cox* [1899] L. R. 1 Q. B. 198; *Regina v. Dodds*, 4 Ont. Rep. 390; *Regina v. Jamieson*, 7 Ont. Rep. 149; *Dunham v. St. Croix Soap Mfg. Co.*, 34 N. B. 245; *Stevens v. Cincinnati Enquirer Co.* (Super. Ct. Cin., Ohio; 1903), 28 Ohio Law Bul. 235. The defendant also relies upon the decisions to the effect that the offer by a newspaper of a prize to the person who should name winning horses in a given race is not a lottery. *Caminada v. Hulton*, 60 L. J. (M. C.) N. S. 116 (1891); *Stoddart v. Sagar* [1895] L. R. 2 Q. B. 474; The defendant also invokes the cases relating to pools on horse races, to wit, *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47; *Reilly v. Gray*, 77 Hun, 406, 28 N. Y. Supp. 811; *People v. Fallon*, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492.

The supporting decisions first cited proceed upon the conception that "a lottery is a scheme by which some result is reached, by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished" (*People v. Elliott* [Mich.] 41 N. W. 916, 3 L. R. A. 405, 16 Am. St. Rep. 640); or, as stated by Smith, J., in *Hall v. Cox*, supra, "that, to constitute a lottery, it must be a matter depending entirely upon chance"; and that in enterprises similar to that involved in the action at bar, skill and judgment, based upon experience, knowledge, or ascertainment of facts related to the problem to be solved, are effective elements in the winning of the prizes. These cases are distinguished from *Barclay v. Pearson* [1893] L. R. 2 Ch. 154, where the scheme offered a prize to the person supplying the correct word omitted from a given sentence, which word had been selected arbitrarily by the promoter of the enterprise; and *Hall v. Macwilliam*, 65 J. P. 742 (King's Bench), where the award was dependent upon the guessing of certain spots in the newspaper, which had previously been selected arbitrarily, wherein it was considered that skill and judgment could play no part.

The question in this case is not, what does the maintenance of good morals demand, but what does the statute mean, and do the facts bring the present case within it? Ordinary respect for the opinion of three Attorneys General of the United States, and for the general current of authority in this country and England, should influence a trial court in the same direction. But independent consideration leads to the same result.

Each person pays to the author of the enterprise a sum of money for the privilege of competing for a prize offered by the latter, which prize is possibly, and perhaps presumptively, but not necessarily, paid from the general fund created by all the contributors. The contest is to determine who of the contributors can state with the greatest accuracy a fact only determinable with mathematical accuracy in the future, to wit, the number of cigarettes on which tax will be paid during a specified future month. The aggregate depends largely upon the total number of taxable cigarettes sold and prepared for sale, and

is assumed to be represented by the sales of revenue stamps during the month. In short, the number of stamps sold by the Internal Revenue Department during the month for the purpose of meeting taxes on cigarettes is the fact to be ascertained. But the number of cigarettes sold, or so far made ready for sale as to demand stamps, is the chief underlying fact. This fact is no artificial nor arbitrary creation. It will result from conditions known in their general nature, such as the abundance or scarcity of the product of which the subjects of the tax are chiefly composed, the consequent price to the consumer, the present extent and probable increase or decrease of the habit of using the article, and the stock customarily carried by manufacturers and dealers, of which some knowledge may be gained by economic statistics. Each salient condition upon which the aggregate sale depends is a subject of an intelligent study, that enables a skilled person to forecast the fact, with an accuracy in some palpable degree measured by his study and knowledge, and his skill in the use of such knowledge. It is quite unlikely that his study and inferences therefrom will be so thorough and accurate as to enable him to state the fact with mathematical correctness, nor does the enterprise demand this. He is required only to state it with an accuracy greater than his fellow competitors. The fact is certain, in the sense that it will exist, not because some person has secretly made it certain, but because there are recognized forces that will bring the sales to a certain limit, and a knowledge of these forces enables the contestants to approximate to their resultant. Assume that the figure 1,000 represents the fact. In the case of the lottery the number exists by a secret arbitrary selection, and no intellectual exertion on the part of the competitors can ascertain it. If any person draw the prize, it is by reason of a coincidence of numbers to which no one either intelligently contributes or seeks to contribute. The fact is not only beyond foreknowledge, but also beyond all effort at foretelling. The competitors idly await. The agencies that will cause a particular person to hold the concurring number exist, but are beyond human conception. No trace of them can be apprehended. Hence each contributor exposes his money to a hazard over which he can have no influence by the aid of intelligent selection. The choice is not aided by knowledge; it is not imperiled by ignorance. No competitor can assist or diminish his possibility of achievement. But enterprises like that at bar involve an economic fact somewhat similar and related to those of previous months and years, dependent in an essential part upon well-known laws of trade, production, consumption, habits of the people, and the like. The fact grows from laws, and from conditions upon which such laws act, both of which are to an extent known to some, and may be so known to all. After studying these laws and the subjects of their operation, each competitor, by the use of logical methods, is qualified to express a valuable judgment concerning the fact whereon the prize depends. It is urged that certainty cannot be attained. Truth is usually in some obscurity, but in this case it can be pursued, and a nearer approach to it gained, by the means stated. It cannot be attained in any degree by a guess, which is a conclusion expressed either without knowledge or the use of knowledge, if that be possible. A mere guess can gain

only what chance brings. It is obvious that an arbitrary selection of a number by a competitor, or a guess, would be absolutely futile. The contestant who relied upon chance opinion, unaided by judgment, might win the prize, but such result would not accord with reasonable expectation. Indeed, a guess proper could not be employed, as the data is furnished, which each mind would use intuitively or purposely, providently or carelessly, as a basis of judgment. But the mere fact that some might conclude indolently or rashly, or with whatever error or disregard of given and obtainable antecedent and present data, does not make the solution of the problem a matter of chance, for the opportunity for a rational judgment is at hand, if one have something of capacity and inclination to employ it. An opportunity is offered to gain a prize by those paying for the privilege of competing. The task is that one competitor shall foretell with greater accuracy than his fellow contestants the effect of conditions that have or may arise upon the consumption of tobacco in certain forms, and all are supplied with certain information that will aid in shaping the judgments to be given. The results in previous months or years are furnished. Chance has no part in designating the recipient, except so far as all judgments may be wrong by reason of unknown or improperly used data.

In this independent discussion nothing is added to the amply illustrated argument in previous decisions, upon whose authority there was inclination to base the present determination. However, so much has been repeated, in a somewhat different form, for the purpose of stating simply the grounds of an obviously correct conclusion.

The demurrer will be sustained.

HERMAN v. METROPOLITAN ST. RY. CO.

(Circuit Court, S. D. New York. January 24, 1903.)

1. ATTORNEY AND CLIENT—CONTINGENT FEES—VALIDITY OF CONTRACT.

A contract between plaintiff and his attorney by which plaintiff agreed to pay the attorney 50 per cent. of any recovery for injuries to plaintiff, and, in addition, to pay all the disbursements, was unconscionable and void.

2. SAME—LIEN OF ATTORNEY—PROSECUTION OF SUIT AFTER SETTLEMENT.

Where, in an action for injuries, plaintiff's attorney served notice of a lien for his compensation, and plaintiff settled the case with defendant, before trial, without the attorney's consent, whereupon the attorney continued the prosecution for his fees, and a verdict was rendered assessing plaintiff's damages at \$500, the attorney was entitled to recover from such amount the reasonable value of his services actually rendered, whereupon the balance of the recovery would be remitted.

Henry L. Franklin, for the motion.

Henry A. Robinson, opposed.

LACOMBE, Circuit Judge. This cause was tried after plaintiff had settled it with defendant, receiving a sum satisfactory to himself

¶ 1. See Champerty and Maintenance, vol. 9, Cent. Dig. § 26.

and executing a general release, which was set up in a supplemental answer. The settlement and release was without notice to plaintiff's attorney, who had served notice of lien for his compensation. The jury found, in answer to specific questions, that defendant was negligent, that plaintiff was free from negligence, and that the amount of damage sustained by the plaintiff was \$500. Testimony has since been taken to show for what amount the lien of plaintiff's attorney should be sustained. He undertook to prove that he had a contract with plaintiff for 50 per cent. of any recovery, the plaintiff to pay all disbursements. The only evidence to support this proposition is his own testimony, which the plaintiff contradicts. The court is not satisfied that such a contract was made, but, if it were, it was so utterly unconscionable as to be void. *Matter of Fitzsimons* (Sup.) 79 N. Y. Supp. 194. The action was to recover damages for injuries resulting from an ordinary street accident, a collision between a car and a truck. To constrain or persuade a client into agreeing to give half the recovery, and to pay all the disbursements besides for preparing and trying such a case, is an abuse of confidence, which, in the language of the case cited, "it would not be in the interest of public policy or professional ethics" to approve.

The services actually rendered seem to be fairly worth about \$150. Inasmuch as plaintiff has released his claim, no verdict can be rendered giving him any part of the damages found; he has already been paid them. Verdict, however, will be directed for \$150, to which and to the judgment thereon the lien of plaintiff's attorney will attach. Inasmuch as the recovery is less than \$500, the judgment will be without costs.

GLOBE-WERNICKE CO. v. BROWN et al.

(Circuit Court, W. D. Pennsylvania. February 19, 1903.)

No. 17.

1. TRADE-MARKS—DESCRIPTIVE CHARACTER OF WORD—"ELASTIC" AS APPLIED TO SECTIONAL BOOKCASES.

The word "Elastic" is not aptly descriptive of bookcases or filing cabinets constructed in sectional parts, so that their size may be increased or diminished by adding or taking away sections, but is at most only suggestive of such feature, which does not preclude its appropriation as a trade-mark by the manufacturer of such articles to identify the goods of its manufacture.

2. SAME—UNFAIR COMPETITION.

The word "Elastic" held, under the evidence, to have been used for such length of time by plaintiff as to have acquired a secondary meaning in the trade and with the general public as identifying sectional bookcases, and similar articles of its manufacture, and to entitle it to protection against the use of such word in connection with the goods of other manufacturers, even if not valid as a technical trade-mark.

In Equity. Sur pleadings and proofs.

¶ 1. Arbitrary descriptive or fictitious character of trade-marks and trade-names, see note to 50 C. C. A. 323.

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

Taggart, Denison & Wilson and C. S. Crawford, for complainant.
J. S. & E. G. Ferguson, for defendants.

ACHESON, Circuit Judge. By stipulation the parties have agreed that the court shall consider this case on bill, answer, and affidavits *ex parte* plaintiff and defendants as upon final hearing. The suit is by the Globe-Wernicke Company, a corporation of the state of Ohio, against Clarence B. Brown and James I. Rees, citizens of the state of Pennsylvania, to restrain the defendants, who are retail dealers in furniture, from using in their business the word "Elastic" in connection with bookcases and similar furniture, not manufactured by the plaintiff.

The bill avers and the proofs show the following facts: The Wernicke Company, the plaintiff's predecessor in business, about May 1, 1894, engaged in the business of manufacturing and selling sectional bookcases and similar furniture, constructed in separate sections, so that the sections can be put together in different forms and shapes, and arranged in one or several distinct structures, and rearranged. The Wernicke Company was the first to put upon the market and introduce to the public any bookcase or similar article of furniture having these characteristics. The said company, on or about May 1, 1894, adopted as a trade-mark and distinguishing name for such bookcases and like furniture the word "Elastic," and thereafter and continuously it and its successor in business, the plaintiff company, have used that word as a trade-mark by stamping or impressing it on all sections of bookcases and similar articles manufactured and sold by them, and by imprinting the word upon the letterheads and stationery and catalogues and advertising matter of all kinds used in connection with such business. On May 11, 1897, the Wernicke Company caused this trade-mark to be registered in the United States Patent Office, and a certificate of registration therefor was duly issued. On or about August 1, 1899, the Wernicke Company sold and transferred its entire business and all rights and interests appertaining thereto, including the exclusive right to use the said trade-mark, to the plaintiff company. The plaintiff has built up and is conducting a large and extensive business in its sectional bookcases and similar furniture under the name of "Elastic." The defendants are engaged in the business of selling office furniture in the city of Pittsburgh, and have been offering for sale and selling sectional bookcases and filing cabinets under the name of "Elastic," and have been advertising the same as "Elastic" bookcases and "Elastic" filing cabinets, although the same are not in fact of the plaintiff's manufacture.

The defendants insist that the word "elastic" could not be appropriated as a trade-mark for such sectional bookcases or similar furniture, because it is merely descriptive of the articles. The argument is based on the fact that the size of such a sectional article may be increased or diminished by adding to or taking from it some pieces. But this peculiarity is by no means aptly represented by the word "elastic." The primary meaning of this word (as defined by Webster) is, "having a power or inherent property of returning to the

form from which a substance is bent, drawn, pressed, or twisted." This is the common acceptation of the word "elastic." Certainly a sectional bookcase or other like article of furniture does not have the capability of spontaneously returning to a former size or shape. In no true sense is such an article elastic. The Century Dictionary and other authorities, indeed, give to the word "elastic" the secondary meaning of "admitting of extension," "capable of expanding or contracting according to circumstances," but such use of the word is figurative, the illustrations being "elastic consciences," "elastic principles," "elastic spirits," etc. The most that can be said correctly is that the term "elastic" as applied to sectional bookcases and similar furniture is somewhat suggestive of one of their characteristics. This, however, I think, was not enough to take the word out of the range of lawful appropriation as a trade-mark for sectional furniture such as the plaintiff manufactures; and which its predecessor in business first introduced to the public.

But if the word "elastic" were deemed to be so descriptive of these articles as to be inadmissible as a technical trade-mark, still, under the proofs, the word has acquired such a secondary signification, denoting sectional bookcases and like furniture of the plaintiff's manufacture, that the plaintiff should be protected in its use. It clearly appears that in the trade and with the general public the word "Elastic" has become distinctly associated with sectional bookcases and like articles manufactured by the plaintiff, indicating their origin. Philip H. Yawman, president of the Yawman & Erbe Manufacturing Company of Rochester, N. Y., the manufacturer of the sectional bookcases the defendants are selling, testifies that "the word 'Elastic' has for a long time been used and advertised prominently by the Wernicke Company and the Globe-Wernicke Company in connection with such sectional bookcases, and it has been thoroughly understood by me, and by the Yawman & Erbe Company, and, I believe, by the trade generally, that such word was used and claimed by the Wernicke Company, and later by the Globe-Wernicke Company, as being their trade-mark, and as distinguishing and identifying such goods of their manufacture." He further states that his company, and, he believes, all other manufacturers of sectional bookcases, have acquiesced in the exclusive right of the Wernicke Company and the Globe-Wernicke Company to the word "Elastic" in this connection. And by a number of affidavits made by other persons it is, I think, firmly established that in the trade and among the purchasers and users of such articles the word "Elastic" has come to mean, and does mean, when used in connection with sectional bookcases and similar furniture, goods manufactured by the plaintiff company.

Upon the proofs I am of opinion that the plaintiff is entitled to relief as well on the ground that the word "Elastic" was here rightfully appropriated as a trade-mark, as also upon the ground that the word has acquired a secondary meaning signifying goods of the plaintiff's manufacture.

Let a decree be drawn in favor of the plaintiff.

HECHT, LIEBMANN & CO. v. PHENIX WOOLEN CO. et al

(Circuit Court, D. Rhode Island. March 21, 1903.)

No. 2,583.

1. CORPORATIONS—STOCKHOLDERS.

Parties who permit the issuance of stock in a corporation to them, acquiesce in it for many years, and do not disavow the acts of the officers in issuing it, are liable as stockholders, even though they paid no consideration for the stock, and the regularity of its issue might be questioned.

In Equity.

Edwards & Angell, for complainant.

Samuel W. K. Allen, for respondents.

BROWN, District Judge. This bill seeks to hold Annie M. S. Dews and Fred S. Dews liable as stockholders for the debts of the Phenix Woolen Company, a corporation of Rhode Island. The case is submitted on bill and answer, and the single question is whether the respondents were stockholders.

The bill alleges in proper form that the said Annie M. S. and Fred S. Dews were stockholders. It seems clear that the facts set up in the answer are insufficient to meet the explicit allegations of the bill, or to show that the respondents were not stockholders. While it is true that a person cannot, without his knowledge or consent, be made a stockholder merely by a record or transfer upon the books of the corporation, or by the issue of a certificate in his name, this does not avail the respondents. They do not set up in their answer, either directly or inferentially, that the stock was issued or transferred to them without their knowledge or consent. Neither do they allege that they did not in any way exercise the rights of stockholders, or that they did not vote or receive dividends upon their stock. On the contrary, the allegations are inconsistent with a lack of knowledge.

The substance of the answer is that at the time of the organization of the Phenix Woolen Company an agreement was made between William A. Walton, its president, and Joseph S. Dews, its treasurer, that Walton should advance about \$100,000 for the use of the corporation, and as part security for the payment of his loan should hold as collateral the capital stock of said corporation then issued or to be issued; that about September 30, 1889, certificate No. 1, for 660 shares of the capital stock, was issued in the name of Annie M. S. Dews, and on the same day certificate No. 3, for 66 shares, was issued in the name of Fred S. Dews; that neither said Annie M. S. nor said Fred S. Dews ever paid any consideration therefor, or for any part of it; that both of said certificates of stock were immediately transferred to and held by said Walton as collateral security for his loan to the corporation; that on the same day certificate No. 2, for 330 shares, was issued

¶ 1. Stockholders' liability to creditors in equity, see notes to *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.

to Walton, who, on February 10, 1890, severed his connection with the Phenix Woolen Company, and was paid in full all the obligations he held against said corporation, including said loan, and thereupon Walton transferred and assigned to Annie M. S. Dews his 330 shares of capital stock, and certificate No. 6, for 330 shares, was issued to her on February 11, 1890; that neither Annie M. S. Dews, nor any person for her, paid Walton anything in consideration of said transfer; that afterwards, on November 18, 1892, certificate No. 7, for 321 shares, was issued to Annie M. S. Dews, certificate No. 8, for 21 shares, to Fred S. Dews, and on July 1, 1893, certificate No. 11, for 39 shares, was issued to Annie M. S. Dews, and certificate No. 12, for 3 shares, to Fred S. Dews; that certificates Nos. 7, 8, 11, and 12 were each and all issued as stock dividends by the officers of said corporation, without any vote or other authority of the corporation; that no money or other consideration was ever paid for said stock, or for any part of it; that the said Annie M. S. Dews never had said certificates, nor any of them, in her possession, but was informed by the officers of the corporation that said certificates of stock were held from time to time by the creditors of said corporation as collateral security for its indebtedness. The answer alleges also that the respondents "were informed, and always understood, when said stock was issued, that the same was to be pledged and held by the creditors of said corporation as collateral security for the payment of the indebtedness of the corporation until such time as its earnings should be sufficient to pay the corporation debts, and relieve said stock from all liability therefor."

The answer is inconsistent with the view that the respondents did not have knowledge of what was done, nor consent thereto. Thus the answer alleges that certificates Nos. 1 and 3 were immediately transferred to and held by William A. Walton as collateral security. It would seem to follow from this allegation that the transfer to Walton was made by the respondents to whom the shares had been issued. The answer sets up the transfer. There is no allegation that this transfer was not made by the respondents, or that it was not authorized, or that it was not made with their authority, knowledge, or consent. The answer also alleges that Walton transferred and assigned 330 shares of stock to the respondent Annie M. S. Dews, and that certificate No. 6 for said shares was issued to her in February, 1890. The statement that Annie M. S. Dews never had the certificates, nor any of them, in her possession, is not a sufficient allegation that she was not fully informed that the stock had been issued to her, or transferred to her.

The substance of the case is this: The respondents permitted the issue of stock to them, paying no consideration therefor; and they transferred the same, to be held as collateral security for debts of the corporation. Can they now be permitted to assert against creditors that they were not stockholders, merely for the reason that they paid no consideration for the stock, or because they assented to the transaction merely to assist the corporation in raising funds, or because of any irregularity in the original issue? The case of *Keyser v. Hittz*, 133 U. S. 138, 149, 10 Sup. Ct. 290, 294, 33 L. Ed. 531, states the law, as follows:

"We must not be understood as saying that the mere transfer of the stocks on the books of the bank to the name of the defendant imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts, and engagements of the bank. But if, after the transfers, she joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified, or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks."

The respondents knew of the issuance of stock to them. They acquiesced in it for many years, and did not disavow the acts of the officers of the corporation in issuing the stock to them. They cannot evade liability by saying that they never paid for their stock, or by questioning the regularity of its issue. *Thompson's Liability of Stockholders*, § 161; *Sigua Iron Co. v. Greene*, 31 C. C. A. 477, 88 Fed. 207; *Wells v. Larabee*, 36 Fed. 866. See, also, note, 23 C. C. A. 330, 331, and cases cited; *Latimer v. Bard* (C. C.) 76 Fed. 536.

Decree will be for complainants.

UNITED STATES v. CLARK et al.

(District Court, M. D. Pennsylvania. February 19, 1903.)

No. 13.

1. USING MAILS TO DEFRAUD—INDICTMENT—REV. ST. § 5480.

An indictment under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], for using the mails to defraud, must show that the fraudulent scheme was "to be effected" through that medium as an essential part, and not as a mere adjunct or incident, and that the original design contemplated and embraced this, which is not necessarily the case with a charge that defendants falsely pretended, in pursuance of the fraudulent scheme in which they had engaged, that they were prepared to give personal instruction by correspondence through the mails. That the mails were actually to be used to effect the scheme must be both charged and proved.

2. CONSPIRACY AGAINST UNITED STATES—REV. ST. § 5440.

A conspiracy to defraud an individual, even though the mails be made use of for the purpose, does not fall within the terms of section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676]. What is there provided for is a conspiracy of two or more either to commit an offense against the United States or to defraud it.

Rule to Show Cause Why Indictment Should not be Quashed.

C. A. Van Wormer and Jno. F. Scragg, for defendants.

S. J. M. McCarrell, U. S. Atty.

ARCHBALD, District Judge. It is not every fraudulent scheme in which the mails may happen to be employed that is made an offense against the federal law, but only such as are "to be effected" through

¶ 1. Nonmailable matter relating to frauds and counterfeiting, see note to *Timmons v. United States*, 30 C. C. A. 86.

that medium as an essential part. Rev. St. § 5480, Act March 2, 1889, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696]; *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; *Stewart v. United States* (C. C. A.) 119 Fed. 89. To make out an offense, therefore, under the statute, this must be both charged and proved. It is not sufficient that the mails were actually used, although that is one ingredient. The scheme must involve their use to effectuate the fraudulent purpose, the use in fact being merely the overt act. The present indictment is defective in this respect. While it is true that the defendants are charged with having falsely pretended, in pursuance of the fraudulent scheme in which they had engaged, that they were prepared to give personal instruction by correspondence conducted through the United States mails, which, at first blush, might seem to imply that the use of the mails was contemplated, yet upon consideration it is plain that such was not necessarily the case, as the persons to be approached and brought within range of the scheme might be sought out and induced through canvassers or solicitors or by advertisement in the public prints, in neither of which instances would an offense against the federal law have been committed. When a correspondence was actually entered into, there might be; but not even then, perhaps, if the use of the mails was only incidental. What is sought to be prevented is an abuse of the post office facilities of the country to carry out schemes to defraud, a far wider range being secured through this public agency, with greater chance for immunity on account of the distance at which they are able to be undertaken. But, as stated above, this use must be an essential of the scheme, and not a mere adjunct or incident. The original design of the parties must contemplate and embrace it. So the statute reads, and we cannot enlarge upon it. There is a growing tendency to try and do so, which must be resisted. Bad debts contracted by mail are even sought at times to be made the basis of a prosecution under it; but the federal law was not intended to bolster up the credit system of the country, nor improve its morals. In the present instance the omission to charge that the scheme devised by the defendant was to be effected by the use of the mails is fatal to the first count of the indictment, no offense against the federal law being stated without it.

The second count is even more defective than the first. It merely charges a conspiracy to defraud the persons named in the first count, to whom circulars had been sent by mail. It is supposed to be drawn under section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676]; but what is there provided for is a conspiracy of two or more either to commit an offense against the United States or to defraud it. A conspiracy to defraud an individual, even though the mails be made use of for that purpose, clearly does not fall within its terms.

The rule is made absolute, and the indictment quashed.

LAND TITLE & TRUST CO. v. ASPHALT CO. OF AMERICA.

(Circuit Court, D. New Jersey. February 13, 1903.)

1. PLEDGES—ENFORCEMENT.

Where an agreement pledging securities to a trustee for the payment of interest on certificates provided that, in case of default in the performance of any obligation undertaken by the pledgor, the trustee might institute such proceedings as might be advised by counsel, the trustee was entitled, in default in payment of the interest, to resort to a court of equity to enforce the agreement, notwithstanding that the agreement provided a mode of enforcement without the intervention of the court.

2. SAME—NECESSITY OF SALE—DEMURRER.

A bill by a trustee for the sale of securities pledged to secure the payment of interest on certificates issued by the pledgor, alleging a default in the payment of interest, should not be dismissed on demurrer, because on the final hearing it may appear that it will not be necessary to sell all the certificates pledged, as prayed in the bill.

3. RECEIVERS—APPLICATION FOR INSTRUCTIONS BY STOCKHOLDERS—DEFENSE TO A SUIT—DISCRETION OF RECEIVER.

Where a stockholder in a corporation applies to the receivers and requests them to set up, by way of answer to a bill filed by a trustee for the sale of certificates pledged by the corporation, certain facts which he alleges on information and belief, and the receivers aver that they have inquired into said alleged facts and have found them without foundation, the court will not require the receivers to make answer of such matters.

Nathan Bijur, for petitioner.

A. H. Wintersteen, for receivers.

Chas. L. Corbin, for Land Title & Trust Co.

Julien T. Davies, for Harrity committee.

KIRKPATRICK, District Judge. The complainant herein, the Land Title & Trust Company, filed their bill for the sale of securities pledged to them, as trustees, for the payment by the Asphalt Company of America of the interest upon certain certificates, and for the purpose of enabling the said trust company to purchase the said certificates at par.

The bill sets out that default has been made in the payment of the interest on the said certificates, and in the payment of certain sums provided in said trust deed to form a sinking fund for the redemption of said certificates at maturity. Prior to the filing of this bill, the said Asphalt Company of America had been adjudged insolvent by this court, and receivers appointed to take charge of and care for its property, which consisted of the stocks and obligations of several various companies engaged in the business of laying asphalt pavements. For this reason the said receivers, representing the company and the owners of the equity of redemption of said pledged assets, were made parties to this suit, the bill in which prays, *inter alia*, "that an account may be taken, by and under the direction of this court, of the amount due for principal and interest on said collateral gold certificates" of the Asphalt Company of America (by which name said certificates secured by said pledge were known), and "that the property subject to the lien of the complainant, as trustee, and of the said holders of collateral gold certificates of the Asphalt Company

of America, may be ascertained, and that all of the said property may be now sold and the proceeds applied to reimburse the trustee for all cost and expenses of said sale and of said trust, and to pay and discharge counsel fees and trustee's commissions, and to pay the unpaid semiannual interests and the principal of said certificates."

The bill recites that, as the several installments of interest on said certificates become due, the said Land Title & Trust Company, being the trustee for said certificate holders, requested the receivers, in whose custody all the assets of said company were, to pay said interest, which they were unable to do. The agreement between the said Asphalt Company of America and said trustee expressly provides that:

"If at any time the company shall make default in the performance of any obligations undertaken by it in this agreement, and such default shall continue for thirty days after demand for performance has been made in writing by the trustee, * * * the trustee may, in the event of default made and continued as in this section of the agreement, at the request in writing of the owners and holders of a majority in amount of the certificates at the time outstanding, institute such legal proceedings as may be advised by counsel to enforce the obligation of this agreement undertaken by the company."

So, upon this default (a refusal to pay the interest), the trustee became entitled to resort to a court of equity to enforce the obligation of the agreement, notwithstanding the fact that the agreement points out and provides a mode of enforcement without the court's intervention. In *Guarantee Trust and Safe Deposit Company v. Green Cove Springs and M. R. Company*, 139 U. S. 143, 11 Sup. Ct. 514, 35 L. Ed. 116, the court said:

"If the provisions of the mortgage concerning foreclosure were subject to the construction that they are exclusive of all right to resort to a court of equity, then they would be invalid, as intended to oust the jurisdiction of the court, which by the uniform current of authority cannot be done."

I have no doubt this court has jurisdiction of the subject-matter in this suit. Harry C. Spinks, claiming to be the holder of 1,000 shares of the stock of the Asphalt Company of America, applied to the said receivers, and requested them to demur to said bill, "because it did not set out any such breach of the conditions and agreements as would entitle the complainant to the relief prayed for," and also requested said receivers to set up by way of answer certain allegations of fact in said petition stated to be true upon information and belief. To both of these requests the receivers refused to comply, and this appeal is taken to compel them to do so.

The court has examined the bill and the exhibits annexed, and is satisfied that a demurrer thereto would not lie. It is not denied that two semiannual payments of interest are in default, and the securities which have been pledged as security, therefore, are, as has been said, liable to sale under the decree of this court. Whether it shall be necessary to sell all of said securities, as prayed for in the bill, could not be determined upon a demurrer. The bill should not be dismissed because it asks for more relief than the court upon the final hearing may adjudge them entitled to.

As to the alleged facts stated on information and belief, which the petitioner asks the receivers to set up by way of answer to said bill, the receivers say they have inquired into them, and find them without

foundation or merit. The court will not require the receivers to set up in answer matters which upon investigation they are satisfied are not in accordance with the facts and incapable of proof. While the petitioner is free with his charges of fraud in respect to the dealings of the holders of the stock of the Asphalt Company of America in transferring their stock to the National Asphalt Company, the court fails to perceive how these charges, if true, can avail as a defense in the present suit.

The application for instruction to the receivers must be denied, and the appeal dismissed.

T. BING & CO.'S SUCCESSORS v. UNITED STATES.

(Circuit Court, S. D. New York February 5, 1903.)

No. 3,211.

1. CUSTOMS DUTIES—PLASTER OF PARIS STATUETTES.

Decorated and ornamented statuettes, made from plaster of paris—sulphuric acid, lime, and water—are not taxable under Tariff Act July 24, 1897, c. 11, par. 95 (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]), as china, porcelain, or crockery ware, including statuettes ornamented, etc., but are taxable under paragraph 450 (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]), as manufactures of plaster of paris, or of which such substance is the component material of chief value, not specially provided for in the act.

Albert Comstock, for appellants.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of decorated and ornamented plaster of paris statuettes, under Act July 24, 1897, c. 11 (30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]). It was assessed at 55 per cent., under paragraph 95 (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]):

"China, porcelain, parian, bisque, earthen, stone, and crockery ware, including clock cases with or without movements, plaques, ornaments, toys, toy tea-sets, charms, vases and statuettes painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if plain white and without superadded ornamentation of any kind, fifty-five per centum ad valorem."

The appellants claim it belongs under paragraph 450 (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]):

"Manufactures of leather, finished or unfinished, manufactures of fur, gelatin, guttapercha, human hair, ivory, vegetable ivory, mother-of-pearl and shell, plaster of paris, papier mache, and vulcanized india-rubber known as 'hard rubber,' or of which these substances or either of them is the component material of chief value, not specially provided for in this act, and shells engraved, cut, ornamented, or otherwise manufactured, thirty-five per centum ad valorem."

These statuettes are not within paragraph 95 (30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]), unless they are earthenware, or the word "including" may be said to take in statuettes of any, or any similar, material, which is not claimed. Earthenware, by the Century Dic-

tionary, is anything made of clay, and baked in a kiln or dried in the sun. They are found to be of plaster of paris, 47 per cent. of which is sulphuric acid, 33 per cent. lime, and 20 per cent. water, and which sets in shapes. Neither of these parts is clay or earth, and the composition is neither earthen, in fact, or known as such. It is plaster of paris, and the statuettes appear to be exactly manufactures of plaster of paris. The decoration and ornamentation do not, separately or together, change their character as manufactures, but they remain within the words and meaning of paragraph 450 (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]).

Decision reversed.

CAMP MFG. CO. v. PARKER.

(Circuit Court, E. D. North Carolina. February 27, 1903.)

1. **BILL OF REVIEW—LEAVE TO FILE.**

Leave to file a bill of review can only be obtained from the court in which the decree is rendered and enrolled.

2. **SAME—TIME OF FILING.**

After decision of a cause in the Circuit Court of Appeals, a bill of review filed in the Circuit Court without leave of the Circuit Court of Appeals must be considered, in determining whether it was filed within a reasonable time, as filed on the date on which leave to file was subsequently granted by the Circuit Court of Appeals.

3. **SAME.**

A bill of review for matters of law appearing on the record must be filed within the time allowed for an appeal, and for newly discovered matters within a reasonable time.

4. **SAME—LEAVE TO FILE.**

A bill of review for newly discovered matters cannot be filed without leave of the appellate court.

5. **SAME—BASIS FOR.**

A bill of review may be based on newly discovered evidence, which could not have been used on a former hearing, or for errors appearing on the record.

6. **SAME—NEWLY DISCOVERED EVIDENCE.**

When a bill of review is based on newly discovered evidence, it must be on new matter which has arisen since the decree.

7. **SAME—FRAUD NEWLY DISCOVERED.**

A bill of review alleged fraud in concealing from complainant the actual number of acres in a tract of land; but it appeared that there was correspondence between the parties on the question of acreage before the first suit, and the opinion in that suit considered the subject. *Held*, that the bill could not be maintained on the ground of newly discovered matter.

In Equity.

Jas. E. Shepherd, for petitioner.

B. B. Winborn, for defendant.

PURNELL, District Judge. This cause was decided by the Circuit Court of Appeals at February term, 1899 (91 Fed. 705, 34 C. C. A. 55), and on March 22, 1900, a final decree entered, in accordance with

the mandate of that court, embodying a perpetual injunction against the defendant. On the 3d day of December, 1901, defendant, Henry Parker, filed a bill of review, on which process was issued, and at November term, 1902, of the Circuit Court of Appeals, obtained from the Circuit Court of Appeals an order allowing him to file such bill of review. The Camp Manufacturing Company having answered, the cause was set down for hearing and duly argued. The bill, after setting forth the contract, etc., upon which the original suit was based, alleges the parties with whom said contract was made in 1889 were to make a survey of the "Exum Peel Tract," which survey was accordingly made, and disclosed the fact that this tract of land contained, "as he is informed and believes," 94½ acres, which fact was concealed from him, and he was paid a rental under the contract on 54 acres, and complainant was ignorant of the fraud thus practiced upon him when the rental was tendered to and accepted by him. An allegation reflecting on complainant's former counsel is then set forth, but was expressly abandoned and ignored on the hearing. Subsequent allegations set forth in detail wrongs based on the alleged mistake in acreage. The answer denies the material allegations, and sets up other defenses.

Without attempting to decide the issues, the question at the threshold of the controversy is, is the petitioner, on the face of the bill, entitled to maintain a bill of review? It will be seen the bill was filed two years and seven months after the rendition and enrollment of the decree of the appellate court, and nearly a year later (November term, 1902) permission of the appellate court thereon was obtained. Leave to file a bill of review can only be obtained from the court in which the decree is rendered and enrolled—in the case at bar, the Circuit Court of Appeals; hence this bill must be taken to have been filed subsequent to the November term of that court, at which term such leave was granted. After the rendition of the decision of the Circuit Court of Appeals, February 7, 1899, this court, as was its duty, simply entered a decree in accordance with the mandate of the higher court. From the entry and enrollment of the decree of the Circuit Court of Appeals, or the entry of the formal decree in this court in accordance therewith, it was over two years before the bill was properly filed. A bill of review for matters of law appearing on the record must be filed within the time allowed for an appeal, and for newly discovered matters should be within a reasonable time. The latter cannot be filed without leave of the appellate court. *Bates*, Fed. Eq. Proc. § 715; *Ricker v. Powell*, 100 U. S. 104, 25 L. Ed. 527.

A bill of review may be based upon newly discovered evidence which could not have been used on a former hearing, or errors appearing on the record. *Bates*, Fed. Eq. Proc. §§ 710-717, inclusive; 1 *Foster*, Fed. Proc. 666 et seq. There is no allegation of error in the decree—the record; but the relief is asked on the ground of mistake in acreage, called a fraud in the bill, but it is not stated exactly when this was discovered. On an examination of the record it will be seen there was correspondence on this subject in 1895, and this question is considered in the opinion of the Circuit Court of Appeals. When a bill of review is based on newly discovered evidence, it must be on new matter which has arisen since the decree. *Purcell v. Coleman*, 4 Wall.

519, 18 L. Ed. 435; *Beard v. Burts*, 95 U. S. 434, 24 L. Ed. 485; *Nickie v. Stewart*, 111 U. S. 776, 4 Sup. Ct. 700, 28 L. Ed. 599. The petitioner was the owner of the land. The question of acreage was mooted several years before the cause was disposed of by final decree, certainly in 1895; and, if there was error in the number of acres, the true number could have been ascertained by reasonable diligence and not unreasonable expense. The basis of this bill of review is not, therefore, such newly discovered matter as will entitle petitioner to the relief prayed for.

It is therefore considered, ordered, and adjudged that the bill be, and the same is, dismissed, and petitioner, Henry Parker, pay the costs incurred, to be taxed by the clerk of this court.

LILIENTHAL BROS. v. STEARNS.

(Circuit Court, D. Oregon. March 13, 1903.)

No. 2,748.

1 CONTRACTS—RIGHT OF RESCISSION—CONSTRUCTION—MUTUALITY.

A contract for the purchase of growing hops provided that the buyer should have the right to examine the condition of the hops before picking, to determine whether they would produce the quality called for, "and if at such time they should on such examination ascertain" that the growing hops were not in the condition required they might terminate the contract. *Held*, that the quoted clause of the contract did not confer on the buyers authority to arbitrarily decide as to the quality of the hops, so as to render the contract void for want of mutuality.

Cotton, Teal & Minor, for plaintiffs.
Wm. D. Fenton, for defendant.

BELLINGER, District Judge. This is an action upon a hop contract. Defendant demurs to the complaint upon the ground that it shows on its face that the contract sued upon is lacking in mutuality. The contract sued upon, among other provisions, contains the following:

"Provided, that before, at or during the time of picking such hops the buyers shall have the right to examine the condition of the growing hops to determine whether or not the same at such time are in the condition in which they should be to produce the quality called for under the terms of this agreement, and if at such time they shall upon such examination ascertain that the growing hops are not in such condition, then the buyers may at their option, and when request is made for the payment of the advances, give notice in writing to the seller by mailing such notice to the seller's address above specified, that the hops are not in the condition agreed on and that they will not purchase or receive any or all of the hops bargained to them by the terms of this agreement, and that they will make no advances or further advances to the seller pursuant to its terms, and in such event the buyers shall be discharged from any obligation to make any advances or further advances, and from the obligation to purchase or receive any part or the whole of said hops; but this instrument shall stand and remain in full as a mortgage upon the whole of said hop crop for advances which they may make

¶ 1. Mutuality in contracts, see note to *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 543.

or have made, and for interest thereon, and as a contract for the sale of such portion of said crop as the buyers may by such notice declare their intention to purchase pursuant to this contract."

It is contended, in behalf of the demurrer, that by this provision the plaintiffs may, at their option, abandon their contract of purchase. I am of the opinion that the phrase, "and if at such time they shall upon such examination ascertain" that the growing hops are not in the condition required, does not confer upon the plaintiffs the authority to decide for themselves whether the hops are in the condition required by the terms of the contract. By the word "ascertain" the right is reserved to the plaintiffs merely to acquire information, not to decide as to the condition of the hops. The question as to whether the hops are of such quality as required by the contract is one, in case of dispute, that must be determined in the usual mode by which disputed questions are determined in controversies between parties.

The demurrer is overruled.

In re LEVI.

(District Court, W. D. New York. January 5, 1903.)

1. **BANKRUPTCY—PREFERENCE—PROOF OF CLAIM—NOTE—BONA FIDE PURCHASER.**

A note, discounted by a bank without knowledge of the insolvency of the maker and in due course of business, by crediting the payee with the amount of the discount, which note in the hands of the payee and indorser would not be provable in bankruptcy against the maker's estate until certain preferences received were surrendered, is provable by the bank as a bona fide holder.

On Review of Ruling of Referee.

Wellington, Jones & Millard, for claimant.

Adler & Adler, for trustee.

HAZEL, District Judge. This is a review of a decision of Van Voorhis, referee. The question under consideration is solely whether the State Bank of Chicago has a provable claim against the bankrupt estate. The claim arises by virtue of a promissory note given by the bankrupt to Sleph & Jaffe, a firm in Chicago, and discounted by the claimant bank in due course of business. Sleph & Jaffe had received payments from the bankrupt which are admittedly preferences. The note in their hands, as conceded by both parties and the referee, would not be provable until such preferences were surrendered. The referee holds that the bank, by virtue of discounting this note and placing the proceeds to the credit of Sleph & Jaffe, does not become such a bona fide holder of the note as to permit its filing a claim against the estate which would be free from the taint of preference received by Sleph & Jaffe. The admitted facts show that the bank discounted the note without knowledge of the insolvency of the bankrupt. The evidence, as far as material, was by stipulation of the parties submitted in the form of an affidavit. The referee, therefore, had no greater opportunity to judge of the credibility of the evidence

than has this court. The evidence of the cashier of the bank discloses that the note was purchased by the bank in the ordinary course of business, and that the bank paid to Sleph & Jaffe the sum of \$295.30 therefor. The manner of payment was in the form of a credit to Sleph & Jaffe in their banking account. The note not having been paid by Sleph & Jaffe on maturity, the bank is endeavoring to enforce the claim in its own behalf, and not as agent of Sleph & Jaffe. The referee holds that the presentment of the claim by the bank is but a subterfuge to enable the payee of the note, Sleph & Jaffe, the indorser to the bank, to secure a preference. This holding is based on the theory that, inasmuch as the bank did not actually pay over the money at the time credit was given to the payee, value was not given for it. This contention cannot be maintained. The facts in this case are analogous to those disclosed by *In re Wyly* (D. C.) 116 Fed. 38, 8 Am. Bankr. Rep. 604. In that case the court said of the bank filing a claim transferred to it by a grocery company under the same circumstances as in the case at bar:

"It is true the bank has, since the insolvency of the bankrupts, practically agreed to first look to the bankruptcy court for the payment of the note, and to hold the grocery company only for that portion which is not paid out of the dividends arising from the bankruptcy estate. * * * The trustee, failing to show that the note was the property of the grocery company, seeks to enforce against the claim of the bank equities which would have existed by virtue of the provisions of the bankruptcy court act in favor of the estate of the bankrupts against the grocery company, the original payee of the note."

The court in that opinion well said:

"The wisdom of vouchsafing to the indorsee of negotiable paper the high degree of security now almost uniformly observed by the courts is made manifest by tracing the different rulings on the subject, and their effect upon credit and commerce. While it is right to scrutinize carefully every circumstance in a transaction of this character for evidence of mala fides, a judge should not be led by considerations of expediency to leave the beaten tracks of law and precedent."

It would seem that the doctrine of the case cited would be the safer rule to apply to a case like that under consideration. Transactions similar to that under review are of constant occurrence, and their stability should be sustained if consistent with the rules of law. The ruling of the referee is reversed, and the claim allowed.

STRAUSS v. CONRIED.

(Circuit Court, S. D. New York. December 16, 1902.)

1. FOREIGN JUDGMENTS—CONCLUSIVENESS—AUSTRIAN COURTS.

A judgment of a court of Austria in a suit in which it had jurisdiction of the subject-matter and the parties will be accepted by the courts of the United States as conclusive between the parties of the matters adjudicated.

In Equity. On motion for preliminary injunction.

Benno Loewy, for the motion.

Dittenhoefer, Gerber & James, opposed.

LACOMBE, Circuit Judge. Whatever rights Johann Strauss had to these operas passed to his widow, the complainant. What those rights were is a question which was litigated in the Austrian courts between the parties to the suit at bar. The complainant here was complainant there. The defendant here was defendant there; voluntarily appearing, presenting his proof, arguing, and appealing even to the court of last resort. That the Austrian courts had jurisdiction of the subject-matter seems entirely clear. Certainly, on the record here, it must be held that they had jurisdiction of the person of defendant. In Austria it seems that full force and effect is given to foreign judgments of competent courts having jurisdiction of the parties. The United States Supreme Court held in 1894 that:

"In Austria the rule of reciprocity does not rest upon any treaty or legislative enactment, but has been long established by imperial decrees and judicial decisions upon general principles of jurisprudence." *Hilton v. Guyot*, 159 U. S. 223, 16 Sup. Ct. 166, 40 L. Ed. 95.

There is not sufficient in the papers here submitted to warrant this court in reaching a different conclusion from that expressed above. We start, therefore, with an adjudication between the parties which is to be accepted as settling for this court the points it decided. That judgment decided that the contract of 1891 between defendant and Johann Strauss gave to the former only the right of performance of the dramatic works therein mentioned, and which are the subject of this suit, and the right to permit third persons to perform the same for a percentage royalty or for a lump sum consideration, and only for the period from March 15, 1891, to March 15, 1899, and for the territory of the United States of North America, England, Canada, and Australia, and that said contract and said rights terminated on March 15, 1899, and the rights no longer exist. This adjudication between the same parties appears to dispose of every question raised on this motion. As to the action of *Conried v. Witmark* in the Supreme Court, the complainant here is not a party.

Complainant may take injunction pendente lite, restraining defendant from performing these operas himself, or from undertaking to authorize others to perform them, or from collecting royalties, and from interfering in any way with the complainant in producing or licensing others to produce the same. This injunction, however, shall not operate to restrain the prosecution of the action of *Conried v. Witmark*, now pending in the Supreme Court of the state of New York.

BULLOCK ELECTRIC MFG. CO. v. CROCKER WHEELER CO.

(Circuit Court, D. New Jersey. November 21, 1902.)

1. DEPOSITIONS—COMPLAINANT—INTEREST OF WITNESS—DOCUMENTARY EVIDENCE—REFUSAL TO PRODUCE—STRIKING AND OPENING DEPOSITION.

Where a witness whose deposition was taken was one of the complainants in the suit, and the only object for which a written contract was desired was to show the interest of the witness, his refusal to produce such contract was no ground for striking his deposition, or to open the same that he might be compelled to produce and be examined concerning it.

Thomas Ewing, Jr., for the motion.
Clifton V. Edwards, opposed.

KIRKPATRICK, District Judge. This motion is twofold: (1) To strike from the files the deposition of a witness, who is one of the complainants in this cause, because he refused to produce on demand an agreement which he had made with his co-complainant in regard to the patent which is involved in this suit; or (2) to open his deposition, and require him to produce said agreement, and subject himself to further cross-examination.

The only object sought to be obtained by the production of this paper called for which is noted in the record is that the same is "material, relevant, and competent to prove the interest of the witness"; but the witness is one of the complainants, and his interest is conceded. The paper is not necessary for that purpose. If for any other purpose the paper is required, its production can be obtained through a subpoena duces tecum, which the witness, though a party to this suit, is bound to obey. In such case the witness is under protection of the court, who will see to it that he be not compelled to disclose the contents of the paper until the court has had an opportunity to determine if it be necessary for him to do so.

There is nothing in the moving papers tending to show that the paper called for contains anything relevant or material to the issue, and the motion for its production is denied.

HERMAN & GUINZEBERG v. UNITED STATES.

(Circuit Court, S. D. New York. February 17, 1903.)

No. 2,991.

1. CUSTOMS DUTIES—GRASS PIQUETS.

Grass piquets, consisting of stalks of oats or of wheat, cut in the milk, and grasses dyed to imitate their natural color, mixed with palm leaf and other artificial leaves, bound at the ends of the stems with wire, in all about 15 inches in length, to be used for millinery purposes, are not taxable for duty under Revenue Act July 24, 1897, par. 449, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], as manufactures of grass, palm leaves, straw, weeds, etc., but are properly assessed at 50 per cent. ad valorem under paragraph 425, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], as artificial or ornamental grains, leaves, and flowers, and stems or parts thereof, not specially provided for.

Stephen G. Clarke, for appellant.
Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of grass piquets, consisting of stalks of oats or of wheat, cut in the milk, and grasses dyed to imitate their natural color, mixed with palm leaf and some artificial leaves, and bound with wire at the ends of the stems. They are about 15 inches long, and are used for millinery purposes. They were assessed at 50 per cent. ad valorem, under paragraph 425 of the Act of July 24, 1897, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], applicable to numerous millinery articles and ornaments, "and artificial

or ornamental feathers, fruits, grains, leaves, flowers and stems or parts thereof of whatever material composed, not specially provided for." They are claimed to be within paragraph 449, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], for manufactures of * * * grass * * * palm leaf * * * straw, weeds * * * or of which these substances or either of them is the component material of chief value, not specially provided for, * * * but the terms 'grass' and 'straw' shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof." These bunches are not wrought of grass or palm leaf, which are the only things contained in them that are mentioned in paragraph 449, but are, rather, collections of these things with others, and seem to fall among artificial or ornamental grains and stems, of whatever material composed, as named in paragraph 425, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675]. The oats and wheat are specially mentioned as grains, and the grasses of that nature appear to be well enough covered by stems. Decision affirmed.

SUCH v. BANK OF STATE OF NEW YORK.

(Circuit Court, S. D. New York. February 27, 1903.)

1. **ATTORNEY AND CLIENT—SUBSTITUTION OF ATTORNEY—FEES—DETERMINATION.** Where an attorney contracted to prosecute a cause for 15 per cent. of the proceeds of any recovery, and an application was made by plaintiff before termination of the cause for substitution of attorneys, the fees to be paid as a condition to such substitution could not be fixed with reference to the future course of the litigation, but should be determined by the reasonable value of the services to the date of substitution.

Motion for Order of Substitution of Attorney for Plaintiff.

Harrison & Byrd, for the motion.

James Parker, opposed.

LACOMBE, Circuit Judge. It was conceded by both sides on the argument that plaintiff and his attorney had entered into a contract by which the attorney was to prosecute the cause, and in the event of final recovery was to be paid 15 per cent. of the proceeds. By insisting that another attorney shall now be substituted, plaintiff is presumably breaking that contract, and in the proper way and at the proper time the attorney will presumably have an opportunity to recover damages for that breach. It would therefore be improper upon this application to fix compensation for services actually rendered to date, upon any considerations of the future course of the litigation. No doubt, upon assessment of damages for breach of contract, the tribunal which disposes of the question will deduct from the amount awarded to the attorney, should he be held entitled to recover, the sum already paid him as retainer, and now to be paid as a condition for order of substitution.

It seems that, for all services to date, \$500 is a fair allowance, of which \$250 has been paid. Upon payment of the balance, order of substitution will be made.

EDWARDS v. MERCANTILE TRUST CO. et al.

(Circuit Court, S. D. New York. February 10, 1903.)

1. ACTIONS—DEATH OF COMPLAINANT—ABATEMENT.

Where a suit was brought by plaintiff, in a representative capacity, on behalf of all others similarly situated, and before plaintiff's death another was permitted to intervene, by order of court, and was made a party plaintiff, with plaintiff's knowledge and consent, the action did not abate by plaintiff's death.

2. SAME—SALE OF STOCK—STAY—LACHES.

Where defendant advertised certain stock for sale on December 27, 1902, naming February 10th as the day of sale, and complainant made no application for an injunction to restrain the sale until February 5th, in the absence of anything tending to excuse the delay, plaintiff was guilty of such laches as deprived him of the right to stay the sale.

Motion to Vacate Ex Parte Stay.

Chas. W. Pierson and Francis Lynde Stetson, for the motion.
Edgar L. Fursman and C. Godfrey Patterson, opposed.

LACOMBE, Circuit Judge. The argument of the main motion was, by order to show cause, set for February 20th. The property involved is 15,000 shares of stock, which the trust company had advertised for sale on February 10th at 12 o'clock noon; and complainant, with the order to show cause, applied for and obtained a stay of the sale until after the hearing of the motion. The trust company now contends that complainant is not entitled to such a stay. Several grounds are suggested, but one only need be considered.

All the transactions of which complaint is made were fully completed in the year 1893. Apparently, they were of such a character—being embodied in documents—as to make it reasonable to suppose that any one interested might readily obtain knowledge of them. However that may be, it appears from a bill of complaint in an earlier action brought by Jacob Edwards, the original plaintiff here, and verified by Robert J. Edwards, who has sued out the bill of revivor, that the facts were known as early as 1898. This suit was begun September 19, 1902; the original complainant died December 22, 1902; and bill of revivor was filed February 4, 1903. This is a representative suit, however; the complainant originally named suing in behalf of all others similarly situated—i. e., all other income bondholders and stockholders. On December 8, 1902, another holder (one Bennett) was, by order of the court, allowed to intervene, and was made a party plaintiff, with knowledge and assent of complainant. The action, therefore, did not abate by reason of the death of the original complainant. There was at all times a complainant represented by counsel, and in a position to apply for whatever relief might be deemed necessary. The trust company began advertising the sale of the stock, naming February 10th as the day of sale, as early as December 27, 1902; and it must be assumed, in the absence of any affidavits to the contrary, that such announcement of sale came to the knowledge of complainant and his counsel. Week after week, however, was allowed to elapse without notice of any application for injunction, although there was ample time in which to present, to ar-

gue, to examine, and to decide every possible question arising on the papers. Complainant, however, waited until five days before the day of sale, and then sought to postpone the argument until February 20th, while insisting that the sale should meanwhile be stayed. His delay is inexcusable, and the court is clearly of the opinion that he cannot be allowed to hold the stay, and thus force a postponement of the sale, when it is only by reason of his own laches that argument on the main motion was not had in due course long enough before the sale to avoid any necessity for postponement.

Order accordingly.

I. W. LYON & SON v. UNITED STATES.

(Circuit Court, S. D. New York. February 7, 1903.)

No. 3,253.

1. CUSTOMS—REVENUE—CHALK—RATE OF DUTY.

Precipitated chalk, dried and bolted, and imported to be used for making tooth powder, is not taxable at one cent a pound, under paragraph 13, Act July 24, 1897 (30 Stat. 152 [U. S. Comp. St. 1901, p. 1627]), "as chalk (not medicine nor prepared for toilet purposes), when ground, precipitated naturally or artificially, or otherwise, prepared," but is taxable under the last clause of the section, at 25 per cent. ad valorem, as manufactures of chalk not specially provided for.

Albert Comstock, for appellant.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. This article is precipitated chalk, dried and bolted, and imported and used for making a tooth powder. It was assessed at 1 cent per pound under paragraph 13 of the act of July 24, 1897 (30 Stat. 152 [U. S. Comp. St. 1901, p. 1627]), as "chalk (not medicine nor prepared for toilet purposes) when ground, precipitated naturally or artificially, or otherwise, prepared," apparently because it is not a complete toilet article, but only "intended to be used in the preparation of a toilet article." But the exception is not of toilet articles, but of chalk prepared for toilet purposes, and the use intended is a toilet purpose. It seems to be a manufacture of chalk not otherwise provided for, under another clause of that paragraph, and dutiable at 25 per cent. ad valorem.

Decision reversed.

ROBINSON v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1903.)

No. 2,947.

1. CUSTOMS DUTIES—TRIMMINGS.

Goods woven wholly from silk from 4 to 12 inches wide, and used directly in these widths for trimming women's hats, etc., are not assessable as trimmings, under paragraph 390 of the act of July 24, 1897 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), not being trimmings until made into designs to be applied as trimmings, or into trimmings as they are applied to articles being trimmed, but are assessable as manufactures of silk, under paragraph 391.

Albert Comstock, for appellant.
Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The goods in question are found by the board to be woven wholly of silk from 4 to 12 inches wide, "used directly in these widths, either exclusively or chiefly, for trimming women's hats, bonnets or other wearing apparel; are generally known in commerce as chiffon or mousseline bands, or as gauze ribbons, or as gauze bands," and were assessed as "trimmings," under paragraph 390 of the act of July 24, 1897 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), which lays a duty on "laces, and articles made wholly or in part of lace, edgings, insertings, galloons, chiffon or other flouncings, nets or nettings and veilings, neck ruffings, ruchings, braids, fringes, trimmings, embroideries and articles embroidered by hand or machinery, or tamboured or appliqued," "made of silk or of which silk is the component material of chief value," of 60 per cent. ad valorem. The protest claimed that they were "woven fabrics in the piece," of silk, under paragraph 387 (30 Stat. 186 [U. S. Comp. St. 1901, p. 1669]), or "manufactures of silk," not specially provided for, under paragraph 391 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]).

These articles are not in themselves trimmings, and will not become such until they are made into designs to be applied as trimmings, or are made into trimmings as they are applied to articles being trimmed. That they are used for making trimmings does not make them such. They are not such, within the meaning of the tariff acts, unless they had by usage come to be known by that name, and the evidence taken in this court shows quite clearly that they had not been brought within the meaning of that word. In *Hartranft v. Meyer*, 149 U. S. 544, 13 Sup. Ct. 982, 983, 37 L. Ed. 840, relied upon as supporting the classification, the word "trimmings," in the clause of the act there in question, as paraphrased by the court, was connected with the words "used for making or ornamenting hats, bonnets and hoods." Here the word "trimmings" stands alone as one of a class of separate articles, covering what the name of itself includes, without extension on account of the use to which the article may be put. In this view, the goods seem, rather, to be manufactures of silk, under paragraph 391.

Decision reversed as to these narrow widths.

VEIT SON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 9, 1903.)

No. 3,179.

1. CUSTOMS DUTIES—SPANGLED HORSEHAIR BRAIDS.

Spangled horsehair braids, being very loose braids of the very long hair from the manes and tails of horses, carrying the spangles, which are the chief feature of the manufacture, are not assessable as "manufactures of wool ornaments with beads or spangles of whatever material composed," under paragraph 371 of the act of July 24, 1897 (30 Stat. 185

[U. S. Comp. St. 1901, p. 1667]), but as articles "composed wholly or in part of beads or spangles, * * * but not composed in part of wool," under paragraph 408 (30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]).

W. Wickham Smith, for appellants.
Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The goods in question are spangled horsehair braids, and have been assessed at 50 cents per pound and 60 per cent. ad valorem, under a clause of paragraph 371 of the act of July 24, 1897 (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]), laying that duty on "manufactures of wool ornaments with beads or spangles of whatever material composed." The general appraisers appear to have found that they "are made in chief value of horsehair, or of which horsehair is an essential, component, material, and conspicuous feature, elaborately ornamented with spangles and beads and spangles composed of gelatin, glass, and other substances." There is no testimony in the record, which covers several importations of these appellants and others, but samples of the goods here immediately in question show that they are very loose braids of the long hair from the manes and tails of horses, carrying the spangles, which are the chief feature of the manufacture, and without which the horsehair would be useless as a braid. The protest referred to paragraph 408 (30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]), which lays a duty of 60 per cent. ad valorem on "trimmings and other articles not specially provided for in this act composed wholly or in part of beads or spangles made of glass or paste, gelatin, metal or other materials, but not composed in part of wool." The assessment appears to have been made under 371 (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]), because of this paragraph:

"383. Whenever, in any schedule of this act, the word 'wool' is used in connection with a manufactured article of which it is a component material, it shall be held to include wool or hair of the sheep, camel, goat, alpaca or other animal, whether manufactured by the woolen, worsted, felt or any other process."

But "manufactures of wool ornamented," in paragraph 371, are obviously fabrics so complete in themselves as to be capable of ornamentation in addition to their structure. These articles are not manufactures of hair ornamented with spangles, but are rather structures of hair and spangles, the use of the hair being to carry the spangles. The hair is not used as wool would be to make an article for ornamentation, and wool could not be used as this hair is for carrying the spangles. They do not appear to be "manufactures of wool ornamented," under 371, but seem rather to be articles "composed wholly or in part of beads or spangles," "but not composed in part of wool," under 408. The exclusion there is not of wool or hair, but of wool only, which implies that there the exclusion is not left to 383, but that wool is expressly by itself excluded.

Decision reversed.

HUNTER & WHITCOMBE v. UNITED STATES.

(Circuit Court, S. D. New York. February 17, 1903.)

No. 3,013.

1. CUSTOMS DUTIES—LINOLEUM.

Linoleum of colored material, mixed in making, and taking such form as the pressure of the rollers and resistance of the materials give them, is not taxable for duty as "inlaid linoleum," but as linoleum "figured or plain," under Act July 24, 1897, par. 337 (30 Stat. 180 [U. S. Comp. St. 1901, p. 1662]).

Albert Comstock, for appellants.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. These goods are linoleum of colored material, mixed in making, and taking such form as the pressure of the rollers and resistance of the materials give them. They have been assessed as "inlaid linoleum," instead of as linoleum "figured or plain," as claimed, under paragraph 337, of the act of July 24, 1897 (30 Stat. 180 [U. S. Comp. St. 1901, p. 1662]), according to a supposed usage of the trade. The evidence taken in this court negatives such usage. "Inlaid" means laid into a definite space, as a separate part of the material of the structure; and the product is of a higher grade of manufacture, on which the higher duty appears to be laid. As the case now stands, this mixed, or "granite," linoleum, as it is sometimes called, does not appear to be inlaid linoleum either in fact or in name, and it therefore seems to have been assessed erroneously.

Decision reversed.

F. H. PETRY & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 7, 1903.)

No. 3,147.

1. CUSTOMS DUTIES—PAPER BOOKS—ILLUMINATED LITHOGRAPHIC PRINTS.

Paper books in the German language for the use of children, containing illuminated lithographic prints, weighing less than 24 ounces each, are taxable for duty under Act July 24, 1897, par. 400 (30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), and are not entitled to free entry, under paragraph 502 (30 Stat. 196 [U. S. Comp. St. 1901, p. 1681]), as books and pamphlets printed exclusively in a foreign language.

W. Wickham Smith, for appellant.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. These are books of paper for children's use in the German language, containing illuminated lithographic prints, not weighing 24 ounces each, and seem to come exactly within a clause of paragraph 400 of the act of July 24, 1897 (30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), under which they were assessed. Paragraph 502 (30 Stat. 196 [U. S. Comp. St. 1901, p. 1681]) puts "books and pamphlets printed exclusively in languages other than English" on the free list. Books in any language may contain these peculiar prints, and, when they do, they come quite specifically under

that clause of paragraph 400 (30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), and are taken out of the free list. The illuminated lithographic prints in children's books of this weight are what seem to be aimed at.

Decision affirmed.

GABRIEL & SCHALL v. UNITED STATES.

(Circuit Court, S. D. New York. February 13, 1903.)

No. 3,271.

1. CUSTOMS DUTIES—COMMERCIAL CARBONATE OF BARYTA.

Commercial carbonate of baryta is exempt from duty under section 2 of the tariff act of July 24, 1897, providing that "the following articles when imported shall be exempt from duty": "489. Baryta, carbonate of, or witherite" (30 Stat. 196 [U. S. Comp. St. 1901, p. 1681]), and not dutiable at 25 per cent. ad valorem, under paragraph 3, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], as a chemical compound or salt not provided for.

W. Wickham Smith, for appellant.
Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of commercial carbonate of baryta, and was assessed at 25 per cent. ad valorem, under paragraph 3 of the act of July 24, 1897, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], which lays that duty on "alkalies, alkaloids, distilled oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for." Section 2 of the act provides that "the following articles when imported shall be exempt from duty": "489. Baryta, carbonate of, or witherite." 30 Stat. 196 [U. S. Comp. St. 1901, p. 1681]. One is chemically prepared, and the other is a native ore of the same kind, used for the same purpose. A prominent meaning of the word "or" is "either," as a distributive. Under the words of the section, both are "following articles," and the plain meaning of the words of the paragraph would seem to be that either carbonate of baryta or witherite is exempt. If not either, but only witherite, the other words would have no meaning whatever, and all words in a statute are supposed to have some meaning. The evidence shows that under similar words in the act of October 1, 1890, par. 500 (26 Stat. 604), this was by the customs officers passed free. *U. S. v. Ducas*, 24 C. C. A. 121, 78 Fed. 339, was in relation to acetate of copper as verdigris, under paragraph 749 in the free list of the act of 1890 (26 Stat. 610), which read "verdigris or subacetate of copper." There the acetate of copper was not mentioned by name, nor claimed to be included except as a kind of verdigris. Here the carbonate of baryta is expressly named, with witherite, but neither is claimed to be included within the other. There is no apparent reason for excluding one, more than the other, from the free list; and that case does not seem to require that the carbonate expressly mentioned in, should be excluded from, the list.

Decision reversed.

In re NOYES. In re GEARY. In re WOOD. In re FROST.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1902.)

Nos. 701, 702, 703, and 744.

1. CONTEMPT OF COURT—PROCEEDINGS FOR PUNISHMENT—EVIDENCE.

In proceedings for contempt of court in refusing to obey and obstructing the execution of writs of supersedeas granted by it, evidence of the relation of the respondents to the litigation or the parties concerned, and showing other acts of misconduct on their part in relation thereto besides those charged, is admissible to show their animus and motives and to characterize their action.

2. SAME — JUDGE — OBSTRUCTING EXECUTION OF WRIT OF SUPERSEDEAS FROM APPELLATE COURT.

Respondent, as judge of the District Court for one of the districts of Alaska, made ex parte orders in a number of suits instituted in aid of actions of ejectment to recover placer mining claims, appointing the same person receiver in each case, and directing him to take possession of the claims, with all personal property of the defendants thereon, and to work the claims and to hold the gold taken therefrom, subject to the order of the court. The pleadings had not been filed nor any process issued, the affidavits on which the applications were made were not read, and the orders signed had been previously prepared at the instance of the man who was thereby appointed receiver. His bond was fixed at \$5,000 in each case, although in one case plaintiff's showing was to the effect that the daily output of the claim was \$15,000. Respondent denied motions by defendants for removal of the receiver, and refused to allow an appeal. An appeal was subsequently allowed by a judge of the Circuit Court of Appeals, who also approved bonds given by defendants, and granted writs of supersedeas commanding respondent to stay any and all further proceedings in relation to said orders and the appointment of a receiver, and commanding the receiver to restore to the defendants all property which he had taken or received as such receiver. The writs were served, but the receiver refused to obey them, and, on application to respondent, he refused to make any order requiring the receiver to obey. The receiver then had in his possession gold dust taken from the claims to the value of about \$200,000, which was stored in a bank. Respondent wrote a letter to the marshal requesting him to preserve peace and good order and to "hold things in statu quo," and also a letter to the military commander asking him to render the marshal such assistance as required, and supplemented such letters by oral instructions to the marshal to guard the gold dust, and not to permit any of the parties to obtain possession of it. *Held*, that such letters and instructions were overt acts which had the direct effect of interfering with the execution of the writs of supersedeas, and, in view of the other action of respondent and his refusal to order his receiver to obey the writs, constituted a contempt of the Circuit Court of Appeals.

3. SAME—ATTORNEY—RIGHT TO GIVE LEGAL OPINION.

An attorney for a receiver, who advised his client that in his opinion a writ of supersedeas granted by an appellate court on appeal from the order making his appointment was void because the order was not appealable, and that, even if valid, it did not require him to turn over certain property in his hands, but who did not advise the receiver as to what his action should be or to disobey the writ, did not thereby go beyond the legitimate privilege of an attorney in giving legal advice, and was not guilty of a contempt of court.

4. SAME—OBSTRUCTING EXECUTION OF WRIT.

A receiver had in his hands a quantity of gold dust taken from mining claims which he was operating, stored in boxes in safe-deposit vaults, at a time when he was arrested for contempt of court in refusing to obey a writ of supersedeas commanding him to restore the property pending

an appeal. He turned the keys to the boxes over to respondent, who was district attorney, and told the marshals who had him in charge that he had done so. They demanded the keys of respondent for the purpose of executing the writ of supersedeas, but he refused to give them to them, and used language which indicated that his action was willful and deliberate. *Held*, that he was guilty of a contempt of the court issuing the writ.

5. SAME.

On the organization of the judicial districts in Alaska, respondent, an attorney, was sent there as a special examiner by the department of justice to instruct the clerk and marshal as to their duties and the keeping of their accounts. In private litigation over mining claims a receiver had been appointed to work the claims, who had taken therefrom a large quantity of gold, which he had stored in the vaults of a bank, when a writ of supersedeas was issued by the Circuit Court of Appeals commanding him to restore all property in his hands. Respondent, with knowledge of such writ and that the receiver had refused to obey it, advised the marshal to guard the gold in the bank, and to prevent the defendants from obtaining it. He also wrote him a letter stating that if it became necessary for him to incur extraordinary expense "in suppressing specific unlawful acts of violence or attempted violence, burglary, robbery, etc.," there was an extraordinary expense fund from which he could be reimbursed. He also employed three detectives for several weeks, who were paid from government funds, and ostensibly in its service, but were in fact employed on behalf of the receiver, with whom respondent was on intimate terms. *Held*, that his action in advising the marshal as he did, in the light of his other conduct, was clearly intended to obstruct the execution of the writ of supersedeas, and constituted a contempt of court.

E. S. Pillsbury, *amicus curiæ*.

P. J. McLaughlin and F. J. Heney, for Arthur H. Noyes and C.

A. S. Frost.

J. G. Maguire, for Thomas J. Geary.

Joseph K. Wood, in *pro. per.*

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The affidavit upon which the order to show cause was directed to Arthur H. Noyes charges that on July 23, 1900, said Arthur H. Noyes, as judge of the District Court of Alaska, Second Division, at Nome, Alaska, signed an order in the action entitled *Chippis vs. Lindeberg et al.*, appointing Alexander McKenzie receiver of property described in the complaint, which consisted of a placer mining claim, and enjoined the defendants, who were then in possession of the claim, from working the same; and on the same date made similar orders in four other similar causes pending, *viz.*, *Melsing vs. Tornanses*, *Comptois vs. Anderson*, *Rodgers vs. Kjellman*, and *Webster vs. Nakkeli et al.* That thereupon the receiver took possession of the claims, and proceeded to mine the same, and extracted therefrom gold dust of the value of more than \$100,000. That the defendants in each of the said cases presented to the said Arthur H. Noyes, judge of said court, a petition for the allowance of an appeal from said order, together with an undertaking on appeal and assignment of errors, but that the said Arthur H. Noyes refused to grant said petition or to allow such appeal. That thereafter, on August 29, 1900, Honorable W. W.

Morrow, one of the judges of this court, made orders allowing appeals in said cases, and directing that writs of supersedeas issue thereon out of this court, directed to the said Alexander McKenzie and the said Arthur H. Noyes, commanding the said Noyes to desist from any further proceedings on account of said orders, and commanding the said McKenzie to restore to the defendants in said cases all property which he had taken or received as receiver. That on September 14, 1900, certified copies of said orders allowing such appeal in some of said cases, and writs of supersedeas in all of said cases, were filed in the office of the said District Court at Nome, and certified copies of the writs of supersedeas were served upon said Arthur H. Noyes, and also upon the said receiver; and demand was made upon the latter that he return to the defendants in said actions the gold and gold dust which he had taken from the claims described in the complaints in said actions, which gold dust was then in his possession, and was of the value of about \$200,000. That said receiver refused to deliver said gold dust, or any part thereof, to the defendants in said actions, and refused to comply with the writs of supersedeas, whereupon application was made by the respective defendants, through their counsel, to the said Arthur H. Noyes for orders directing the enforcement of the writs of supersedeas which had been issued by this court, and that the said Arthur H. Noyes then and there declined to make such orders, saying that the matter was out of his hands. That on September 15, 1900, the defendants in said cases, through their counsel, again requested said Arthur H. Noyes to make an order directing the enforcement of the said writs of supersedeas, but the said Noyes then and there stated and declared that the orders appointing the receiver were not appealable; that the defendants were not entitled to an appeal. That on said last-named date the said Noyes gave instructions to the United States marshal to place a guard over the vaults containing the gold dust, and to prevent access thereto by any person. That the object of said order was to defeat the execution of the said writs of supersedeas. That on said date the said Arthur H. Noyes, in the presence of T. J. Geary, said to the said marshal, "Go ahead and keep possession of the gold dust, and do not let McKenzie or any of the parties go near it," and that at the same time the said Noyes stated, in the presence of said Geary, that he did not think the order appointing McKenzie as receiver was an appealable order, but that, assuming that it was, the only supersedeas that could be effected was one staying proceedings, and that on the record as it was there was no justification for the defendants demanding the return of the property. That on October 6, 1900, in the case of Chipps vs. Lindeberg et al., the plaintiff, by his attorneys, Hubbard, Beeman & Hume, filed a motion in said District Court of the District of Alaska at Nome for an order of the court restraining the defendants in said case from working the placer mining claim in controversy therein, and from taking out of the jurisdiction of said court any gold taken therefrom, and that said motion was based upon an affidavit of the plaintiff, which referred to the writ of supersedeas as "an alleged writ of supersedeas

from the Circuit Court of Appeals of the Ninth Circuit." That upon such motion the said Arthur H. Noyes, judge of said court, ordered that the defendants in said action show cause on October 8th why an injunction should not issue restraining them from further working the claim, and from deporting from the jurisdiction of the court any gold dust taken therefrom. That upon October 10th the said Arthur H. Noyes made an order upon such application for an injunction, enjoining the defendants in said action from removing any gold dust taken from said placer claim to any place outside of the Nome precinct, District of Alaska. That the conduct of the said Arthur H. Noyes after the appointment of the said receiver, and above described, was for the purpose of interfering with and preventing the enforcement of said writs of supersedeas. The answer of Arthur H. Noyes admits that he refused to make an order requiring the receiver to return the gold dust to the defendants, but avers that he did not believe he could or should make such an order, and that all matters pertaining to the receivership had passed beyond his control, except such orders as he was required to make by the terms of the writ. That he did not state, as a reason for refusing to make an order requiring the receiver to deliver the gold dust, that the orders appointing the receiver were not appealable, but admits that it was his judgment and opinion that such orders were not appealable. He denies that he ordered the marshal to allow no one, especially McKenzie, or the parties interested, to have access to the vaults in which the gold dust held by the receiver was deposited, or that he stated to the said marshal to go ahead and keep possession of the gold dust. He admits that he stated that the only order he could make in such cases was one staying proceedings; that the writ of supersedeas directed him to stay all proceedings in the receivership matter, and to desist and refrain from any further acts in connection therewith; and he alleges that the injunction of October 10th was made upon the belief and in the full conviction that such order was within his power as a judge in the said case then pending, for the reason that the appeals had been taken only from the orders appointing the receiver, leaving all other matters in said causes pending in the District Court for further proceedings. That in all the matters set forth in the charges he acted in good faith, and in full respect for the authority, writs, and orders of this court, and he denies that he sought to interfere with or prevent the enforcement of the writs of supersedeas.

Of the evidence which was taken upon the issue raised by the answer of Arthur H. Noyes to the order to show cause, a large proportion consists of testimony concerning the attitude of the judge toward the litigation then pending before him in the cases which are hereinafter referred to, as well as in other cases in which McKenzie was receiver or was interested. Much of it tends strongly to show the existence of a criminal conspiracy between some of these respondents and McKenzie and others to use the court and its process for their private gain, and to unlawfully deprive the owners of mines who were in possession thereof of their property under the forms of law. Concerning this portion of the evidence, it is not

necessary to express an opinion. The respondents are on trial here for the offense of contempt of the process of this court, and for no other offense. Reference to the evidence of their misconduct will be made only for the purpose of finding the animus which actuated them in the commission of the acts with which they stand charged. We find it unnecessary to discuss all of this evidence in detail. We shall assume as proven none of the material facts which are testified to, except such as are not disputed, or are corroborated by other evidence, or are so well sustained by the proofs as to leave in our minds no reasonable doubt of their truth.

Judge Noyes arrived at Nome on July 19, 1900, in company with other officers of his court, and in company with Alexander McKenzie. Prior to going to Nome, McKenzie had been engaged in organizing the Alaska Gold Mining Company, a corporation, for the purpose of engaging in mining at Nome, and in that connection had made the acquaintance of O. P. Hubbard, a member of the firm of Hubbard, Beeman & Hume, attorneys at Nome, Alaska. On the day of his arrival at Nome, McKenzie went to the office of Hubbard, Beeman & Hume, and had an interview with Mr. Hume, in which he told the latter that Hubbard had transferred to him, McKenzie, his interest in the litigation which involved the right of possession of the Anvil Creek mining claims, and that Hubbard had represented to him that the other members of the firm would do the same, that is, would transfer to his corporation the contingent interest they had in those claims. The contingent interest of Hubbard, Beeman & Hume was a one-half interest in the claims in case the plaintiffs prevailed. Hume testified that McKenzie further represented to him and to Beeman that he controlled the appointment of the judge and the district attorney, and that if they desired to have those cases heard it would be absolutely necessary to transfer their interest to his corporation, and receive in lieu certificates of stock, and he testified that, at the same time, McKenzie demanded that a one-fourth interest of the business of Hubbard, Beeman & Hume be transferred to Joseph K. Wood, the district attorney, and that Wood become a silent partner in the firm, and stated that, if all this were assented to, Hume should become deputy district attorney. The evidence shows that Hume and his partners agreed to these suggestions, and Wood became a silent partner in the firm of Hubbard, Beeman & Hume, and that Hume was appointed deputy district attorney. All this was done on Thursday, July 19th. The evidence shows that on the same day, and immediately after making these arrangements, McKenzie took Hume and Beeman aside and demanded that an entire one-fourth interest of the firm be placed in his, McKenzie's, name, and that he receive one-fourth of the profits. Hume testified that this was assented to on the next morning, after much objection and hesitation, and only after McKenzie had threatened him that, if he refused, his business and the interests of his clients would be ruined. He testified further that partnership articles were drawn up and signed in accordance with the agreement. Wood admitted that the agreement was entered into whereby he and McKenzie were each to have a one-fourth interest in the firm, but he expressed the belief that it was never acted upon or carried out so far as McKenzie's

interest was concerned. At that time Hubbard, Beeman & Hume were attorneys for the plaintiffs in four actions at law that were pending concerning the title to four of the best placer mining claims on Anvil Creek. Immediately after entering into the partnership agreement, McKenzie directed the firm to get all their stenographers at work preparing papers for applications for the appointment of receivers in those actions. This was done in the four cases then pending, to wit, Rodgers vs. Kjellman, involving claim No. 2 below Discovery on Anvil Creek; Comptois vs. Anderson, involving claim No. 3 above Discovery; Melsing vs. Tornanses, involving claim No. 10 above Discovery; and Webster vs. Nakkeli, involving a claim on Nakkeli Gulch, tributary to Anvil Creek; and a new action was brought, Chipps vs. Lindeberg et al., involving Discovery Claim on Anvil Creek. The firm of Hubbard, Beeman & Hume employed three stenographers, and were busily engaged until the afternoon of Monday, July 23d, in making out papers. Bills in equity and affidavits in aid of the pending actions at law were prepared in all these causes except in Rodgers v. Kjellman. In that case, the receiver was appointed upon a complaint in ejectment and affidavits. In Melsing vs. Tornanses, the bill was not verified. While the papers were being prepared, McKenzie was constantly in and about the office of Hubbard, Beeman & Hume, urging haste. On Monday morning, July 23d, he had a wagon waiting in front of the office of the firm for the purpose of conveying himself and his keepers to take possession of the mines as soon as he should be appointed receiver. Monday afternoon there were two such wagons waiting. These facts are shown by the testimony of several disinterested witnesses, one of whom, Arthur M. Pope, testified that as early as 9 or half past 9 o'clock in the morning his attention was directed to teams standing ready to convey McKenzie and others to the mines on Anvil Creek, and that on that day, or perhaps the day before, he had received information from Hubbard, Beeman & Hume that McKenzie would be appointed receiver of those mines. Between half past 5 and 6 o'clock in the evening of Monday, July 23d, the papers having been prepared, but not filed, Mr. Hume called upon Judge Noyes at his hotel, presented his papers, and asked for the appointment of a receiver in the five suits. Mr. Hume testified that he started to read the affidavit of the plaintiff in one of the cases, whereupon the judge said it was not necessary to read the affidavit, and asked for the orders, and that the witness then stated that he desired to recommend for appointment Alexander McKenzie, to which the judge replied that he had known McKenzie for many years, that he was a very good man, and that, as he was a stranger in the country, he would prefer to appoint someone with whom he was acquainted; and thereupon he appointed McKenzie receiver of all of said mining claims, with instructions to take immediate possession of the same and work them, and to preserve the gold dust and proceeds of the claims subject to the further orders of the court; and all persons then in possession of the claims were ordered to deliver to the receiver immediate possession, control, and management thereof, and were enjoined from in any manner interfering with the mining or working of the claims, or the receiver's control or management thereof. The amount of the bond

required of the receiver was in each case only \$5,000, and this in the face of the showing made by the plaintiff's affidavit in one of the cases that the daily output of the mine involved therein was \$15,000. Immediately after the orders were signed, and before any bonds were filed, and before the papers were filed by the clerk, or the summons had been issued, the receiver proceeded to take possession of the five placer claims involved in those suits. The appointment of a receiver in these cases was a complete surprise to the defendants therein. Judge Chas. S. Johnson, formerly the district judge of Alaska, who was an attorney for certain of the defendants, testified that, in a conversation he had with Judge Noyes on his arrival, the latter had stated that his court would not be open for business until his return from St. Michaels; that he would go there in a few days, and there formally open his court and spread his commission on the records, and return; that he would keep a clerk or deputy at Nome until he returned, but added: "He will transact no business until I return from St. Michaels." The fourth section of the act of June 6, 1900, under which Judge Noyes was appointed, provided that the Judge of the Second District of Alaska should reside at St. Michaels, and it authorized him to hold court elsewhere in the district upon giving at least 30 days' notice. 31 Stat. 321-323. This notice was given by Judge Noyes by publication. It was dated July 21, 1900, and gave notice that a special term of the District Court would be held at Nome on Monday, August 22, 1900, or as soon thereafter as practicable and convenient. Upon learning that a receiver had been appointed, the attorneys for the defendants in those cases endeavored to obtain an order setting aside the appointment. Samuel Knight, an attorney for certain of the defendants, prepared papers and called upon the judge on July 24th, and requested that his motion be set for hearing immediately, or as soon as possible. The judge replied that the matter could not then be taken up nor until after his return from St. Michaels. Mr. Knight urged that the matter be set for hearing at 3 o'clock that afternoon, to which the judge replied that the notice was too short. Judge Noyes declined to give the order or to set the cases for hearing, whereupon Mr. Knight said he would serve a notice on Hubbard, Beeman & Hume, and would be there at 3 o'clock in the afternoon. At 3 o'clock counsel appeared, the motions were argued, and Judge Noyes announced that he would render his decision on the following Monday. On the following Monday, July 30th, he made no decision. Two days later he left Nome for St. Michaels. After he returned, the motions were reargued on August 3d and 4th. On August 10th they were decided adversely to the defendants. W. H. Metson and Judge Kenneth M. Jackson, on behalf of the defendants whom they represented, made similar motions and efforts to obtain orders setting aside the appointment of the receiver in their cases. In the meantime, on July 25th, Judge Noyes made an order in the case of Chippis vs. Lindeberg et al., which should receive more than casual notice. W. H. Metson, one of the attorneys for the defendants in that case, hearing that the receiver had taken possession of the personal effects of the defendants therein, went on July 24th to the judge and asked him to make an order so construing the order of the 23d as to permit the defendants to re-

main in the possession of their tents and their personal property, and thereupon the judge so ordered. On July 25th, Mr. Metson having heard that the judge had made a statement that he had been imposed upon in making the order of the previous day, went to the judge and stated what he had heard, and remarked that he was not in the habit of imposing upon judges, and did not intend so to do. To which Judge Noyes replied: "Your people are preventing the receiver from working the Discovery claim. I am going to tie your people up all around. I am going to make an order which will take everything away from them." Mr. Metson protested against this, and requested the judge not to take so drastic a remedy, and drew his attention to the fact that the complaint called for the possession of the mine only; and he argued that to take away the tools and supplies and personal effects of the defendants would be a great injustice. To which Judge Noyes replied: "I have been imposed upon, and I am going to tie them up." Mr. Metson testified positively to these facts. Judge Noyes admitted that portions of Metson's testimony are true, and made uncertain denial of the remainder. We entertain no doubt, in view of all the facts and circumstances, and the nature of Judge Noyes' own testimony, that the interview occurred substantially as testified to by Mr. Metson. He testified further that he requested the judge to refrain from making such an order, and that the judge declared his purpose to make it, and told him if he got anything he would have to see McKenzie about it. Judge Noyes denied that he referred Metson to McKenzie. The order which was made on July 25th was entitled an "order enlarging the powers of receiver." Among other things, it directed the receiver to "take possession of all sluice boxes, pumps, excavations, machinery, pipe, plant, boarding houses, tents, buildings, safes, scales, and all personal property, fixed and movable, gold, gold dust, and precious metals, money boxes, or coin, and all personal property upon said claim." The receiver took possession of the tents and the beds of the men, the men's own personal property, the boxes of gold dust belonging to the men, the gold dust taken from other claims belonging to the defendants, the contents of the safe, and the time books of other claims which the defendants were working, and there was no redress until some six weeks later, when the receiver, on the advice of his counsel, surrendered a few of the things so taken.

On August 15th the defendants applied to Judge Noyes for orders allowing them appeals to this court from the orders appointing the receiver, and accompanied their application in each case with bonds and assignments of error, and presented bills of exceptions. The applications were denied. After the appeals had been subsequently allowed by the order of the Honorable W. W. Morrow, one of the judges of this court, and copies of the orders of the judge and the writs of supersedeas thereupon issued had arrived at Nome on September 14th, Marshal Vawter on that day served the writs upon Judge Noyes and upon the receiver. Mr. Knight called upon the judge on the same day and stated to him that he had come to see about getting an order to put into effect the writs of supersedeas, and the judge said to him: "I can do nothing about this order; this litigation has caused me

a great deal of worry. My hands are tied; the court has taken the whole matter out of my hands. You gentlemen have got to fight this thing out among yourselves," and he added: "I shall make no order; it is not my duty to do so; it is not within my province or right to do so." On the following day Mr. Knight made a similar application for such order, and presented to the judge a form of order, to which, he testified, the judge replied that he had talked with Mr. McKenzie, and had come to the conclusion that the writs were void, and added: "You have laid a very suspicious emphasis upon the injunctive part of these orders; you are not entitled to an appeal, and your record shows evidence of a great deal of haste." Judge Noyes further stated to Mr. Knight that he was having an order prepared. Cornelius L. Vawter, who was the marshal of the District Court of Alaska, Second Division, in the fall and summer of 1900, testified that on September 14th he served copies of the writs upon Judge Noyes and McKenzie, and that later in the same day he called upon the judge and asked if there was anything that could be done in relation to the writs, and that the judge answered that he was not going to do anything; McKenzie could do as he pleased. The marshal testified that on the following day, while he was in consultation with Major Van Orsdale, he received from Judge Noyes the following letter:

"Nome, Alaska, Sept. 15, 1900.

"C. L. Vawter, United States Marshal, City—Dear Marshal: I have been able for the first time to make an examination of the original order sent down from the Circuit Court of Appeals, and find that it will be necessary for me to enter certain orders of record here, which will be done as soon as they can be drawn and spread upon the record. In the meantime, it devolves upon you to preserve the peace and good order so far as it is possible for you to do, and I have taken occasion to request Major Van Orsdale to render such assistance as necessary to protect life and property and to hold things in statu quo until the order can be prepared and presented to the court.

"Sincerely yours,

Arthur H. Noyes, Judge."

The marshal testified that in connection with the letter, and after he had put a posse of two soldiers in the bank, he had a conversation with Judge Noyes, in which he told the judge what he had done to guard the bullion, and that the judge remarked: "That is right. Hold it there. Don't let this crowd get it; don't let anybody get it; keep the guard on there until further orders." The marshal testified further that it was rumored at that time that the Lane people and the Pioneer Mining Company (the defendants in the Anvil Creek cases) were going to go in and take the bullion out, and that their attorneys had requested him to have the writs enforced, and that he informed Judge Noyes of this later, and that the judge said it was right "not to enforce them; not to let them get the bullion." Marshal Vawter testified that later, at St. Michaels, he had a conversation with the judge, in which he said to the latter: "There is no danger but what you are going to obey the writ of the appellate court, is there?" and the judge answered:

"Don't you think it. In the first place I have got a right to interpret those writs. They have not put up bonds enough. I don't know whether they are genuine or not. I don't know who Frank Monckton is. I am not going to

take any clerk of the court's word for it. In any event the Supreme Court will knock them out when it gets there."

Judge Noyes contradicted the testimony of the marshal in regard to this conversation, and denied that he made the remarks which the marshal attributed to him. There is partial corroboration of the marshal's testimony by that of George V. Borchsenius, the clerk of the court, who testified that he was present during a part of the conversation at St. Michaels, and that he heard some remark of Judge Noyes concerning Mr. Monckton, the clerk of the Circuit Court of Appeals. It should be noted that Marshal Vawter, at the time when he testified, was no longer marshal of the court, and that his feeling toward Judge Noyes was unfriendly, and that he and the judge were not upon speaking terms. Chas. D. French, captain in the United States Army, Seventh Infantry, testified that he was on duty at Nome in August, September, and October, 1900. That he had an interview with Judge Noyes on September 15th, in which reference was made to the writs of supersedeas, and that he asked Judge Noyes what was going to be done about it, to which Judge Noyes answered that he understood it that the writs required him not to do anything whatever. Capt. French further testified:

"There was some further conversation. He directed me not to issue any executive order in reference to these writs, as I understood it. * * * I understood I was required not to undertake the execution of the writs. I was captain of Company K, Seventh Infantry, which was engaged in controlling the town, and was, as I understood it, held responsible for keeping the peace."

Capt. French later testified that when the judge forbade him to issue an executive order he understood it to refer to the writs of supersedeas, and he so informed Major Van Orsdale, his superior officer. Major Van Orsdale, who was in command of the military forces at Nome, testified that, on the morning of September 15th, Kenneth M. Jackson, one of the attorneys for the defendants in the Anvil Creek cases, called upon him and told him that the receiver had refused to comply with the writs of supersedeas, and that there was danger of serious trouble, as a vigilance committee was being or was about to be organized for the purpose of taking possession of the properties that McKenzie was responsible for as receiver, and that he was very anxious that matters should proceed in a lawful way; that if the committee got started there was no knowing where it would end, and very serious trouble would probably result, possibly bloodshed. Kenneth M. Jackson testified that what he told Major Van Orsdale was that McKenzie had refused to obey the writs, and that the marshal had refused to enforce them, and that the defendants were afraid that McKenzie and the plaintiffs would remove the gold dust and get away with it, and that if they did attempt to take the gold dust out of the bank some one would get hurt, and that he wanted the assistance of the military to enforce the writs. We have no hesitation in accepting Mr. Jackson's statement as embodying the truth of the situation. It is fully sustained by the circumstances, and by the general facts in the case as testified to by other witnesses. There was no danger of a general riot or of the

formation of a vigilance committee, and there was no danger of bloodshed unless either the plaintiffs or the defendants or the receiver should attempt by force to remove the gold dust from the safe deposit vault where it was stored. It is true there were miners in Nome at that time who had been working for the receiver whose wages had not been paid, and who were clamorous for payment, but there is no credible evidence that they contemplated or threatened the use of violence to take the gold dust, or for any purpose, or that there was talk of a vigilance committee. Major Van Orsdale testified that he went to see Judge Noyes, together with Capt. French; that he reported to the judge what he had heard about the writs and the danger of riot and bloodshed, and that the judge informed him that the matter had been taken entirely out of his hands, and that he did not know what Mr. McKenzie was going to do about it, but if the matter was brought to his attention he would inform Mr. McKenzie that he should comply with the writ, or words to that effect. That afternoon, about 4 o'clock, Major Van Orsdale received the following letter from Judge Noyes:

"Nome City, Alaska, Sept. 15, 1900.

"Major Van Orsdale, Nome City, Alaska—My Dear Major: After you called with Captain French this morning I saw the original papers on file from the Circuit Court of Appeals, and I find that it is necessary for an order to be entered by this court, which will be entered, of course, as soon as the same can be prepared, and such further steps will be taken as will be a full and complete compliance with the order of the Circuit Court of Appeals. My anxiety in this matter is to do everything in my power, and have all those whom I can in anywise control fully comply with the order of the court above, which, of course, will be done. In the meantime it is necessary that matters should rest in statu quo, and peace and order be preserved, and I therefore request that you render such assistance to the marshal as may be necessary to maintain that peace and quiet.

"Assuring you of my desire to co-operate in every effort that is needful in order to preserve life and property, I am,

"Very sincerely yours,

Arthur H. Noyes, Judge."

Judge Noyes testified that the letter to Major Van Orsdale was written in pursuance of an interview that he had previously had with Major Van Orsdale, when the latter had called upon him and told him there was going to be a disturbance and an attack upon the bank, or that a mob was likely to assemble, and that there was going to be bloodshed.

On September 17th, W. H. Metson made formal application in court for an order directing the receiver to comply with the writs of supersedeas in his cases, and the judge answered, saying that he was preparing a formal order which would be filed. On September 19th, Mr. Metson and Judge Johnson made, in open court, a motion for the enforcement of the writ of supersedeas in the Chipps case, and accompanied the motion with an affidavit that McKenzie had extracted \$130,000 from the mine, which he refused to deliver, and they asked the court to make an order on the writ of supersedeas that he transfer that property to the defendants. Judge Noyes, being then engaged in hearing a trial, directed that the trial proceed, and made no answer to the application which was thus

made. It appears that no order was made in open court by Judge Noyes in any of these cases at any time, but Mr. Metson testified that subsequently he found among the papers in the Chipps case orders which bore date September 17th, which were not filed, and which contained, indorsed upon them in pencil, in the handwriting of Wheeler, the private secretary of the judge, the memorandum, "Not to be filed." The order, after setting forth certain recitals, concludes as follows:

"Ordered that all further proceedings herein in relation to said interlocutory order of this District Court of said 23d day of July, 1900, be and are hereby stayed pending the said appeal from said interlocutory order to the Circuit Court of Appeals."

Similar orders were made in the other cases, all bearing date of September 17, 1900. Judge Noyes testified that these orders were made to express his understanding of the requirements of the writs of supersedeas so far as they were directed to him, and that he did not make or authorize the memorandum "not to be filed." The writs contained the following:

"And that you, said Alexander McKenzie, do forthwith return unto the said defendants the possession of any and all property of which you took possession under and by virtue of said order, and that you do make return of this supersedeas, together with your acts and doings thereon, to said District Court for such District of Alaska, Second Division, as you will answer the contrary at your peril, and you, the Judge of said District Court for the District of Alaska, Second Division, are hereby commanded to stay any and all proceedings which may have issued as aforesaid upon said order, and to stay any and all further proceedings in relation to said order and the appointment of a receiver in this case, pending the appeal last aforesaid in this court."

Judge Noyes testified that he was not advised of the fact that Judge Morrow had approved the form of the writs of supersedeas, or that he had taken other action than to make the orders upon which said writs were issued, and that, taking the writs in connection with those orders and the amount of the bonds upon which the appeals had been allowed, which was \$35,000 in each case, he was in doubt whether the writs directed the receiver to turn over the gold dust. He testified that he told McKenzie that he, McKenzie, ought to comply with the writs, but as to what was necessary for him to do in order to comply therewith he did not undertake to advise him; that he thought, when the appeals were taken, the whole thing was taken out of his, Noyes', hands, and that he was restrained from taking any further steps in the cases whatever, so far as the receiver was concerned. He admitted that he declined to make an order requiring the receiver to turn over the gold dust, "not believing I was bound to; on the contrary, believing it was not a part of my duty to do so." On October 6th, this gold dust remaining still in the possession of McKenzie, the receiver, but the mining claims involved in the suits having been surrendered by him to the defendants, who were then engaged in mining the same, Chipps, the plaintiff in the case of Chipps v. Lindeberg et al., by his counsel, applied to the court for an order upon the defendants therein, to show cause why they should not be restrained from removing from the terri-

jurisdiction of the court the gold dust which they were then extracting from the mine, and accompanied the application with an affidavit setting forth the facts of the allowance of the appeal by Judge Morrow, and the issuance of the writ of supersedeas, which was therein referred to as "an alleged writ of supersedeas of the Circuit Court of Appeals of the Ninth Circuit." Hearing was had upon the order to show cause on October 8th, at which time a discussion was had before the court by counsel for the respective parties concerning the effect of the writ of supersedeas. It was argued on behalf of the plaintiff that inasmuch as the appeal had been taken only from the receivership proceedings, and the main action remained pending before the court, there could be no violation of the writ of supersedeas by enjoining the defendants from deporting the gold dust from the jurisdiction. That argument was met by the defendants' counsel with the proposition that on proper application to the court, and the proper bond being given, the court would have jurisdiction to issue an injunction, but that the court would have no jurisdiction unless the bond was offered, and they contended that the application for the injunction, without the bond, was merely a makeshift to avoid the writ of supersedeas. On October 10th the court made the injunction order, enjoining the defendants from moving any of the gold dust from the jurisdiction of the court. It was made without bond, and without suggestion of a bond. Judge Noyes testified that it was not his intention to order an injunction without a bond, and that if he so ordered in this instance it was by mistake. Marshal Vawter testified, and his testimony is not contradicted, that on October 10th, the day when the injunctions were issued, and some three hours before their issuance, McKenzie came to him and was very anxious to have the injunctions served that night, and wanted him to be ready to make the service. On October 15th, McKenzie was arrested at Nome upon an order of this court to show cause why he should not be held guilty of contempt for his disobedience to the writs of supersedeas. The defendants, on October 16th, made a motion in court to dissolve the injunction of October 10th. On the following day, W. T. Hume, one of the attorneys for the plaintiffs, stated in open court that he thought it was the duty of the plaintiffs' attorneys in that matter, and for their own good, to dissolve the injunction of their own motion, or for the court to dissolve it. Judge Noyes thereupon immediately said, "All of the injunction orders are dissolved forthwith."

The record and the evidence of these proceedings show from first to last, upon the part of Judge Noyes, an apparent disregard of the legal rights of the defendants in the cases in which McKenzie was appointed receiver. The proceedings upon which the receiver was appointed were extraordinary in the extreme. Immediately after his arrival at Nome in company with the man who, it seems, had gone to Nome for the express purpose of entering into the receivership business, and who boasted to others that he had secured the appointment of the judge, and that he controlled the court and its officers, upon papers which had not as yet been filed, before the issuance of summons, and before the execution of receiver's bonds, without no-

tice to the defendants, without affording them an opportunity to be heard, Judge Noyes wrested from them their mining claims, of which they were in the full possession, the sole value consisted of the gold dust which they contained, and which lay safely stored in the ground, and placed the claims in the hands of a receiver with instructions to mine and operate the same, and this without any showing of an equitable nature to indicate the necessity or propriety of the receivership, or the necessity for the operation of the mines by a receiver in order to protect the property or to prevent its injury or waste. When the defendants undertook to appeal from these orders, their right of appeal was denied them. The receiver so appointed was permitted to go on and mine these claims on an extensive scale, and extract from them their value. According to the testimony, some of the mines were "gutted." The appointment of the receiver was, in the case of *Chippys vs. Lindeberg*, almost immediately followed by an order authorizing the receiver to take into his possession all the personal property of the defendants which was found upon the claim, including their stores, provisions, tools, and tents. The order so made was so arbitrary and so unwarranted in law as to baffle the mind in its effort to comprehend how it could have issued from a court of justice. That it was not inadvertent is shown by the fact that, before making it, Judge Noyes was reminded that the suit involved the placer mining claim only, and by the further fact that the order was preceded by the threat to "tie up" the defendants and take away their property, and was followed three weeks later by the deliberate execution of similar orders in the other four cases. The appointment of the receiver in each case was in direct violation of the Code of Alaska, under which the court was organized (31 Stat. 451, § 753), which provides as follows:

"A receiver may be appointed in any civil action or proceeding, other than an action for the recovery of specific personal property—First, provisionally, before judgment on the application of either party, when his right to the property which is the subject of the action or proceeding, and which is in the possession of an adverse party, is probable and the property or its rents or profits are in danger of being lost or materially injured or impaired."

There is evidence of other arbitrary and oppressive action of the court in McKenzie's favor in cases in which he was receiver or was interested, notably the case of the Topkuk mine. It is shown that two of the original locators of that mining property went to Judge Noyes upon his arrival at Nome and complained of the action of certain trespassers, and that he referred them to his private secretary, Wheeler, saying that the latter was about to resign his office and take up the practice of the law; that they went to Wheeler, and he proposed that if they would give him a one-half interest in the mine he would secure them the full possession of their property within 24 hours; that they refused this exorbitant demand, and after some discussion were about to engage his services in consideration of a one-eighth interest, when negotiations were dropped, for the reason, it is suggested in the evidence, that McKenzie had become interested on the other side. An action of ejectment was then commenced by the persons whom the locators complained of, and one

Cameron was immediately appointed by the court receiver of the mining property, upon a bond of \$10,000. He proceeded to operate the mine upon an extensive scale, refused to use the machinery which the owners had placed there at an expense of \$6,000, and, instead, rented machinery from McKenzie at the rate of \$50 per day, and bought supplies of him to the amount of \$7,800. The owners attempted to protect their interests. They challenged the sufficiency of the bond and the ability of the sureties to respond, but without avail. They attempted to watch the clean-ups, but their right to be present was denied by the receiver. They applied to the court for relief, but the only relief they could obtain was an order that one of their number, who was designated by name, be permitted to be present at each clean-up simultaneously with one of the plaintiffs. The evidence is that a considerable portion of the time the plaintiffs declined to be present, and thereupon the receiver denied the right of the designated defendant to be present. When the defendants finally established their title to the property by the verdict of a jury, and the receiver was discharged, his account showed that he had taken out of the mine \$30,000, while his expenses were largely in excess of that amount. The owners contended that he had taken from the mine more than \$200,000. Upon a reference of the receiver's account to a referee appointed by Judge Noyes, it was found that the receiver had taken from the mine \$100,000, and that his expenses were no more than \$35,000. The evidence shows that neither the receiver nor his bondsmen have any property which can be found to apply upon this large deficit of \$65,000. All these matters were properly shown to this court upon these proceedings, to throw light upon the transaction, to show the animus of Judge Noyes in those cases, and to aid the court to interpret the nature of his conduct in the matters upon which contempt is charged.

The charges are in substance that the respondent is guilty of contempt of this court in refusing to execute an order directing the receiver to obey the writs of supersedeas, in giving to the marshal and to Major Van Orsdale instructions to hold matters in statu quo and permit no one to have the gold dust, and in issuing the subsequent injunction of October 10th enjoining the defendants from removing the gold dust from the jurisdiction of the court. When the writs of supersedeas arrived at Nome, and their contents were made known to Judge Noyes, and an application was made to him for an order requiring the receiver to obey them, it was his plain duty to make that order. The receiver had refused to obey the writs. He was an officer of Judge Noyes' court, subject in all his conduct as receiver to be controlled by the order of that court, subject to removal or punishment for contempt in case of disobedience. If Judge Noyes believed the writs were void, it was none the less his duty to obey them, and to leave the question of their validity to the decision of the court whose writs they were. He had no warrant for saying that his hands were tied. The writs of supersedeas did not tie his hands so as to prevent his obedience to their own terms. In language which was neither uncertain nor doubtful, they directed him to go no further with the receivership, and McKenzie to surrender

all the property he had taken as receiver, including the gold dust. It is absurd to say that Judge Noyes was enjoined from ordering McKenzie to do the very thing the writs commanded the latter to do. It was no excuse for denying the application for the order that the bonds upon which the appeals had been allowed were less in amount than the value of the gold dust which the receiver had taken out of the claims. The inadequacy of the bonds, if they were inadequate, was no concern of Judge Noyes. The appeals had been allowed, it is true, upon bonds aggregating \$100,000, but that sum was considerably larger than the sum total of the bonds which Judge Noyes had required of McKenzie as receiver.

Had Judge Noyes done nothing further than to refuse to make an order directing the receiver to obey the writs, however, we should hesitate to hold his refusal to be contempt of court. But he went further than that. Not only did he refuse to make the order, but, apparently fearful that the defendants in those cases were about to obtain possession of the gold dust under the writs, he issued to the marshal and to Major Van Orsdale directions to hold things in statu quo, and couched his directions in words which, upon their face and unexplained, we can construe no otherwise than as meaning that his purpose was to prevent the delivery of the gold dust to the defendants or to any one. These orders, it is true, were accompanied with the promise that the court would investigate the writs and issue such orders as might be proper for their enforcement, but, when the promised orders were finally made, they were orders not enjoining obedience, but the reverse. In framing the orders, Judge Noyes took the language of the supersedeas so far as it enjoined him from further proceeding in the receivership matter, and turned it into a general order of the court, which, if it had any force or effect at all, had the effect to inhibit the surrender of the gold dust by McKenzie, the receiver. But Judge Noyes disclaimed that he had any purpose to interfere with the writs or to obstruct their enforcement, and testified that his orders to the marshal and to Major Van Orsdale were made in consequence of the representations which the latter had made to him of the danger of violence, and were not directed against the delivery of the gold dust to the defendants, but were issued to preserve order and prevent riot and possible bloodshed. We have not disregarded the evidence which has been offered on behalf of Judge Noyes to explain the letters to the marshal and to Major Van Orsdale by reference to an alleged condition of lawlessness at Nome at that time which threatened the safety of the property and the funds in the bank. The evidence does not convince us that that state of things existed. On the contrary, the overwhelming weight of the evidence is that the only commotion that existed at that time was caused by the belief or the apprehension that the defendants in the suits, if balked by the refusal of the receiver to deliver the gold dust, would themselves take possession thereof. The evidence upon that point is to our minds so clear as to leave no room for doubt. We are convinced that Major Van Orsdale misunderstood the purport of the communication which he received from Judge Jackson. But, inasmuch as Major Van Orsdale

represented the situation to Judge Noyes as he has detailed it, we reckon with that fact, and with the element of doubt which it might create were it not for the other evidence in the case. All doubt is removed, however, when we come to consider the testimony of Marshal Vawter and Capt. French concerning the oral directions which they received from Judge Noyes in connection with the "statu quo" letters. Vawter was instructed, as he testified, to prevent the defendants in those cases from obtaining the gold dust. Capt. French, a disinterested witness, to whose testimony we must give full credit, testified that Judge Noyes directed him to issue no executive order in reference to the writs, which he understood to mean, and which could only mean, that Judge Noyes forbade him to issue an order that the gold dust referred to in the writs be turned over to the defendants in obedience to the commands of the writs. These oral instructions furnish evidence of the motive of the written instructions. In giving them, and in making the written instructions, the respondent willfully committed an overt act which had the direct effect to interfere with the execution of the writs of this court, and thereupon the charge of contempt must be sustained. Concerning the remaining charges against the respondent, it is not necessary to make extended comment. His action in issuing the writ of injunction of October 10th was attended by no features of contumacy or want of respect for this court, except the fact that it was made upon a petition which referred to the writs of supersedeas as "an alleged writ of supersedeas of the Circuit Court of Appeals," and the fact that when the injunction was allowed it was allowed without bond. It is significant, perhaps, of the purpose which these injunctions were intended to serve that on October 17th, after the arrival of the warrant of arrest of McKenzie, Judge Noyes of his own motion dissolved them.

In arriving at the conclusion which we have reached in this case, we have not failed to recognize the seriousness of the charge of contempt when laid at the door of a judge of a court, nor the necessity of maintaining a due regard for the judicial discretion which belongs to that office. It is essential, however, to the administration of justice that the process of courts be obeyed. Upon no one does this obligation of obedience rest with more binding force than upon a judicial officer. The respondent Arthur H. Noyes is adjudged guilty of contempt of the authority of this court by his resistance to the execution of its writs of supersedeas. In view of the fact that he holds a public office, it is the opinion of the court that the respondent be required to pay a fine. It is accordingly adjudged that he pay a fine of \$1,000.

Thomas J. Geary, an attorney of this court, was cited to show cause upon evidence which had been furnished by himself in his testimony taken before this court on January 23, 1901, in the case of Kjellman vs. Rodgers, upon the proceedings which were instituted against Alexander McKenzie for contempt. Mr. Geary testified at that time that he was the attorney for McKenzie, the receiver, at Nome, and that on or about September 17th he discussed

with Judge Noyes the application which had been made to the latter for an order directing the receiver to turn over the gold dust according to the writs of supersedeas, in which discussion Judge Noyes said to him that he did not believe he possessed the authority to make such an order, and that the only order he could make was one staying proceedings, leaving the property where it was. The witness proceeded to say: "Under those circumstances, I advised Mr. McKenzie not to turn over the money." In the cross-examination which was then had appears the following testimony:

"Q. Was not your advice to McKenzie that the order was not appealable from, and for that reason he should not obey the writ of supersedeas? A. That was part of it; not all of it. * * * Q. Did you not advise him that the order of Judge Morrow allowing the appeal was void? A. Yes, sir; I advised that, because I thought that under the two cases that I have cited, that the order appointing McKenzie being merely an order appointing a receiver and not an injunction order, that Justice Morrow or this court had no jurisdiction of an appeal from the order appointing a receiver. Q. Had you any intention of advising McKenzie on the 15th to turn over the gold dust? A. I do not know how I can answer that any plainer than I have. I stated at that time that I advised Mr. McKenzie that evening after 6 o'clock that in my opinion the supersedeas did not require him to turn over the money. Q. After that writ had been served upon him, McKenzie, did you advise him not to obey that writ? A. Yes, sir. It did not change my opinion at all. If the original proceeding was void and the court had issued a writ it had not authority to issue, it was void."

In his testimony taken in the present proceedings, the respondent testified that he never at any time advised McKenzie to disobey the writs; that he went no further than to state to McKenzie his opinion of the law, and that he advised him that in his opinion not only the orders appointing him receiver were not appealable, but that the writs themselves did not require him to surrender the possession of the gold dust; and he testified that he gave McKenzie no advice whatever as to the course of action he ought to pursue in the matter. Upon his attention being directed to the specific testimony which he had given in the McKenzie case, and which is quoted above, he testified that either he did not catch the scope of the interrogatory, or that the testimony had been incorrectly taken by the reporter, and that he had not intended to testify as reported. In that connection he directed attention to the fact that, by the other questions and his answers thereto given in his former testimony, it appeared that he did not advise McKenzie in regard to his action, or advise him to disobey the writs. There is no other evidence in the case sustaining the charge that the respondent advised the receiver to disregard the writs or to disobey the orders of this court. The testimony of Kenneth M. Jackson tends rather to some degree to corroborate the evidence of the respondent in that regard. We think that, upon due consideration of the whole of the evidence against the respondent Geary, there is not sufficient to convince us beyond a reasonable doubt that he has been guilty of contempt of the court. The charge against him will therefore be dismissed.

Joseph K. Wood, the United States district attorney, went to Nome in company with McKenzie and Judge Noyes, and immediately

after his arrival, through the intermediation of McKenzie, became a silent member of the firm of Hubbard, Beeman & Hume, and appointed Mr. Hume his deputy district attorney. He corroborated the testimony of Hume to the effect that an arrangement was also made whereby McKenzie was to be a member of the firm and to receive one-fourth of the profits thereof, but he expressed a doubt whether the agreement was ever carried out. The charge which is made against Wood is that at the time of the arrest of McKenzie on October 15, 1900, the keys of the safe-deposit vaults in which McKenzie, as receiver, kept the gold dust which was to be delivered under the writs of supersedeas, had been given by McKenzie to Wood, and that when the officers, in the presence of McKenzie, demanded of Wood the possession of the keys, he refused to surrender the same. Geo. H. Burnham, one of the deputy marshals who went from San Francisco to arrest McKenzie and enforce obedience to the writs of supersedeas, testified that on October 15, 1900, while he had McKenzie in his custody under arrest, he and Shelley Monckton, the other deputy marshal, demanded of McKenzie the keys of the box which contained the gold dust in the Alaska Banking & Savings Deposit Company, and that McKenzie answered that he had given the keys to Mr. Wood, the United States attorney; that Mr. Wood soon thereafter came into the room, and Monckton said to him: "Mr. Wood, we understand you have the keys of the boxes that contain the gold dust in the Alaska Banking & Savings Deposit Company, deposited there by Mr. McKenzie, the receiver;" and that Mr. Wood said: "Do you understand I have the keys to those boxes? Understand nothing; I don't care what you understand;" and that Mr. Monckton then said: "Well, Mr. Wood, Mr. McKenzie has just informed us that he gave you those keys; that you were an officer of the court; that he thought the keys were safer with you than with himself; and I now make demand on you for those keys;" and that McKenzie then added: "Mr. Wood, I told the marshals you had the keys; that I thought they were safer with you than with myself;" that then Mr. Monckton said: "I make demand on you for those keys; have you the keys?" and that Wood replied: "I don't know whether I have them or not;" and that he then got up and went to the door, and as he was going to the door he said, "I will see you later." Dr. Cabell Whitehead, the manager of the bank, testified that when the deputy marshals came to the bank to obtain the gold dust he asked them if they had the keys, and they replied denying that they had them, and that afterwards he met Wood on Stedman avenue and told him that the deputy marshals were at the bank and wanted to see him, to which Wood replied that "the sons of bitches knew where to find him if they wanted to see him"; that the witness protested against the use of that sort of language to him, and told Wood he was simply trying to protect property, that he could not see any good purpose that could be served by breaking open those boxes, which the officers had a right to do and would do, and that Wood answered: "I will deliver those keys to no one until I have seen a certain person;" that the witness then said to Wood that he did not think there was time to see anybody, because the

marshals had been waiting some time, and he did not think they would wait much longer, and that Wood turned and went across the street and said: "Let them proceed with their damned burglaries." McKenzie testified that after he was arrested he handed Wood his pocketbook and keys, and told him he wished him to take possession of them, as he was afraid they were going to take him to jail, and he did not wish them to get possession of his private papers and private affairs, and that when the deputy marshals inquired of him if he had the keys he answered, "No," and informed them that Mr. Wood had them, and that shortly after Wood passed through the room, and Monckton asked him if he had the keys, or requested him to give up the keys, and Wood said, "I will see about that later," and passed right on. Mr. Wood never did surrender the keys, and the marshals were compelled to break open the boxes. In his answer upon the order to show cause the respondent states that his failure and refusal to give up the possession of the keys was not through a purpose on his part to hinder or obstruct the officers in discharging their duty, or to render ineffectual any order of this court, or to be in contempt of court, but alleges that he was acting on the belief that he had not the authority or the right to surrender possession of the keys without instructions from McKenzie, or against McKenzie's wishes as he understood them. We think the evidence fully sustains the charges against the respondent Wood, and indicates upon his part a hostile attitude toward the officers of this court, whose duty it was to enforce the writs of supersedeas, and a disposition to willfully obstruct them in the performance of their duty. We are disposed, however, in dealing with his case, to take into consideration the nature of the averments of his answer upon the order to show cause, and the apology which he subsequently made to this court. It is the judgment of the court that the respondent Joseph K. Wood is guilty of contempt of the lawful orders of this court, and that he be imprisoned in the county jail of Alameda county, Cal., for a period of four months.

C. A. S. Frost, an attorney at law, was sent to Nome by the department of justice as a special examiner to advise and instruct the clerk of the court and the marshal concerning their duties and accounts. He held that office until September 15, 1900, when he resigned to become assistant district attorney to Joseph K. Wood, in the place of Hume, who had resigned, which office he held until April 15, 1901, when he became the private secretary of Judge Noyes. Direct testimony in support of the charges against Frost is given by Marshal Vawter, who testified that the relations between Judge Noyes, McKenzie, and Frost were intimate; that on September 15, 1900, Frost told him that the writs of supersedeas were void, and on that date dictated to him the following letter:

"Hon. C. L. Vawter, U. S. Marshal, Nome, Alaska—Sir: Your attention is invited to that portion of section 846, Rev. St. U. S., which reads as follows: 'That where the ministerial officers of the United States have, or shall incur extraordinary expenses in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States has the authority to allow the payment thereof under special taxation of the District

or Circuit Court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying extraordinary expenses of the judiciary.' If it shall be necessary for you to incur extraordinary expenses under this statute in suppressing specific unlawful acts, acts of violence or attempted violence, burglary, robbery, etc., you will be authorized to employ such force as may be necessary in the premises, and the necessary expenses thereof incurred by you may be included in an extraordinary expense account to be rendered and paid as provided in said action.

"Respectfully,

C. A. S. Frost."

The marshal testified that the letter was accompanied by an order to swear in a large posse comitatus to prevent the delivery of the gold dust to the Lane crowd or to the Pioneer people, and that Frost at the same time remarked that such delivery must be prevented at all hazards, and that he said:

"They are going to try to take it by force, and these writs that have been sent up here will be declared void by the Supreme Court. You must obey this court; you are the executive officer of this court here."

Frost in his testimony contradicted the marshal as to all essential features of his testimony, except that he admitted having written the letter, but the marshal is so well corroborated that we entertain no doubt of the truth of his testimony. Geo. Leekley, who was the marshal's deputy and clerk, and who occupied the same room with Frost, testified that a day or two after September 14th, the date when the writs of supersedeas arrived at Nome, he had a conversation with Frost, in which the latter stated that it was the duty of the marshal by all means to preserve the gold dust intact in the bank in which it was then deposited, and prevent the defendants in said cases and the owners of the gold dust from securing the same under the writs. He also testified that Frost was the confidant and intimate friend and adviser of McKenzie and Judge Noyes, and spent a great deal of time in their company. There are other facts which are fully proven in the case, and which show the deep personal interest which Frost had in the McKenzie receivership, and his partisanship for McKenzie's cause in the controversies then pending. It is proven that in August, 1900, Frost, in violation of his duties as an officer of the United States, and for the purpose of aiding McKenzie, employed, on behalf of the United States, three detectives, Carson, Carroll, and McLean, who for such services during the latter part of August, all of September, and a portion of October, were paid by the department of justice, two of them \$10 per diem and their expenses, and one \$15 per diem and his expenses, and that the purpose for which the detectives were employed, and the sole service which they rendered, was to watch the movements of the defendants and their attorneys in the cases in which McKenzie was receiver. Frost admitted the employment of these men, but stated that they were engaged for the purpose of ferreting out certain efforts which he had heard were being made to corrupt the jury panel of the District Court. The explanation which he gave is inherently improbable. He testified, in substance, that it came to his knowledge that attempts were being made to get persons on the jury panel, and that names were being furnished by interested parties to that end, and that it was

for the purpose of ascertaining who was doing this, and to prevent the corruption of the jury panel, that the three detectives were employed. He declined to state the nature of his information, claiming that it was a confidential communication. On cross-examination he testified that he gave the detectives no instructions to watch any particular person, but simply informed them that he had been informed that attempts were being made to corrupt the jury panel, and that he wanted them to find out who was doing that work. He testified that he received from them reports from time to time, but he declined to divulge the nature of their reports. On further cross-examination it was shown from the witness that there were upwards of 300 names drawn for the grand and petit jury; that the names were selected one-half by the clerk of the court and one-half by the jury commissioner; that Frost made no inquiry of the clerk nor of the jury commissioner, and had no talk with either of them on the subject, and directed no investigation of either; that he gave to his detective no instructions whatever concerning either of these officers, and that he directed no investigation of the 300 names which were put in the box for jurors, and never personally saw that list or made any investigation of it. He admitted that these detectives were paid, under the order of the judge, out of funds in the hands of the clerk. On further cross-examination he testified to a conversation which he had with Judge Noyes concerning lists of names that were presumably to be put into the jury box, and stated that Judge Noyes showed him the lists, and an affidavit accompanying them to the effect that certain persons had been furnishing names for the jury panel, and stated that Judge Noyes asked him if he knew of any way in which he could find out who the parties were who were attempting to corrupt the jury panel, and that he, Frost, had replied by saying that while he was in the department of justice the Attorney General had authorized the employment of persons to investigate that sort of thing, and that he informed the judge that if, in his opinion, it was necessary or advisable to employ some one for that purpose, he thought it might be done. He further testified that Judge Noyes told him that the lists had been furnished by attorneys, and that they were in the handwriting of two persons named. This testimony is not corroborated by Judge Noyes. He testified that he did not make any inquiry as to where the lists were obtained, and that he does not remember that any one told him the lists had been furnished by attorneys, and that he could not have told any one whose handwriting the names were in, and that he could not have shown Frost those lists earlier than August 25th, because the affidavit which was attached thereto was dated August 25th. There is positive and direct testimony of other witnesses concerning the purpose for which the detectives were employed. John F. Mercer, who was a deputy marshal, and who had been a captain in the First Montana Regiment in the Philippines, a man of standing and of good repute so far as the evidence shows, testified that Frost told him that he wanted those detectives to watch Judge Johnson, Mr. Metson, Mr. Knight, Judge Jackson, Lane, their attorneys and following, and report to him their actions and doings. The witness testified that Frost stated to

him that they were watching these people; and that Frost told him that they "had the means of ascertaining what was going on in certain neighborhoods, notably the judge's chambers." "I know," said the witness, "they were watching Mr. Metson's office; I know they were watching Judge Jackson very closely." Mercer further testified that he saw these detectives giving their reports to Frost; that on one night one of them, Carson, reported that an attempt was to be made by the defendants in those suits to take certain gold dust out of the bank. That immediately after, Frost conferred with the witness, and told him what Carson had reported, and said, "It must be prevented," and that he went out with Frost late that night to the bank, and that Frost seemed very much excited, and thought they ought to make a general alarm, and that this happened on the night of the arrival of the writs of supersedeas. Marshal Vawter testified that L. D. McLean, one of the detectives, told him that he was employed as a spy upon the attorneys and owners of those Anvil Creek claims of which McKenzie was receiver. Dr. Cabell Whitehead, manager of the bank, testified that McKenzie came to him frequently and told him of reports which his detectives had made to him, and that on one occasion he referred to McLean as one of his detectives, and reported a conversation which he said McLean had overheard through the wall of the room adjoining W. H. Metson's office. W. H. Metson testified that Carson was already employed by him before Frost engaged him as a detective, but that Frost was evidently not aware of that fact. That Carson came to him and reported to him that Frost had engaged him for the purpose of watching him, Metson, and had directed him to seek employment from Metson in order to be in a position to watch his movements and report the same to Frost. That thereupon he, Metson, ostensibly and openly employed Carson, and from that time on Carson made regular reports to Frost, and that the reports were first submitted to Metson for his supervision. Geo. A. Leekley testified, also, that on the night of the arrival of the writs of supersedeas Frost made several trips to the bank, and that Frost informed him that he had just received information that the defendants and owners of the gold dust were going to attempt to take the dust from the bank that night. George V. Borchsenius, the clerk of the court, testified that he objected to the payment of the bills of these detectives, for the reason that he did not think they were proper bills, but that Judge Noyes ordered him to pay them immediately, and said to him that he could either pay them or be in contempt of court. The amount of McLean's bill was about \$900. The amount paid to the others is not stated. The whole of the evidence concerning the case of Frost convinces us beyond any reasonable doubt that he not only aided and abetted to the utmost of his power the efforts of McKenzie to obstruct the execution of the writs of supersedeas, but that in his official capacity he grossly betrayed the interests of the United States which were intrusted to his care. The respondent C. A. S. Frost is adjudged to be in contempt of the lawful orders of this court, and for his contempt it is the judgment of the court that he be imprisoned in the county jail of Alameda county, Cal., for a period of 12 months.

ROSS, Circuit Judge (concurring). The findings of fact in the cases of Arthur H. Noyes, Joseph K. Wood, and C. A. S. Frost, embodied in the foregoing opinion of my Brother GILBERT, to the effect that each of those parties committed the contempt alleged against him, meets with my concurrence; but I am of the opinion that the records and evidence in the cases show beyond any reasonable doubt that the circumstances under which and the purposes for which each of those persons committed the contempt alleged and so found were far graver than is indicated in the opinion of the court, and that the punishment awarded by the Court is wholly inadequate to the gravity of the offenses. I think the records and evidence show very clearly that the contempts of Judge Noyes and Frost were committed in pursuance of a corrupt conspiracy with Alexander McKenzie, and with others not before the court, and therefore not necessary to be named, by which the properties involved in the suits mentioned in the opinion, among other properties, were to be wrongfully taken, under the forms of law, from the possession of those engaged in mining them, and the proceeds thereof appropriated by the conspirators. For those shocking offenses it is apparent that no punishment that can be lawfully imposed in a contempt proceeding is adequate. But a reasonable imprisonment may be here imposed, and I am of the opinion that, in the case of the respondent Arthur H. Noyes, a judgment of imprisonment in a county jail for the period of 18 months should be imposed, and in the case of Frost a like imprisonment of 15 months.

The facts and circumstances against the respondent Wood are by no means so strong, although I find it difficult, if not impossible, to reconcile his ignorance of and disconnection with the conspiracy with the facts that immediately upon his arrival at Nome he was, at McKenzie's dictation, given a one-fourth interest in the firm of Hubbard, Beeman & Hume (which firm was employed to carry on the legal part of the nefarious business), and that Hume (who was, so far as appears, a total stranger to Wood) was, likewise at McKenzie's dictation, immediately appointed by Wood assistant United States attorney. I think Wood should be imprisoned for 10 months.

In regard to the respondent Geary, I agree with the finding of the court to the effect that the contempt alleged against him is not sufficiently established. Reading and considering Geary's entire testimony, and especially his written opinion given McKenzie at the time of the occurrences in question, and in the light of the testimony of Mr. Metson, I am of the opinion that it is not shown that he went beyond the legitimate privileges of an attorney in giving his legal advice. I therefore concur in the dismissal of the proceedings against him.

MORROW, Circuit Judge (concurring). I concur in the findings of fact contained in the opinion of Judge GILBERT in the cases of Arthur H. Noyes, Joseph K. Wood, and C. A. S. Frost, and in the judgments directed to be entered thereon. I am also of the opinion that the evidence does not establish the charge against Thomas J. Geary.

In my judgment the evidence establishes the fact that there was a conspiracy between the respondent Noyes, McKenzie, and others to secure possession of certain valuable mining claims at Nome, Alaska, under proceedings involving the appointment of a receiver for the purpose of working the properties and obtaining the gold deposited in the claims. To carry these proceedings to a supposed successful conclusion, Noyes, McKenzie, and others found it a necessary part of their scheme to resist the process of this court. In pursuance of this conspiracy, the contempt charged against Noyes was committed; but I agree with Judge GILBERT that this conspiracy is outside the charge of contempt, and, in view of the fact that the respondent Noyes holds a judicial position, I concur in his judgment that the respondent be required to pay a fine of \$1,000.

L. BUCKI & SON LUMBER CO. v. ATLANTIC LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1903.)

No. 1,143.

1. WRONGFUL ATTACHMENT—MALICE—WANT OF PROBABLE CAUSE—SUBMISSION OF QUESTIONS TO JURY—SUFFICIENCY OF EVIDENCE.

Evidence in an action for damages for wrongfully and maliciously suing out writs of attachment examined, and *held* to require the submission to the jury of the issues as to the want of probable cause and the existence of malice.

2. SAME.

While the issue of probable cause in an action for wrongfully and maliciously suing out an attachment is, as a general rule, for the court, yet where it depends on disputed facts and conflicting evidence as to defendant's good faith and just belief, it is for the jury.

3. SAME.

In an action for wrongfully and maliciously suing out an attachment, the issue of malice *per se* is for the jury.

4. SAME—ADVICE OF COUNSEL.

Where an action for wrongfully and maliciously suing out an attachment is defended on the ground that the advice of counsel was sought and followed, the fact that the counsel was a director and secretary of the defendant, renders the issue of malice peculiarly for the jury.

5. SAME—MOTION FOR DIRECTED VERDICT.

In an action for wrongfully and maliciously suing out writs of attachment, a motion for a directed verdict for defendant on the ground that "it appears from the evidence herein" that the defendant had probable cause, and that "it appears from the overwhelming weight of the testimony" that the defendant had no malice, is improperly granted, such matters being for the jury.

6. SAME—AMENDMENT OF PLEADINGS—DISCRETION.

In an action for wrongfully and maliciously suing out an attachment, the refusal to permit plaintiff to file an additional count averring the wrongful and malicious prosecution of the common-law suit in which the writ issued, the amendment being asked to eliminate embarrassment which might arise upon defendant's contention that the damages suffered were not solely the result of the attachment, is not an abuse of discretion.

7. SAME—PRODUCTION OF BOOKS—RELEVANCY OF EVIDENCE.

Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], provides that in the trial of actions at law the federal courts may require the parties to produce

books or writings containing evidence pertinent to the issue in cases and under circumstances where it might be done by the ordinary rules of chancery. *Held*, that a motion by defendant, in an action for wrongfully and maliciously suing out an attachment, to require plaintiff to produce its books so as to show its insolvency, inability to meet accrued obligations, and failure to make profits was improperly granted, neither plaintiff's insolvency nor inability to meet accrued obligations being a defense.

8. SAME—DISPOSITION OF ATTACHED PROPERTY—RELEVANCY OF EVIDENCE.

In an action for wrongfully and maliciously suing out an attachment, evidence tending to show what disposition was made of the attached property after its release and bonding is irrelevant, and improperly admitted.

9. SAME—VALUE OF PROPERTY.

In an action for wrongfully and maliciously suing out an attachment on the property of a sawmill company, evidence of a witness as to how much he paid for the mill four years after the attachment is irrelevant, and improperly admitted.

10. SAME—SOLVENCY OF PLAINTIFF—NONEXPERT WITNESS.

In an action for wrongfully and maliciously suing out an attachment, an objection to a question propounded by defendant to a nonexpert witness as to what, supposing there had been no attachment, and the plaintiff had been unable to procure a certain loan, would have been its ability to continue payment of its obligations, including sums due defendant, is improperly overruled.

11. SAME—MALICE—PROBABLE CAUSE—SUBSEQUENT EVENTS.

In an action for wrongfully and maliciously suing out an attachment, evidence as to matters occurring after the issuing of the attachment is inadmissible to establish probable cause or show absence of malice.

12. SAME—PARTY'S OWN EVIDENCE.

In an action for wrongfully and maliciously suing out an attachment, the testimony of defendants that they were not actuated by malice is properly admitted in conformity to the Florida rule admitting such evidence under a statute authorizing a party to a civil action to testify in his own behalf.

18. SAME—INSTRUCTIONS IN ORIGINAL CASE.

In an action for wrongfully and maliciously suing out an attachment, instructions given by the court in the original action, expressive of its opinion as to certain facts proved in that case, are properly excluded as irrelevant.

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

This is an action for damages for maliciously suing out two writs of attachment and the levying and maintaining the levy of such writs upon the properties of the plaintiff in error. The declaration consists of two counts. The first count charges the defendants with maliciously and without probable cause suing out a writ of attachment for \$9,980.80, and maliciously endeavoring to maintain the same. The second count charges the defendants with maliciously and without probable cause suing out, levying, and maintaining the levy of another writ of attachment for \$75,000. Both writs were issued and levied on the 1st day of October, A. D. 1897, at half past 6 o'clock p. m., and both were auxiliary attachments to common-law suits by the ordinary process of summons, which were served upon an officer and agent of the plaintiff residing in the city of Jacksonville, in the said county, where the business of the plaintiff in error was conducted. The suits were removed to the court below from the state court.

The plaintiff was a corporation organized under the laws of the state of New Jersey, and the Atlantic Lumber Company was a corporation organized under the laws of the state of Florida. Daniel G. Ambler was the president

¶ 12. See Malicious Prosecution, vol. 33, Cent. Dig. § 140.

and a director; Arthur Meigs was the general manager and a director, and Richard H. Liggett was the secretary and a director of the Atlantic Lumber Company at the time the attachments were issued, and had been such officers for several years prior to such attachments. All of the defendants were citizens of the state of Florida. All the pleas went out on demurrer, except the pleas of not guilty, and the case went to trial on such issues of fact as were raised by pleas of not guilty.

In the summer of 1892, the plaintiff and defendant company became bound to each other by mutual covenants in a contract as follows: The plaintiff to build a sawmill with a daily capacity of 100,000 feet per day, with a boom pen of the capacity of 2,000,000 feet; defendant company to deliver into said pen 2,000,000 feet of good merchantable green pine logs each month for eight years from the starting of such mill, at specified prices. The size of the logs were to be such that the average each month should be $3\frac{1}{2}$ logs per 1,000 feet, board measure, which said size the defendant guaranteed. Payments were to be made on the 1st and 15th of each month for the deliveries made during the preceding two weeks. Other provisions and details of the contract will be found recited in other cases in this court between these same parties growing out of this same contract, and particularly in *Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 109 Fed. 411, 48 C. C. A. 455, wherein we held as to this same contract as follows: "The contract contained stipulations and guaranties in regard to which there might be failures and breaches frequently occurring during the life of the contract—such as the failure to pay in time as agreed, and the failure to maintain the warranty as to the average of the logs delivered monthly—none of which would necessarily put an end to the contract, even if suit should be instituted for such breach. Notwithstanding the subsidiary provisions, breaches of which might warrant a suit, the contract appears to be an entirety, and not several independent agreements." See *Atlantic Lumber Co. v. Bucki & Son Lumber Co.*, 63 U. S. App. 382, 35 C. C. A. 59, 92 Fed. 864; *Id.*, 63 U. S. App. 384, 35 C. C. A. 59, 92 Fed. 864; *Atlantic Lumber Co. v. L. Bucki & Son Lumber Co.*, 35 C. C. A. 59, 92 Fed. 864; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 35 C. C. A. 590, 93 Fed. 765; *Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 47 C. C. A. 685, 109 Fed. 1061; *L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. of Md.*, 48 C. C. A. 436, 109 Fed. 393; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 48 C. C. A. 455, 109 Fed. 411; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 53 C. C. A. 513, 116 Fed. 1.

The plaintiff in error contends, and it must be admitted that he introduced evidence tending to show, as follows:

Plaintiff built the mill and boom pen, according to covenant, at an expense of nearly \$150,000, and commenced sawing about the 1st of April, 1893, when the defendant commenced to make deliveries. As soon as the mill had started up, plaintiff had performed all the covenants in the contract except to pay for the logs thereafter delivered. Defendant company continued to make deliveries of logs—that is, logs with green merchantable sap, which by contract should not exceed four inches—up to about May, 1897. In the latter part of September, 1896, a destructive cyclone swept over the state of Florida from the mouth of the Suwanee river to the Georgia line, felling or destroying the pine forests over an area of land 40 miles wide and 120 miles long. In such area defendant company, prior to the storm, had bought timber lands or stumpage, upon which it relied to supply the logs called for by the contract. This area of virgin timber was southwesterly from the town of Starke, Alachua county. Into this area, from said town, the defendant company (not owning any franchise to build and operate a railroad) built a railroad, long prior to the storm, under the charter of another railroad corporation, connecting at Starke with the railroad owned by the F. C. & P. Railroad Co., and extending to plaintiff's mill, which was in the city of Jacksonville, Duval county. Prior to defendant company's building such road a distance of thirty miles, at a cost, with equipment, of about \$230,000, it had obtained from the said F. C. & P. Railroad Co. a contract for freight rates for its logs to Jacksonville from any point on the line of defendant company's main line of railroad aforesaid. Defendant company's capital stock was only \$100,000 par value, but by borrowing money it built said railroad, and became

the owner of all the stock of said chartered railroad company, except about \$4,000. This new road was bonded at \$8,000 per mile, and defendant company owned all the bonds, which it hypothecated to raise money on to build said road. At the time of the said storm defendants' logging camp equipment, consisting of about 150 mules, tackle, etc., and log carts, costing about \$30,000, and iron rails for spur tracks for logging purposes only, costing about \$12,000, were located and were operating in such storm area, at or near the western end of its main railroad, some 30 miles from Starke. All this large outlay of money was necessary to enable defendant to obtain logs of required size to fill the contract—at least defendant thought so—and thereby the defendant company had expended all its capital of \$100,000 and approximately \$172,000 more. Soon after the storm the defendants were confronted with financial ruin. Why?

(1) Because the storm destroyed timber within 100 miles of Jacksonville running up into billions of feet, according to an estimate made by Ambler, defendant company's president, which estimate he caused to be published. There were in Jacksonville and vicinity five or six other sawmills to be supplied with logs. Necessarily, defendants foresaw that, resulting from such enormous destruction of timber, they would not only lose a large portion of their capital invested in timber and timber lands within the storm area, but the supply of standing timber which they did not own, within such a distance from Jacksonville as to render it possible to be delivered into plaintiff's boom at the contract price, would be largely diminished, and the price of standing timber largely increased. And this apprehension or foresight is abundantly verified by the evidence in this case.

(2) They foresaw that they would soon have to cease cutting storm timber, because it would soon be ruined by worms, and, unless they could find timber at a profitable distance from their main line of road, and had capital to buy it with to fill the contract, a very large portion of their capital invested in such railroad would be lost. For it was a fact, then well known to defendants, and now conceded by defendants' own testimony, that the business over their road from Starke, apart from hauling their own logs, would hardly pay operating expenses, and that, consequently, if they should move their logging plant to some other part of the state, said railroad would be utterly worthless, save the value of the iron rails, partially worn out, if perchance legislative authority to remove them could be obtained.

(3) With this calamity staring it in the face, defendant, by its general manager, Meigs, applied, by letter dated February 23, 1897, to the plaintiff, to modify such contract so as to enable defendants to put into its boom pens, from the storm area, all the logs they could, as fast as they could, in order to save as much of this timber as possible in the storm region by getting it into water before it was destroyed by worms. Defendants also requested that plaintiff should pay for all excess above the 2,000,000 feet limited by the contract at contract prices; and this request was put on the ground that defendant company was financially unable to put such excess into the boom unless it received pay for it as the logs were delivered. Defendant company, in this letter, urged plaintiff to so modify the contract on the ground unequivocally admitted in the said letter that there was no doubt defendants would at an early date be short of a supply of logs to fill the contract. Plaintiff yielded to such requests on being so importuned, and the payments and advances made by it to defendants to aid in saving them from ruin were such that defendant company, at the end of each month from February 1st to September 1st, on account of such excess, including some advances prior to said letter, owed the plaintiff large sums of money.

(4) Still later—about the 1st of May—the worms had honeycombed the sap of the logs, and rendered them unmerchantable, and defendant company requested, as a further favor, that plaintiff would accept such storm logs on a survey excluding the sap, the average of the logs not to be diminished, and only the heart of the logs to be paid for; and this was agreed to, providing such storm logs were not to be delivered after the worm had penetrated the heart. As the contract called for merchantable logs, and it was then and is now conceded by defendants that a log was not, under such contract, merchantable, unless its diameter at the small end was twelve inches, and it

being conceded by defendants and established by evidence that the sap on the logs delivered for the four months next prior to October 1st averaged 3.65 inches, defendants could not cut and deliver a log which, including the sap, measured at the small end less than 16 inches. Half inches are not counted. See Preston's Rules of Survey. The result necessarily was that defendants had to abandon, as lost, all storm logs under 16 inches at the small end, and could cut no tree or stick that was not 16 inches and upwards at the small end, excluding sap. This was a great financial loss to defendants.

(5) But it cost as much to cut, load and unload, survey and transport the storm log as the green log, and, as defendants only got pay for the heart of the storm logs, they lost on delivering such logs, by excluding sap, nearly one-half of the cost of the log in the boom, and they had to deliver above 2,000,000 feet including sap to get pay for 1,000,000 feet excluding sap. Defendants struggled along during June, July, August, and September, 1897, under great and distracting financial distress, and delivered such storm logs during said months at a monthly loss of at least \$5,000 per month, because they could not deliver logs according to contract. In each of said months the logs averaged about 4 logs per thousand, and were short in quantity about 250,000 each month, and many of them less than 12 inches in diameter, and therefore not merchantable, and in many of them the worms had penetrated the heart. Defendant company finally had to abandon cutting such storm logs after it ceased deliveries to plaintiff, because it was unprofitable.

(6) As a further act of kind treatment by plaintiff, it had overpaid the defendant company the full contract price for all such inferior logs delivered up to September 15th by \$250, and on October 1st the contract price of the logs delivered after September 15th, if up to contract, was \$6,841.79. This sum of \$6,841.79, less a credit of \$250 was, on October 1st, the only possible claim defendant company had against plaintiff, making no deductions whatever for the breach of warranty as to size or unmerchantability because of less diameter than 12 inches at the small end, or worms in the heart; and had so paid, without calling for larger logs, until September 11th, when larger logs were requested.

(7) On October 1, 1897, the defendant company was insolvent, and by such insolvency had in fact incapacitated itself to continue to perform the contract, and defendants admit in the witness box that their company was indebted on the day aforesaid in the sum of about \$140,000; that much of it was overdue; its paper at its bank went to protest on that day; it was unable to meet its pay roll, overdue, and unable to pay freight on logs, overdue; and defendants admit, as such witnesses in their own behalf and otherwise, that the defendant company did not, on October 1st, own logs available to comply with the contract, and unable to buy others that would comply with the contract.

The foregoing statement contains the ultimate facts as stated, which are either admitted by the defendants themselves, or established by the evidence beyond dispute. The following facts are also conceded, or indisputable on the evidence:

(8) Over three weeks prior to October 1st, defendant Liggett, on instructions by Meigs, his company's general manager, prepared two affidavits for attachments—one for \$75,000, the amount of the other was left blank—and left said affidavits with his clerk in his law office, to be used in his (Liggett's) absence, if he, the said clerk, was instructed by the officers of the company to use them. Liggett then went to Virginia, Meigs went to New York, and Ambler had been in New York for four months (prior to October 1st), and neither of said officers returned to Florida until after the writs were issued.

(9) Plaintiff, on the evening of September 30th, had consummated with a Boston lumber dealer financial arrangements by selling lumber already on hand in its yards and on its docks, by which said dealer bought said lumber for the sum of \$25,000, which plaintiff expected to receive on October 2d, and which defendants knew plaintiff had the best of reasons to believe it would receive in a day or two. And plaintiff had assured the defendants that, as soon as said moneys were received from the Boston Company, it, the plaintiff, would advance to defendants not less than \$12,000 on account of log deliveries, and to that extent relieve them of financial distress.

(10) Well knowing such facts, and also well knowing that, relying upon having said \$25,000 from the Boston Company, the plaintiff had not made any other financial arrangements for cash for use in its business; and, well knowing that plaintiff had, within two weeks prior to October 1st, paid defendant company nearly \$10,000 on log account; and well knowing for the above reasons that on the 1st day of October plaintiff did not have any cash on hand—the defendants Ambler and Meigs went into plaintiff's New York office, at No. 29 Broadway, and requested a payment of \$2,500 on log account, to meet their paper due at their bank on that day, to prevent it going to protest. And because Ambler and Meigs did not get the \$2,500, they, in a state of mental excitement over their own company's financial condition, and without calling for a settlement or making any effort to come to an agreement as to what their just claim for logs was; without any attempt on their own part to examine their own books, which they had not seen for three weeks, to ascertain what their just claim was; without even intimating in any way that they were going to sue out attachments; and without consulting counsel as to their claim or right to an attachment—they (Ambler and Meigs) made a rush from plaintiff's office to the nearest telegraph office in New York City, and before 2 o'clock p. m. wired one Elmore, a clerk, of 24 years, to immediately sue out attachments for the balance claimed on log account, of \$9,980.80, and for \$75,000 for so much profit they assumed they could make in the next three years and a half. Elmore, under such instructions, filled up the blank in the one affidavit, inserting \$9,980.80, and swore to that, and the other for \$75,000, caused them to be filed with the clerk of the court, and the bonds required by statute. The clerk issued the writs of attachment, and by about 6 o'clock p. m. of said October 1st those writs were levied on all the plaintiff's mill plants, on over 5,000,000 feet of manufactured lumber, and on over 3,000,000 feet of logs in the boom. These writs were auxiliary to two common-law actions commenced by præcipe and summons on the same day, which summons was served on an officer of plaintiff company. The defendant, plaintiff in said action, on the motion of plaintiff in each case, pursuant to statute, was ordered by the court to file a declaration specifying the claims on which the attachments were based, and such declaration in the case, for balance on log deliveries, only claimed \$8,609.78, without giving credit for \$2,000 defendant company had been paid, which \$2,000 was credited in making up the sum of \$9,980.80, stated in the said affidavit for the writ. Crediting this \$2,000, the utmost possible claim for logs was \$6,609.78. This smaller attachment for \$9,980.80 was dissolved on motion, based on the attachment papers and said declaration, showing no such sum was due on October 1st for log deliveries, for which an attachment could issue.

The declaration in the action in which the writ for \$75,000 was had specified two separate and independent grounds. One was for such expected profits; the other was on a claim discovered after the writs of attachment were issued by getting possession of plaintiff's books at its mill, to wit, that the cut or product of the timber and lumber from the logs was many millions of feet in excess of the survey according to Preston's rules; and that defendants claimed the right to be paid for such excess at the contract price, although they knew Preston's rules were based on board measure; and by cutting large timber the lumber thus saved from the same kerf would make a large excess over such survey. To make such claim defendants had to charge their own surveyor with making fraudulent surveys. On an issue of fact denying indebtedness, the writ for \$75,000 was dissolved, because no such indebtedness was found to exist, and on the trial of the action on the merits on claims for profit and overcut, defendant (plaintiff here) recovered.

By writs of error, petitions for a rehearing in this court, and application for a writ of certiorari defendants were able to maintain the lien of these attachments for nearly two years; and, as usual in such cases, the plaintiff's business was ruined and destroyed in consequence of such writs.

After issuing these writs, Ambler, Meigs, and Liggett returned to Florida, and (a) sued out, on October 4th, two other attachments for about \$2,000 each, repeating therein the charges of fraud, and then wired the Boston Company that they have attached for \$90,000 to prevent plaintiff from getting the \$25,000; and, (b) learning that the sheriff is about to allow plaintiff to saw up

the logs in the boom under an arrangement whereby the lien of the attachment would rest on the manufactured product of the logs, which would increase defendants' security, the lumber being more valuable than the logs, the defendants interfere, and apply to the sheriff, urge him to grant no favors to plaintiff, because they want to coerce it to settle their demands, and that the sheriff ought to stand by home people as against foreigners.

The defendants in the court below, to show probable cause for the issuance of the attachments, and the nonexistence of malice therein, offered evidence showing that prior to and at the time of the suing out of the writs they took the advice of the counsel of the Atlantic Lumber Company, who was also a director and secretary of the same, and also the advice of other counsel in a partial way, and the said defendants here rely in addition for justification upon the following matters, which there was evidence tending to establish, to wit:

The defendant made all essential preparations for the performance of the contract. It purchased large quantities of timber land and stumpage privileges. It provided itself with a logging outfit, having a capacity of $2\frac{1}{2}$ million feet per month. It built a permanent railroad from the Florida Central & Peninsular Railway into the timber region. It made a 20-year traffic contract with the F. C. & P. to haul its log trains from Starke (the junctional point with defendant's railroad) to the plaintiff's mill at the uniform price of \$4 per car. It provided itself with a powerful locomotive and 50 log cars, each having a capacity of over 4,000 feet. The performance of the contract was commenced and continued without serious difficulty until June, 1897. The contracts provided that during the first year payments for logs should be made by 60-day drafts, payable in the city of New York, but that after one year from the date of the contract the defendant might demand cash. Upon the expiration of the first year the defendant did demand cash, but continued to take plaintiff's paper in settlement for logs. All of this paper was handled by the National Bank of Jacksonville, the time of payment in each instance being made to suit the pleasure of the bank. On June 5, 1897, one of the plaintiff's log drafts went to protest. This immediately caused distrust at the bank. During the month of June plaintiff's boom pen became so crowded with logs that the defendant was unable to put more logs into the pen, and in consequence the defendant was compelled to shut down its log camp for a period of about ten days. By allowing its log pen to become crowded, plaintiff disabled itself from accepting and receiving two million feet of logs per month, and this in itself was a breach of the contract. Nevertheless, the defendant, for the purpose of assisting the plaintiff, voluntarily, and at great loss to itself, shut down its camps as stated. During July and August the plaintiff's log drafts went to protest at frequent intervals, and when the log settlement of August 15, 1897, became due, the plaintiff was wholly unable to pay cash, and the bank refused to discount its draft, because at that time some of the log drafts were past due, unpaid, and had been protested. Afterwards, on August 19th, upon the statement of the plaintiff that all of the protested log drafts had been taken up (a statement which subsequently proved untrue), the bank consented to discount the plaintiff's ten-day draft for \$5,340.75, dated August 16, 1897, given the defendant in settlement for the deliveries made prior to August 15, 1897. On August 23, 1897, the defendant notified the plaintiff in writing that, owing to the refusal of the bank to discount the plaintiff's paper, the defendant would in future have to require the plaintiff to pay cash. The draft for \$5,340.75 fell due August 26th, and was not paid, and was duly protested. This draft was not paid until some time in the following year. On September 1, 1897, \$6,024.98 became due to the defendant from the plaintiff for logs delivered between August 14, 1897, and that date. Payment of this amount was demanded, but the plaintiff was unable to pay any part of the same. On September 15, 1897, the further sum of \$5,704.56 became due for logs delivered between August 31, 1897, and that date. Payment of the same was demanded, but the plaintiff was able to pay only the sum of \$2,500 on account thereof. Afterward, on September 18th, 20th, and 27th, the plaintiff paid the defendant the sums of \$2,000, \$3,961.65, and \$1,500, respectively. These sums being applied to the balance due for logs delivered between

August 14 and September 15, 1897, left due from the plaintiff to the defendant the sum of \$1,767.99 on account of those logs. On October 1, 1897, the plaintiff became indebted to the defendant in the further sum of \$6,841.79 on account of logs delivered between September 15, 1897, and October 1, 1897. The result of all this was that on October 1, 1897, the plaintiff owed the following amounts on account of logs: (1) The protested draft for \$5,340.75, of which \$3,340.75 was due on account of logs delivered prior to August 15, 1897. (2) The sum of \$1,767.99, the same being the balance due on account of logs delivered between August 14, 1897, and September 15, 1897. (3) \$6,841.79 on account of logs delivered between September 15, 1897, and October 1, 1897. The plaintiff likewise owed the defendant a little less than \$1,800 on another account, which was then long overdue. During the months of June, July, August, and September, 1897, the defendant, in order to assist the plaintiff, diminished the log delivery to the plaintiff to less than two million feet per month, and sold the balance of the logs to other parties for a much less sum than the contract price. Thus in July, August, and September the defendant sold 211,985 feet, 623,511 feet, 410,364 feet, and 385,638 feet, respectively, to Hunter and Cashen, and also 678,195 to Clerk, during these four months. On September 11, 1897, Arthur Meigs, general manager of the defendant, wrote the plaintiff as follows: "I beg to advise you that in future we shall be obliged to deliver you the entire output of our camps, which will be about 2,500,000 per month, until we have made up the average to you of two million feet per month. We are now something over 1,000,000 feet behind this average. I hope you will be able to receive the logs, and pay for them according to the contract, and that we shall not be obliged to shut down our camps, in which event we shall, of course, hold you for the expenses incurred in so doing." On receipt of this letter Charles L. Buckl, president of the plaintiff, informed D. G. Ambler, president of the defendant company, that the plaintiff would not permit the defendant to make up the deficiency in delivery. The draft for \$5,340.75, above referred to, embraced a balance of \$3,340.75 due on account of logs delivered prior to August 15, 1897, and the sum of \$2,000, which was styled "an advance" on logs to be delivered. The history of this so-called advance was as follows: About September, 1894, the plaintiff owed the defendant about \$1,400 on account of certain matters growing out of the logging camps, and the defendant's general manager at that time applied to the president of the plaintiff to make payment of same, and was informed by the president that he was unable to pay the same unless authorized by the board of directors, but that he would make the defendant an advance, and the plaintiff consequently added the sum of \$3,000 to its next log draft as an advance to the defendant, and when this draft became due the defendant paid the said \$3,000 and the interest thereon, and in the draft taken in the next settlement the same sum of \$3,000 was added as an advance. This operation was kept up until August 15, 1897, the defendant in each case paying the interest, and the process amounting to not more than the plaintiff's making its paper for \$3,000 more than was due on the log account, the defendant taking care of the paper to that extent, and paying the interest on the said so-called advance. When the settlement of August 15th came, a sufficient part of the amount then due for logs was applied to this so-called advance to liquidate it, and when the new draft was taken an advance of \$2,000 was included therein, instead of \$3,000, making the draft \$5,340.75. On October 1, 1897, the Atlantic Lumber Company brought two common-law actions against the Buckl Company—one for \$15,000, in which an ancillary writ of attachment for \$9,980.80 was contemporaneously sued out; and another action for \$90,000, in which an ancillary writ of attachment for \$75,000 was contemporaneously sued out. On November 1, 1897, the court dissolved the smaller attachment for \$9,980.80 upon motion, and from this order no supersedeas was sued out. The attachment for \$75,000 was dissolved February 14, 1898, upon pleas involving the merits. Meanwhile the two actions had been consolidated, and on May 7, 1898, the Atlantic Lumber Company recovered a verdict for \$8,988.37, upon which judgment was duly entered. Some of the defendants were permitted to testify substantially that they believed there was probable cause; that they acted in good faith, and were not actuated by malice. And there was

much other evidence, bearing, some of it, directly, some indirectly, and much of it—not all—on the issues of the case.

After the close of the evidence, the defendants presented a motion as follows:

"Now come the defendants, the Atlantic Lumber Company, D. G. Ambler, Arthur Meigs, and R. H. Liggett, by their attorneys, and jointly and severally move the court to instruct the jury to find the defendants not guilty on the first count of the declaration, on the following grounds:

"(1) Because the plaintiff has failed to prove want of probable cause for suing out the writ of attachment for \$9,980.80.

"(2) Because the plaintiff has failed to prove that said writ of attachment for \$9,980.80 was sued out maliciously.

"(3) Because it appears that there was probable cause for suing out the writ of attachment for \$9,980.80.

"(4) Because it appears from the undisputed evidence that at the time of the suing out of said writ of attachment the defendants believed, and had reasonable grounds for believing, that the plaintiff was indebted to them in the sum of \$9,980.80.

"(5) Because the circumstances under which said writ of attachment was sued out exclude the idea that the said writ of attachment was sued out maliciously, it appearing from the evidence that the Atlantic Lumber Company was advised by counsel learned in the law that they had a right to include in the amount of their attachment the draft of \$5,340.75 held by the National Bank of Jacksonville, and that said draft was taken upon the express agreement that it should not be in settlement of the indebtedness of the L. Bucki & Son Lumber Company to the Atlantic Lumber Company unless paid, and it further appearing from the evidence that within six hours from the suing out of said writ of attachment the Atlantic Lumber Company would have had a legal right to sue out a writ of attachment against the plaintiff for the sum of \$9,980.80, excluding the amount of said draft, and it appearing likewise that this writ of attachment was sued out after dark, on October 1, 1897, and after all prospect of payment had ceased.

"(6) Because it appears from the undisputed evidence that the defendants D. G. Ambler and Arthur Meigs were acting as officers of the Atlantic Lumber Company, in their official capacity as such, and not as individuals, in suing out said writs of attachment, and there is no evidence that they instigated or procured the suing out of said writs of attachment in their individual capacities, or other than as officers of the Atlantic Lumber Company.

"(7) Because it appears from the undisputed evidence that the defendant Richard H. Liggett was acting as the attorney of the Atlantic Lumber Company in suing out said writ of attachment, and not as an officer of the Atlantic Lumber Company, nor in an individual capacity.

"(8) Because it appears from the undisputed evidence that the defendants acted on the advice of counsel in suing out said writ of attachment, and were advised that they had a right to sue out said writ of attachment for the purpose of enforcing the lien of the Atlantic Lumber Company against the property attached in the way and manner in which the Atlantic Lumber Company attempted to enforce the same.

"And now come the defendants, the Atlantic Lumber Company, D. G. Ambler, Arthur Meigs, and R. H. Liggett, by their attorneys, and jointly and severally move the court to instruct the jury to find the defendants not guilty upon the second count of the declaration, for the following reasons, and upon the following grounds:

"(1) Because the plaintiff has failed to prove that there was want of probable cause for suing out the writ of attachment against the plaintiff for the sum of \$75,000.

"(2) Because the plaintiff has failed to prove malice on the part of the defendants, or either of them, against the plaintiff, in suing out said writ of attachment.

"(3) Because it appears from the evidence herein that the defendant the Atlantic Lumber Company had probable cause for suing out the writ of attachment for \$75,000.

"(4) Because it appears from the overwhelming weight of the testimony in the case that the defendants, the Atlantic Lumber Company, D. G. Ambler, Arthur Meigs, and R. H. Liggett, had no malice in suing out said writ of attachment, and sued the same out in a reasonable and honest belief that the Atlantic Lumber Company had a cause of action against the plaintiff for the sum of \$75,000 for which a writ of attachment might issue.

"(5) Because the following facts have been shown to exist by the overwhelming weight of the evidence:

"(a) That on October 1, 1897, the plaintiff owed the Atlantic Lumber Company, on account of logs delivered by the Atlantic Lumber Company to the plaintiff prior to that time, the payment of which was demanded and refused by the plaintiff on the said 1st day of October, 1897, and this fact is established by the judgment obtained by the Atlantic Lumber Company against the plaintiff.

"(b) The failure to pay the amount due for logs was a breach of a substantial provision of the log contract, as determined by this court and the Circuit Court of Appeals in the suit of L. Bucki & Son Lumber Company against the Atlantic Lumber Company to recover damages for breach of contract, because it appears from the undisputed evidence that the officers of the Atlantic Lumber Company, D. G. Ambler, Arthur Meigs, and R. H. Liggett, on October 1, 1897, entertained an honest and reasonable belief that the provisions of the log contract calling for an average of $3\frac{1}{2}$ logs per thousand applied to logs delivered for the whole period of eight years, as shown by their consistent claim to that effect during the period of three and one-half years, during the greater part of which time the plaintiff acquiesced in that construction of the contract.

"(c) It is shown by the undisputed evidence that on October 1, 1897, the officers of the Atlantic Lumber Company, D. G. Ambler, Arthur Meigs, and R. H. Liggett entertained a reasonable and honest belief that the average of the logs theretofore delivered was better than $3\frac{1}{2}$ per thousand, and that this information was based upon entries appearing in the books of the Atlantic Lumber Company, which had been made in due course of business.

"(d) It appears that the court which heard the motion to dissolve the attachment dissolved the same solely upon the ground that the general average of the logs delivered prior to October 1, 1897, was on that date 3.52 to the thousand, instead of 3.50.

"(e) It appears from the undisputed evidence that the officers of the Atlantic Lumber Company, D. G. Ambler, Arthur Meigs, and R. H. Liggett, on October 1, 1897, entertained a reasonable and honest belief that the Atlantic Lumber Company would be able to perform the unexpired portion of the log contract, and realize a profit thereon in excess of \$75,000.

"(6) Because it appears from the evidence that prior to October 1, 1897, Arthur Meigs, the general manager of the company, submitted all of the material facts of which he had knowledge, or which he could obtain by diligent inquiry, to a licensed and reputable attorney at law, and was advised by said attorney that under conditions similar to those existing on October 1, 1897, the said Atlantic Lumber Company had the right to sue for the recovery of \$75,000 damages, and to sue out a writ of attachment for the amount thereof against the property of the plaintiff.

"(7) Because on October 1, 1897, at the time of the suing out of said writs of attachment, the Atlantic Lumber Company and its officers, D. G. Ambler, Arthur Meigs, and R. H. Liggett, acted under an honest and reasonable belief that the L. Bucki & Son Lumber Company was indebted to the Atlantic Lumber Company in the sum of \$75,000, and that the said Atlantic Lumber Company had the right to proceed to recover said indebtedness by a writ of attachment against the property of the said L. Bucki & Son Lumber Company."

After argument the court granted the motion, and thereupon directed a verdict for all of the defendants on both counts. Judgment was entered on the verdict, and the plaintiff sues out this writ.

H. Bisbee and Geo. C. Bedell, for plaintiff in error.

R. H. Liggett, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

Having stated the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The foregoing statement shows a case of conflicting facts and evidence as to the want of probable cause in suing out the writs of attachment complained of and as to the actual and inferential malice of the defendants in suing out the same, which should have been submitted to a jury.

In *Alsop v. Lidden*, 30 South. 401, 403, the Supreme Court of Alabama defined probable cause for suing out an attachment as follows:

"Probable cause is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe that some one of the grounds for the suing out of the writ existed. And in deciding upon the existence of probable cause the plaintiff's belief in the existence of a ground for the attachment cannot be considered, nor the existence of such facts as might have influenced his judgment; but the test is the effect they might have upon the judgment of ordinarily prudent and reasonable men. These definitions exclude all idea that mere suspicions and belief, however honestly and intensely entertained, unsupported by facts known to the plaintiff in attachment, which would have justified reasonable and cautious men in believing the defendant had been guilty of some act creating a ground of attachment, constitute probable cause. 'A party may, in extreme eagerness to collect a debt or to obtain security for it, without probable cause resort to an attachment; and the absence of probable cause, coupled with the unlawful act of suing out the writ, is a vexatious or malicious abuse of the process.' *Durr v. Jackson*, 59 Ala. 210. 'Malice may sometimes be inferred from the want of probable cause.' *Jordan v. Railroad Co.*, 81 Ala. 226, 8 South. 192."

As a general rule, the question of probable cause may be for the court; yet, where it depends on disputed facts and conflicting evidence as to defendant's good faith and just belief, the question is for the jury. "It is true that what amounts to probable cause is a question of law in a very important sense. In the celebrated case of *Sutton v. Johnstone* the rule was thus laid down: 'The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law.' This is the doctrine generally adopted. *McCormick v. Sisson*, 7 Cow. 715; *Besson v. Southard*, 10 N. Y. 236. It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause or that they do not. *Taylor v. Williams*, 2 Barn. & Adol. 845. There may be, and there doubtless are, some seeming exceptions to this rule, growing out of the nature of the evidence—as when the question of the defendants' belief of the facts relied upon to prove want of probable cause is involved. What their belief was is always a question for the jury." *Stewart v. Sonneborn*, 98 U. S. 187, 194, 25 L. Ed. 116.

The plaintiff's evidence makes a *prima facie* case to the effect that at the time the writs were sued out the plaintiff was solvent; that it was not removing its property from the state, nor had the defend-

ants any just reason for fearing the same; that the writs sued out were premature—that is, before the debts sued for were demandable; that, so far as the writ of attachment for \$9,980.80 is concerned, it was causelessly sued out for more by \$3,000 than was to become due at the close of the day October 1, 1897; and that the writ for \$75,000 was premature even on the theory that the defendants were entitled to recover \$75,000 for breach of the contract, and also it was groundless and improperly sued out, because there had been no such impairment of the contract as authorized the defendants to sue for a breach of the same as an entirety, and on the further ground that, even if the contract had been breached, the defendants were insolvent, unable to further comply with the contract themselves, and in fact suffered no damage whatever by the ending of the same. And the plaintiff's evidence tended to show that the defendants acted without due and full inquiry as to the actual facts, not in the best of faith, and with ulterior motives; and, further, that after the facts were shown and ascertained as to prematurity of writs and the just amounts due, the defendants continued and pressed and prosecuted the attachments to the ultimate ruin of the plaintiff's business.

The defendants met this *prima facie* case by the proposition that the plaintiff corporation, though transacting with defendants and others for years a large business in Florida, with all of its property and a resident agent there, was actually a nonresident of the state; by conflicting evidence as to the breaches of the lumber contract by the plaintiff, and as to the amount actually falling due from the plaintiff under the contract for logs delivered; as to the transactions and negotiations between the parties during the life of the contract leading up to the issuance of the attachments; and as to the ability of the defendants to have carried on their deliveries of logs under the contract to show the damages suffered from the alleged breach. The defendants supplemented their case by showing that prior to the issuance of the attachments they took the advice of their own attorney, learned in the law, who was also secretary and a director in the lumber company, and by the admitted evidence of the defendants Ambler, Meigs, and Liggett to the effect that they acted in good faith, without malice.

The trial judge gave no reasons, preserved in the record, for directing a verdict, and whether he relied upon particular of the grounds assigned in the motion or upon the whole combined we are not advised.

As to the writ of attachment for \$9,980.80, the first and third grounds relate to the matter of probable cause, assuming that the plaintiff had failed to prove want of probable cause, and that the case showed the existence of probable cause for suing out the writ. As noticed above, the case shows that this writ was sued out prematurely, and for an amount more than to eventually become due the plaintiff; and in the sum thereof was included a draft for \$5,340.75, which was not owned by the lumber company (see *May v. Vann*, 15 Fla. 554), and there was other evidence tending to show the want of probable cause.

The second ground related to malice, charging that the plaintiff had failed to prove that the writ was sued out maliciously. This has been answered in what was said above; and, besides, malice *per se* in such actions is a question for the jury. *Stewart v. Sonneborn*, *supra*.

The fourth ground charges that it appears from the undisputed evidence that at the time the writ was sued out the defendants believed, and had reasonable grounds for believing, that the plaintiff was indebted to them in the sum of \$9,980.80. A sufficient answer to this is that there is no such undisputed evidence.

The fifth ground relates to the matter of malice, asserting that it appears that the Atlantic Lumber Company was advised by counsel learned in the law that they had a right to include in the amount of their attachment the draft of \$5,340.75 held by the National Bank of Jacksonville, followed with admission that the writ was prematurely issued; and the sixth ground relates to the same matter, charging that it appears from the undisputed evidence that the defendants acted on the advice of counsel, and were advised that they had a right to sue out said writ of attachment. We understand that the question of advice of counsel in instituting and prosecuting a suit goes to affect the question of malice, which, in suits of this kind, is a question for the jury; but in relation to this particular case we deem it proper to say that the question was one particularly for the jury, because the counsel whose advice was alleged to have been given and taken was a director and secretary of the lumber company, and it is, to a certain extent, the question of a person advising himself in his own interest. We think it reasonably clear that a lawyer "learned in the law" cannot advise himself as to the right and propriety of suing out an attachment, and, when prosecuted for suing it out maliciously, rebut all malice by showing that he advised himself. As to the effect to be given to the advice of interested counsel, see *Watt v. Corey and Ricken*, 76 Me. 87; *Plow & Manufacturing Co. v. Jones & Co.*, 71 Iowa, 234, 238, 32 N. W. 280.

As to the second writ of attachment the motion presents some dissimilarity in grounds. The first and second are not supported by the evidence.

The third—in regard to the \$75,000 attachment—merely claims that it appears from the evidence (not the undisputed evidence) that "the Atlantic Lumber Company had probable cause for suing out the writ of attachment;" and the fourth is that "it appears from the overwhelming weight of the testimony in the case" that the defendants had no malice in suing out the said writ of attachment, but sued the same out in a reasonable and honest belief that they had a cause of action against the plaintiff for which a writ of attachment might issue. Clearly, these questions were matters for the jury.

The fifth ground deals again with what is called "overwhelming weight of the evidence" to the effect that the plaintiff owed the lumber company on account of logs delivered prior to that time; that the failure to pay the amount due for the logs was a breach of a substantial provision of the log contract; that it appears from the undisputed evidence that the defendants entertained an honest and

reasonable belief that the provisions of the log contract called for an average of $3\frac{1}{2}$ logs per 1,000, applied to logs delivered for the whole period of eight years, as shown by their consistent claim to that effect during a period of $3\frac{1}{2}$ years; that it is shown by the undisputed evidence that the officers of the Atlantic Lumber Company entertained a reasonable and honest belief with regard to the general average, and that the court which heard the motion to dissolve the attachment dissolved the same solely on the ground that the logs delivered prior to October 1, 1897, was on that day 3.52 to the 1,000, instead of 3.50. All these relate to questions as to whether and how the parties had complied with the log contract, as to which there is no reconciling the conflicting evidence. It is contended that this court decided that the failure to pay the amount due for logs was a breach of a substantial provision of the log contract, but omission is made of the fact that this court also decided that the provisions of the log contract calling for an average of $3\frac{1}{2}$ logs per 1,000 applied to logs delivered for each and every month of the contract, and not to logs delivered during the whole period of eight years.

The sixth ground of the motion relates to the advice of counsel, asserting that it appears from the evidence that prior to October 1, 1897, Arthur Meigs, general manager of the company, submitted all the material facts of which he had knowledge, or which he could obtain by diligent inquiry, to a licensed and reputable attorney at law, and was advised that under conditions similar the lumber company had the right to sue out attachment for \$75,000, etc. What we have hereinbefore remarked as to advice of counsel as proven in this case continues to apply.

The seventh and last ground of the motion claims that the defendants acted under an honest and reasonable belief that the Bucki Lumber Company was indebted to the Atlantic Lumber Company in the sum of \$75,000, and that the said Atlantic Lumber Company had the right to proceed to recover said indebtedness by a writ of attachment against the property of the said Bucki & Son Lumber Company. It may be that they did act under an honest and reasonable belief; but whether they did or not, under the evidence of this case, it could only be determined by a jury.

The writ of attachment for \$75,000 was prematurely issued, even on the theory that there had been such a breach of the contract as entitled the Atlantic Lumber Company to consider the same abrogated, and claim as damages contingent and prospective profits. In this connection the question is urged as to whether the Atlantic Lumber Company had any right under Florida law to sue out a writ of attachment for unliquidated damages made up of prospective and contingent profits, and arising out of the breach of the contract. The affidavit for the attachment asserts that \$75,000 was actually due, and the declaration propounds a claim for no specific liquidated damages, but for \$200,000 unliquidated damages. We do not find that the question has been decided by the Supreme Court of the state of Florida in construing the attachment laws of that state, but we do find that the attachment laws provide for a creditor and a debtor and an amount actually due. We have been furnished with very able

briefs on both sides of the proposition, but it would not be profitable to review the arguments advanced nor the cases cited. In *Drake on Attachments* (6th Ed.) the cases are reviewed, and this conclusion reached:

"23. In the cases above cited, where the damages were unliquidated, it will be observed that the contracts for breach of which suits were brought afforded a rule in themselves for ascertaining the damages, and upon this ground the actions were sustained. But where such is not the case, it has been considered that attachment cannot be resorted to, as will appear in the next three sections."

Paragraph 13 of the log contract stipulates reciprocally \$75,000 as liquidated damages for the breach of the contract. As to the effect of such stipulation, see *Sun Printing, etc., Association v. Moore*, 183 U. S. 642, 646, et seq., 22 Sup. Ct. 240, 46 L. Ed. 366. Whatever effect this stipulation should have in determining the right of the Atlantic Lumber Company to a writ of attachment for \$75,000 liquidated damages, based on a breach of the log contract—a question we pass over as not necessarily presented on this record—it certainly furnishes no sufficient ground for holding that there was probable cause shown by the evidence in this case for suing out the attachment for \$75,000.

It seems clear that no one of the grounds on the motion to direct a verdict by itself, nor all combined, warranted the court in its action, and therefore, and for the reasons hereinbefore given, we conclude that the court erred in directing a verdict for the defendants.

Although the conclusion reached renders it necessary to reverse the case, there are assignments of error presenting rulings on the trial, which, in view of the new trial to be awarded, ought to be passed upon. We will deal with them seriatim.

The first assignment complains of the ruling of the court denying the plaintiff leave to file an additional count averring the wrongful and malicious prosecution of a common-law suit for \$200,000 damages, the filing of which was sought on the ground that it would eliminate from the trial of the action embarrassment which might otherwise arise upon the contention of the defendants that the damages suffered and complained of were not solely upon the wrongful suing out of the attachments. The matter of allowing amendments to pleadings is one within the discretion of the trial court, unless some statute intervenes. No statute is cited, and we see no reason to hold that the trial judge abused his discretion. See Vol. 1, Ency. Pl. & Pr. 524 et seq., for authorities.

The second assignment of error is to a ruling and order of the court requiring plaintiff to produce certain of its books kept in New York and certain other books specified in the exception in advance of the trial. Section 724 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] provides for such orders in cases and under circumstances where parties might be compelled to produce the same by ordinary rules of proceeding in chancery. The grounds of the motion to produce in this instance were that the defendants expected to obtain from said books evidence tending to show that the plaintiff was on October 1, 1897, insolvent, and not realizing any profit out of its

business; and it was alleged that said books contained statements which would show that the plaintiff was, on October 1, 1897, actually unable to meet its accrued obligations. The reasons given for producing the books appear to us to be insufficient, for neither the defendants' insolvency nor inability to actually meet its accrued obligations constituted any defense in the present suit. *Kauffman v. Armstrong* (Tex.) 11 S. W. 1048; *Floyd v. Hamilton*, 33 Ala. 235; *Lockhart v. Woods*, 38 Ala. 631. As to the right to discovery in equity, see *Story*, Eq. Pl. § 572.

The third assignment of error is to the disallowance of plaintiff's peremptory challenge to a jurymen after the court had allowed two of plaintiff's challenges and the plaintiff had tendered the panel, reserving the right to exercise its third peremptory challenge after the defendant should have accepted the panel or challenged one of the members thereof. If there was any error in the court's ruling in this respect, it is not likely to occur in a second trial.

The fourth, fifth, sixth, and seventh assignments relate to the admission of and the refusal to admit certain evidence of doubtful relevancy, tending rather to complicate the case than prejudice either one of the parties.

The eighth and ninth assignments of error complain of the court overruling objections to evidence tending to show what disposition was made of the attached property after release and bonding of the same. In our opinion, these objections should have been sustained, as the evidence appears to be wholly irrelevant, and not tending in any wise to show probable cause or absence of malice in suing out the attachments.

The tenth assignment of error complains of ruling out plaintiff's question to his own witness in regard to the item, "Services of an architect in the cost of the mill." In reality it was the refusal of the court to permit the witness to explain. When another trial shall be had in the case, the witness can give his evidence in such a way that there will be no necessity for an explanation.

The eleventh assignment of error complains of disallowing the plaintiff's objection to the defendants' question to witness McGuire as to how much he had paid for plaintiff's mill when he bought it in 1901, some four years after the attachment was sued out. The irrelevancy of the matter is patent.

The twelfth assignment objects to the ruling of the court overruling the objection to the question propounded by the defendants to one Mr. Simmons, a person not shown to be nor claiming to be an expert, as follows: "Supposing there had been no attachment on October 1, 1897, and the L. Bucki & Son Lumber Company had been unable for any reason to procure this loan, what would have been its ability to continue to make payment of its obligations, including the amount due for logs, and to continue to receive pay for logs?" The objection was on the ground that the question is based on a hypothesis not shown to be true or untrue. It calls for the conclusion of the witness as to the ultimate fact which the jury are impaneled to try without calling for any fact from the witness as to the property and assets of the L. Bucki & Son Lumber Company,

or as to its liability. The objection should have been sustained. 12 Amer. & Eng. Enc. Law, 424, note; *Milwaukee Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

The thirteenth, fourteenth, and fifteenth assignments of error complain of admitting evidence over the objection of the plaintiff of matters occurring after October 1, 1897, the date of the attachment to establish probable cause or show the absence of malice. "In a suit for malicious prosecution the conduct of the defendants is to be weighed in view of what appeared to them when the suit was instituted, not in the light of subsequently appearing facts." *Stewart v. Sonneborn*, *supra*. The evidence appears to be not only irrelevant, but should have been excluded, as tending to unnecessarily complicate an otherwise very complicated case, and because the effect of it would be to mislead the jury.

The sixteenth and seventeenth assignments of error complain that one of the defendants (Ambler) was permitted to testify with regard to his own knowledge and on information as to the affairs of the L. Bucki & Son Lumber Company in the three and four months immediately preceding the issuance of the attachments. The main issue in the case was as to Ambler's good faith—whether, acting conscientiously, impartially, reasonably, and without prejudice, he believed that some of the grounds for suing out the writs of attachment existed. It would seem that the objection to the admission of the evidence sought from Ambler was one rather to its effect than to its admissibility.

The eighteenth assignment of error is based on the fact that the trial judge, over the objection of plaintiff, allowed the defendants Ambler, Meigs, and Liggett to testify that they were not actuated with malice. In *Hinds v. Keith*, 6 C. C. A. 231, 234, 57 Fed. 10, 13, this court held:

"The courts in many of the states have held that in cases in which knowledge, motive, or intent may be imputed to parties by circumstantial evidence they are permitted to testify directly as to the existence of such motive or intent, and the ruling of the court below was in harmony with these decisions. But we think the sounder principle and better rule is to exclude such evidence. The Supreme Court of Alabama has declared that the rule is well settled in that state that a 'party certifying for himself should not be permitted to state the motive or intention with which he did an act; that such motive or intention is an inferential fact, to be drawn by the jury from proven attendant facts and circumstances.' *Burke v. State*, 71 Ala. 382; *Whizenant v. State*, *Id.* 383. In actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the state within which such courts are held prevail. Rev. St. § 721 [U. S. Comp. St. 1901, p. 581]; *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119 [28 L. Ed. 708]; *Ex parte Fisk*, 113 U. S. 720, 5 Sup. Ct. 724 [28 L. Ed. 1117]."

In *Germania Fire Ins. Co. v. Stone*, 21 Fla. 555, the Supreme Court of Florida held as follows:

"Under the statute permitting a party to a civil action to testify in his own behalf, it is competent for him, where the question is whether or not he did a certain act with a fraudulent intent, to testify as to his intention, and to state whether or not he, at the time of acting, considered that he had the right to do the act. Such testimony, however, is not conclusive upon the jury."

—And in argument cited decisions in the state of New York, from which state the Florida statute permitting parties to testify is said to have been obtained, quoting with approval the following proposition from *Thurston v. Cornell*, 38 N. Y. 281, to wit:

"That under the law admitting parties to testify in their own behalf it is well settled that, where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was."

If this decision is in harmony with the prevailing jurisprudence in the state of Florida—and we have no reason to doubt it—the trial court may well have admitted the evidence under authority of our decision in *Hinds v. Keith*, *supra*. And the same may be said of the questions raised in the nineteenth, twentieth, and twenty-first assignments.

The twenty-second, twenty-third, and twenty-fourth assignments relate to the rejection of evidence claimed to be in rebuttal, and the questions raised may be avoided on another trial.

The twenty-fifth assignment of error complains of the ruling of the court in rejecting evidence as to certain instructions given by the court to the jury in the common-law action of the Atlantic Lumber Company against the L. Bucki & Son Lumber Company to recover alleged indebtedness for which the attachments mentioned in the declaration herein were sued out; the instructions being the then opinion of the court as to certain facts proved in that case. These instructions were ruled out as irrelevant and immaterial to the issues in the present case, and therein we see no error.

The twenty-sixth assignment complains of the instruction of the court directing a verdict in favor of the defendants. This matter has been hereinbefore fully disposed of.

The twenty-seventh assignment complains of the rejection in evidence of a certain bill in equity by plaintiff against the Atlantic Lumber Company to correct the error of the court in calculating the amount of a remittitur ordered in said case on a motion for a new trial. This evidence was rejected by the court as irrelevant and immaterial to the issues in this case. We consider that the evidence offered was too remote to properly affect any of the questions to be presented to the jury. The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to grant a new trial, and thereafter proceed according to law and in accordance with the views expressed in this opinion.

KAREM v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 24, 1903.)

No. 1,068.

1. ELECTION—FEDERAL LEGISLATION AFFECTING STATE ELECTIONS—LIMITATION OF POWER.

The power of Congress to legislate on the subject of voting at purely state elections is entirely dependent upon the fifteenth constitutional amendment, and is limited by such amendment to the enactment of appropriate legislation to prevent the right of a citizen of the United States

to vote from being denied or abridged by a state on account of race, color, or condition; and since the amendment is, in terms, addressed to action by the United States or a state, appropriate legislation for its enforcement must also be addressed to state action, and not to the action of individuals.

2. PENAL STATUTE—CONSTRUCTION—CONSTITUTIONAL POWER TO ENACT.

A penal act of Congress cannot be sustained, as an exercise of the power given by a constitutional provision to enact appropriate legislation for its enforcement, where the act is broader in its terms than the constitutional provision, and the language used covers wrongful acts without as well as within the same. In such case the courts cannot limit the act by construction, and bring it within the constitutional grant of power.

3. ELECTIONS—PREVENTING CITIZEN FROM VOTING AT STATE ELECTION—FEDERAL STATUTE.

Rev. St. § 5508 [U. S. Comp. St. 1901, p. 3712], which makes it a criminal offense "if two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," is not appropriate legislation for the enforcement of the fifteenth constitutional amendment, both because it relates to the acts of individuals, and not of a state, and because it is broader in its terms than the legislation authorized by the amendment; and it will not sustain an indictment for conspiring to prevent a citizen from voting at a purely state or municipal election on account of his race or color, whether the defendants are charged as individuals, or as officers of the state.

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

The plaintiff in error has been convicted under an indictment framed under section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712]. The indictment, in substance, charges that the plaintiff in error and C. H. Watson and G. P. Bohn and others, to the grand jury unknown, combined and conspired together to injure, oppress, threaten, and intimidate certain named persons of color, citizens of the United States and of the state of Kentucky, and lawfully qualified voters under the law of Kentucky, from exercising and enjoying "a right and privilege secured to them * * * by the Constitution and laws of the United States, to wit, the right and privilege to vote at the election hereafter named, without distinction of race, color, or previous condition of servitude." It is then averred that there was held within the state of Kentucky on November 7, 1899, an election for state and municipal offices only, and that at a certain named precinct the defendant Karem was a judge of election, C. H. Watson a clerk, and G. P. Bohn the sheriff holding the election, and that the said persons of color were lawful voters in said precinct, and legally entitled to vote at said election, and that they each appeared at the polls within the time fixed by law and offered to vote in and at said election, but that, in pursuance of the conspiracy aforesaid, the said defendants did prevent them from voting on account of their race, color, and previous condition of servitude. To this indictment the defendant Karem demurred upon the ground that the facts stated did not constitute an offense against the laws of the United States. The demurrer was overruled. The indictment was dismissed as to the alleged conspirator Bohn. The remaining defendants, Karem and Watson, entered pleas of not guilty. At the conclusion of all the evidence each of the defendants moved the court to instruct the jury to find against the government. This motion was allowed as to Watson and disallowed as to Karem, who has sued out this writ to reverse a judgment based upon a verdict of guilty.

W. M. Smith and Swager Shirley, for plaintiff in error.

R. D. Hill, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

Many errors have been assigned and argued, but, inasmuch as we are of opinion that no offense was charged against the United States in the indictment, it is wholly unnecessary to pass upon any of the other questions of either fact or law.

If congress has not declared the acts charged to have been done by Karem to be an offense against the United States, the courts have no power to treat them as such, even though the congress may have the constitutional power to make such acts a crime against the United States. *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563.

The contention of the government is that the acts charged constitute an offense indictable and punishable under sections 2004 and 5508 [U. S. Comp. St. 1901, pp. 1272, 3712]. Those sections are in these words:

"Sec. 2004. All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding."

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than \$5,000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Neither the act from which section 2004 is taken, nor any section of the Revised Statutes, undertakes, in terms, to make its violation an offense against the United States, or provide for any punishment. It does nothing more than the amendment does *proprio vigore*. As said in *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, the amendment "annulled the discriminating word 'white,' wherever it was found in a state constitution or election law, "and thus placed the colored person in the enjoyment of the same right as white persons." "And," said Justice Miller, in the same case, "such would be the effect of any future constitutional provision of a state which should give the right of voting exclusively to white people, whether they be men or women."

But if section 2004 be regarded as anything more than a declaration of the effect of the fifteenth amendment, no penalty is provided for its violation. In *United States v. Reese*, 92 U. S. 214, 216, 23 L. Ed. 563, the court said:

"If Congress has not declared an act done within a state to be a crime against the United States, the courts have no power to treat it as such."

Referring to this section 2004, then the first section of the act of 1870 (Act May 31, 1870, c. 114; 16 Stat. 140), the court said:

"It is not claimed that there is any statute which can reach this case, unless it be the one in question. Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, * * * shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any constitution * * * of the state to the contrary notwithstanding. This simply declares a right, without providing a punishment for its violation."

The indictment in this case must therefore be predicated wholly upon section 5508, or the acts charged have not been constituted an offense punishable by the United States. But the constitutional authority for the legislation embodied in this section is very much broader than the fifteenth amendment. It was the sixth section of the enforcement act of 1870 (Act May 31, 1870, c. 116; 16 Stat. 141). The character of the "rights and privileges" protected is best illustrated by some of the cases in which it has been construed and enforced. The right of a qualified voter to vote for a member of Congress is a right "secured by the Constitution or laws of the United States," within the meaning of section 5508 of the Revised Statutes. *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274. In the case cited the indictment was brought under sections 5508 and 5520 of the Revised Statutes. The indictment in that case charged that the conspiracy was to deprive certain qualified colored voters, on account of their color, race, or previous condition of servitude, "of the enjoyment of the right and privileges of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States, * * * which said right and privilege of suffrage was secured to the said Berry Saunders by the Constitution and laws of the United States." The Supreme Court held that the right to vote in a congressional election was a right secured by, and dependent upon, the Constitution and laws of the United States. In *Lackey v. United States*, 46 C. C. A. 189, 107 Fed. 114, 53 L. R. A. 660, after quoting from the opinion in the argument for that conclusion, we said:

"The judgment of the court was also rested, in part, upon the broader ground that the Congress had the general implied power to protect the elections on which its existence depends from violence and corruption. But all that is said in that case upon this aspect of the question was said of elections at which electors or Congressmen are to be chosen, and of the direct interest of the United States in securing such elections from violence, corruption, and fraud. But whether the power of Congress to legislate in respect to congressional elections depends upon the effect of the second and fourth sections of article 1 of the Constitution, or arises out of the implied power to protect such elections against violence and fraud because they are federal elections so far as federal officials are thereby directly chosen, it is very obvious that, whether such power be attributed to either the one or the other source, it furnishes no reason for any interference at a purely state election."

In *United States v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673, an indictment under this section was also sustained. "The particular right held in that case to be dependent on and secured by the laws of the United States, and to be protected by section 5508 of the Revised Statutes, against interference by individuals, was the right of a citizen, having made a homestead entry on public land, within the limits of the state, to continue to reside on the land for five years, for the purpose of protecting his title."

In *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, it was held that a citizen of the United States, in the custody of a marshal of the United States under a lawful commitment to answer an offense against the United States, has the right to be protected by the United States against lawless violence, and that this right is a right secured to him by the Constitution and laws of the United States and that a conspiracy to prevent his enjoyment of this right of protection is indictable under section 5508.

None of the cases in which an indictment under this section has been sustained involved a discrimination against voters in a purely state election on account of race, color, or previous condition of servitude. It is plain that resort can be had to this section only upon the theory that the right to vote at a purely state election is a right or privilege secured by the Constitution or laws of the United States. But the power of Congress to legislate at all upon the subject of voting at purely state elections is entirely dependent upon the fifteenth amendment. *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588. The plain purpose of that amendment was to prevent all discrimination by the United States and by the states in the exercise of the suffrage on account of "race, color, or previous condition of servitude." The amendment reads thus:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have the power to enforce this article by appropriate legislation."

The well-settled construction of the article is that it does not confer the right of suffrage upon any one. *United States v. Reeves*, 92 U. S. 214, 23 L. Ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

In the case last cited the opinion in the Circuit Court was by Justice Bradley, and is reported as *U. S. v. Cruikshank*, 1 Woods, 308, and Fed. Cas. No. 14,897. In the opinion referred to, the learned justice, referring to the amendment, said:

"It does not confer the right to vote. That is the prerogative of the state laws. It only confers a right not to be excluded from voting by reason of race, color, or previous condition of servitude, and this is all the right that Congress can enforce."

Referring to the power of Congress to enforce this amendment by appropriate legislation, he said:

"It is not the right to vote which is guarantied to all citizens. Congress cannot interfere with the regulation of that right by the states, except to prevent, by appropriate legislation, any distinction as to race, color, or previous condition of servitude. The state may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else."

In *United States v. Reese*, cited above, the court said:

"The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its

adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment there was no constitutional guaranty against this discrimination. Now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.' "

In *United States v. Cruikshank*, cited above, the court said:

"In *Minor v. Happersett*, 21 Wall. 178, 22 L. Ed. 627, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. In *United States v. Reese et al.*, supra, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

The Fifteenth amendment is therefore a limitation upon the powers of the states in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the state, the power of the state to prescribe qualification being limited in only one particular. The right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote.

There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article: First, legislation authorized by the amendment must be addressed to state action in some form, or through some agency; second, it must be limited to dealing with discrimination on account of race, color, or condition. These in their order:

- I. That state, and not individual, action, is the subject of this article, would seem clear from many considerations. The right to vote in a purely state election, being, as we have seen, a right granted by and dependent upon the law of the state, is therefore a right which can only be denied or abridged by the state. The amendment is therefore, in terms, addressed to state action. Action by the United States and by the state in contravention of this right of nondiscrimination on account of race, color, or condition is inhibited. It has been argued that the amendment operates only to annul discriminations in existing

constitutions and laws, and to prohibit all future legislation denying or abridging the right of suffrage on account of race, color, and condition, and that the power of Congress to enforce it is therefore limited to legislation appropriate to the prevention and punishment of conduct based upon discriminating legislation. We think this too narrow a view of the article. Although it has reference to state, and not individual, action, it has a wider scope than the mere nullification or inhibition of state legislative action, and avoids and inhibits not only state legislation, but all state action of every kind, and by every one assuming to exercise the power of the state, whether the state's authority be exceeded or not. When the Constitution speaks of a state, and inhibits the doing of certain things, it sometimes includes under the term "state" every instrumentality or agency of the state which presumes to act by authority of the state, and in other cases the action of the state in its sovereign or legislative character is alone referred to. This amendment is not limited to the prohibition of "laws" denying or abridging the elective function. For this very reason we conclude that legislation enforcing it may be corrective of any state action, whether based on state laws authorizing discrimination or not. With the exception of the first clause of the first section of the fourteenth amendment, that section is, like the fifteenth amendment, addressed broadly to the state. The other clauses of that section read as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Each of the clauses quoted above has been authoritatively construed as addressed to state action in some form, and not to mere individual conduct. *Slaughter House Case*, 16 Wall. 36, 21 L. Ed. 394; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *United States v. Harris*, 106 U. S. 629, 638, 1 Sup. Ct. 601, 27 L. Ed. 290; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 657; *Civil Rights Case*, 109 U. S. 3, 11, 3 Sup. Ct. 18, 27 L. Ed. 835; *Chicago, B. & Q. R. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

In *United States v. Cruikshank*, the Chief Justice said:

"The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society."

In *Virginia v. Rives* the court said:

"The provisions of the fourteenth amendment here refer to state action, exclusively, and not to any action of private individuals."

In *United States v. Harris*, Justice Woods, after citing and commenting upon the earlier cases, said of the fourteenth amendment:

"The language of the amendment does not leave this subject in doubt. When the state has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the law; when, on the contrary, the laws of the state, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon congress."

Referring to *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, where a law of Congress prohibiting discrimination in jury service on account of race, color, etc., was upheld as warranted by the last clause of the first section of the fourteenth amendment, the court, in the *Civil Rights Case*, 109 U. S. 3, 151, 3 Sup. Ct. 18, 24, 27 L. Ed. 835, said:

"In *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the *Virginia case*, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute book of the state actually laid down any such rule of disqualification or not, the state, through its officer, enforced such a rule; and it is against such state action, through its officers or agents, that the last clause of the section is directed. The aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering."

In *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, it is said, referring to the fourteenth amendment:

"That the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities; and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name and for the state, is clothed with the state's power, his act is that of the state."

In *Logan v. United States*, 144 U. S. 263, 293, 12 Sup. Ct. 617, 626, 36 L. Ed. 429, the cases cited above were reviewed, and the doctrine to be deduced from them thus formulated:

"The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the states, as the case may be, and cannot, therefore, be affirmatively enforced by Congress against unlawful acts of individuals, yet that every right created by, arising under, or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object."

The principles of interpretation applicable to the first section of the fourteenth amendment are equally applicable to the construction of the fifteenth amendment. The amendment simply limits state power in respect to suffrage at state elections by prohibiting discrimination in the enjoyment of the elective franchise on account of race, color, or condition. The right to vote in its own election can be conferred only by the state. No one, therefore, but the state, can "deny or abridge" the right to vote. The amendment is therefore properly addressed to the state. Individuals may by unlawful force or fraud prevent an otherwise lawful voter from voting. But it would simply be an act of lawless violence. The right of suffrage would not be denied or abridged. Individuals cannot deny or abridge the right of suffrage, for they cannot confer it. It is a right which is secured by, and dependent upon, law. Individuals cannot "deny or abridge" a right of suffrage confirmed by law by a mere lawless act of fraud or intimidation or violence. To deny or abridge it in the sense and meaning of the fifteenth amendment, there must be some act of the state, through its legislative, judicial, or executive departments. Some one exercising the power of the state, whether with or without the sanction of the law of the state, must deny to otherwise qualified voters the right to vote on account of race, color, or condition. That would be an act of the state, and such act might be made an offense against the United States by virtue of the power granted by the fifteenth amendment. To justify legislation directed to the mere lawless acts of individuals at a purely state election, even though such acts be based upon color or race, would be to enter the domain of the police power of the state. We speak only of purely state elections, for the power of Congress over its own elections rests upon altogether different principles. There is no more reason for assuming that this amendment authorizes legislation for the punishment of the ruffianly act of an individual in preventing the enjoyment of the right to vote in a state or municipal election, even though the intimidation be grounded upon race, color, or previous condition of servitude, than there would be for legislation punishing a trespass upon property upon the ground that such a trespass would be a denial of due process of law. Both the fourteenth and the fifteenth amendments are addressed to state action through some channel exercising the power of the state.

2. Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color, or condition. The act commonly known as the "Enforcement Act" (being the act of May 31, 1870; 16 Stat. 140) contained a number of sections which were plainly intended to enforce the provisions of the fifteenth amendment. These sections were the first, third, fourth, and fifth. The first has been carried into the Revised Statutes as section 2004 [U. S. Comp. St. 1901, p. 1272]. The third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 [U. S. Comp. St. 1901, p. 3712] of the Revised Statutes. The third, fourth, and fifth sections of that act have been held to have been in excess of the jurisdiction of the Congress under the fifteenth amendment, and therefore null and

void. The ground upon which this conclusion was reached was that neither section was confined in its operation to discriminations on account of race, color, or previous condition of servitude, and all were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under the article. *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *Lackey v. United States*, 46 C. C. A. 189, 107 Fed. 114, 53 L. R. A. 660.

3. It may be conceded that the Congress has power to provide for the indictment and punishment of any person exercising the power of the state who should exclude, on account of race, color, or previous condition of servitude, the vote of lawfully qualified voters, even at a purely state election. But has congress so legislated? Section 5508 [U. S. Comp. St. 1901, p. 3712] is plainly not limited to acts done by persons acting under and exercising the power of the state. The indictment charges that the defendant conspirators were officers of election, and, as such officers, excluded colored voters from voting on account of race, color, etc. If the case made by the indictment is within this section, it is not because it provides specifically for the punishment of the offense charged, but because it comes under the general provision providing for the punishment of any unlawful interference with the free enjoyment of some right or privilege secured by the Constitution or laws of the United States. This section has for its object the punishment of all persons who conspire to prevent the free enjoyment of any right or privilege secured by the Constitution or laws of Congress, without regard to whether the persons so conspiring are private individuals or officials exercising the power of the United States or of a State. Neither does it draw any distinction between a conspiracy directed against the exercise of the right of suffrage based upon race or color, and a conspiracy not so grounded. It is therefore not legislation appropriate to the enforcement of the fifteenth amendment; and, if the only warrant for its enactment was that article, we should be obliged to hold that Congress had exceeded its jurisdiction, because broad enough to cover wrongful acts without as well as within its jurisdiction. That it is not within the province of the courts to so limit an act by judicial construction as to make it operate only on that which Congress may rightfully prohibit and punish is now a well-settled principle of constitutional interpretation. *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550; *United States v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; *Lackey v. United States*, 46 C. C. A. 189, 107 Fed. 114, 53 L. R. A. 660.

The case of *United States v. Reese*, above cited, is very much in point. The court had under consideration the constitutionality of sections 3 and 4 of the act of May 31, 1870, now constituting Section 5506 of the Revised Statutes. The indictment charged two inspectors of a municipal election in the state of Kentucky with refusing to receive the votes of certain colored voters, in contravention of the terms of the third section of the act. The section in question was directed to the conduct of election judges and inspectors, but did not limit the

operation of the act to exclusions from suffrage on account of race, color, or condition. The court said, in speaking of the section then under consideration:

"We find there no words of limitation, or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth amendment. That section has for its object the punishment of all persons who, by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting. In view of all these facts, we feel compelled to say that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, etc. If congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise, without regard to such discrimination, the language of these sections would be broad enough for that purpose. It remains now to consider whether a statute so general as this in its provisions can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc. There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language, broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those which are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and, when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. We must therefore decide that congress has not as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment, and that the Circuit Court properly sustained the demurrers and gave judgment for the defendants."

In *United States v. Harris*, 106 U. S. 629, 637, 1 Sup. Ct. 601, 27 L. Ed. 290, section 5519 [U. S. Comp. St. 1901, p. 3714] was held void, as not warranted by the constitution. That section is in these words:

"Sec. 5519. If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under

the law; or for the purpose of preventing or hindering the constituted authorities of any state or territory giving or securing to all persons within such state or territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

It was sought to be supported under the thirteenth, fourteenth, and fifteenth amendments. The court said:

"It is clear that the fifteenth amendment can have no application. That amendment, as was said by this court in the case of *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563, 'relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude.' See, also, *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; s. c. 1 Woods, 308, Fed. Cas. No. 14,897. Section 5519 of the Revised Statutes [U. S. Comp. St. 1901, p. 3714] has no reference to this right. The right guaranteed by the fifteenth amendment is protected by other legislation of Congress, namely, by sections 4 and 5 of the act of May 31, 1870, c. 114, and now embodied in sections 5506 and 5507 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712]. Section 5519, according to the theory of the prosecution, and as appears by its terms, was framed to protect from invasion by private persons the equal privileges and immunities, under the laws, of all persons and classes of persons. It requires no argument to show that such a law cannot be founded on a clause of the Constitution whose sole object is to protect from denial or abridgment by the United States or States, on account of race, color or previous condition of servitude, the right of citizens of the United States to vote."

The court further held that the act was not warranted by either of the other amendments, because it covered cases both within and without the authority of Congress. Referring to the claim that it might be supported by the fourteenth amendment, the court said:

"As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the state, or their administration by her officers, we are clear in the opinion that it is not warranted by any clause of the fourteenth amendment."

Assuming that exemption from discrimination at a state election is a "right or privilege secured by the Constitution or laws of the United States," it is a right which originates only in the fifteenth amendment, and can only be enforced by legislation directed to state action in some form, by which otherwise qualified voters are denied the elective franchise on account of race or color. This is the limit of the power of Congress under the article. Section 5508 is not so limited, and is not, therefore, appropriate legislation for the enforcement of the fifteenth amendment. The warrant for the section is found in other provisions of the Constitution, and other sections of the act of 1870, from which this section was taken, carried into the Revised Statutes as sections 5506 and 5507, were intended to enforce this amendment. We therefore conclude that the offense charged in the indictment is not included within or covered by section 5508.

The judgment must be reversed, with directions to sustain the defendants' demurrer to the indictment.

SOUTHERN ELECTRIC RY. CO. v. HAGEMAN.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1903.)

No. 1,754.

1. JURISDICTION OF FEDERAL COURT—PROOF OF CITIZENSHIP—MANNER OF RAISING ISSUE.

A complaint filed in a federal court contained the requisite allegations showing diversity of citizenship. The answer was a general denial. No plea to the jurisdiction was filed, and there was some evidence tending to show diversity of citizenship. At the conclusion of the case the defendant asked an instruction directing a verdict in its favor, but the court was not advised that the instruction was intended to challenge the jurisdiction of the court or the sufficiency of the proof to show diversity of citizenship. *Held*, that the instruction did not fairly challenge the jurisdiction of the court, and, as the record, considered as a whole, did not show want of jurisdiction, the refusal of the instruction was not erroneous.

2. STREET RAILROADS—ACTION FOR COLLISION WITH VEHICLE—PLEADING NEGLIGENCE.

A general allegation of negligence in a complaint in an action against a street railroad company to recover for injuries received by plaintiff by reason of a surrey in which she was riding having been struck by a street car, as that "one of defendant's motor cars, run and operated by defendant's motorman, * * * without notice or warning to plaintiff, was carelessly and negligently caused to run up to and against said surrey, * * * and that her said injuries were wholly occasioned by the carelessness and negligence of said defendant's motorman in so operating the defendant's said motor car as to cause it to strike said surrey," is sufficient, in the absence of a motion to require it to be made more specific, to entitle plaintiff to prove and rely on any omission of duty on the part of the motorman in the management of the car.

3. SAME—INSTRUCTIONS.

The charge of the court, in an action to recover damages from a street railroad company for injuries received by plaintiff by reason of the vehicle in which she was riding having been struck by a car, examined, and *held* not erroneous or misleading, as applied to the evidence, and, considered as a whole, to properly submit to the jury the questions of negligence and contributory negligence.

4. SAME—DUTY OF CARE IN OPERATING CARS.

A motorman in charge of a street car is under the same obligation to exercise care and prudence to avoid collisions and to avoid injuring people as they are to exercise care not to get in way of cars, each having an equal right to the use of the street.

5. INSTRUCTIONS—REFUSAL OF REQUESTS.

A court is not required to give an instruction prepared by counsel, no matter how correct it may be in the abstract, if the same principle, or substantially the same principle, has been enunciated in its charge, though in different language.

Sanborn, Circuit Judge, dissenting.

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

¶ 1. Diverse citizenship as ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

¶ 4. Care required of motormen, see note to *Stelk v. McNulta*, 40 C. C. A. 361.

Walter H. Saunders and Frederick W. Lehmann (W. F. Boyle and H. S. Priest, on the brief), for plaintiff in error.

Seneca N. Taylor (S. C. Taylor and Charles Erd, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action to recover damages for personal injuries which Cora Hageman, the plaintiff below, sustained by being thrown from a vehicle in which she was riding, by a street car which belonged to, and was being operated at the time by, the Southern Electric Railway Company, the plaintiff in error. The collision occurred on South Broadway, in the city of St. Louis, in the month of November, 1898.

The persons who testified in behalf of the plaintiff at the trial, who witnessed the accident, and were acquainted with the circumstances under which the collision occurred, were the plaintiff herself and her two sisters, who were riding in the vehicle with her. These witnesses concurred in the following statement relative to the affair: That in the early evening of the day in question they were driving north along South Broadway in a one-horse surrey, on the east side of the defendant's street railway tracks, which were laid about in the center of the street; that the plaintiff was acting as driver and sat on the front seat while her two sisters occupied the back seat; that they reached a point in the street where, on the east side of the tracks, it was very muddy for a distance of about 200 feet; that to avoid the mudhole the plaintiff drove upon the east track; that as she did so her two sisters, who were on the lookout, looked back south, in the direction from which a street car might be expected to approach, but saw none until they had driven along the track about 50 or 60 feet, when the headlight of a car that was coming around a curve in the street, some 2 blocks or 900 feet distant from and in the rear of the surrey, was observed; that, anticipating no immediate danger, not knowing how fast the car was approaching, they continued to drive along the track a little distance, intending to turn off as soon as they had passed the mudhole; that after they had driven about 75 feet along the track, and the car had approached to within 60 or 75 feet, one of the sisters on the back seat discovered for the first time that the car was approaching very fast—faster than cars usually run, and at a rate of speed which she estimated to be near 30 miles per hour, whereupon she called to the plaintiff to drive off the track as quick as possible, and at the same time shouted to the motorman to stop, which he failed to do; that the plaintiff, when she was thus directed to turn off the track, attempted to do so immediately, but before the vehicle had cleared the track it was struck by the car and overturned; and that in consequence thereof the plaintiff sustained very severe injuries.

The witnesses who were produced by the defendant company, who were present when the collision occurred, were the motorman and the conductor of the car, the latter of whom, however, being on the rear platform did not see the surrey, as he admitted, until it had been overturned. The motorman made the following statement, in sub-

stance: That he was returning to the car shed with his car, intending to turn it in for the night; that he had no passengers, and did not stop on that trip to take up any passengers; that he was running his car at the rate of about 7 or 8 miles per hour, as he judged; that he saw the surrey in which the plaintiff and her sisters were riding, when he was about 400 feet distant therefrom; that the surrey was then proceeding north on the west side of the tracks, where the traveling was comparatively good; that as he neared the surrey, and was within 35 or 40 feet from the same, it turned east, and was driven by the persons in charge directly across the track in front of his car, and in the direction of the mudhole, which he admitted to be on the east side of the tracks; that he made every possible effort to stop his car, but failed to do so in time, and that it came into collision with the vehicle in the manner already described.

Two employes of the defendant company, one of them a track laborer and the other a motoneer, testified that shortly after the accident occurred, when the plaintiff and her sisters had been taken to the car sheds of the defendant company, they overheard one of the sisters remark, "Cora, I told you you could not cross in time;" but both of the plaintiff's sisters denied that they made any such statement, or that they were driving, prior to the accident, on the west side of the street.

It will be observed, therefore, that the evidence of three persons who testified in the plaintiff's behalf tended strongly to establish a case of culpable negligence on the part of the defendant company—such negligence consisting in running the car in question along a public thoroughfare at an excessive rate of speed, and in the failure of the motor-man to take such reasonable precautions to avoid a collision as ought to have been taken after he discovered the presence of the surrey—while the testimony of a single witness on behalf of the railway company tended to show that the collision was occasioned by an act of inexcusable negligence on the part of the plaintiff herself. Moreover, all of the four eyewitnesses of the occurrence must be esteemed interested witnesses, and no preference can be given to the statements of any of them on the ground that they were disinterested or impartial observers of the accident. The case, therefore, upon the merits, was one for the jury; and the finding of the jury on the issues submitted to them ought not to be disturbed unless it clearly appears that some action was taken by the trial court which misled the jury, and induced them to render a verdict that otherwise would not have been rendered.

The first ground upon which the plaintiff in error relies to obtain a reversal of the judgment below is that the plaintiff below did not prove the fact which she alleged in her complaint, namely, that at the time the present action was brought she was a citizen of the state of Illinois, and a resident of Tazewell county, in that state. It is claimed that the defendant below put this allegation in issue by its answer, and that, because it was not clearly proven on the trial, the lower court should have directed the jury to return a verdict in favor of the defendant company, as it was requested to do. This contention, we think, should be overruled for the following reasons: The jurisdictional question was raised in the trial court in no other way

than by the peremptory instruction to return a verdict for the defendant to which we have last alluded, and that instruction neither advised the trial judge nor the opposing counsel that it was asked because the plaintiff had not proved that she was a citizen of the state of Illinois, and because the court was for that reason without jurisdiction. After carefully scanning the record, we have no reason to believe that the lower court acted upon the instruction with the understanding that it was intended to challenge the sufficiency of the evidence to establish that fact. Besides, if it had been given, and a verdict and judgment in accordance therewith had followed, the judgment would have operated as a bar to the further prosecution of the cause of action in any court, since the record would not have shown upon what ground a recovery was denied, whereas the necessary jurisdictional averments were contained in the plaintiff's petition. It goes without saying that the defendant was not entitled to a judgment that would have had such an effect, even if the point which it made was well taken. At most, it was only entitled to a judgment that the case be dismissed for want of jurisdiction. If the instruction in question was asked with a view of challenging the jurisdiction of the court, it should have been so framed as to disclose that fact; that is to say, if counsel for the plaintiff in error believed that the plaintiff had failed to prove with sufficient certainty that she was a citizen of the state of Illinois when the action was instituted, they should have so advised the trial court, and not allowed it to act on the instruction in the dark. If the purpose of the request had been disclosed, and the evidence already introduced had been deemed insufficient by the trial court to establish her citizenship, the requisite proof that the plaintiff had in fact taken up her abode in the state of Illinois, with intent to make it her domicile, would undoubtedly have been forthcoming. As it was, the testimony which was introduced showed that she went to Illinois five months before the action was brought, and resided there continuously until the suit was filed, and for a month or more thereafter, when she returned to the city of St. Louis on a visit to her relatives, remaining a week or more, and that she then returned to Illinois, where she has ever since resided. This evidence was doubtless regarded as sufficient to establish the fact that she was a citizen of Illinois, inasmuch as no plea to the jurisdiction had been interposed, and the fact of citizenship had not been challenged otherwise than by a general denial of all the allegations of the complaint which was contained in the defendant's answer. This method of raising the issue was not calculated to attract serious attention. Moreover, it cannot be successfully maintained that upon the face of the entire record the judgment below appears to be void for want of jurisdiction. We accordingly hold that the instruction, in the form in which it was presented, did not fairly challenge the sufficiency of the evidence to warrant the jury in finding that the plaintiff was a citizen of Illinois, or to bring that question before us for review. The testimony to which allusion has been made was testimony which certainly had some tendency to show that the plaintiff was a citizen and resident of that state when the action was brought, so that the record, considered as a whole, cannot be said to disclose that the judgment is void for want of jurisdiction.

Another point on which counsel for the plaintiff in error seem to place some reliance is that the only negligence charged in the petition was the failure of the motorman to sound his gong as the car approached the surrey; and it is said that inasmuch as it appears that such omission of duty was not the proximate cause of the collision, because the plaintiff and her sisters saw the car when it was 900 feet distant, the trial court erred in not directing the jury to return a verdict for the defendant on the ground that the plaintiff had failed to establish the act of negligence on which she relied for a recovery. But this contention, we think, places a false construction on the averments contained in the petition. Nothing was said in the plaintiff's petition about a failure to sound the gong being the cause of the collision. She averred in her complaint that:

"One of the defendant's motor cars, run and operated by defendant's motorman, and in his charge, * * * without notice or warning to plaintiff, was carelessly and negligently caused to run up to and against said surrey with force and violence as plaintiff was endeavoring to drive said surrey off the track, * * * and that her said injuries were wholly occasioned by the carelessness and negligence of said defendant's motorman in so operating the defendant's said motor car as to cause it to strike said surrey."

This was an allegation of negligence in a very general form, such as entitled the plaintiff to prove and rely upon any omission of duty on the part of the motorman in the management of the car; and especially is this so in a case where no motion was made to compel the plaintiff to make her complaint more specific, and where the case was tried throughout on the obvious assumption that she would be entitled to recover if she succeeded in showing that the motorman was guilty of any dereliction of duty, or of failing to take any reasonable precaution to avoid the collision which he might and ought to have taken. The peremptory instruction, therefore, cannot be sustained as a proper instruction on the ground last suggested.

The remaining questions to be considered relate to the charge of the trial judge, and, for convenient reference, the material parts thereof are quoted below in the margin.¹ The only portions of the charge

¹ "You have seen from these pleadings that the injury complained of is charged to be the carelessly and negligently causing said car to run upon and against said surrey with force and violence while the plaintiff was endeavoring to drive it off the track, whereby her injury resulted. This allegation of negligence is put in issue by the general denial, and therefore the burden of proof is put on the plaintiff to establish all the allegations of the complaint, including that one; that is to say, she must show by the preponderance of the proof that her allegations are true.

"The defendant, in addition to denying the complaint, interposes the defense of contributory negligence; that is to say, it alleges that plaintiff's injuries, if any, were caused by her own negligence in driving in front of said car so close thereto that it was impossible for the motorman thereof to avoid a collision with the vehicle in which she was driving, when by looking she might have seen, or by listening she might have heard, said approaching car, and might have avoided said accident; and the burden of proof is on the defendant to show by the weight of the evidence that she was guilty of contributory negligence, unless her own evidence establishes that fact.

"In trying these issues there are two theories: The first theory is that the plaintiff was driving on the west side of the track, and drove her vehicle in front of the car, and so close thereto that the defendant's motorman was

to which exceptions were taken at the trial are those portions which have been italicized.

It will be observed, by a careful analysis of the instructions, that the issue as to whether the plaintiff and her sisters were driving along the west side of the railway tracks, and suddenly turned east upon the track, immediately in front of the approaching car, in the manner explained by the motorman, or whether they were driving on the east side of the track, and went upon the track for the purpose of avoiding a mudhole, in the manner testified to by them, was fairly submitted to the jury; and we have little doubt that the latter view of the case was the one which the jury adopted, as being in most respects

unable, with the means and contrivances at hand, to stop the car until the collision had occurred.

"The second theory is that the plaintiff in this suit was driving on the east side of South Broadway street northwardly, and came to a pond of water or bad place in the road, through which she wished to avoid driving, and, to avoid it, drove her vehicle upon the railroad track of the defendant, and drove along the track parallel with the water and mud and bad place in the road; that before entering upon the track her companions looked behind to see if any car was in sight, and, there being none in sight, she drove upon the railway track; and that while upon the railway track the defendant company, through its agent, negligently ran its car against the surrey, and upset it, and injured the plaintiff.

"It is for you to determine which, if either, of these two theories is true; and, in order to present them concisely, the court will say that if you find from the testimony in the case that the plaintiff was driving north on the west side of the track, and carelessly and negligently drove across the track in front of the defendant's car, which was running on the east track in the same direction, and so close thereto as that the motorman in charge thereof, in the exercise of proper care and diligence, with the means and contrivances at hand, could not stop the car until the collision had occurred, then the plaintiff cannot recover.

"But on the other hand, if you find that the plaintiff was driving on the west side of the track, as hereinbefore stated, and drove her vehicle across the track in front of defendant's car, yet if you further find from the evidence that defendant's motorman, by the exercise of proper care and vigilance, could have avoided the injury by stopping his car upon the first appearance of danger, and before the collision occurred, and negligently and carelessly failed to do so, then the plaintiff should recover.

"Now as to the other theory: If you find from the evidence that the plaintiff was driving a vehicle along the east side of defendant's street railway track, and came to a pond of water, or a muddy, bad place in the road, and wished to avoid it by driving along and upon the track, then the court tells you that it was her duty, or the duty of those who were riding in the vehicle with her, while she was driving along the defendant's track in the direction in which the cars were run thereon, to observe the surroundings, and from time to time to look behind to see whether a car was approaching on the track on which they were driving, and to turn off the track in time to enable the car to pass without being unnecessarily delayed, and this duty is imposed by law because the cars on their own tracks have the right of way; but because they have the right of way, and because it is the duty of pedestrians and persons riding in or driving vehicles to get off the track, so that the cars may not be unnecessarily impeded, this fact does not relieve the defendant's agents from keeping a strict lookout, and from using reasonable diligence and care to avoid injury to pedestrians or persons driving or riding in vehicles. The law requires each to exercise ordinary care and prudence—the one to avoid injury to himself, and the other to avoid inflicting an injury on others. So that if, from all the evidence, you find that the plaintiff, while driving along the east side of the track, in order to avoid the water and mud,

the more reasonable and probable. The jury were also instructed, in substance, that if the plaintiff went upon the track from the west side, immediately in front of the approaching car, and so suddenly that the motorman, by the exercise of proper care, could not stop his car, then the plaintiff was guilty of contributory negligence, and could not recover; furthermore, that, if the plaintiff drove on the track from the east side, it was her duty to be mindful of her surroundings, and to be on the lookout for cars, and to turn off on the approach of a car, so as not to delay it unnecessarily, and that if she failed in the performance of her duty in any of these respects, and directly contributed to the collision, she could not recover. On the

as before stated, failed to exercise such care and diligence as I have just indicated, and by reason of such failure and negligence directly contributed to the injury complained of, then your verdict should be for the company, *unless you further find from the evidence that the defendant's motorman, by the exercise of proper care and vigilance, could have avoided the collision, by stopping his car, but negligently failed to do so, in which event the plaintiff should recover.*

"Upon the question as to whether or not the injury was a direct result of the plaintiff's negligence, or whether it resulted from the direct negligence of the motorman of the defendant in running and operating his said motor car on the occasion in question, you can take into consideration all the facts and circumstances as proved by the evidence to have existed at the time when and place where the injury occurred, and give to each fact and circumstance, and to the testimony of each witness, such weight only as you deem such fact, circumstance, or testimony entitled to, in connection with all the evidence in the case.

"In the determination of this question, you must not overlook the fact that because the railway company, as stated above, has the right of way on its tracks, that all persons in a town or city have the right to cross the tracks, or to drive upon them, so they don't abuse the right by unnecessarily delaying or impeding the progress of the cars. Each must exercise the right to use the streets with due regard to the rights of others, and hence, although you may believe from the evidence that plaintiff was negligent in driving the vehicle upon and along the defendant's railway track, yet if you further believe from the evidence that after she had driven her said vehicle upon the track the motorman operating defendant's motor car saw, or by the exercise of ordinary care might have seen, said vehicle upon the track a sufficient length of time before the collision occurred, as that by the exercise of ordinary care he could have avoided the collision, it was his duty to have done so, and if you find he did not, and the plaintiff was injured as the direct result of such negligence and failure on his part, then she is entitled to recover. *Nor does the law permit the defendant's motorman to speculate or experiment as to whether the vehicle can get off the track before his car strikes it. On the contrary, at the first appearance of danger it is his duty to take the necessary steps to avoid a collision; and if the plaintiff was on the track, and he saw the vehicle after she had driven on the track a sufficient length of time to enable him to stop his car, and to give her notice or time to get off the track before colliding with her vehicle, but negligently and carelessly permitted his car to go forward in the belief that she would get off the track before the collision would occur, and as the result of such conduct upon his part the collision did occur, and plaintiff was injured, then she is entitled to recover.*

"The court tells you that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what a person of ordinary care, under the existing circumstances, would not have done. Nor can you assume, gentlemen, even if you find that the collision was the result of defendant's negligence, that plaintiff was injured. In order to recover, the burden of proof is upon her to show she was injured, and to what extent, in addition to defendant's negligence."

other hand, the jury were instructed, in substance, that if the motorman could have avoided the collision by the exercise of proper care and diligence in the management of his car after the danger of a collision became manifest, and he failed to do so, then the plaintiff could recover.

These were as specific instructions as could or ought to have been given, in view of all the circumstances of the case and the conflicting character of the testimony. They left the jury to judge as they thought proper of the conduct of the respective parties. Besides, the instructions were addressed to a jury who were familiar with the manner in which persons usually drive along the streets of large cities, and with the manner in which street cars are usually operated therein, and who for that reason were perhaps better qualified than the trial judge to decide intelligently concerning what was done and what ought to have been done by the respective parties to the transaction, and how, in the exercise of ordinary care, they should have acted. As the case was one, therefore, which called for the exercise of that knowledge which laymen acquire in the course of their daily experience, it was peculiarly a case for the jury; and a court ought to be very certain that an error was committed which was prejudicial to the party against whom the verdict was rendered, before it sets the verdict aside.

Counsel for the plaintiff in error criticise two excerpts from the charge, and only two, which we have italicized below, and assert that they embody erroneous propositions of law, which must perforce have misled the jury. These excerpts from the charge were framed, we think, by the trial judge, upon the theory that there was evidence in the case from which the jury might reasonably conclude that the motorman was aware of the vehicle being on the east track in front of him for such a length of time before the collision occurred that he ought to have taken the precaution to bring his car so far under control before it was too late that he could easily stop it if need be. These paragraphs of the charge were conceived, we think, upon the assumption that the jury might discredit the motorman's statement concerning the speed of his car, and the direction from which the plaintiff drove upon the track. They do not seem to have been framed with a view of declaring the law in case the jury credited the statement of the motorman that the plaintiff drove on the track from the west, immediately in front of his car, but rather with a view of defining the motorman's duty in case the other theory was adopted, that the plaintiff turned onto the track from the east, and that the car was moving at an excessive rate of speed. And upon the assumption, on which the learned trial judge seems to have acted in framing these excerpts from the charge, we think that he was fully justified by the evidence in giving the jury such directions as they contain. The motorman admitted that he saw the surrey when it was 400 feet distant. He seems to have been well aware that there was a mud hole on the east side of the track, on which side, following the rule of the road, those in the surrey would naturally drive. He could hardly expect them to turn out at once into this mudhole to permit him to pass the surrey, the surrey being near the north end of it, nor was

the plaintiff required to do so. And as the motorman was running his car light, with no passengers, and with a view of turning in for the night, the jury may have concluded that his car was moving at a rapid pace. In view of this testimony, and all the conclusions of fact that a jury might draw therefrom, it was proper to advise the jury that the motorman was not entitled to speculate or take the chances of the vehicle getting off the track before he overtook it, and that the law cast on him the duty of exercising a degree of care and vigilance commensurate with the situation. If he saw this vehicle 400 feet in advance of him on the east track, as the jury may have concluded that he did see it, and knew that it was opposite to a mud-hole, and if he was running his car very rapidly, as the jury may have concluded that he was doing, it was his duty to have slackened the speed of his car and brought it under such control as to forestall a possible collision.

In this connection it should be observed that the rules of law which prescribe the duties and liabilities of those who go on the track of a steam railroad at other places than street crossings have little, if any, application to those who go upon the track of a street railway. The former are trespassers, while the latter are not. One who has occasion to drive upon a public thoroughfare wherein a street railway track is laid at grade has the right to use any part of the street which he finds it necessary or convenient to use. He may drive along a street railway track, if occasion exists for so doing, the only limitation upon his rights in this respect being that he must not unnecessarily obstruct the movement of street cars; and, being free to move, he must turn off the track as soon as he can conveniently, if he sees a car approaching, and he must also be on the lookout at all times for cars. On the other hand, companies who operate street cars in the public streets owe certain duties to the public that are equally imperative. Those persons whom they place in charge of their cars must be on the lookout for vehicles and pedestrians who may be expected to be found traveling on the street; and who have an equal right with the railway company to use the street. They must take all reasonable and proper precautions to avoid running over pedestrians or into vehicles, and must not move at such a high rate of speed as will endanger the lives of others and imperil the safety of their own passengers. In other words, a motorman in charge of a car has no right to act on the assumption that he is entitled to a clear track at all times and that pedestrians and vehicles are bound, at their peril, no matter what may be the inconvenience, to get out of the way. In short, a motorman is under the same obligation to exercise care and prudence, so as to avoid collisions and to avoid injuring people, as these are to exercise care not to get in the way of street cars, so as to be run over and injured. *Winters v. Kansas City Cable Ry. Co.*, 99 Mo. 509, 517, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. Rep. 591; *Robinson v. Louisville Ry. Co.*, 50 C. C. A. 357, 112 Fed. 484; *Cincinnati Street Ry. Co. v. Whitcomb*, 14 C. C. A. 183, 66 Fed. 915; *La Pontney v. Cartage Co.*, 116 Mich. 514, 74 N. W. 712; *Flannagan v. St. Paul Street Railway Co.*, 68 Minn. 300, 301, 71 N. W. 379; *Driscoll v. West End Street Ry. Co.*, 159 Mass. 142, 34 N. E. 171; *Cooke v. Baltimore Traction*

Co., 80 Md. 551, 31 Atl. 327; Hays v. Tacoma Ry. & Power Co. (C. C.) 106 Fed. 48, and cases cited.

We conclude, therefore, that if the jury found, as they may well have done, that the motorman saw this surrey on the east track, directly in front of him, when he was 400 feet distant; that he was at the time running his car at a high rate of speed, and was acquainted with the condition of the street opposite the point where the plaintiff was driving—then they might well have concluded that the motorman was guilty of culpable negligence in not arresting the speed of his car to some extent, so as to prevent a possible collision. The jury were the exclusive judges of what he ought to have done under the circumstances aforesaid, and the admonition of the court that the motorman had no right “to speculate or experiment as to whether the vehicle [would] get off the track before his car [struck] it,” or to take the chances of the plaintiff getting out of the way—was not out of place or misleading. The court did not undertake to tell the jury when there “was an appearance of danger,” but left the jury to determine that question in the light of all the facts and circumstances of the case, as it was their right and duty to do.

Complaint is also made because the trial court refused some of defendant's requests for instructions, and we are asked to reverse the judgment for that reason; but an examination of these instructions, and a comparison of the same with the court's charge, satisfies us that the principles of law therein declared, in so far as they were correct, were embodied substantially in the court's charge. And it is too well settled to require any citations of authority that in such cases a refusal to embody a rule of law in the precise language chosen by counsel affords no ground for a reversal. A court is never required to give an instruction prepared by counsel, no matter how correct it may be in the abstract, if the same principle, or substantially the same principle, had been enunciated in its charge, though in different language.

Upon the whole, we conclude that the case was properly tried below, and that no errors are disclosed by the record which would warrant a reversal. The judgment is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). After as careful an examination of the record and rulings in this case as I have been able to make, my mind has been forced to the conclusion that the trial below was unfair, and that some of the rulings of the court were erroneous. I have reached this conclusion (1) because the court refused to instruct the jury that the evidence of contributory negligence was conclusive, and entitled the defendant to the verdict; (2) because the court charged the jury that the plaintiff could recover, although her negligence directly contributed to the injury, if the negligence of the defendant also contributed to it, when the law is the converse of this proposition; and (3) because the court charged the jury that if “the motorman operating defendant's motor car saw, or by the exercise of ordinary care might have seen, said vehicle upon the track a sufficient length of time before the collision occurred, as that by the exercise of ordinary care he could have avoided the collision, it was his duty to have done

so, and if you find he did not, and the plaintiff was injured as the direct result of such negligence and failure on his part, then she is entitled to recover. Nor does the law permit the defendant's motorman to speculate or experiment as to whether the vehicle can get off the track before his car strikes it"—and it refused the charge, as requested by counsel for the defendant, that "the plaintiff, when she saw the car approaching, or was advised by her companion that it was approaching, was in duty bound to turn from the track in ample time to avoid collision; and if she speculated upon the chances, and remained upon the track longer than was safe or necessary, when she might have driven out of it, and out of all danger to herself and her companions, then she was guilty of negligence in remaining upon the track so long as she did."

I. Conceding that the plaintiff drove upon the track from the east side, as she testified, conceding that the motorman was guilty of negligence, and conceding that every other fact and circumstance was as the plaintiff and her witnesses testified, these facts remained unquestioned: The plaintiff and her sisters drove upon the car track to avoid some mud in the driveway east of the track, which was neither impassable nor dangerous. When they passed upon the track, they could see for a distance behind them of at least 800 feet. It was a dark evening. When the car came upon the street upon which they were driving, it was more than 800 feet behind them, and it bore a bright headlight, which they could and did see, while the motorman could not and did not see their buggy until he came within about 400 feet of it. They saw the headlight. They knew that it was the light of an approaching car, and that neither they nor any other person could tell the distance or the speed of the car, and the light it carried, from a view of it in the dark. The motorman could not turn the car from the track, and both parties knew that fact. The plaintiff could drive her surrey off the track into the mud without any danger, and both parties knew and acted in view of that well-known fact. The plaintiff and her sisters knew that the car was approaching when it was more than 800 feet from them, and that its collision with them was inevitable unless they drove from the track before it reached them or the car was stopped. To them, therefore, came the first notice of the peril, the danger, because they saw the headlight of the car before the motorman saw the surrey. Upon them the first and primary duty to avoid the accident was imposed, because the motorman could not turn his vehicle, and they could drive their vehicle from the track; because it was their legal duty to do so, and to avoid the collision; because the motorman had the right to presume that they would discharge that duty; and because they had the first notice of the danger. *McCann v. N. Y. & Q. C. Ry. Co.*, 56 App. Div. 419, 421, 67 N. Y. Supp. 748; *Holwerson v. St. Louis & Suburban Ry. Co.*, 157 Mo. 216, 227, 57 S. W. 770; *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215, 35 Atl. 1126; *Lockwood v. Belle City St. Ry. Co. (Wis.)* 65 N. W. 866; *McClellan v. Chippewa Valley Electric Ry. Co. (Wis.)* 85 N. W. 1018, 1019. This duty was imposed upon the occupants of the surrey the moment they saw the approaching headlight, and consequently knew the danger, and it continued to be

until the accident occurred. How did they discharge this duty? They never discharged it at all, but simply neglected to do so, and voluntarily took the chance that the car might run too slowly to hit them, or the motorman might stop it before it reached them. They testified that they first saw the headlight when they had driven about 60 feet upon the track; that they knew it was the headlight of a coming car, and they could not tell its speed or distance by looking at it; that they watched it all the time until the car struck them; that after they saw it they continued to drive along the track upon a slow trot for a distance of 75 or 100 feet, and then for the first time tried to drive off the track, and at the same time screamed to the motorman to stop. There is no doubt or dispute about these facts, and to my mind they present a clear case of contributory negligence, which was the primary cause of the accident. It was certainly the duty of the plaintiff to drive from the track as soon as she knew that a car was coming, whose distance and speed she could not know. It was her duty to do this every instant of the time after the approaching car and the danger it threatened were first discovered. It was her failure to discharge this duty, her negligence, that not only contributed to cause the accident, but was the primary, moving cause of it. If she had not been guilty of this negligence—if she had driven from the track at the time she first learned that the car and its inevitable danger were approaching, or at any time after that while she was driving the 75 or 100 feet which she subsequently traversed along the track—the accident could not have occurred. Nor does the fact, if it is a fact, that the motorman was negligent after he discovered the danger, condone or modify the fatal effect of this negligence of the plaintiff, because his negligence after discovery of the peril is met by the fact that after the plaintiff discovered the peril she was first and continually guilty of the negligence which was the primary and effective cause of the injury. Conceding all the negligence charged upon the defendant, the case is one in which each of two parties who owed relative duties to each other neglected his own duty, and relied upon the faithful discharge by the other party of his duty, so that the negligence of each directly contributed to cause the injury that resulted. In such a case it is always the duty of the court to instruct the jury that there can be no recovery. *Clark v. Zarniko*, 45 C. C. A. 494, 496, 106 Fed. 607, 608, and cases there cited.

2. It is a familiar principle of law that one whose negligence is one of the proximate causes of his injury cannot recover damages of another, even though the negligence of the latter also contributed to it. The question in such a case is not whose negligence was the proximate cause of the injury, but it is, did the negligence of the plaintiff directly contribute to it? If it did, that negligence is fatal to his recovery, and the negligence of the defendant does not excuse it. *Pyle v. Clark*, 25 C. C. A. 190, 192, 79 Fed. 744, 746, 747; *Motey v. Granite Co.*, 20 C. C. A. 366, 369, 74 Fed. 156, 159; *Chicago & N. W. Ry. Co. v. Davis*, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Railway Co. v. Moseley*, 6 C. C. A. 641, 643, 646, 57 Fed. 921-923, 925; *Reynolds v. Railway Co.*, 16 C. C. A. 435, 69 Fed. 808, 811, 29 L. R. A. 695; *Schofield v. Railway Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Hay-*

den v. Railway Co., 124 Mo. 566, 573, 28 S. W. 74; Wilcox v. Railway Co., 39 N. Y. 358, 100 Am. Dec. 440.

The charge of the court was that the converse of this proposition was the law of this case. It was, in effect, that the negligence of a plaintiff which directly contributed to cause the injury was no defense to a recovery if the negligence of the defendant also contributed to it. The court treated of this subject in four places in the charge: First, when discussing the theory of the defendant that the plaintiff drove upon the track from the west side, it said: If the plaintiff "negligently drove across the track in front of the defendant's car, which was running on the east track in the same direction and so close thereto as that the motorman in charge thereof, in the exercise of proper care and diligence, with the means and contrivances at hand, could not stop the car until the collision had occurred, then the plaintiff cannot recover." This was a charge that if the defendant was guilty of no negligence whatever, and the plaintiff's negligence was the sole cause of the injury, she could not recover. In the second place, the court, in treating of this entry upon the west side of the track, said that if plaintiff "drove her vehicle across the track in front of defendant's car, yet if you further find from the evidence that defendant's motorman, by the exercise of proper care and vigilance, could have avoided the injury by stopping his car upon the first appearance of danger, and before the collision occurred, and negligently and carelessly failed to do so, then the plaintiff should recover." That is to say, no matter how negligent the plaintiff was, yet, if the defendant was guilty of any negligence whatever—if the motorman could have avoided the injury by the exercise of even a reasonable degree of care—then the plaintiff could recover. His third charge upon the subject was when treating of the theory that the plaintiff entered the track upon the east side, and he closed that charge with these words:

"So that if, from all the evidence, you find that the plaintiff, while driving along the east side of the track in order to avoid the water and mud, as before stated, failed to exercise such care and diligence as I have just indicated, and by reason of such failure and negligence directly contributed to the injury complained of, then your verdict should be for the company, unless you further find from the evidence that the defendant's motorman, by the exercise of proper care and vigilance, could have avoided the collision by stopping his car, but negligently failed to do so, in which event the plaintiff should recover."

This is a plain and clear statement that, if the motorman of the defendant was guilty of any want of care or vigilance whatever, the plaintiff could recover, notwithstanding the fact that the jury found that the plaintiff was guilty of negligence that directly contributed to the injury. The fourth and last place in which the court discussed this question sums up the instruction to the jury upon this subject in these words:

"Hence, although you may believe from the evidence that plaintiff was negligent in driving the vehicle upon and along the defendant's railway track, yet if you further believe from the evidence that after she had driven her said vehicle upon the track the motorman operating defendant's motor car saw, or by the exercise of ordinary care might have seen, said vehicle upon the track a sufficient length of time before the collision occurred, as that by

the exercise of ordinary care he could have avoided the collision, it was his duty to have done so; and if you find he did not, and the plaintiff was injured as the direct result of such negligence and failure on his part, then she is entitled to recover."

This is a declaration that however careless, however negligent or reckless, the plaintiff may have been, yet if the motorman could, by the exercise of ordinary care, have seen the carriage and have avoided the collision, his negligence was fatal to the defendant, and the plaintiff could recover, notwithstanding her contributory negligence.

The rule given by the court in this case in these four excerpts from the charge is not modified or contradicted by any part of the instructions. It is, in effect, as a careful reading of it will demonstrate, that a street car company is liable for damages resulting to any one driving upon its tracks in every case in which the motorman could, by the exercise of ordinary care, see the carriage and stop the car before the collision, although the party driving upon the track in front of him may have been guilty of culpable negligence which was the direct and primary cause of the accident. This seems to me to be the direct converse of the law of contributory negligence which is sustained by the authorities and is thought to be consonant with reason.

Counsel for the defendant requested, and the court refused to give, the following instruction, which, in my opinion, correctly states the law upon this subject:

"The motorman in charge of the car had a right to assume that the plaintiff, while driving upon the track in the same direction in which the car was moving, would from time to time look back to ascertain whether a car was approaching, and would turn from the track in time to enable the car to pass without being delayed in its progress; and the motorman was under no legal duty to stop or check his car until he saw that the plaintiff was not going to turn from the track, or that the plaintiff could not turn from the track; and if the plaintiff knew that the car was approaching, and did not turn out to allow it to pass, and the motorman failed to observe that she was not going to turn off the track in time to avoid collision, and these acts of plaintiff and of the motorman concurred in causing the injury complained of, and the act of neither without the act of the other would have caused the injuries, then the plaintiff cannot recover, and the verdict must be for the defendant."

Morrissey v. Bridgeport Traction Co., 68 Conn. 215, 35 Atl. 1126; *McClellan v. Chippewa Valley Elec. Ry. Co.* (Wis.) 85 N. W. 1018; *McCann v. New York & Q. C. Ry. Co.*, 56 App. Div. 419, 67 N. Y. Supp. 748; *Winter v. Crosstown St. Ry. Co.* (Super. Buff.) 28 N. Y. Supp. 695, 5 Am. El. Cas. 515; *Vogts v. Metropolitan St. Ry. Co.*, 36 Misc. Rep. 799, 74 N. Y. Supp. 844; *Smith v. Crescent City Ry. Co.*, 47 La. Ann. 833, 17 South. 302.

3. The court refused to give the charge quoted in the earlier part of this opinion, to the effect that the plaintiff, when she saw the car approaching, was in duty bound to turn from the track in time to avoid the collision; that if she speculated upon the chances, and remained upon the track longer than was safe or necessary, when she might have driven out of all danger, then she was guilty of negligence in remaining upon the track as long as she did. This was, in my opinion, a correct statement of the law, and the court should have given it to the jury. *McCann v. N. Y. & Q. C. Ry. Co.*, 56 App. Div. 419, 67 N. Y. Supp. 748. The court charged the jury:

"Nor does the law permit the defendant's motorman to speculate or experiment as to whether the vehicle can get off the track before his car strikes it. On the contrary, at the first appearance of danger it is his duty to take the necessary steps to avoid a collision."

But it refused to charge that if the plaintiff speculated upon the chances, and remained upon the track longer than was safe or necessary, when she might have driven off of it, she was guilty of negligence in so doing. The first duty when the approaching car was discovered by the plaintiff, and the advancing surrey was discovered by the motorman, was upon the plaintiff. It was her duty to drive off the track. The motorman had the right to presume that she would do so until it became apparent that she could not or would not take her vehicle from the railway. She had no more right to speculate upon the chances, and remain upon the track longer than was safe or necessary, nay, she had not as much right, as the motorman, because she could drive her vehicle from the track, and he could not remove his from the railway. It was consequently error, in my opinion, for the court to refuse to instruct the jury that speculating upon the chances, and remaining upon the track longer than was safe or necessary, was negligence on the part of the plaintiff.

The entire trial seems to me to have been conducted under the erroneous view that no negligence of the plaintiff, no matter how culpable or causal, could constitute any defense to the action, if the negligence of the defendant in any way contributed to it. The rule which permeates the charge, and which was given to the jury at least four times in the course of it, is that the plaintiff may not recover if her negligence is the sole cause of the injury, but that, if the negligence of the defendant concurs and contributes with her negligence to cause the injury, she may recover. The true rule is that the plaintiff may not recover in any case in which his own negligence and the negligence of the defendant each directly contribute to produce the damage for which the suit is brought. It was this error in the theory of the trial that in my opinion induced the erroneous rulings to which attention has been called, and prevented the defendant, as it seems to me, from securing a fair trial of its case.

ST. LOUIS & S. F. R. CO. v. SOUTHWESTERN TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1903.)

No. 1,800.

1. UNAUTHORIZED CONDEMNATION—INJUNCTION—REMEDY TO RESTRAIN IN ARKANSAS.

A bill in equity for an injunction is the proper remedy in the state of Arkansas to restrain an unauthorized exercise of the power of eminent domain.

2. INCORPORATION STATUTES—FACT, NOT APPEARANCE, TEST OF COMPLIANCE.

Where a statute requires articles of incorporation to be signed by the president and directors, the fact that the president and the directors signed them is a compliance with the statutes, notwithstanding the fact that they did not affix their official titles to their signatures.

8. SAME—FILING ARTICLES IN COUNTY CHOSEN AS PLACE OF BUSINESS SUFFICIENT.

The filing of the duplicate of the articles of incorporation with the clerk of the county selected by the corporation as its place of business is a sufficient compliance with the provisions of section 1334, Sandels & H. Dig., upon this subject. It is not necessary to file a duplicate in every county to which the business of the corporation extends.

4. CONDEMNATION—SURVEY NOT PREREQUISITE WHERE DESCRIPTION SUFFICIENT WITHOUT IT.

A survey of a telephone or telegraph line is not an indispensable prerequisite to condemnation proceedings under section 2770, Sandels & H. Dig., where the data for a clear and substantial description and location of the line exist without it.

5. SAME—DESCRIPTION OF ROUTES IN ARTICLES.

A description of the routes of lines of telegraph or telephone to be constructed, in the articles of incorporation of a telephone company, is not indispensable to the acquisition of the power to condemn the right of way for such lines, under sections 1326, 1328, Sandels & H. Dig., if the general purpose of conducting a telegraph or telephone business throughout the state is plainly stated therein.

6. SAME—INJUNCTION AGAINST ENTRY.

Where a failure to agree is alleged in a petition for condemnation, and is a condition precedent to the right to condemn, the fact that there was no such failure is no ground for an injunction against entry thereunder, because the owner has a perfect remedy at law by answer and trial in the condemnation proceedings.

7. CONSTITUTION OF ARKANSAS—LIMITS LEGISLATIVE RIGHTS, BUT DOES NOT AFFECT REMEDIES OR PROCEDURE.

Section 23, art. 5, of the Constitution of Arkansas, which reads, "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length," limits legislation which grants, modifies, or destroys rights, but it has no application to legislation which affects remedies and methods of procedure alone.

8. SAME—TELEPHONE COMPANIES—CONDEMNATION.

The act of March 31, 1885, Act No. 107, p. 176, Acts Ark. 1885 (sections 2757, 2758, 2770, Sandels & H. Dig.), which grants to telephone and telegraph companies the right to condemn the right of way along railroads, highways, and postroads, and provides that the proceedings thereunder shall be conducted as prescribed in sections 2770-2781, inclusive, Sandels & H. Dig., is constitutional and valid.

9. SAME—NECESSITY FOR TAKING—JUDICIAL QUESTION.

The necessity for the taking by a corporation of the easement or property sought in condemnation proceedings is a judicial question, to be determined by the court upon a consideration of the power of eminent domain granted to the corporation, and the facts and circumstances of the case.

10. SAME—WHERE RIGHT TO CONDEMN EASEMENT EXPRESSLY GRANTED.

Where the Legislature has granted to a telephone company the right to condemn an easement on the right of way of a railroad company for the construction and operation of a telegraph and telephone line, with a proviso that the ordinary use of the right of way by the railroad company for its purposes shall not be thereby obstructed, the issue regarding the necessity of the taking of the easement sought by the telephone company is limited to two questions, namely:

(1) Will the use of the right of way by the railroad company be substantially obstructed by the use of the easement sought?

(2) If the telephone company is to acquire an easement for its purposes on the railroad right of way, is the location and character of the

¶ 9. See Eminent Domain, vol. 18, Cent. Dig. § 536.

easement which it describes and seeks to acquire such that this easement is necessary for its use?

The question whether the telephone company could construct and operate its lines on other property, so that there is no real necessity for it to acquire any easement on the railroad right of way, is not open to determination under such a law, because the Legislature has granted the right to acquire the easement notwithstanding the fact, which must have been patent to it, that telegraph and telephone lines might in every case be constructed elsewhere than upon the railroads and highways mentioned in the statute.

11. SAME—ARKANSAS CORPORATION NO POWER IN INDIAN TERRITORY.

A corporation of the state of Arkansas has no right, by virtue of the laws of that state, to exercise the power of eminent domain in the Indiana Territory.

(Syllabus by the Court.)

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

On March 31, 1902, the Southwestern Telephone & Telegraph Company filed a petition in the circuit court for Sebastian county, in the state of Arkansas, to condemn an easement for the poles and wires of a telephone and telegraph business along the railroad and on the right of way of the St. Louis & San Francisco Railroad Company between Ft. Smith and Huntington, in the state of Arkansas, a distance of 32 miles. On April 11, 1902, the judge of the Sebastian county court made an order under sections 2770-2782, Sandels & Hill's Digest of the Laws of Arkansas, that upon the deposit of \$1,500 the telephone company might enter upon the right of way of the railroad company, erect its poles, and string its wires. This proceeding for condemnation was removed to the Circuit Court of the United States. Afterwards, and on July 7, 1902, the railroad company filed in the latter court a bill in equity to perpetually enjoin the telephone company from entering upon or using any portion of the right of way of the railroad company for its telephone or telegraph business. A general demurrer was interposed to this bill by the telephone company, which was sustained by the court, and a decree was rendered dismissing the bill. This appeal assails this decree. The bill and the exhibits attached to it are voluminous. Its material averments must be considered in weighing the arguments for the appellant, and they will not be set forth at length here, but will be stated and considered in the opinion.

B. R. Davidson (L. F. Parker, on the brief), for appellant.

T. P. Winchester, W. R. Martin, W. L. Terry, and W. J. Terry, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

This is a bill in equity to enjoin the telephone company from prosecuting condemnation proceedings to secure an easement upon the right of way of the railroad company. If, as counsel for the appellant contend, the bill fairly shows that the telephone company was not a corporation, that it had no power of eminent domain, and that there was no necessity for it to use any of the right of way of the railroad company for its telephone or telegraph business, then the railroad company had the right to prevent it from entering upon its right of way; and this suit in equity for an injunction was the proper method of obtaining this relief, under the practice and decisions in the state of Arkansas. *Niemeyer v. Little Rock Junction Railway*, 43 Ark. 120.

The question, therefore, is whether or not the bill fairly shows that the defendant was without authority to condemn and secure the easement it seeks.

1. Counsel for the appellant argue that the telephone company never became a corporation, because of this state of facts, which is disclosed by the bill and its exhibits: The statutes of Arkansas provided that any number of persons, not less than three, who by articles of agreement should associate, under any name assumed by them, to carry on any kind of manufacturing, mechanical, mining, or other lawful business, and who should comply with all the provisions of the act, should constitute a corporation (Sandels & H. Dig. § 1326); that, before any such corporation should commence to do business, the president and directors thereof should file with the Secretary of State a true copy of their articles of association, signed by the president and a majority of the directors, and a sworn certificate of the purpose for which the corporation was formed, the amount of its capital stock, the amount actually paid in, the names of its stockholders, and the number of shares by each respectively owned; and that they should also file a duplicate with the clerk of the county in which the corporation was to transact business. Sections 1334, 1346. On April 13, 1896, Charles J. Glidden, James A. Chambers, and Arthur F. Adams associated themselves together, by articles of agreement, in writing, under the name of the Southwestern Telephone & Telegraph Company, to engage in the business of erecting and operating a telephone and telegraph. They held a meeting on that day, elected themselves directors, these directors chose Charles J. Glidden president of the corporation, and the president and directors signed and verified by their oaths the certificate required by section 1334. On the same day Glidden, Adams, and Chambers signed the articles of agreement and incorporation; but Glidden did not write the word "President" after his signature, nor did the three parties who signed the articles of association write the word "Directors" after their signatures. On April 4, 1896, the president and directors filed with the Secretary of State these articles, signed in this way, and the sworn certificate required by section 1334. Now, the alleged defect in this incorporation is that, whereas the statute required that the copy of the articles of incorporation filed with the secretary should be signed by the president and the directors, the copy filed was signed by the three individuals, Glidden, Adams, and Chambers. But these individuals were in fact the president and the directors of the corporation on April 4, 1896, when they filed the copy of the articles with the secretary, and the presumption is that they were such when they signed them upon the day before, for the legal presumption always is that the officers of corporations and municipalities faithfully discharge their duties. It was the fact of the signature of the articles by the president and the directors, and not the appearance of that fact, that conditioned the validity of the incorporation. There is no averment in the bill that, when these articles were signed, Glidden was not the president, and the three signers were not the directors. The only averment is that they did not sign them as such. As, under the legal presumption, they were the president and the di-

rectors when they signed the articles, so that the fact corresponded with the requirement of the statute, the incorporation of the company is not invalid because the president and directors failed to write their official titles after their names. This conclusion becomes irresistible when it is considered that at the same time that these articles were filed with the secretary of state the president and directors also filed with him the certificate required by section 1334, signed and verified by the president and a majority of the directors of the corporation, in which they set forth the fact that Glidden was the president, and that the three signers of the articles were the directors, of the corporation, so that when the articles and the certificate, which were filed together with the secretary, are read together, the fact that the former were signed by the president and the directors appears upon the face of the papers.

2. Another objection to the incorporation is that no duplicate of the articles of association was filed with the clerk of Sebastian county in the state of Arkansas. But the place of business selected by the corporation, and specified in the articles of association, was Little Rock, in Pulaski county; and the bill contains no averment that the duplicate of the articles was not filed with the clerk of that county, while the legal presumption is that it was filed there, because the presumption is that the officers discharged their duty, and because, under section 1334, a copy of the certificate filed in the office of the Secretary of State is made prima facie evidence of the due formation, existence, and capacity of the corporation. The case presented by the bill, then, is that a duplicate of the articles of incorporation was filed in the county of Pulaski, the county which was selected by the corporation and specified in its articles as the place where it was to transact business, but it was not filed in the county of Sebastian. But the statute did not require it to be filed in every county into which the business of the corporation might extend, but only in the county which should be selected and specified in the articles as that in which the general business of the corporation was to be transacted. The corporation fully complied with the requirement of the statute here under consideration when it filed a copy of its articles in Pulaski county, and the objection that it failed to file it in other counties is untenable.

3. It is insisted that the defendant has no power to condemn an easement along the right of way of the railroad company, because it did not survey and locate its line before instituting its proceedings; and the clause of section 2770, Sandels & H. Dig., which reads, "Any railroad, telegraph or telephone company organized under the laws of this state, after having surveyed and located its lines of railroad, telegraph or telephone, shall in all cases where such companies fail to obtain by agreement with the owner of the property through which said lines of railroad, telegraph or telephone may be located the right of way over the same, apply to the circuit court of the county" to have the damages for the taking assessed, is cited in support of this contention. But the only purpose of the survey and location mentioned in this section is to secure a description of the property to be affected, and to give fair notice to the owner of the

extent of the right which the condemning company seeks. No survey was necessary to accomplish this end in the case before us, because the right of way of the railroad company and the railroad itself furnished the data for a substantial description and location of the easement which the telephone company sought, and which it fairly describes in its petition for condemnation attached to the bill in this suit, in these words:

"A line of poles and wires constituting a telegraph and telephone line from the city of Fort Smith to the town of Huntington; the said line of poles and wires to be placed along the right of way of said railroad as follows, to wit: Beginning on the right of way of said railroad company at Fort Smith on the side opposite the side now occupied by the poles and wires of the Western Union Telegraph Company, forty feet from the center line between the rails of its main track, and continuing at said distance where the right of way of defendant will permit of going so far, and not nearer than fifteen feet from the center line between the rails of the main track in any event, and not less than fifteen feet from the center line between the rails of all said tracks, switches, spurs, etc., to the town of Huntington."

This description and location of the easement sought was sufficiently clear and accurate to form the basis of a petition for condemnation, because it fairly apprised the railroad company of the right to be condemned. The law never requires the performance of a useless act, and, as the data for a plain and substantial description and location of the easement which the telephone company was seeking to condemn existed without a survey, no survey was requisite to the commencement or maintenance of its proceedings for condemnation.

4. The articles of incorporation of the telephone company state the purpose of its incorporation in these words:

"Fourth. The general nature of the business proposed to be transacted by this corporation is that of telephone and telegraphy.

"Fifth. The general route of the lines of said corporation shall be from a point or points in the city of Little Rock to a point or points in the town of Benton, both within the state of Arkansas, and from point or points in all the cities, towns and villages in the state of Arkansas along all railroads, bridges, streets, highways and other convenient ways and courses leading thereto."

Benton is about 23 miles southwesterly of Little Rock, so that the line specified in these articles was about 23 miles long. The line which the telephone company now seeks to build, and for which it has instituted these condemnation proceedings, commences at Ft. Smith, a distance of 164 miles from the city of Little Rock, and is but 32 miles in length, so that it is not a portion of the specific line mentioned in the articles of incorporation. It is insisted that the telephone company has no power to condemn an easement for this line, because it is not mentioned in its articles. But the statute under which this corporation was organized did not require it to state in its articles of incorporation the lines it would build or the business it would transact. On the other hand, it authorized the organization of the corporation "for the purpose of engaging in or carrying on any kind of manufacturing, mechanical, mining or other lawful business." Section 1326. Section 1328 provides that the purpose for which every such corporation shall be established shall be distinctly

and definitely specified in the articles of association, and that it shall not be lawful for the corporation to direct its operations or appropriate its funds for any other purpose, and there are no more specific or drastic provisions of the statutes of Arkansas upon this subject. When the telephone company stated in its articles that the purpose of its incorporation was to conduct a general telephone and telegraph business, it fully complied with the literal terms and accomplished the desired end of these provisions of the law, and acquired ample authority to condemn easements and construct telephones between any of the cities or towns of the state of Arkansas. The Legislature, in its wisdom, empowered corporations, upon a bare statement of the general purpose of their existence, to conduct any lawful business. It did not require them to state how, when, or where all that business should be transacted, but left the extent of the business, and the means by which it should be carried on, to the discretion of the officers of the corporations, and to other provisions of the statutes and of the law that are not here in question. It was not necessary for this corporation to specify in its articles every mile of the routes upon which it might at any time in the future conduct its business, in order to acquire the power of eminent domain to condemn an easement for lines it might wish to construct. The statement of the purpose of the corporation was ample to empower it to condemn a right of way in the state of Arkansas along the line here in issue.

5. Under section 2770, a failure to agree with the owner of the property is a condition precedent to the right to condemn any interest therein; and the complainant alleges in its bill that the telephone company never made any effort to obtain the right of way it seeks, and never failed to agree with the petitioner relative to its acquisition. But the petition for the condemnation of the easement, a copy of which is attached to the bill, contains the averment that the telephone company has made an honest effort to secure the right of way it seeks from the defendant, and that the latter declines to permit it to acquire this easement upon any terms whatever. This averment is jurisdictional and triable in the condemnation proceedings, and, if it is not true, that fact will compel their dismissal. *Lewis on Eminent Domain*, §§ 301, 357; *Reed v. Ohio & Mississippi Ry. Co.*, 126 Ill. 48, 52, 17 N. E. 807; *Toledo, A. A. & N. M. Ry. v. Det., L. & N. R. R. Co.*, 62 Mich. 564, 576, 29 N. W. 500, 4 Am. St. Rep. 875; *G. R., L. & D. R. Co. v. Weiden*, 69 Mich. 572, 579, 37 N. W. 872; *Railroad Co. v. Sanford*, 23 Mich. 418; *Matter of Marsh*, 71 N. Y. 315, 318; *Gilmer v. Lime Point*, 19 Cal. 47, 60; *Elliott on Railroads*, § 1119. As the complainant may plead and prove in the condemnation proceedings the fact that there was no failure to agree, and may thereby defeat them, that fact forms no basis for an independent suit in equity to enjoin the entry of the telephone company under those proceedings. The remedy by answer and trial of this issue in the action at law is not only adequate, but complete, and the bill in equity cannot be sustained upon this ground.

6. It is contended that the condemnation proceedings are void because the act under which they are taken is violative of section 23

of article 5 of the Constitution of Arkansas. The act in question is Act No. 107, p. 176, of the Acts of Arkansas of 1885. Section 1 provides that any corporation organized for the purpose of transmitting intelligence by telegraph or telephone may construct and operate telegraph and telephone lines along the public highways, streets, and railroads within the state of Arkansas, provided that the ordinary use of such highways, streets, and railroads shall not thereby be obstructed, and that just damages shall be paid to the owners thereof for their occupation by the telegraph and telephone corporations. Section 2 declares that, in the event that such telegraph or telephone companies fail to secure the right of way by consent or agreement, then they shall have the right to condemn the easements they require "in the manner prescribed by law for taking private property for right of way for railroads as provided by section 5458 to 5467, both inclusive, of the Revised Statutes of Arkansas, 1884." Sandels & H. Dig. §§ 2770 to 2781, inclusive. Section 13 provides that section 5458 be amended so that it will read that any railroad, telegraph, or telephone company organized under the laws of the state of Arkansas shall, in all cases where they fail to obtain by agreement with the owner of property the right of way over it, apply to the circuit court of the county in which the property is situated, by petition, to have the damages assessed. The sections of the act of March 31, 1885, to which reference has been made, are sections 2757, 2758, 2770, Sandels & H. Dig. 1894.

The provision of the Constitution of Arkansas to which it is said that these sections are obnoxious reads:

"No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length."

The argument is that the act under which these condemnation proceedings are conducted is void because sections 2770 to 2781, inclusive, of Sandels & Hill's Digest, were extended to telephone companies by reference to their numbers, without re-enacting and publishing them at length. The answer to this argument is twofold: In the first place, the right to condemn was conferred, and the power of eminent domain was granted to the telephone and telegraph companies, not by reference, but by enactment, by sections 1, 2, and 13 of the act of March 31, 1885 (sections 2757, 2758, 2770, Sandels & H. Dig.); and even if that portion of the act which took effect by reference, and which simply prescribed the method of procedure for the condemnation proceedings, had been unconstitutional, there was ample power in the court, under the common law, to proceed to effect the condemnation after the right and power had been given. The second answer to this contention is that while section 23, art. 5, of the Constitution of Arkansas, limits legislation which grants, modifies, or destroys the rights of parties, it has no application to legislation which simply affects remedies and methods of procedure. *Watkins v. Eureka Springs*, 49 Ark. 131, 134, 4 S. W. 384; *Geer v. Board of Com'rs of Ouray Co.*, 97 Fed. 435, 439, 38 C. C. A. 250, 254. As all that portion of the act of 1885 which conferred any rights upon the telephone and telegraph companies was enacted and pub-

lished at length, and the only portion which extended any provisions of the law by reference to sections related to the method of procedure alone, the act was neither unconstitutional nor void, and it conferred plenary power upon the telephone company to condemn the easement it seeks.

7. The complainant alleges in its bill that its right of way between the cities of Ft. Smith and Huntington has been condemned and is necessary for railroad purposes; that the construction of a telephone and telegraph line, and the granting to another company of the right to enter and to erect improvements upon the complainant's premises, would be a great obstruction and interference with their uses for railroad purposes, would constitute an unnecessary interference with the complainant's enjoyment of its property, would impair its value to the extent of \$15,000, and would add to the hazards of the traveling public. It avers that there is no public necessity for the construction of this line of telephone and telegraph, or for the condemnation of its right of way for that purpose, and alleges that the only reason for the defendant's desire to condemn it is the saving which may be made by the use of its property, instead of that which is not used for railroad purposes, and which is equally accessible to the telephone company. These averments of the bill, however, must be taken in connection with the allegations of the petition for condemnation, which is attached to it, and which disclose this state of facts: The railroad company is the owner of a right of way between Ft. Smith and Huntington 100 feet in width, with a single-track railroad on or near the center thereof, about 4 feet 8½ inches wide, with the necessary switches, turnouts, turntables, water tanks, station houses, and section houses. The Western Union Telegraph Company has a telegraph line upon one side of this right of way. The telephone company intends to construct a line of poles and wires on the other side of this right of way, 40 feet from the center line between the rails of the main track, wherever the right of way of the defendant will permit, and not nearer than 15 feet from the center line of the rails in any event. The poles will be not less than 25 feet long, not less than 6 inches in diameter at the small ends nor more than 18 inches in diameter at the large ends. They will be placed firmly in the ground, and guyed at all curves so as to resist the tension of the wires. They will average about 35 to the mile. Where it is necessary to cross the track of the railroad company, they will be of sufficient height and distance apart to raise all wires clear above all other wires or structures upon the right of way, and will be so strung that they will not come nearer than 25 feet from the top of the rails of the railroad. The poles will be set so as not to interfere with any ditch, drain, or culvert of the railroad company. In the event that the railroad company should desire to change the location of its track, or to make any improvements upon its right of way, the telephone company agrees to remove its poles to any part of the right of way adjacent, designated by the railroad company, at its own expense. It agrees to allow the defendant to take dirt, gravel, stone, water, and other materials from the part of the right of way occupied by its poles and wires; and, in case the railroad

company grades its right of way, the telephone company agrees at its own expense to reset its poles to conform to the new grade. It assumes all risks to its poles, wires, and property, and agrees to hold the railroad company harmless from any damages occasioned by the burning of grass upon the right of way. The stipulations and promises contained in this petition will be binding upon the telephone company and its successors if it thereby secures the easement it seeks. *St. Louis & C. R. Co. v. Postal Tel. Co.* (Ill.) 51 N. E. 382, 391; *Chicago & A. R. Co. v. Joliet, L. & A. Ry. Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Peoria & P. U. R. Co. v. Peoria & F. Ry. Co.*, 105 Ill. 110; *Mobile & O. R. Co. v. Postal Tel. Cable Co.* (Miss.) 26 South. 370, 45 L. R. A. 223.

The main question which these averments of the bill and the petition for condemnation, which is in reality a part of it, present, is whether or not there is any necessity for the taking of the easement sought by the telephone company upon the right of way of the railroad company. It is conceded that the necessity of the taking by a corporation of the easement or right which it seeks in condemnation proceedings is a judicial question, which must be determined by the court upon a thoughtful consideration of the powers lawfully granted to the corporation, and of the facts and circumstances of the case in hand. It is a basic rule of the exercise of the power of eminent domain that property devoted to one public use cannot be lawfully taken for another and inconsistent use without express or plainly implied legislative authority. *Chicago & A. R. Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485. Nor can one corporation condemn and take away the franchise or right to the use of property already devoted to a public use for the benefit of another corporation for the mere sake of economy, or by virtue of any necessity created for its convenience. Nothing less than an absolute necessity which arises from the very nature of things will warrant such a proceeding. *Pennsylvania Railroad Company's Appeal*, 93 Pa. 150; *Pittsburg Junction Railroad Company's Appeal*, 122 Pa. 511, 6 Atl. 564, 9 Am. St. Rep. 128. These rules apply to cases in which the second use is inconsistent with the first, and practically destroys it. They are inapplicable to the case at bar, because the use to which the telephone company proposes to put the right of way of the railroad company is not necessarily inconsistent with or destructive to its use for railroad purposes, and because express legislative authority has been given to the telephone company to acquire the easement it seeks. The state of Arkansas has expressly empowered telephone companies to construct and operate telegraph and telephone lines along the railroads within that state, provided the latter are not thereby obstructed, and just damages are paid to their owners. Sections 2757, 2770, *Sandels & H. Dig.* This legislation forecloses the question strenuously urged upon our consideration, whether the telephone company could not at some greater expense construct and operate its lines between Ft. Smith and Huntington over property that has not been appropriated to railroad uses. It forecloses it because it is plain that no case could ever arise in which a telephone or telegraph company might not construct and operate its line over private property,

instead of along railroads or public highways. This fact was patent to the Legislature of Arkansas when it enacted this statute, and its grant of the power to these companies, notwithstanding this fact, to condemn and use the railroad rights of way and the public highways for their poles and wires, was a determination that they should be entitled to this privilege, notwithstanding the fact that considerations of economy and convenience alone should dictate their choice of these locations. This legislation narrows the issue of necessity to two questions: First, will the use of the right of way by the railroad company for its purposes be substantially obstructed by the easement sought by the telephone company? and, second, if the telephone company is to acquire an easement on the railroad right of way, is the location and character of the easement which it seeks to obtain necessary for its use? If either of these questions should be answered in the negative, the attempted condemnation ought not to proceed. If they should both receive affirmative answers, the necessity of the condemnation of the easement sufficiently appears, and proceedings to affect it ought not to be enjoined upon this ground. The burden was upon the complainant to show by the allegations of its bill that these questions should be answered in the negative. Those averments and the allegations of the petition for condemnation have been set forth at length, and they will not be repeated. They must be considered together, and, when so considered, they fail to present a case in which it fairly appears that the use of the right of way of the railroad company for the purposes of operating its trains and conducting its business will be either unnecessarily or materially obstructed by the construction and operation of the contemplated lines of telephone and telegraph, or in which it appears that the telephone company is seeking to acquire any easement upon this right of way which is not necessary for the construction and operation of its lines. For these reasons, the demurrer ought not to be sustained either because there is no necessity for the taking of the easement which the telephone company seeks, or because the construction and operation of its lines will materially obstruct the use of the right of way for the purposes of the railroad company. *St. Louis & C. R. Co. v. Postal Tel. Co.* (Ill.) 51 N. E. 382, 386, 387; *Mobile & Ohio R. Co. v. Postal Tel. Cable Co.*, 26 South. (Miss.) 370, 372, 45 L. R. A. 223; *Savannah, F. & W. Ry. Co. v. Postal Tel. Cable Co.* (Ga.) 38 S. E. 353, 355; *Lewis on Eminent Domain*, § 269; *M. & O. R. Co. v. Postal Tel. Cable Co.* (Ala.) 24 South. 408, 411.

8. The complainant avers in its bill that the railroad runs for about a mile and a half near the town of Bonanza, and for a considerable distance just north of the town of Jensen, through the Indian Territory, and that the telephone company is not incorporated in that territory, has no right to exercise the power of eminent domain, and has instituted no proceeding to condemn the right of way therein. The telephone company, a corporation of the state of Arkansas, has no right to exercise the power of eminent domain in the Indian Territory, and this averment of the bill is fatal to the proceedings for the condemnation of any part of the right of way of the railroad company within that territory, and to the general demurrer. The result

is that, while there is no equity in the bill to warrant the restraint of the proceedings to condemn the easement sought by the telephone company upon the right of way of the railroad company in the state of Arkansas, it presents good ground for an injunction against the telephone company to prohibit it from entering upon the right of way of the railroad company in the Indian Territory.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to issue an injunction restraining the telephone company from entering upon the premises of the railroad company, or erecting any improvements thereon, in the Indian Territory, until by proper condemnation proceedings or otherwise it shall acquire an easement therein, or until the further order of the court, and with directions to take farther proceedings herein not inconsistent with the views expressed in this opinion.

KING v. POMEROY.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1903.)

No. 1,798.

1. NATIONAL BANKS—VOLUNTARY LIQUIDATION—SHAREHOLDER'S LIABILITY—COURT'S RECEIVER MAY ENFORCE.

Under the act of June 3, 1864, c. 106 (13 Stat. 99), authorizing the formation of national banks, a federal court sitting in equity had jurisdiction in a proper case to appoint a receiver to liquidate its obligations, and to authorize him to collect and to enforce by action the liability of the shareholders of the bank under section 12 of the act (section 5151, Rev. St. [U. S. Comp. St. 1901, p. 3465]).

2. RECEIVER—HAS RIGHTS OF CREDITORS AS WELL AS DEBTORS.

In the absence of restrictive legislation, a receiver in liquidation proceedings may ordinarily enforce the rights of creditors as well as the rights of the debtor.

3. NEW REMEDY—CUMULATIVE, NOT EXCLUSIVE.

While a remedy given by the act creating the right is ordinarily exclusive, a new remedy provided in a case in which the right and an appropriate remedy already existed is merely cumulative, and the injured party is at liberty to pursue either.

4. NATIONAL BANKS—VOLUNTARY LIQUIDATION—REMEDY OF CREDITORS' SUITS NOT EXCLUSIVE.

The remedy of a creditor's suit to enforce the liability of shareholders of national banks in voluntary liquidation, provided by section 2 of the act of June 30, 1876, c. 156 (19 Stat. 63 [U. S. Comp. St. 1901, p. 3509]), is cumulative and not exclusive.

5. SAME—ACTION OF COMPTROLLER, WHEN UNNECESSARY.

In cases in which a court of equity appoints a receiver to liquidate the debts of national banks in voluntary liquidation no action of the comptroller is requisite to empower the court's receiver to enforce the liability of the shareholders. The court has plenary power to ascertain the necessity of enforcing the liability, and to direct its receiver to collect it.

¶ 1. Actions by and against receivers and "agents" of national banks, see note to *McCartney v. Earle*, 53 C. C. A. 398.

¶ 4. Enforcement of statutory liability of shareholders in national banks, see note to *Williamson v. American Bank*, 52 C. C. A. 6.

See *Banks and Banking*, vol. 6, Cent. Dig. §§ 932, 933.

6. SAME—SHAREHOLDERS' LIABILITY—STATUTE OF LIMITATIONS.

The statute of limitations does not run against an action to enforce the liability of a shareholder of a national bank during the time while proper liquidation proceedings are pending in a court of equity.

7. SAME.

The liability of a shareholder of a national bank whose affairs are in course of judicial administration in a court of equity does not mature until the court ascertains the necessity of enforcing it, determines the amount which the shareholder must pay, and fixes the time of payment; and the cause of action of the receiver of the court to enforce the liability does not accrue until the liability thus matures.

8. OPINIONS—GENERAL STATEMENTS NOT AUTHORITATIVE BEYOND QUESTION AT ISSUE.

General expressions in the opinions of courts are not authoritative beyond the questions which they were considering and deciding when they used them.

(Syllabus by the Court.)

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

The writ of error in this case challenges a judgment which sustains a demurrer to a complaint made by Albert S. King, as receiver of the First National Bank of Frankfort, in the state of Kansas, against J. P. Pomeroy, a shareholder of that bank. These are the material facts which the bill discloses: The First National Bank of Frankfort was located at that town, in the state of Kansas, on April 13, 1891, and the defendant, Pomeroy, owned 70 shares of its stock, of the par value of \$100 per share. That bank went into voluntary liquidation under section 5220 et seq. of the Revised Statutes [U. S. Comp. St. 1901, p. 3503] on April 6, 1891. It was insolvent, and the Comptroller of the Currency was requested to appoint a receiver of its property, and he refused to do so on the ground that he had no jurisdiction over the affairs of a bank in voluntary liquidation. Thereupon, on April 13, 1891, a creditor of this bank, a citizen of the state of Missouri, filed a bill against it in the United States Circuit Court for the District of Kansas, wherein, for reasons it is unnecessary to state, it prayed for the appointment of a receiver of the assets and credits of the bank and the liabilities incident thereto, to the end that he might convert them into money and liquidate its liabilities. The bank appeared in the court, and consented to the appointment of a receiver, and he entered upon the discharge of his duties. He gathered the tangible assets of the bank, converted them into money, and distributed the proceeds, until, in December, 1898, he reported that these assets were all disposed of except \$665.14 in cash, that the unpaid liabilities of the bank were still \$36,301.74, and he prayed for directions regarding the enforcement of the liabilities of the shareholders. On September 5, 1899, H. D. Stone, a creditor who had proved his claim against the estate of the bank, intervened in this suit, pleaded his claim, the cash in the receiver's hands, the disposition of all the tangible assets of the bank except this, the indebtedness of the bank, the names and addresses of its stockholders, and prayed that the court would ascertain the necessity of the enforcement of the liability of the shareholders, that it would make an assessment upon them, and that it would appoint a receiver to collect this assessment. On February 12, 1900, the court made an interlocutory decree, in which it found the facts set forth in the intervening petition to be true, that the amount of the assessment necessary to pay the debts of the bank was 38.84 per cent. of the par value of the stock, that an assessment of that amount be made, and that the amounts of this assessment should be paid by the respective shareholders to the receiver who had theretofore been appointed in the suit within 60 days from the date of the order. The assessment upon the stock of the defendant, Pomeroy, under this order was \$2,716.80. It is for this amount, upon this state of facts, that the receiver of the Circuit Court has brought the action now before us. The court below held that these facts stated no cause of action, and dismissed the case.

W. W. Guthrie and W. F. Guthrie, for plaintiff in error.

B. P. Waggener, 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.

When a corporation becomes insolvent, all its property and all the liabilities of the guarantors of its obligations constitute a trust fund pledged to the payment of its debts. And in cases where through fraud or maladministration this fund is being diverted from those who are entitled to receive it, the power is vested in, and the duty is imposed upon, courts of equity to appoint a receiver, to direct him to convert these trust funds into money, and to distribute the proceeds among the creditors. *Sawyer v. Hoag*, 17 Wall. 611, 622, 21 L. Ed. 731; *Hayden v. Thompson*, 71 Fed. 60, 66, 17 C. C. A. 592, 598. Such a suit falls within the jurisdiction of a court of equity because it is a suit to execute a trust, because it avoids a multiplicity of suits by each of many creditors, and because the creditors have no adequate remedy at law.

The receiver appointed in such a proceeding is the hand of the court to gather and distribute the trust funds, and in the execution of its orders he has the power and the authority of the court, so that when it is said that the receiver in the action now in hand is without authority or power to maintain this suit, the real contention is that the Circuit Court of the district in which this insolvent bank was located had no jurisdiction to enforce the liability of its shareholders in the proceeding before it. There is nothing in the suggestion that the court may have a power to enforce the liability of the shareholders with which it cannot invest its receiver. If the court has the jurisdiction to enforce this liability, the receiver whom it appoints and directs to do so has all the power of the court to receive the money and to maintain actions to recover it. Receivers of courts of equity appointed in the judicial administration of the affairs of insolvents are, in the absence of restrictive statutes, empowered to enforce the rights of the creditors as well as the rights of the debtor, and there is no restrictive legislation in this case limiting the power of the receiver to maintain this action.

It is conceded in this case that the court below lawfully appointed the receiver, and that by his agency it rightfully collected the debts due to the bank, converted its tangible assets into money, and distributed its proceeds to the creditors. But the contention of counsel for the defendant in error is that the Circuit Court had no power by the hands of its receiver to collect the amount lawfully owing from the shareholders to the creditors, because the latter did not proceed to enforce this liability by the particular suit in equity pointed out by the provisions of section 2 of the act of June 30, 1876, c. 156 (19 Stat. 63 [U. S. Comp. St. 1901, p. 3509]), and because the Comptroller of the Currency has never authorized or directed the institution of this action against the shareholder.

A brief reference in chronological order to the legislation which conditions the soundness of this position will best present the ques-

tions it raises. The jurisdiction of the court below sitting in equity to appoint a receiver, and through him to administer the affairs of an insolvent corporation, to collect the trust fund pledged to its creditors, and to liquidate its debts, vested in that court when it was established. It existed long before the act of 1864, which authorized the formation of national banks, and the act of 1876, which granted the new remedy upon which counsel now insists, were enacted, and it still exists. It was general and comprehensive. It included all cases of fraudulent diversion or maladministration in which controversies arose between citizens of different states, and it is conceded that this was such a case. This jurisdiction required no special act of Congress to give it effect, but it attached to and embraced every corporation as it came into existence, unless by some act of Congress its extent was curtailed or diminished.

By the act of June 3, 1864, 13 Stat. 99, Congress authorized the formation of national banks, made certain provisions for the supervision and the liquidation of their debts, and then declared that they should not be subject to any visitatorial powers other than such as were authorized by that act or were vested in the courts of justice. Rev. St. § 5241 [U. S. Comp. St. 1901, p. 3517]. The courts of justice had power to appoint receivers, and to liquidate the debts of all insolvent corporations, when this act was passed. That power necessarily remained in those courts, and embraced the national banks as they came into existence, except in those cases in which this jurisdiction was withdrawn from the courts by that or some other act of Congress. The act of 1864 provided that in certain cases the Comptroller of the Currency might appoint receivers to liquidate the debts of the national banks and to enforce the liabilities of their shareholders. Under this legislation the Comptroller became a special tribunal, with limited powers, authorized to act in cases specifically named in the statute, but in no other instances. In all other cases the power of appointment of receivers, of liquidation of the debts of the banks, and of enforcement of the liabilities of the shareholders remained in the courts as it existed before. The cases in which the Comptroller was empowered to appoint receivers and to enforce the liability of shareholders were: (1) Where the bank had refused to pay its circulating notes (section 5234, Rev. St. [U. S. Comp. St. 1901, p. 3507]); (2) where it failed to maintain its capital at the minimum (section 5141 [page 3462]); (3) where it failed to maintain its reserve (section 5191 [page 3486]); (4) where it failed to redeem its circulating notes, or to select a place at which it would redeem them (section 5195 [page 3492]); (5) where it failed to dispose of its stock taken as security within six months (section 5201 [page 3494]); and (6) where it failed to pay up its capital stock and refused to go into liquidation (section 5205 [page 3495]).

Conceding now that in all these cases in which the power to appoint a receiver and to enforce the liability of the shareholders was vested in the Comptroller by the act of 1864, that authority was thereby withdrawn from the courts under the familiar rule that, where the same act creates the right and prescribes the remedy for its enforcement, that remedy is exclusive, still the fact remains that

in all the cases in which no such power was vested in the Comptroller the jurisdiction and authority of the courts remained unimpaired and plenary. Thus, full jurisdiction still remained in the courts of equity to appoint a receiver to liquidate the debts of an insolvent bank and to enforce the liability of its shareholders where the transfers of notes or other evidences of debt, assignments of mortgages or other securities, deposits of money, bullion, or other valuable things, and payments of money were made by the national banks with a view to give preferences in contemplation of insolvency in violation of section 5242, Rev. St. [U. S. Comp. St. 1901, p. 3517], as well as where a bank had gone into voluntary liquidation under sections 5220 and 5221 [page 3503], and its funds were being fraudulently diverted from the *cestuis que trustent*. The conclusion that this power still remained in the courts of equity under the act of 1864 is not only a rational deduction from the fact that this part of their general jurisdiction over such corporations, which existed from the time of their creation, was neither expressly nor impliedly taken from them by that act, but, in so far as it relates to banks in liquidation, it is the unavoidable effect of sections 5205, 5220, and 5221, Rev. St. [U. S. Comp. St. 1901, pp. 3495, 3503], when they are read together. Sections 5220 and 5221 and those immediately succeeding them provided that any banking association might go into voluntary liquidation under the direction of its shareholders by a vote of those owning two-thirds of its stock. Section 5205 provided that, if a bank refused to go into liquidation, the comptroller might appoint a receiver, and enforce the liability of its shareholders. The conclusion is irresistible that, if it did go into liquidation, and if it did not fall into any of the other classes of cases in which the comptroller was authorized to appoint a receiver, he was without such authority, and the jurisdiction of the courts over national banks in voluntary liquidation remained as complete as it was over the ordinary insolvent corporation.

The argument that, although a court of equity might have had the authority to appoint a receiver to liquidate the debts of this bank, yet it had no power to enforce the liability of the shareholders, is not persuasive. In the first place, under the act of 1864 there was no other way to collect the amounts owing by the shareholders of a bank in voluntary liquidation save by the decree of a court of equity, and where there is, as in such a case, a clear right, and no other adequate remedy, the cases are rare in which a court of equity will not afford one. In the second place, conceding that this liability was not to the bank, and that it could not be collected or enforced by the debtor, still it was as much a trust fund, or the pledge of a trust fund, for the benefit of the creditors, as any of the tangible property of the corporation, and the enforcement of this liability and the distribution of its proceeds is as much a part of the liquidation of the debts of the bank as the collection and distribution of the proceeds of its bills receivable, or any other of its assets. Hence the conclusion is that, because there was no other adequate remedy to enforce the liability of shareholders of an insolvent national bank in voluntary liquidation under the act of 1864, and because that li-

ability was a trust fund, or the pledge of a trust fund for the benefit of the creditors of the bank, a court of equity had plenary power to appoint a receiver, and to authorize him to enforce that liability by actions at law. *Richmond v. Irons*, 121 U. S. 27, 44, 48, 50, 7 Sup. Ct. 788, 30 L. Ed. 864; *Irons v. Bank*, Fed. Cas. No. 7,068; *Irons v. Bank (C. C.)* 17 Fed. 312, 313; *Wright v. Bank*, Fed. Cas. No. 18,084; *Elwood v. Bank*, 41 Kan. 475, 21 Pac. 673; *Harvey v. Lord (C. C.)* 10 Fed. 238, 239; *Wilson v. Book (Wash.)* 43 Pac. 939, 940; *Farmers' Loan & Trust Co. v. Funk (Neb.)* 68 N. W. 520, 522, 524; *Hayden v. Thompson*, 71 Fed. 60, 66, 17 C. C. A. 592, 598.

The acts of Congress and the rights and remedies of creditors and shareholders of national banks in voluntary liquidation stood in this way from 1864 until Congress passed "An act authorizing the appointment of receivers of national banks and for other purposes," which was approved on June 30, 1876, c. 156, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509]. This act was not, and it did not purport to be, an amendment of the act of 1864. It was an independent law, giving remedies not provided by the prior act. Section 1 empowered the Comptroller of the Currency to appoint a receiver to close up a national bank and to enforce the personal liability of the shareholders (1) where such a bank was dissolved under section 5239 [U. S. Comp. St. 1901, p. 3515], (2) where a creditor had obtained a judgment against it which had remained unpaid for 30 days, and (3) where a bank had become insolvent. Section 2 authorized any creditor of such a banking association in voluntary liquidation to enforce the liability of its shareholders by a bill in equity brought on behalf of himself and all other creditors of the association against the shareholders in any court of the United States which had general jurisdiction in equity in the district in which the association had been located or established. It is upon this second section, and upon the fact that the suit in equity in which this receiver was appointed was not a proceeding under that section, that counsel relies to defeat this action. But how can this section curtail or affect the undoubted jurisdiction which the federal courts had when it was enacted to enforce by the hands of their receivers the liability of shareholders of banks in voluntary liquidation through suits in equity for a judicial administration of their affairs? It does not in terms withdraw or limit the power of courts of equity. It is not inconsistent with the existence or the exercise of that power. It simply extends to every creditor a remedy which creditors who were citizens of states other than that of the location of the bank had before it was enacted. It does not present a case in which the remedy is given in the same act which creates the right, so that it is rendered exclusive by that fact, as in *Pollard v. Bailey*, 20 Wall. 527, 22 L. Ed. 376, and *National Bank v. Francklyn*, 120 U. S. 756, 7 Sup. Ct. 757, 30 L. Ed. 825. On the other hand, it falls under the converse of this principle. It falls under the familiar rule that, where a statute simply gives a new remedy in a case in which the right and an appropriate remedy existed before its enactment, it is cumulative, and not exclusive, and the party injured is at liberty to pursue either remedy. *Sedgwick on Construction of Statutory and Constitutional Law* (2d Ed.) p. 342, 340-4;

Wright v. Bank, Fed. Cas. No. 18,084; Clements v. Bowes, 17 Sim. 167, 175. In the case last cited there was a demurrer to a bill brought by a shareholder of a railway company on behalf of himself and others, in which he prayed for an account of the receipts and payments of the defendants on behalf of the company. This demurrer rested on the ground that the Legislature had provided a different method of winding up and dealing with the affairs of a railway company. But the court said:

"To oust the jurisdiction of the court of chancery in such a case, the Legislature should have so declared it. It is plain, where the court of equity has jurisdiction in such a case, an act giving further relief does not by that oust the title of the court of equity, without express terms being used to put an end to the jurisdiction which is inherent in the court."

This rule is familiar, and needs no citation of authorities to sustain it. It has been repeatedly applied to the very act under consideration, and both reason and authority persuade that the remedy which the act of 1876 gave was cumulative, not exclusive, and that the jurisdiction and power remained after as before its passage in the federal courts to appoint receivers of national banks in voluntary liquidation in proper cases, and to empower these receivers to enforce by actions at law the liability of the stockholders. *Harvey v. Lord* (C. C.) 10 Fed. 236, 238; *Irons v. Bank* (C. C.) 17 Fed. 308, 312, 313; *Richmond v. Irons*, 121 U. S. 27, 44, 48, 50, 7 Sup. Ct. 788, 30 L. Ed. 864.

In opposition to this conclusion counsel for the defendant in error cites and relies upon *Kennedy v. Gibson*, 8 Wall. 498, 505, 19 L. Ed. 476; *Bushnell v. Leland*, 164 U. S. 685, 17 Sup. Ct. 209, 41 L. Ed. 598; *Cook County Nat. Bank v. United States*, 107 U. S. 449, 2 Sup. Ct. 561, 27 L. Ed. 537; and *Williamson v. American Bank*, 115 Fed. 793, 52 C. C. A. 1. The three cases from the Supreme Court do not touch the question at issue. The first two simply hold that in the classes of cases in which the power to appoint a receiver of a national bank that is not in voluntary liquidation was granted to the Comptroller of the Currency by the act of 1864 and in which that authority had been exercised by him, his decision that it was necessary to enforce the liability of the shareholders under section 5234, Rev. St. [U. S. Comp. St. 1901, p. 3507], was conclusive of that question, in the absence of a direct attack upon it for error of law, fraud, or mistake; and that such a decision and order was a prerequisite to an action by his receiver against a shareholder to enforce his liability. *Deweese v. Smith*, 106 Fed. 438, 45 C. C. A. 408. But there is nothing in the opinions or decisions in these cases to the effect that any action of the Comptroller is either authorized or required to empower a court which has lawfully taken jurisdiction of the administration of the affairs of an insolvent bank in voluntary liquidation to empower its receiver to enforce the liability of the shareholders of such a bank. In such a case the Comptroller has neither jurisdiction nor authority. The court which is conducting the litigation is vested with plenary power to effect and to complete it. The determination of the necessity of enforcing the shareholders' liability, and of the amount required from the shareholders to complete the liquidation, is a necessary

step in the proceeding before it; one which the court has ample authority to take, and in which its decision and order is as conclusive as is the Comptroller's in the cases within his jurisdiction. The court draws to itself the requisite jurisdiction to complete the administration which it is conducting, and excludes the jurisdiction of all other tribunals.

The case of *Cook County Nat. Bank v. United States*, 107 U. S. 449, 2 Sup. Ct. 561, 27 L. Ed. 537, is still wider of the mark. The only question there at issue was whether the distribution of the proceeds of the liquidation of a national bank in one of the cases in which the Comptroller was given jurisdiction by the act of 1864 was governed by the general law, which gives a preference to the United States in the administration of the estates of insolvents (Rev. St. § 3466 [U. S. Comp. St. 1901, p. 2314]), or by the provisions of the national banking act of 1864, which specifically prescribe the method of distribution of the proceeds of the liquidation of such banks (sections 5234, 5236, Rev. St. [U. S. Comp. St. 1901, pp. 3507, 3508]); and the court held that the provisions of the latter act which were inconsistent with the general law must prevail upon the familiar principle that, where a special act and a general law are inconsistent, they must, if possible, stand together; the former as the law of the particular case, and the latter as the general law of the land. *Board of Com'rs v. Aetna Life Ins. Co.*, 90 Fed. 222, 227, 32 C. C. A. 585, 590. It is not claimed that the question before us in this case ever occurred to the mind of the justice who wrote the opinion in that case or to that of any member of the court which decided it, much less that it was ever considered or determined by them. But counsel founds an elaborate argument for the exclusiveness of the remedy prescribed by the act of 1876 upon some general remarks which fell from the lips of the learned justice who delivered the opinion in that case to the effect that the act authorizing the formation of national banks was complete in itself, and that it constituted a complete system for the establishment, government, winding up, and distribution of the proceeds of such institutions. These statements were true and conclusive so far as they related to the facts presented and the questions at issue in that case, but they were neither true nor authoritative upon the facts conceded and the question at issue in the case at bar. They were not true, because, as we have seen, the act authorizing the formation of national banks—the act of 1864—provided no method of winding up the affairs of a national bank in voluntary liquidation in cases of fraud or maladministration, no remedy for the enforcement of the liability of shareholders in such a case, no procedure for the avoidance of the acts of preference denounced by section 5242, Rev. St. [U. S. Comp. St. 1901, p. 3517], and no remedy for the enforcement of many other rights which vest under the national banking act, and which are constantly preserved and enforced by the courts through the exercise of their general jurisdiction. Those statements are not authoritative in this case because the authority of general expressions and broad statements in the opinions of courts is always limited to the specific questions which they were considering and deciding when they were used. *Cohens v. Virginia*, 6 Wheat. 264, 399,

5 L. Ed. 257; *U. S. v. Wong Kim Ark*, 169 U. S. 649, 679, 18 Sup. Ct. 456, 42 L. Ed. 890; *Northern Bank v. Porter Township*, 110 U. S. 608, 615, 4 Sup. Ct. 254, 28 L. Ed. 258; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 574, 15 Sup. Ct. 673, 39 L. Ed. 759.

In *Williamson v. American Bank*, 115 Fed. 793, 52 C. C. A. 1, the assignee of a national bank located at Asheville, in the state of North Carolina, which was in voluntary liquidation, and a creditor of that bank, exhibited a bill in equity to the judges of the Circuit Court of the District of South Carolina on behalf of themselves and all other creditors against a single shareholder of the insolvent bank and his trustee to enforce the shareholder's liability, and the court sustained a demurrer to the bill. It is plain that the demurrer was properly sustained, because the insolvent bank was a necessary party in the first instance to any suit to enforce the liability of its shareholders, and it was not made a party to that proceeding. The ascertainment of the debts and liabilities of the bank and the judicial determination of the necessity and the requisite extent of the enforcement of the stockholders' liability are essential prerequisites to the collection of the amounts owing by them, and the insolvent bank is a necessary party to these adjudications. The court in that case, however, went farther, stated as one of the reasons for its decision that the remedy for the enforcement of the stockholders' liability under the act of 1876 was exclusive, and cited in support of that conclusion *Pollard v. Bailey*, 20 Wall. 527, 22 L. Ed. 376, and *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825, which hold that, where the same act creates a right and provides a remedy for its infringement, such a remedy is exclusive. But, as we have seen, the act of 1876 does not fall under this rule, but under its converse, because the right against the shareholders was created by the act of 1864, there was an ample remedy for its enforcement through the general equity powers of the courts before the act of 1876 was enacted, and the remedy given by that act neither expressly nor impliedly abrogated or limited the existing remedy, but merely added another. For this and for the other reasons which have already been stated at length, and because the opinion and decision of the Supreme Court in *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864, has conclusively determined this question otherwise, we are unable to agree with the learned judges of the Court of Appeals of the Fourth Circuit upon the effect of the act of 1876.

In the case of *Richmond v. Irons* a judgment creditor of a national bank in voluntary liquidation filed a creditors' bill against that bank and its president on February 3, 1875, and prayed, among other things, for the appointment of a receiver of its property to convert it into money, and to apply its proceeds to the payment of his judgment. A demurrer was interposed to this bill upon the ground that a receiver of this character could only be appointed by the Comptroller of the Currency. This demurrer was overruled, and on February 26, 1875, one Harvey was appointed receiver. After the passage of the act of 1876 the Comptroller appointed Harvey his receiver, and as such he undertook to enforce the liability of the shareholders of this bank. He was met by a plea in abatement, and this plea was sus-

tained upon the ground that the receiver appointed by the court had the power to collect the amount owing by the respective shareholders and the Comptroller's receiver should not be permitted to disturb them. *Harvey v. Lord* (C. C.) 10 Fed. 236. On October 5, 1876, the complainant in the original suit in equity filed an amended bill, in which he alleged that the bank was insolvent, and that it went into voluntary liquidation on September 22, 1873, and in which he set forth the names of the stockholders and the amounts of stock held by them respectively, and prayed, among other things, that an account be taken of the debts and liabilities of the bank, and that the shareholders be required to pay to the receiver the amounts necessary to liquidate the debts of the corporation. The shareholders within the jurisdiction of the court were brought in as defendants. All the objections to the amended bill that have been made in the case before us were interposed in that case. Finally, on July 23, 1883, the complainant again amended his bill so as to allege that it was filed on behalf of himself and all other creditors of the bank, and thereupon a decree was rendered in favor of the complainant to the effect that the shareholders were liable for the debts of the bank, and, after a report had been procured from a master upon the amount of the debts and liabilities of the corporation, an order was made in 1886 that the shareholders should pay an assessment of 83.2 per cent. of the par value of their stock in discharge of their statutory liability. From the final decree in this case some of the shareholders appealed to the Supreme Court, and that court held (1) that the Circuit Court had jurisdiction, before the act of 1876 was passed, to appoint a receiver of the property of an insolvent national bank in voluntary liquidation, and to enforce the liability of its shareholders; and (2) that the passage of that act did not deprive it of that power, but that the court might exercise it in the original suit which had been instituted before the act of 1876 was passed. 121 U. S. 47, 48, 50, 7 Sup. Ct. 788, 30 L. Ed. 864. The suit in which the receiver in the case under consideration was appointed falls within this decision of the Supreme Court, and rests firmly upon the principles upon which that adjudication was based. It was commenced by a creditor of the insolvent Bank of Frankfort, a citizen of the state of Missouri, in the state of Kansas, in the jurisdiction in which that bank was located. The insolvent bank was the defendant in that suit. The court appointed a receiver to liquidate its debts in 1891. The enforcement of the liability of its shareholders was a part of that liquidation, and hence within the jurisdiction of that court, and a part of the duty of its receiver under its orders. On February 12, 1900, after the tangible assets had been converted into money and distributed, the court, in the course of this liquidation proceeding, ascertained that it would be necessary, in order to complete it, to collect of the shareholders of the bank 38.84 per cent. of the par value of their stock, and ordered them to pay this assessment to its receiver accordingly. The general jurisdiction of the Circuit Court was ample to authorize this action. That jurisdiction was not withdrawn or limited by the act of 1876, and its receiver had plenary power under its order to institute and maintain the action at bar to compel the defendant to

pay the amount of the assessment which the court had made upon the stock which he held. The objection to the jurisdiction of the court and of its receiver cannot be sustained.

Another reason why this action ought not to be maintained is pressed upon our attention. It is that it was barred by the limitation of three years prescribed by the Code of Civil Procedure of Kansas, art. 3, § 18, subd. 2. This contention rests upon the argument that the bar of the statute cannot be postponed by the failure of a creditor to avail himself of any means within his power to prosecute or preserve his claim (*Bauserman v. Blunt*, 147 U. S. 657, 13 Sup. Ct. 466, 37 L. Ed. 316), and that the creditors were aware of the insolvency of the bank, and hence of the liability of its stockholders, and could have commenced their suit to enforce it as early as April 13, 1891, when the bill for the appointment of the receiver was filed. But the answer to this objection is that the suit to administer the affairs of the bank, commenced in 1891, was, like the proceedings of the comptroller in cases within his jurisdiction, a proceeding to ascertain and enforce the liability of the shareholders as well as to administer the tangible assets of the bank, because that ascertainment and enforcement was a part of the liquidation contemplated, so that no time ran against the creditors during the pendency of that proceeding. Under that bill, every creditor who proved his claim became a party to the suit as of the date of the bill, and the subsequent intervening petition of Stone for the ascertainment and enforcement of the liabilities of the shareholders commenced no proceeding which was not already pending, conferred no power and invoked no jurisdiction which the court could not as well have exercised on the original petition and the reports of its receiver. *Richmond v. Irons*, 121 U. S. 52, 7 Sup. Ct. 788, 30 L. Ed. 864.

The result is that the cause of action which the receiver is now prosecuting in the case before us never accrued until 60 days after February 12, 1900, when the court ascertained the necessity, and ordered the payment of the 38.84 per cent. of the par value of the stock 60 days after that date. There was no time prior to the order of February 12, 1900, when the extent of the liability of the shareholders of this bank was ascertained; no time when it was due. There was no time after April 13, 1891, when the suit in equity to liquidate the affairs of the bank was commenced when any creditor could have maintained a bill to enforce the liability of the shareholders, because the jurisdiction of the court which had already seized the assets and commenced to liquidate the obligations of the bank was exclusive. The result is that the bar of the statute has not arisen, and this action may be maintained under the general rule that, in an action by a receiver to enforce the liability of a shareholder of an insolvent national bank whose affairs are in course of judicial administration in a proper proceeding in a federal court for the purpose of liquidating its debts, the liability of the shareholders of the bank does not become due, does not mature, and the action to collect it does not accrue, until the court decides that it is necessary to collect some part of it, determines the amount, and fixes the time

for its payment. *Deweese v. Smith*, 106 Fed. 438, 441, 45 C. C. A. 408, 410, 411, and cases there cited.

The judgment below is reversed, and the case is remanded to the Circuit Court for farther proceedings not inconsistent with the views expressed in this opinion.

LOUDENBACK FERTILIZER CO. v. TENNESSEE PHOSPHATE CO.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1903.)

No. 1,124.

1. CONTRACT—VALIDITY—MUTUALITY.

A contract by which a manufacturer of fertilizers agreed to buy its entire consumption of phosphate rock for five years from the other party at a fixed price, and the other party agreed to supply the same as ordered, it being further stipulated that the quantity used by the buyer was understood normally to amount to 1,500 tons yearly, but that it should have the right to demand as much as 3,000 tons, imposes upon both parties an obligation to perform, which constitutes a good consideration, and is not void for lack of mutuality.

2. SAME—BREACH.

Plaintiff, the purchaser under such contract, in the conduct of its factory treated the rock with sulphuric acid, and made what was called "acid phosphate," which it sold as a fertilizer, and also used as the base of a higher grade of fertilizer. For more than a year during the term of the contract it ordered no rock from defendant, but purchased the acid phosphate it used from other manufacturers, as more profitable. At the end of that time the price of rock having materially advanced, it ordered the maximum of 3,000 tons for the ensuing year under the contract. *Held*, that its substitution of acid phosphate for the rock previously used in its business, and contracted for, solely because more profitable, was a substantial breach of the contract.

3. SAME—RIGHT TO SUE FOR BREACH—PRIOR BREACH BY PLAINTIFF.

A party to a contract, who commits a substantial breach thereof, cannot maintain an action against the other party for a subsequent failure or refusal to perform.

4. SAME—ENTIRETY.

A contract by a manufacturing concern for the purchase of all of a certain material used in its factory for five years at a fixed price per ton, to be shipped on orders as required, is entire, and not divisible.

5. SAME—ACTION FOR BREACH—ESTOPPEL TO DENY LIABILITY.

A delay of a few days by one party to a contract before refusing a demand by the other party for further performance will not estop it to rely on a prior breach by the party making the demand, where it appears that it was not fully advised as to the action of the other party, and had no intention of waiving its rights.

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

This is an action to recover damages for a breach of a contract. The plaintiff in error, hereafter styled the "plaintiff," is an Ohio corporation, engaged in making fertilizers at its factory in Ohio. The defendant in error, hereafter referred to as the "defendant," is a Tennessee corporation, engaged in mining phosphate rock at Attilla, Tenn. The plaintiff and defendant entered into a written contract, by which the defendant agreed to sell to the

¶ 1. Mutuality in contracts, see note to *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 543.

¶ 3. See *Contracts*, vol. 11, Cent. Dig. § 1207.

plaintiff its entire "consumption of phosphate rock" for a term of five years beginning January 1, 1897, at a stipulated price per ton. This contract, among other things, provided:

- (1) That the rock should be shipped as ordered by defendant.
- (2) Shipments to commence as soon as 500 tons previously contracted for should be consumed, and thereafter the plaintiff agreed to buy its entire consumption from defendant.
- (3) The plaintiff to have the right to demand as much as 3,000 tons annually. But the contract recited: "It is understood that your present annual consumption is estimated at something like 1,500 tons under normal conditions."
- (4) Rock to be settled for on the 10th of each month for all rock received during the preceding month.

The breach alleged is that the defendant refused to comply with the orders of the plaintiff given between January 25, and July 10, 1899, for the shipment of rock aggregating 3,000 tons.

In lieu of a general averment that the plaintiff had not itself previously breached the agreement, the pleader sets forth the circumstances surrounding the making of the contract, and precisely what had been done by each party under the agreement. Thus it is averred that the plaintiff was engaged in making and selling two grades or qualities of fertilizer, one styled a "complete" and the other an "incomplete" fertilizer. The "incomplete fertilizer," otherwise called "acid phosphate" or "acidulated phosphate," is made by treating the crushed rock with sulphuric acid, and then grinding the dried mass into powder. The resulting product is called "acid phosphate," and is itself sold and used as a fertilizer; and the business of plaintiff at the time this agreement was made was in part the manufacture and sale of this grade of fertilizer. Plaintiff's factory was equipped for the manufacture of this acidulated phosphate, and plaintiff informed the defendant that it proposed to enlarge its facilities for making acid phosphate, and to increase its output of that product. It is also averred that this acidulated phosphate was the principal constituent in the making of a more complete fertilizer.

The declaration then avers that between August, 1897, and January, 1899, it did not order any phosphate rock from the defendant, nor did it buy any from any other producer. To explain this, it is averred that the makers of sulphuric acid so advanced the price by a combination as to make it cheaper for plaintiff to buy the acidulated phosphate, both to supply its customers for that grade of fertilizer and as the basis for the higher grade of fertilizers made and sold by it. The declaration proceeds as follows: "So that the plaintiff found it absolutely necessary for its economic life, and therefore it was, by these abnormal conditions, driven to cease the manufacture, temporarily, of acid phosphate, either for use in plaintiff's own factory of complete fertilizers, or for sale for use as a direct, though incomplete, fertilizer." It is then averred that in the latter part of 1898 the promise for a much larger demand for fertilizers, together with a great decline in the price of sulphuric acid and a rise in the price of crude rock, induced the plaintiff to enlarge its capacity for producing this acid phosphate, and for extending its sale, and to meet this increased capacity it ordered the maximum amount of crude rock admissible under the contract. It is then averred that plaintiff gave notice that it would be obliged to buy acid phosphate if defendant did not ship the crude rock as ordered, and would look to it for the difference between the price paid and the cost of manufacture, but that the defendant had refused to carry out its agreement, claiming that plaintiff had first breached the agreement by buying acid phosphate as aforesaid. It is further averred that plaintiff had bought about 3,000 tons of acidulated phosphate to supply its contracts for that product and to carry on its manufacture of the complete fertilizer. The defendant demurred. The demurrer was sustained by Judge Clark, and the plaintiff has sued out this writ of error.

Ernst, Cassatt & McDougall, F. C. Maury, and Thomas E. Matthews, for plaintiff in error.

George T. Hughes and William L. Granbery, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after stating the above facts of the case, delivered the opinion of the court.

The only consideration upon which this contract rests is the mutual obligation to perform. It is not an agreement for the sale and purchase of a definite quantity of phosphate rock. But that is not fatal. If the agreement had been to supply to the plaintiff 1,500 tons of rock each year, no one would question the definiteness of the agreement. That amount was the estimated annual consumption of such rock by the plaintiff under ordinary conditions. But in a particular year it might be more or it might be less than this estimated average consumption. Now, in this situation the seller, in effect, says: "You say your usual consumption is 1,500 tons per year, but that the demand for the rock is dependent on the demand for fertilizers, and that the latter demand is dependent on agricultural conditions, which are variable; that one year you may need more than that amount, and another less. Very well, let us contract with regard to this. I, too, must know something about the amount I may be called upon to supply. We will fix a maximum on that side of 3,000 tons. You, on your part, instead of agreeing to take each year a definite number of tons, must agree to take all of your consumption of rock from me at the stipulated price, and I will agree to hold myself in readiness to furnish you all of your rock as you may order same. But you must take your entire supply from me, for, if you are to take it only as you choose to buy from me, you may choose to buy none if the price goes down and a great deal if the price goes up." Now, such a contract would not be unilateral. The plaintiff would be bound to take its entire supply from the defendant. The amount which is to be bought is made as definite as possible under the circumstances. The quantity is to be measured by the requirements of the factory in a business which necessarily requires a very large amount if it shall continue to be operated in the future as in the past. Though the quantity to be bought and sold was indefinite, it was ascertainable by the terms of the agreement, and therefore certain. "*Certum est quod certum reddi potest.*" A contract to buy all that one shall require for one's own use in a particular manufacturing business is a very different thing from a promise to buy all that one may desire, or all that one may order. The promise to take all that one can consume would be broken by buying from another, and it is this obligation to take the entire supply of an established business which saves the mutual character of the promise. *Manhattan Oil Co. v. Richardson Lubricating Co.*, 51 C. C. A. 553, 113 Fed. 923; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Brawley v. U. S.*, 96 U. S. 168, 172, 24 L. Ed. 622; *Staver Co. v. Park Steel Co.*, 43 C. C. A. 471, 104 Fed. 200; *Smith v. Morse*, 20 La. Ann. 220.

The contract, thus interpreted, is distinguishable from a class of cases where the agreement was held to be a mere option. Thus, in *Railroad v. Dane*, 43 N. Y. 240, an offer to receive and transport

railroad iron from New York to Chicago, not to exceed a certain number of tons, during a specified period, at a definite rate, was accepted without any agreement to deliver any iron for transportation. This contract was held not to be binding on either party for want of mutuality. In *Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn. 381, 387, 18 S. W. 65, a lease was upon consideration that, if the lessee should "deem it advisable" to test for and work mines discovered thereon, he should pay a royalty upon the output. The lease was held void, the lessee not being required to make any test or operate any mine if discovered. In *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791, a contract to sell 10,000 barrels of oil at an agreed price, in such quantities per week as the buyer might desire, and to be paid for as delivered, was held void, because the buyer was held not to be under obligation to take or receive any particular quantity per week, or the whole in a definite number of weeks. In *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869, a contract by a wholesale dealer to sell a retailer, during a certain time, at stated prices, so much lumber as the latter "should require for his trade," was held void for want of mutuality, as there was no approximation of what might be the trade of the retailer. If prices should go down, he would naturally make no sales at a price below what he was to pay; but, if prices went up, he would be in a situation to drive his rivals from business by increasing his trade at the expense of the vendor. In *Davis v. Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357, a contract by which the plaintiffs agreed to work an ore bank for \$1.50 per ton of ore produced "as long as we can make it pay" was held void for want of mutuality and definiteness of terms.

But how does the plaintiff interpret the agreement? For two years it bought no rock. The third year it demands the maximum quantity allowable under any conditions. It excuses itself for its failure to take any rock in 1897 and 1898 by, in effect, saying that "it was more profitable for me to stop making acid phosphate altogether, and to buy my supply of that product." "As I bought 'acid phosphate,' and did not buy the crude rock, I did not violate my agreement with you, for my factory was during that period, consuming no crude rock whatever." But, as illustrating the inconsistency of this position, the plaintiff, when it became cheaper to make than to buy acidulated rock, notified the defendant that if it did not supply its demand for crude rock it would buy acidulated rock, and hold defendant liable for the difference between the price paid and what it would cost to make it; and the damages sued for in this case is the difference between the price paid for the acidulated rock and the cost of making same. If this result is possible, the operation of the contract is most unjust. The only "consumption" of phosphate rock by plaintiff's factory at the date of this contract was in the making of the lower form of fertilizer called "acid phosphate" or "acidulated phosphate." This product it made and sold as a fertilizer. It also used it as a base in making a higher grade of fertilizer. To justify the demand for 3,000 tons of crude rock in 1899—that being double the average or normal demand—the plaintiffs in this declara-

tion aver that when the contract was made they notified defendant that it expected to greatly increase its capacity for making and storing that kind of fertilizer.

Now, in the face of this character of operation conducted by its factory and the known normal "consumption" of rock in its factory, the plaintiff excuses its purchase of acid phosphate by, in effect, saying, "I found it more economical to buy acidulated phosphate than to make it, as I have been doing. This I did in good faith. That is, it was in fact more economical for me to buy than to make, and this good faith of mine justifies my conduct, and now, that it is more profitable to take the rock from you at the stipulated price, seeing that such rock has now doubled in price, and sulphuric acid gone down, than to buy the rock already acidulated, I now elect to resume the consumption of rock for the making of acidulated rock on as great a scale as my agreement with you will permit." Thus interpreted, the agreement is a mere option, and utterly void. *Addison on Contracts*, § 18; *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869; *Amer. Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791; *The Chicago & Great Eastern Railway Co. v. Dane*, 43 N. Y. 240; *Davie v. Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218.

The only consideration for the promise of the defendant to sell is the obligation of the plaintiff to take its entire consumption of rock, and if the plaintiff is in fact at liberty to carry on its business by buying its acidulated rock when its price was less than the cost of making it, and thereby avoiding any actual consumption of crude rock, the contract is one which it may perform or not, as it pleases. "The mutuality of the obligation is the very essence of all contracts founded upon mutual promises. Hence it follows, observes Pothier, that nothing can be more contradictory to such an obligation than an entire liberty in either of the parties making the promise to perform it or not, as he may please. An agreement giving such liberty would be absolutely void for want of obligation." *Addison on Contracts*, § 18. But we do not accept the plaintiff's interpretation of the agreement as correct. From all the surrounding circumstances it was intended to make the amount of rock which the plaintiff was bound to take as definite as possible by the statement of the average or normal consumption in the manner in which the factory was operated and by the agreement to take the entire consumption for a definite time at a stipulated price. Undoubtedly, there is a margin of allowance to be made for the contraction or expansion of the business incident to the varying conditions to which it is ordinarily subject. These conditions may be said to be within the contemplation of the parties when, instead of contracting for a definite amount, deliverable each year, the contract was made for "all of the consumption" of the rock during a definite period of time. This contract gave the plaintiff liberty to use more or less, so long as it did not reduce or increase its consumption beyond the requirements of the usual fluctuations incident to the character of manufacturing carried on by it. This diminution or increase according to the reasonable fluctuations of such a business, if the result of the carrying on of the

business with good faith in view of the obligations of the plaintiff to the defendant, constitutes the limit of the liberty allowed by the contract, and it is only in this respect that the question of good faith has any bearing upon the rights of the parties under the agreement.

Any interpretation of the agreement which will enlarge the discretion of the plaintiff so as to allow him to desist from carrying on the business substantially as it was carried on when the agreement was made by permitting it to substitute purchased acid phosphate for that of its own make, simply because it could temporarily be bought more cheaply than it could be made, would place the defendant at the mercy of the plaintiff, and convert the agreement into a mere option. The contract must be read in the light of the fact that the principal business of the plaintiff was to make "acidulated phosphate" both for sale and for mixing in combination with other chemicals to make another grade of fertilizer. The defendant had the right to believe that the plaintiff's purpose was to continue the making of acid phosphate and that the rock consumed in that business was to be all taken from it. To say that the plaintiff was at liberty to desist entirely from making acidulated phosphate whenever it could buy the product to meet the demands of its business cheaper than it could make it, and was only bound to take rock when it could make that grade of product cheaper than it could buy it, is in opposition to the plain meaning of the agreement, as well as destructive of the mutuality of the contract.

In *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869, the contract was by a wholesale dealer in lumber to supply a retailer during a certain time, and at a stipulated price, with so much of a certain grade of lumber as the purchaser "should require for his trade." This contract was held void for want of mutuality, inasmuch as it left it practically optional with the purchaser to increase or diminish his orders with the rise or fall in price. The opinion of the court was by Grosscup, Circuit Judge, who, after referring to such cases as *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, and *Smith v. Morse*, 20 La. Ann. 220, and *Railway Co. v. Witham*, L. R. 9 C. P. 16, said:

"In all these cases contracts looking towards the future, and embodying subject-matter necessarily indefinite in quantity, have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are, within certain limits, ascertainable by the vendor. He is thus enabled to make reasonably accurate calculation of the extent of his obligation. Then, too, the purchase is only an incident of the vendee's business. Presumably, the business will go on irrespective of a rise or fall in the prices of subsidiary supplies. There thus remains to the vendee little or no temptation, on account of the rise or fall in prices, to greatly enlarge or diminish the quantity of his orders."

In *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218, the contract was to furnish all the steamers of the defendant's line with coal for a definite time at a stipulated price. These steamers were at the time making regular trips between certain ports. Coal was delivered as needed for a part of the time, when defend-

ants sold and ceased to operate their steamers, and declined to receive coal thereafter, although the purchaser of the steamers continued to operate them as before. The contract was construed as one to furnish all of the coal which should be required to operate the steamers during the period covered by the agreement, and that the sale of the steamers did not operate to relieve the defendants from the obligation to take the coal "which the ordinary and accustomed use of the steamers required."

The plaintiff in error has cited and greatly relied upon the case of *McKeever & Co. v. Cannonsburg Iron Co.*, 138 Pa. 184, 16 Atl. 97, 20 Atl. 938. The agreement involved there was to supply an iron mill "with all of the coal you will require for your mill for three years." The prices fixed were for three grades of coal—"forked coal," "run of mines," and "slack." The mill, pending this agreement, introduced natural gas, a fuel unknown when the agreement was made, which greatly reduced the quantity of coal required. It also bought a grade of coal called "nut" from another person, and claimed that they were liable only for the coal of the kinds specified actually required after the consumption of gas was begun. It was held that the mill was at liberty to diminish the use of coal as fuel by the introduction of gas, but that, as it appeared the "nut" coal took the place of "slack," it had no right to use it without liability to the plaintiffs. The case differs in its principal point on the facts and circumstances from the one at bar, though in the minor question—the right to substitute one grade of coal for another—it quite resembles the present case, and supports the conclusion we have reached. The opinion is, however, entitled only to that weight which attaches to a judgment of the Pennsylvania Supreme Court, for it is not supported by either argument or authority.

2. The plaintiff, by the facts stated on the face of the declaration, shows that it committed the first substantial breach of the contract. Having desisted from receiving phosphate rock for a period of nearly two years, because it found it more profitable to buy than to make acidulated phosphate, it now demands damages from the defendant because it had to buy acidulated phosphate at a loss in consequence of the refusal of the defendant to supply it with phosphate rock after it became more profitable to make than to buy that grade of fertilizer. If there is anything well settled it is that the party who commits the first breach of the contract cannot maintain an action against the other for a subsequent failure to perform. The plaintiff has not kept the contract, and shows no excuse for its breach. It does not, therefore, show any such performance on its own part as to entitle it to demand that the defendant shall go on and perform, or pay damages for a subsequent refusal to recognize the contract as in force.

3. The contract was clearly an entire contract. It was for the sale of all the phosphate rock which should be needed for the ordinary requirements of the plaintiff's factory, and was not a number of single contracts for the sale and delivery of definite quantities as ordered from time to time. The breach went to the whole of the consideration. *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. 569, 12 C. C. A. 306; *Monarch Cycle Co. v. Royer Wheel Co.*, 44 C. C. A.

523, 105 Fed. 324; *Norrington v. Wright*, 115 U. S. 213, 6 Sup. Ct. 12, 29 L. Ed. 366; *Cattle Co. v. Martindale*, 11 C. C. A. 35, 63 Fed. 84; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920. We find no settled line of decisions in either Tennessee or Ohio in conflict with the decisions cited. So, whether the contract be a Tennessee or Ohio contract, and be governed by the law of the one state or the other, the result is the same, viz., the contract was entire, and not divisible. The Tennessee statute (section 4620, Shannon's Code) has no application, as it does not determine whether a particular contract is entire or divisible. It only provides that successive actions may be brought for successive breaches of a contract "when ever, after the former action, a new cause of action arises therefrom."

4. The right of the defendant to bring an action for the breach of the agreement is not before us. If it were, we would have to deal with the question as to how far it would be essential to aver and show a readiness on its own part to comply.

5. It is next contended that the defendant company "waived its right to rescind," and "is estopped to deny liability," because it did not refuse performance until after the plaintiff had filed its orders for 3,000 tons of rock between January 25 and July 25, 1899. There is nothing in this in any view of the case. The failure of the plaintiff to order shipments of rock for nearly two years naturally induced the defendant to suppose the agreement abandoned. Hence, when plaintiff began to give orders again, the defendant was unable to comply, having made no preparation to carry out the contract. But under date of February 17th the defendant declined to ship rock, and denied liability for the difference between cost of acid phosphate rock in the market and its cost made from rock under the contract. Under date of March 30th, defendant inquired upon what the mill of defendants had been run during its long period of inactivity in sending orders for rock. Plaintiff's correspondence is disingenuous in this matter. It waited until May 13, 1899, before answering, and then gave no information, referring the defendant to its statement in some earlier letter that "we had complied with the terms of our contract with you in every respect," and making no other explanation of its own breach. Instead it rapidly rushed in its orders, so that within a very short period it ordered 3,000 tons of rock, although its declaration avers that for the previous years its consumption of phosphate rock would not have exceeded 750 tons per year if it had bought the crude rock and made its own acid phosphate. No intention to waive is shown, and no such full knowledge of the facts as would justify us in saying that it was bound even if the fact of waiver was made out. There are other answers to this in view of the pleadings and the attitude of the parties. But it is enough to say that no intent to waive is shown by the facts appearing in the declaration.

The demurrer was properly sustained, and the judgment is affirmed.

MERCHANTS' BANK OF GRENADA, MISS., v. THOMAS.

In re **WRIGHT & BERRYHILL**

(Circuit Court of Appeals, Fifth Circuit. March 31, 1903.)

No. 1,221.

1. BANKRUPTCY—PROVABLE CLAIMS—PARTNERSHIP NOTES.

Under Bankrupt Act, 30 Stat. 562, § 63 [U. S. Comp. St. 1901, p. 3447], providing that fixed liabilities of a bankrupt, evidenced by a statement in writing, absolutely owing at the time of the filing of the petition, may be proved and allowed against his estate, notes signed by a bankrupt firm, which included claims on which one of the partners was not primarily liable, were prima facie debts provable against the firm.

2. SAME—DEBTS OF PARTNERS—PAYMENT BY FIRM—CONSIDERATION.

Where, on the consolidation of the business of two firms and the creation of a new partnership, such partnership agreed to pay the debts of its individual members to the amount of stock of goods contributed to the firm by each member, the mutual promises of the several partners and the reception of the goods contributed by them to the firm was a sufficient consideration for the firm's promise to pay such debts.

3. SAME.

On the organization of a partnership by a consolidation of the stocks of two other firms, the partnership agreed to pay the debts of the individual partners to the extent of goods contributed by them. A settlement was had between the partners and plaintiff bank, to which they were indebted, and notes were given for an indebtedness of one of the partners for which the firm was not liable. Such notes thereafter matured, as did another indebtedness of the firm for overdrafts, etc., when a settlement was had by which new notes were given by the firm for the entire indebtedness, including the notes of such partner, and the time of payment was extended, and the old notes surrendered. *Held*, that such extension of time was a sufficient consideration to render the firm liable for the prior debt of the individual partner.

4. SAME—INSOLVENT PARTNERSHIP—PAYMENT OF INDIVIDUAL DEBTS—CREDITORS ENTITLED TO OBJECT.

Where all the creditors of a bankrupt partnership who were such at the time the firm agreed to pay the individual debt of one of its partners in consideration of an extension of time, both for the debt of such individual partner and the debt of the firm to the same creditor, had been paid in full prior to the filing of the firm's petition in bankruptcy, the firm's agreement to pay such individual debt could not be attacked by the trustee or other creditors on the ground that it was a fraud on the firm's creditors.

5. SAME—ATTORNEY'S FEE.

Where notes given by a firm provided that if they were placed in the hands of an attorney for collection the makers and indorsers agreed to pay the holder an attorney fee of 10 per cent. on the amount due, and the maker thereafter became bankrupt, and the notes were placed in the hands of an attorney for collection, the attorney's fee provided was properly provable as a claim against the bankrupt's estate.

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

Bankruptcy. Contest of claim.

The following is the evidence referred to in opinion:

"Q. Were you never dissatisfied with the manner in which the business was run? A. Yes, sir. Q. Did you not frequently make complaints to the officers of the Merchants' Bank? A. Yes, sir. Q. What did they tell you in regard to it? A. They would see Mr. Berryhill, and get him to make out a

statement, and it seemed to satisfy them all right. I insisted that they would see Mr. Berryhill, and ask him, because he kept on buying so many goods, and if he did not stop I thought we would be ruined. Q. This was of frequent occurrence with you within the last year of your connection with the firm of Wright & Berryhill, was it not? A. Yes, sir. * * * Q. The fact is, you had been paying all other creditors something, had you not? A. Yes, sir. Q. Then on the date of this assignment, on the 4th day of June, 1901, all of your indebtedness practically was paid that was then due, except the bank debt, was it not? A. Yes, sir; the majority of it. Q. You paid everybody else but the bank? A. Yes. Q. You paid all other creditors as your debts fell due? A. Yes, sir. Q. Now, the consideration that moved from the bank to you and to the firm of Wright & Berryhill when you executed those notes on the 15th of January, 1901, was it not the extension of the debts then due to the bank? A. Yes, sir. Q. All the debts owing by you and by the firm of Wright & Berryhill were past due on the 15th of January, 1901, were they not? A. Yes, sir."

W. C. McLean, for appellant.

S. A. Morrison (Robertson Horton, on the brief), for appellee.

Before PARDEE and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a contest as to the validity of a claim against a bankrupt partnership. To make clear the questions involved, it is necessary to make a condensed statement of the facts.

Berryhill Bros., a firm composed of Walter Berryhill and S. N. Berryhill, were engaged in mercantile business. They had a stock of goods worth about \$3,900. W. B. T. Wright was also engaged in mercantile business. He had assets worth about \$4,500. Berryhill Bros. were indebted to the Merchants' Bank of Grenada, Miss., in the sum of about \$4,300, and W. B. T. Wright was indebted to the bank in the sum of about \$1,767.42. The Berryhills dissolved their partnership, S. N. Berryhill withdrawing, and Walter Berryhill assuming all the liabilities and taking all the assets of the firm. At the same time, April 1, 1898, W. B. T. Wright and Walter Berryhill formed a partnership under the firm name of Wright & Berryhill. The two stocks of goods—the one formerly belonging to Wright and the one formerly belonging to Berryhill Bros.—were put together as the property of the new firm of Wright & Berryhill. It was agreed between the members of the new firm that they owned the partnership assets in the proportion of \$3,900, contributed by Walter Berryhill, to \$4,500, contributed by Wright. The two debts to the Merchants' Bank remained unpaid, and constitute the beginning of the debt involved in this litigation.

On April 2, 1898, the Merchants' Bank, by its cashier, J. W. McLeod, made an agreement with W. B. T. Wright and Walter Berryhill, which recited that it was the purpose of the bank to put the debts which Berryhill Bros. owed the bank in "proper shape to follow said merchandise," referring to the merchandise which Walter Berryhill had contributed to the firm of Wright & Berryhill, "in order that said bank shall not lose all rights against the same," and reciting, also, that Wright was willing to execute firm paper to the amount of \$3,000 for the purposes aforesaid, but only on certain conditions, which were stated. The conditions were for the protection of Wright, making the proceeds of the merchandise which Walter Berryhill had

contributed to the new firm especially liable for the \$3,000 note. On the same day another agreement was made by the same parties, which recited that Berryhill Bros. and Walter Berryhill had executed another note to the bank for \$1,000, and that Wright had indorsed the same, but "only as a stimulant to and persuasion of said first-named parties to pay same"; it being agreed that Wright should not be liable on the note except in the event that when the note for \$3,000, referred to in the first contract "is paid, if there be a surplus interest of Berryhill Bros. or Walter Berryhill in the business, this note for \$1,000 is to be good to the extent of the surplus."

The apparent purpose of the two contracts was to give the bank a claim on the goods once belonging to the firm of Berryhill Bros. for the debts which Berryhill Bros. and Walter Berryhill owed the bank. As evidence of part of the indebtedness herein referred to of Berryhill Bros. to the bank, Walter Berryhill on December 30, 1899, made two notes, each for \$885, payable to the bank 12 months after date, and these notes were signed also by the firm of Wright & Berryhill; it being, however, expressly agreed that Wright should not be liable on the notes except in the event that when the notes for \$3,000 and \$1,000 described in the two previous contracts were paid there should be a surplus of the interest of Walter Berryhill in the firm business, then these notes were to be "good to the extent of such surplus." Walter Berryhill owed these debts to the bank, and Wright was apparently, from the inception of his partnership with him, willing to assume them as a member of the firm to the extent of the assets of the firm contributed by Walter Berryhill, and to the extent of the interest which the latter might have in the firm property.

Some payments were made on these notes, and they were renewed from time to time, interest being added. Prior to January 15, 1901, there had been renewals of these several debts by notes, all of which were signed by Wright & Berryhill. During this time the firm of Wright & Berryhill overdrew their account at the bank to the amount of \$4,606.86. The bank was pressing Wright & Berryhill for a settlement of these several claims, and on January 15, 1901, they were all settled by five notes, which include all of the debts herein referred to, for which Wright & Berryhill had signed other notes, the overdraft for \$4,606.86, and also the two notes for \$885, for which Wright was only liable to the extent of any surplus which might remain in his hands of the interest of Walter Berryhill in the partnership after the satisfaction of the other two notes, as shown by the agreement of January 2, 1900. These five new notes are the ones contested in this case. They are each dated January 15, 1901, payable to the Merchants' Bank, and signed Wright & Berryhill, W. B. T. Wright and Walter Berryhill—one for \$2,939.02, due February 15, 1901; one for \$2,962.32, due March 15, 1901; one for \$2,987.60, due April 15, 1901; one for \$3,011.89, due May 15, 1901; and one for \$3,036.17, due June 15, 1901. On July 15, 1901, Wright & Berryhill, as a partnership, were adjudged involuntary bankrupts. On July 24, 1901, the five notes last above described were by the Merchants' Bank, the appellant, presented and duly proved as claims against the bankrupts.

B. F. Thomas, the appellee here, having been appointed trustee in

bankruptcy of the bankrupts, filed before the referee a petition praying a reconsideration of the claim of the Merchants' Bank for two reasons: First, because the bank had received a preference from the bankrupts within four months next preceding the filing of the petition in bankruptcy; and, second, because the claim is not provable against Wright & Berryhill as a firm; that as to Wright the claim is without consideration, and that Berryhill alone, if any one, is responsible on the claim evidenced by the notes; and that, if the claim is allowed at all, it should be allowed against Berryhill individually. The bank answered the petition, denying that they received a preference, and denying that the claim is not provable against the firm of Wright & Berryhill. The claim, as proved, including the attorney's fee embraced in the five notes, amounted to \$16,895.88. The referee reduced the claim by disallowing the following amounts, which were embraced by the five notes: One thousand dollars, being the note for that sum referred to in the contract of April 2, 1898; the two notes for \$885 each, and interest thereon, referred to in the agreement of January 2, 1900; and the attorney's fee provided for by the notes. The claim, as allowed by the referee, was for \$12,134.91.

The case went from the referee to the court of bankruptcy, both the Merchants' Bank and the trustee excepting to the referee's decision. The court held that the claim was provable only for the overdraft \$4,606.86 and an item of \$741.52, which reduced the claim as allowed to \$5,348.38, and, judgment having been entered to that effect, the Merchants' Bank appealed to this court.

By the terms of the bankrupt act, debts of the bankrupt may be proved and allowed against his estate which are fixed liabilities evidenced by a statement in writing absolutely owing at the time of the filing of the petition against him. 30 Stat. 562, § 63 [U. S. Comp. St. 1901, p. 3447]. The five promissory notes signed by the bankrupts are *prima facie* debts provable against them.

There is no evidence in the case tending to show that the appellant received of the bankrupt any preference within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before adjudication.

The objection that the notes are without consideration is equally untenable. When the partnership of Wright & Berryhill was formed, the stocks of goods held by each of them separately were merged. The partnership got the benefit of the stock held by each partner. The partners were then severally indebted to the Merchants' Bank for money advanced. A promise made by the firm to pay the debts of the individual members to the amount of the stock of goods contributed to the firm by each member is sustained not only by the consideration of the mutual promises of the several partners, but, the firm having received the goods, it is but just that it should assume the debts contracted for money to invest in the goods by the partners separately. "If a partnership is formed before goods purchased by one of the partners are paid for, and the partners agree that the new firm shall use and pay for the goods, and one of them gives the firm's note or acceptance to the seller in payment, this binds the firm. It is held to be on a perfectly good consideration, and

it is but just that the firm should assume the debt." 1 Bates on Partnership, § 515, and cases there cited.

When the five notes were made, the whole debt for which they were given was due, and the surrender of the notes and contracts evidencing the debt, and the extension of the time of payment, is sufficient legal consideration to support the notes. It is true that on January 15, 1901, the firm of Wright & Berryhill were not bound by the two notes for \$885. Although signed by the firm, by a collateral agreement they were the obligations of Walter Berryhill only. But they were due, and an agreement to extend the debt evidenced by them, and also the debt shown by the other notes and the overdraft, was a sufficient legal consideration for the renewal of the two \$885 notes, they being surrendered, and the new notes, including them with the other debts, being accepted in their place. By the settlement the firm obtained an extension of its entire debt. If the firm be considered, so far as the amount of the two \$885 notes is concerned, as only the surety of Walter Berryhill, the contract is sustained by sufficient consideration to bind the firm. 1 Brandt on Suretyship, § 16.

This disposes of the questions raised by the written objections to the claim filed before the referee, for the only objections made were that a preference had been given and want of consideration. But another objection is made in the briefs and argument, and no question is raised as to the failure to make it formally before the referee and in the court of bankruptcy. It is contended that the claim is not provable because "an insolvent firm cannot assume the individual debts of the partners; it is a fraud upon the firm creditors, for insolvent partners must be considered as holding their joint property for the payment of their joint creditors." It is to this point that counsel on both sides have given most attention. If the partnership is solvent, all the partners consenting, the firm assets may unquestionably be used to pay or secure the individual debt of one of the partners (*Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530); but when the partnership is insolvent there is conflict in the authorities on the question as to whether the assets of the firm may or may not be so used (*Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370; *Bank v. Durfey*, 72 Miss. 971, 18 South. 456). It is evident, however, on principle, even where the firm is insolvent, that only existing creditors would have cause to complain, or, at least, that subsequent creditors could not impeach the transaction without showing the fraudulent intent of the parties. *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; *Graham v. R. R.*, 102 U. S. 148, 26 L. Ed. 106. The general principle here stated is adopted by statute in Mississippi, for it is provided that the statutes condemning fraudulent conveyances (Rev. Code 1892, §§ 4226, 4227) shall not "in any case extend to creditors whose debts were contracted after such fraudulent act unless made with intent to defraud them." *Id.* § 4228; *Hilliard v. Cagle*, 46 Miss. 309.

The record does not clearly show the insolvency of Wright &

Berryhill at the time they executed certain notes assuming the individual debts of the members of the firm, prior to the making of the five notes on the last settlement with the bank. But it is clearly shown that on and shortly before January 15, 1901, when the five new notes were made, the firm was insolvent. Before that date the firm had never assumed the two notes of Berryhill for \$385 each. The contention is that the assumption of these two notes by the insolvent firm is fraud, as matter of law, against the creditors of the firm. There is no evidence in the case to show a fraudulent intent. The aim of the bank was to secure the payment of the claim, and the purpose of the partnership was to secure and pay it. The alleged fraud is that as matter of law the partnership had no right to make a note that would cause partnership assets to be devoted to the payment of the individual debt of a member of the firm. We do not understand that either the referee or the court of bankruptcy found any evidence of fraud in fact in the transaction.

A partnership has the same dominion and control over its property that an individual has. It can sell it, mortgage it, pledge it, or give it away, all the partners consenting. The partnership, all the partners agreeing, may become the surety of another, or may assume the payment of the debts of another. All such acts by the partnership are subject to investigation and cancellation by the courts, just as such acts of an individual may be investigated and canceled. The acts of either the partnership or the individual are subject to attack for fraud, but only by those affected unfavorably by the acts.

Conceding, only for the purposes of the case, that the partnership of Wright & Berryhill, being insolvent, had no right to assume the payment of Berryhill's two notes for \$385 each, and that such act was a fraud in law on the partnership creditors, we are then met by the question, what is meant by its "creditors"? The creditors meant in the application of this principle are those affected by the act—the creditors of the firm who held claims against it when the notes were given on January 15, 1901. It follows from the absolute dominion which the firm had over its property and its right to make contracts that, both partners consenting, it had the legal right, for sufficient consideration, to assume the payment of the debt of another, and that no one to whom the firm was not then indebted could make any objection. There are, of course, cases in which acts may be fraudulent as against subsequent creditors, but there is nothing in this case tending to such conclusion. *Graham v. Railroad Co.*, *supra*. Only the creditors of the firm existing on January 15, 1901, can raise the question urged on our attention in this case. The trustee, of course, represents all the creditors and can legally act for them. We have carefully read the record more than once, and we fail to find any proof that there are now any creditors of the firm who were its creditors when the five notes were given. It is true that it now appears that the firm was insolvent at that time. It is also shown that it owed debts at that time to the amount of between \$3,900 and \$4,000, besides the debts to the bank. This is shown by proof of a statement made by the firm to the bank. The same statement showed the firm's stock of merchandise was worth \$18,000; that it had good

notes and accounts collectible by March 1st for about \$5,000. This evidence tends to show that the firm was amply able to discharge the debts of about \$4,000 before the date of the bankruptcy, which occurred July 15, 1901, six months after the five notes were given for the debt to the bank. It appears that on June 4, 1901, the firm made a general assignment. The general assignment is not in evidence, and no evidence is offered as to any debt, except the bank debt, that was secured by it. And nowhere does the record show the existence of a debt, except those due to the bank, that was owing on January 15, 1901. On the contrary, the testimony of one of the partners, Wright, tends to show that all of the debts, except that to the bank, that were past due January 15, 1901, were paid before the firm became bankrupt, and that the present debts of the firm are the debts to the bank and debts contracted since the making of the five notes. An excerpt from the evidence on this subject will be found in the statement.

If it appeared from the record that the existing debts had been discharged with means secured by incurring the subsequent liabilities, the latter creditors would be subrogated to the rights of the former. Wait on Fraud. Con. § 103. But no such claim or contention is made or proved, and there is no evidence on which to base it.

Each one of the five notes contains an agreement that, "if this note is placed in the hands of an attorney for collection, the makers and indorsers hereof agree to pay the holder of this note an attorney's fee of ten per cent. upon the amount due." An agreement by which the maker of a promissory note or other contract binds himself to pay a reasonable attorney's fee if the contract is not performed according to its terms, and the other party is required to take steps to enforce it, has generally been held just and valid. *Machine Co. v. Moreno* (C. C.) 7 Fed. 806. It is but a reasonable stipulation for indemnity for expenses which the debtor may himself render necessary. Such contracts are held valid and not against public policy in Mississippi. *Meacham v. Pinson*, 60 Miss. 217; *Eyrich v. Bank*, 67 Miss. 60, 6 South. 615. A promissory note providing for the payment of attorney's fees, "if placed in the hands of an attorney for collection," involves exactly the same question, and a note containing a stipulation in that form was held valid in *Barton v. Bank*, 122 Ill. 352, 13 N. E. 503. A stipulation, however, for a definite amount or percentage as attorney's fees in a note is not conclusive on the parties. A creditor would not be permitted to make a profit to himself by stipulating for a larger sum or percentage than the reasonable attorney's fees he would have to pay. *Munter v. Linn*, 61 Ala. 492; *Williams v. Flowers*, 90 Ala. 136, 7 South. 439, 24 Am. St. Rep. 772. When, however, the amount is not obviously excessive, the stipulation as to the amount should govern. *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99. No evidence was offered as to the value of the attorney's services, except the contract itself.

There is no conflict in the evidence that these notes were placed in the hands of an attorney for collection, and that he has performed services in endeavoring to collect them. For such services the bank

became indebted to the attorney, and the purpose of the stipulation is to indemnify the bank against such expense.

We are of opinion that on the record before us the five notes, including the attorney's fees of 10 per cent., are provable claims against the estate of the bankrupts, and an order permitting them to be so proved must be entered.

The decree of the court of bankruptcy, therefore, must be reversed.

DENNISON MFG. CO. v. SCHARF TAG, LABEL & BOX CO.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1903.)

No. 1,139.

1. RES JUDICATA—DECREE ON DEMURRER—MATTERS CONCLUDED.

A decree sustaining a demurrer to a bill and dismissing the suit is an adjudication only as to the exact point raised by the pleadings and determined on the demurrer.

2. SAME.

A bill alleged that complainant was a manufacturer of labels, and that it had adopted and used certain arbitrary numbers, running from 1001 to 1007, as trade-marks, on its bottle and jar labels, to identify them as its goods and indicate their size and shape; that defendant made and sold labels substantially the same, except having a blue instead of a red border; and that defendant had adopted and used the numbers from 3,001 to 3,007 to designate its labels corresponding in size and shape to those of complainant. The bill prayed for relief on the ground of infringement of trade-mark and unfair competition. *Held*, that a decree sustaining a demurrer to the bill, and dismissing the same for want of general equity, was not a bar to a second suit for unfair competition, on the ground that defendant was using the identical numbers used by complainant to designate its corresponding labels, and also that it made its labels with a red border, in imitation of complainant's.

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

This is an appeal from a final decree sustaining a plea of *res adjudicata* interposed by the defendant to a bill in equity filed by complainant to restrain the infringement of an alleged trade-mark, and in the alternative to restrain the defendant from unfair trade. The complainant's bill, among other things, alleges that it for many years has been engaged in the manufacture and sale of labels, tags, etc.; that among the labels so made and sold in large numbers have been certain labels adapted to use upon bottles and other receptacles, which have been designated "bottle and jar labels," one species or class of which have been rectangular in shape, with red borders, and which have been and continued to be of substantially the same size and shape. In respect of its trade-mark used in connection with said bottle and jar labels, the bill avers: "That it manufactured its said bottle and jar labels in seven different sizes and shapes, arbitrarily devised or selected, and that for the purpose of distinguishing and identifying its said labels, and to differentiate the same from labels manufactured or to be manufactured by others, and to denote the origin of the same as being your orator's manufacture, in advance of all others, your orator appropriated, applied, and used certain arbitrary numbers, hereinafter more particularly referred to and explained, each of which numbers was by your orator, in advance of all others, appropriated, applied, and used as a trade-mark, and each of which, long before the acts of the defendant hereinafter referred to, came to be and was well known

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1048.

in the trade and to consumers as your orator's trade-mark or designation by it employed to distinguish and identify a label of its manufacture, and to enable the identification and sale thereof as your orator's manufacture. And your orator further says that before and at the time of the acts of the defendant hereinafter complained of it was in the exclusive possession and enjoyment of all of the said numbers by it appropriated and used as aforesaid, and that each of said numbers was and had long been in use by consumers as a 'short trade phrase' between buyer and seller, availed of in distinguishing and identifying your orator's said labels and in purchasing and selling the same. And your orator further says that each of the said numbers thus by it appropriated, applied, and used was arbitrarily selected, and that in each instance the number had no relation whatsoever to any characteristic, and was in no way descriptive of the label in connection with which it was used." The bill then alleges that among other trade-marks or numbers so appropriated by it for its labels having red borders are a set or series of seven sets of four figures each, viz., 7001 to 7007 inclusive, and that each of said sets of figures is used to indicate a red-bordered bottle label of a particular size and shape of complainant's manufacture. In explanation of the mode of use the bill avers that "its said numbers, all and singular, have been used and availed of in the same way from the first, each number having been continuously and always employed in connection with a label having a red border and of a particular size and shape, and that each number has continuously and always, in addition to giving notice of and indicating the origin of the label as being your orator's manufacture, given notice of and indicated the color of border, size and the shape of the label. And your orator further says that it is and has long been a custom, for many years observed, for each manufacturer of labels like those hereinbefore mentioned, as well as each manufacturer of steel pens, pencils, buttons, ornamental nails, and other articles, which are necessarily made in a great many different sizes, shapes, and styles, to prepare and use as his trade-marks or designations a series of numbers or marks in the way in which your orator's said numbers or marks have been by it used as hereinbefore explained, which custom had its origin in the necessities of trade, and has been and is of essential and fundamental importance, and which has long been an established custom and observed in the trade to which the labels of your orator and those of the defendant appertain. And your orator further says that the successful prosecution of the business of making and selling labels like those hereinbefore described is to a large extent dependent upon the observance of the said custom, and the use by each manufacturer, to the exclusion of others in the trade, of a series of marks or numbers substantially in the way in which your orator's said numbers have been by it used, as hereinbefore set forth." It is then charged that the defendant corporation is engaged in a like business, and knowing of the appropriation of the said set of numbers for the purpose aforesaid has unlawfully and fraudulently "made use, in connection with the sale of and to denote and designate bottle and jar labels having red borders and not made by or for your orator, of each and all of your orator's numbers or trade-marks, and specifically in the same way that they have been used by your orator as hereinbefore set out." It is then distinctly averred that the defendant has made use of each of the said series of numbers as a designation of a red-bordered label, "substantially the same in shape and size as your orator's label," of the corresponding number used by your orator in connection with a like label. It is charged that these said alleged trade-marks are used upon the cartons containing such labels and in a catalogue descriptive of same used for advertising purposes. This, the bill charges, is done with the intent "to deceive the purchasers and defraud the public and to injure your orator, and that "purchasers and consumers have been and are deceived and misled in buying the labels thus sold by the defendant in the belief that they were and are of the manufacture of your orator." It is further charged "that each of the said numbers thus by the defendant applied upon the outside of its packages is used as a designation or number by the trade and public in buying and selling the goods." The complainant seeks protection against the conduct of defendant, not only upon the contention that it has a valid trade-mark in the numbers so used as and for the purposes

stated, but that if the same are not to be regarded as trade-marks that "their use by the defendant as hereinbefore set out is fraudulent and inequitable, and constitutes an unfair competition in business, which equity will restrain." "And your orator prays that it may have the relief in the premises to which it is entitled, whether the said numbers are held to be trade-marks or not." It is further stated that the complainant "uses among other marks and numbers to distinguish and identify its labels and tags, other than 'bottle and jar labels,' hereinbefore referred to, and that it does not by this bill in any wise waive or relinquish any cause or causes of action whatsoever, at law or equity, which it may have against this defendant by reason of any use by the defendant of any one or more of its marks or numbers not used in connection with bottle and jar labels." Relief in both aspects of the bill and an accounting is prayed.

To this bill the defendant interposed a plea setting out the record in a former cause between the same parties, in the same court, and the decree therein, as a bar to the entire relief claimed under this bill.

The former record and decree relied upon as a bar consisted of a bill filed by this complainant in which the general averments in respect of the business done and the trade-marks claimed by it were, in substance, much like the general averments of the present bill. The specific infringement charged in the former suit was that "the defendant has manufactured bottle and jar labels of seven different sizes and shapes in every way substantially similar to the seven sizes and shapes of your orator's hereinbefore described. In connection with one of these seven labels, to match the label of your orator of corresponding size and shape, the defendant has applied the number '3001.' Thus your orator's label of a particular size and shape, designated '1001,' is by the defendant reproduced and designated '3001,' and each of the other six marks of your orator are imitated in the same way, number '3002' being employed to match your orator's '1002,' '3003' to match your orator's '1003,' '3004' to match your orator's '1004,' '3005' to match your orator's '1005,' '3006' to match your orator's '1006,' '3007' to match your orator's '1007,' all as more fully appears by the page marked 'Defendant's Catalogue' herewith produced, and which page is a page taken from a catalogue by the defendant published and used in its business, and in connection with the sale of its goods to the trade and the public. Your orator charges that the defendant has knowingly and fraudulently arranged the said page marked 'Defendant's Catalogue' with full knowledge in the premises, to match the page of your orator's catalogue herewith produced, designated 'Complainant's Catalogue,' whereby your orator's good will is jeopardized, and the fraudulent sale of the defendant's labels as and for those of your orator, and in inequitable competition therewith, made possible and promoted." That bill also charged that actual deception had resulted, and purchasers had been misled in purchasing the defendant's label, supposing them to be those made and sold by the complainant. It also contained a paragraph identical in phrase with the one in the present bill in respect to the complainant's adoption of many other marks and numbers to distinguish and identify its bottles and jar labels, and that it does not waive any right or cause of action against the defendant by reason of any use by it of any one or more of its marks and numbers not used in connection with bottle and jar labels. That bill also sought relief in the alternative; that is, it averred that it was entitled to the exclusive use of said numbers as trade-marks, but to protection against their use in the manner used, whether trade-marks or not, as constituting unfair trade.

To this bill the defendant demurred, as follows: "The demurrer of the Scharf Tag, Label & Box Company, defendant, to the bill of complaint of the above-named complainant: This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as therein set forth and alleged, doth demur to the said bill, and for causes of demurrer sheweth: (1) That the said complainant has not, in and by the said bill of complaint, made or stated the ownership of any valid trade-mark or any trade-mark upon which it is entitled to the relief prayed, or to any relief from or against this defendant, because of the use of the numbers referred to in the said bill of complaint. (2) This defendant for the second cause of demurrer shows that

the said complainant has not shown any legal or equitable title to the subject-matter of the printed catalogue submitted by the said bill of complaint, and against the publication of which it asks relief, and that on the face of the bill and the catalogues submitted the said complainant is not entitled to the relief prayed or any relief against the publication of the catalogues of this defendant. Wherefore, and for divers other good causes of demurrer not appearing on the said bill, the defendant doth demur thereto, and it prays the judgment of this honorable court whether it shall be compelled to make any further answer to the said bill, and humbly prays to be hence dismissed, with its reasonable costs in this behalf sustained." It also filed an answer to the charges of fraudulent or unfair competition in trade.

The case was heard upon the demurrer, and the bill dismissed. The decree dismissing the bill was in these words: "This cause coming on to be heard upon the bill of complaint of the complainant, and demurrer and answer on the part of the defendant and arguments of counsel, and an opinion having been rendered sustaining the demurrer, and that a decree will be entered dismissing the bill, with costs, unless the complainant elects to amend within fifteen days after notice of this decree; and, the complainant having failed to amend, it is ordered, adjudged, and decreed that the demurrer be sustained; that the bill of complaint herein be dismissed, with costs, in accordance with the opinion heretofore filed in the cause."

Archibald Cox and Charles H. MacDonald, for appellant.

Jas. Whittemore, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

1. The merits are not involved. The only question is upon the decree sustaining the plea of *res adjudicata*.

2. The plea goes to the whole bill. It is consequently too broad if there is any relief possible under the present bill, notwithstanding the thing adjudged which is pleaded in bar.

3. For the purposes of this case we may assume the broadest claims made for the former adjudication, to wit, that it was adjudged that the complainant could not acquire any valid or exclusive right to the numbers used by it or to any such system or method of designating or describing the different kinds of labels to which different numbers were applied. Both the suits were decided by Judge Swan, and opinions were filed in each case. In the opinion filed in the case at bar that learned judge, referring to what he regarded as adjudged in the former case, said:

"It was held in the first case, rightly or wrongly, that the numbers used by complainant as 'short trade phrases' to designate its various labels to its customers, and for the latter's convenience in ordering different sizes of labels by numbers instead of by measurement or lengthy description, do not constitute trade-marks, and that the adoption by any other manufacturer of the same system of designation of his labels was not in itself unfair competition in trade. Whether those conclusions are sound or unsound is not the inquiry. If unsound, it is too late to review them; if sound, they equally defeat this suit. The complainant took and perfected its appeal in that case, but upon its motion the appeal was dismissed. In the first suit the bill sets forth a series of numerals forming part of the same system of 'short trade phrases,' claiming the numerical designation of its various labels as trade-marks, and the use of any of them by defendant upon its labels as an order or trade phrase was an invasion of complainant's property right, and, as in the present bill, that claim failing, alternatively that such use per se evidenced unfair competition in trade."

But the infringement charged in the former case was not the same as the infringement charged in this case. In the former case the infringement consisted in a simulation of the plan, system, or method, and not an identical use of the same specific numbers upon labels of the same size, shape, and color. The complaint was that the defendant violated the complainant's rights in the numbers 1001 to 1007 by the use of the numbers 3001 to 3007 upon labels having blue borders, but of size and shape corresponding to those of the complainant designated by the series of numbers. But the former bill also sought relief upon the theory that if the complainant was not entitled to appropriate the series of numbers, claimed as an exclusive or technical trade-mark, these numbers had acquired a secondary signification indicating origin or ownership, and that equity would protect the use of such numbers in such a way by a rival in trade as was calculated to enable a competitor to sell its own product as and for the goods of the complainant. Upon this question of unfair trade the case made by the former bill and the one at bar present a totally different state of facts. Thus that bill charged "that the defendant has fraudulently and unlawfully violated and infringed your orator's rights in the premises by making use of palpable imitations and infringements of your orator's numbers, trade-marks, and designations"; "that defendant has knowingly made use in connection with bottle and jar labels by it manufactured in the exact way in which your orator has used the numbers aforesaid, which imitations, as applied and used by the defendant, have been calculated to mislead and promote and enable unfair competition and the sale of defendant's bottle and jar labels as and for those of your orator's catalogue."

Referring to this matter, Judge Swan in his opinion sustaining the demurrer said:

"It is not alleged that defendant imitates complainant's labels in any other particular than by denominating by numerals—other than those used by the complainant—the different sizes and colors of labels which it makes and sells, or that it offers its goods as of Dennison's manufacture. The arrangement of the illustrations of labels in the catalogues of both parties is the same, but that feature of a sales catalogue is not the subject of exclusive use. *Adams v. Heisel* (C. C.) 31 Fed. 279. Neither illustrations nor arrangement suggest the identity of Scharf's labels with Dennison's. The differences in color of border design and numerals are so obvious as to disprove at a glance anything more than a generic resemblance. *Liggett and Meyers Co. v. Finzer*, 128 U. S. 184, 9 Sup. Ct. 60, 32 L. Ed. 395. Both catalogues are by reference made part of the bill, and the differences noted are further accentuated by the name of the manufacturer displayed in bold type at the top of those pages of the respective catalogues which depict the labels in controversy. If by possibility the public or the trade has been misled into the belief that Scharf's labels of a given numerical designation, advertised and catalogued as his manufacture and of a given color and design, are Dennison's, which are ordered by another numerical designation, differ in color, appearance, and pattern, and are advertised, catalogued, and known to the trade as Dennison's, the fault is that of the public and the trade, who, in addition to the differences noted, are apprised of the origin of the labels by the catalogue, the boxes, and the cartons, on each of which the manufacturer's name appears. For this consequence of the use of numerals as cipher orders the defendant is not responsible. *Coats v. Merrick Thread Co.*, 149 U. S. 563 [13 Sup. Ct. 966, 37 L. Ed. 847]."

In the former suit the trade numbers claimed were from 1001 to

1007, inclusive. The defendant was not using those identical marks or numbers, but the numbers 3001 to 3007. There seems also to have been a difference in the color of the border of the labels upon which these different series of numbers were used. This Judge Swan notices very pointedly in his opinion quoted above. The charge here is that plaintiff's identical numbers are used in connection with labels like those of the complainant in color, size, and shape.

The equitable principles applicable to cases involving unfair trade are well settled. The difficulty is in their application, for it is quite as impossible to define unfair trade as to define fraud. It follows, therefore, that very slight difference in the facts of two such cases may result in very different decisions.

The question as to whether the former decree is a bar to the relief sought under the present bill in its aspect as a bill to restrain unfair trade must depend upon the identity of the facts of the two cases. The *res judicata* relied upon arises from a decree sustaining a demurrer for want of general equity. There was no hearing upon any issue of facts. In such cases the rule is that the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer. In *Wiggins Ferry Co. v. O. & M. Ry.*, 142 U. S. 396, 410, 12 Sup. Ct. 188, 192, 35 L. Ed. 1055, it is said:

"Where the judgment in the former action is upon a demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings as decided, and does not operate as a bar to a second suit for other breaches of the same covenants, although if the judgment be upon pleadings and proofs the estoppel extends not only to what was decided, but to all that was necessarily involved in the issue."

To the same effect are the cases of *Gould v. Evansville Ry.*, 91 U. S. 526, 23 L. Ed. 416; *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214.

The estoppel of the former suit so far as that bill sought relief upon the ground of unfair competition extends no farther than the precise point raised by the facts there stated in reference to the wrong there charged. The plea in the present case goes to the whole bill, and all relief under it. It is therefore too broad, and the court erred in sustaining it.

Decree reversed and remanded for further pleading.

Judge DAY participated in the decision of this case.

ALASKA COMMERCIAL CO. v. DINKELSPIEL.

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

No. 858.

1. BAILMENTS—ACTION ON DEPOSIT—APPEAL—PREJUDICIAL ERROR.

Plaintiff deposited money and gold dust with defendant in two accounts—one subject to draft, and the other as a special deposit. Plaintiff sued to recover the value of three deposits which he alleged were special. Plaintiff introduced three receipts, one of which did not show

a special deposit; and defendant claimed that all of the gold dust and money deposited had been settled for, except one package, which it offered to deliver. Plaintiff, in order to corroborate his testimony, offered a writing which purported to be a copy of the receipts made by plaintiff's clerk, which showed that the three deposits sued for were special. This writing was objected to, and marked for identification; and, though not introduced in evidence, the court, under the impression that it had been introduced, permitted plaintiff's counsel to base an argument thereon, and included the writing in the papers sent out with the jury. *Held*, that the court's allowing such exhibit to go to the jury was prejudicial error.

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

The defendant in error brought an action against the plaintiff in error, alleging that between November 1, 1899, and August 1, 1900, he deposited with the latter, at Nome, Alaska, gold dust and lawful money of the United States to the amount of \$10,684.64, no part of which had been repaid, except \$6,081.64. The answer alleged that the demand of the defendant in error against the plaintiff in error arose out of three several deposits of money and gold dust in packages deposited with the plaintiff in error, respectively, on November 23, 1899, April 25, 1900, and May 9, 1900, for which it had issued to the defendant in error its receipts; and it alleged that at some date or dates between November 23, 1899, and July 27, 1900, the defendant in error surrendered to the plaintiff in error said receipts, and obtained thereon the said deposits. And it further alleged that the plaintiff in error still had in its possession one package supposed to contain gold dust of the approximate value of \$2,340, belonging to the defendant in error, which it was ready and willing to surrender. The evidence on the trial showed that during the period referred to in the complaint the defendant in error made two classes of deposits with the plaintiff in error—deposits to be drawn upon by the depositor by check or by draft, and deposits in packages for safe-keeping. The defendant in error testified, in substance, that his demand against the plaintiff in error arose upon three deposits made for safe-keeping; that on November 23, 1899, he made his first deposit of that class with the plaintiff in error by depositing \$1,665 in currency, gold dust, and gold coin, for which he received the receipt Exhibit A, which reads as follows:

"\$1,665.00.

Nome City, 11—23—99.

"A. Dinkelspiel has deposited with the Alaska Commercial Comp:

\$240.00 in currency,

\$425.00 Gold Coin,

61½ oz. of gold dust.

Each in separate packages, not weighed or counted.

"W. R. Wheaton."

He testified further that this was a deposit for safe-keeping, although the receipt, it will be observed, does not so state. He testified that on April 25th he deposited for safe-keeping with the company \$2,024.75, for which Wheaton gave him the receipt marked "Exhibit B," of which the following is a copy:

"Nome, Alaska, Apl. 25, 1900.

"Received of A. Dinkelspiel one sack said to contain \$2,024.75 at \$16 per oz. in gold dust for safe-keeping.

A. C. Co., Wheaton."

—That on May 9, 1900, he deposited for safe-keeping \$313.25, for which he received the receipt Exhibit C, which is in form identical with Exhibit B; that in the meantime between January 6, 1900, and June 26, 1900, inclusive, he made 14 deposits with the Alaska Commercial Company, of various amounts, aggregating \$6,681.64, for which they had given him nine receipts, acknowledging that the money had been paid in "to deposit"; and that on account of such deposits he had drawn out various sums at different times, so that on July 21, 1900, there was due him on that account a balance of \$2,012.64. He testified that on that date he asked the company for this bal-

ance, and for the gold dust which he had left with it for safe-keeping, and applied for two drafts on San Francisco—one for \$2,000 and one for \$2,003—for use in his business, the drafts to be drawn on account of what he had there for safe-keeping, and that he delivered his receipts to Mr. Wheaton, but did not receive the drafts or any part of the money and gold dust which had been left for safe-keeping; that Wheaton took the receipts, and handed him back only a receipt to be signed for the balance of his open account, and thereupon gave him the balance of \$2,012.64. He testified further that immediately after he received the receipt from Wheaton the latter walked out of the office, and did not return, and that he waited in the office for two hours, inquiring in the meantime where Wheaton was, but no one seemed to know, and that he never saw him after that. O. W. Carlson, on behalf of the plaintiff in error, testified that he became the agent of the plaintiff in error on July 4, 1900; that he saw Wheaton in the office during the afternoon of July 21st, and that he left the store with him at about 6 o'clock on that afternoon, and that Wheaton never returned to the store afterwards; that some time after Wheaton's death the defendant in error told him that he had some gold sacks that he had placed with the company for safe-keeping. The witness answered that he would see about it, and that he then inquired of the bookkeeper, and found that the company held one sack (the sack of \$2,340 gold dust referred to in the answer); that he showed this sack to the defendant in error, and the latter answered that he should have another, which he said contained about \$300, and that the defendant in error said, also, that he had delivered his receipts to Mr. Wheaton in order to have him compare the accounts; that the witness asked him why he did not get his receipts back, and that he replied that Wheaton would not give them back; that the witness then told him that he could have got them back if he had come to him—that the witness would have seen that he got them back; and the witness testified that he asked the defendant in error why he had not come to him during Mr. Wheaton's illness, that he might have had an opportunity to speak to Mr. Wheaton about the receipts. None of this testimony was contradicted by the defendant in error or by any witness.

From this statement of the facts, it becomes apparent that one of the important issues of the case was whether or not the three receipts were surrendered to the company on July 21, 1900. To sustain his own evidence that such was the case, the defendant in error produced a writing, known in the record as "Identification D," and which we will call "Exhibit D," which purports to be a copy of receipts held by him from the plaintiff in error. It contains the dates and amounts of nine deposits of money and gold dust, together with the words "to deposit" set opposite each. It contains, also, the dates and amounts of the three receipts for the deposit of the three packages in controversy in this suit, which are marked on said exhibit "for safe-keeping." This exhibit bears date Nome, July 21, 1900. The defendant in error testified that it was written on that date by his clerk, Hugo Platt. It appears from the bill of exceptions that when the paper was produced on the trial of the cause, and the defendant in error was asked what it was, and by whom it was made, and from what, objection was made by counsel for the plaintiff in error on the ground that it was immaterial, irrelevant, and incompetent, and not the best testimony, whereupon the paper was marked for identification. It does not appear from the record that it was at any time offered in evidence, or admitted in evidence, or read to the jury. Later, on the argument of the case before the jury, it was referred to by counsel for the defendant in error, whereupon opposing counsel objected on the ground that said paper was not in evidence. The objection was overruled by the court; the court remarking that, to the best of his recollection, the exhibit had been offered and received in evidence without objection. When the jury retired, the exhibit was included among the papers which they took to the jury room, whereupon counsel for the plaintiff in error again objected upon the ground that the paper was not in evidence. The court then said: "My recollection of that paper was that it was marked as identified, then offered and received in evidence." Counsel for plaintiff in error said, "It was identified, but never offered in evidence," and counsel for defendant in error replied, "It was an oversight if it was not offered in evidence."

Thomas & Gerstle, Charles S. Johnson, and A. J. Daly, for plaintiff in error.

W. S. Goodfellow and Charles P. Eells, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It is assigned as error that the court permitted counsel for defendant in error to comment upon Exhibit D as being a part of the evidence, and to read the same to the jury, and that the court permitted said paper to go to the jury, and permitted the jury to consider it as part of the evidence in the case. It is evident from the bill of exceptions that the exhibit was, by inadvertence, not offered or received in evidence, nor read to the jury. Was the ruling of the court in permitting the jury to consider it as evidence, and in permitting them to take it to the jury room, error for which the judgment must be reversed? That it was error is too clear to require discussion. But did it affect a substantial right of the plaintiff in error? To answer this question, it becomes necessary to consider the bearing of the exhibit upon the issues which the jury were called upon to decide. The defendant in error had made two classes of deposits with the plaintiff in error: First, a series of deposits to be drawn against on account; second, certain deposits in packages for safe-keeping. He testified that the three deposits for which the action was brought were all of the latter class. The receipts which were given by the agent of the plaintiff in error for those deposits were produced in evidence. They were found in the possession of the plaintiff in error, its agent having in some way recovered their possession. The defendant in error was the only witness who testified as to the circumstances of their surrender. The plaintiff in error did not profess to know anything of the transaction, except that the receipts had been issued by its agent, and were found in its possession some time after the agent's death, and that there were no packages in its possession corresponding thereto. It was its contention that the packages must have been returned to the owner at the time when the receipts were surrendered. The receipt which was given for the deposit of November 23, 1899, differs materially in form from the other two. It does not, upon its face, purport to show that the deposit thereby represented was a deposit for safe-keeping. One of the questions involved in the case, therefore, was whether that deposit was a deposit for safe-keeping, or a deposit to account, to be drawn against. If it was the latter, it had been included in the settlement of the account, and the defendant in error could not recover for it in the present action. The defendant in error testified that he wrote out the receipt before he made the deposit, but that the agent, when he signed it, added thereto the words "not weighed or counted." These words appear on the receipt, but the defendant in error testified that before the receipt was signed the agent counted the currency and gold coin, and at his request weighed the gold dust; and the witness added, "I wished it weighed, as I was making the deposit." The language of the receipt would seem to indicate that it might have been a receipt for money

and gold dust deposited on account, but the defendant in error testified that it was for packages left for safe-keeping. Exhibit D tends to corroborate him in that respect. It contains the entry of the deposit referred to in the receipt, and adds the words "for safe-keeping," words which are not found in the receipt. The clerk who prepared Exhibit D did not testify from what information or from what data he entered those words. As Exhibit D went to the jury, it contained information in writing tending to show that the deposit of November 23, 1899, was made "for safe-keeping," and was therefore not one of the deposits included in the settlement of July 21, 1900, when, according to the testimony of the defendant in error, he drew down the balance due him on account of deposits made to account, or to be drawn against. The written entry, also, of the date "July 21, 1900," as shown on Exhibit D, tended to corroborate the testimony of the defendant in error that on that date he still had in his possession, and had not yet surrendered, the three receipts. In fact, his counsel, in addressing the jury, as it appears from the record, referred to Exhibit D, and argued to the jury that the testimony of Platt and the defendant in error that they had these receipts in their possession on July 21, 1900, was confirmed and corroborated by the fact that Exhibit D was made, which paper, he said, was in evidence in the case. The paper never having been offered in evidence, nor submitted to opposing counsel for their examination, the latter had no opportunity to cross-examine the witness who made it concerning the data from which it was prepared, or other circumstances connected therewith. In view of all these considerations, it is impossible to escape the conclusion that to permit the exhibit to go to the jury as evidence was error for which the judgment must be reversed. We are unable to say how much the jury may have been influenced by such evidence in finding their verdict. It is enough to say that they may have been influenced by it. *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. Ed. 106; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299. In the case last cited, Mr. Justice Harlan, speaking for the court, said:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party;" citing *Smiths v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717; *Deery v. Cray*, 5 Wall. 795; *Moores v. Nat. Bank*, 104 U. S. 625, 630, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62.

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

CENTRAL TRUST CO. OF NEW YORK et al. v. WARREN.

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

No. 863.

1. STREET RAILROADS—INJURIES—JUDGMENTS—PRIORITY OF LIEN—STATUTES—APPLICATION.

Comp. St. Mont. 1887, div. 5, § 707, providing that a judgment against "any railway corporation" for any injury to person or property shall be a lien within the county where recorded superior to the lien of any mortgage or trust deed on the railroad property, being a part of a statute which applies solely to commercial railroads, does not apply to street railroads.

2. SAME—INCORPORATION.

Comp. St. Mont. 1887, div. 5, c. 25, § 446, relating to the organization of corporations for industrial and productive purposes, and providing that three or more persons who may desire to form a company for the purpose of carrying on any branch of business designed to aid in the industrial or productive interests of the country and the development thereof, or of any of the previously designated branches of business, may incorporate by filing articles, etc., authorizes the formation of a corporation to own and operate a street railway.

3. SAME—CORPORATE MORTGAGES—ALIENATION OF FRANCHISE.

The execution of a mortgage by a street railway corporation in due course of business, while the company was solvent, did not constitute a violation of Const. Mont. art. 15, § 17, prohibiting the alienation of any franchise so as to release or relieve the same or property held thereunder from any of the liabilities of the grantor incurred in the operation or enjoyment of the franchise, though such mortgage on the subsequent insolvency of the corporation might operate to prevent the payment of a judgment for injuries subsequently recovered.

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

In the year 1901 John W. Warren, the appellee, was the plaintiff in a case in the district court of the First Judicial District, in the state of Montana, against the Helena Power & Light Company, a corporation, one of the appellants herein, the defendant in that action, to recover the sum of \$5,000 for personal injuries sustained by the plaintiff on the 15th day of August, 1900, by reason of the alleged negligence of the defendant in operating one of its cars on a street railroad owned and operated by the defendant in the city of Helena, in the state of Montana. In this action Warren recovered a judgment on June 4, 1901, against the Helena Power & Light Company for \$2,500, together with costs amounting to \$134.80. On the 15th day of October, 1901, the Central Trust Company of New York, the other appellant in this case, instituted the present action against the Helena Power & Light Company to foreclose a mortgage or deed of trust executed by the latter company on January 1, 1895, to secure the payment of certain coupon bonds issued by the company to the amount of \$425,000. John W. Warren was made a party defendant to the suit, upon the allegation in the bill of complaint that he had or claimed to have some interest in or lien upon the real property of the Helena Power & Light Company, and it was alleged that his claim or lien was subsequent to the lien of mortgage or deed of trust. Warren was served with a subpoena in the action, and appeared and filed his answer to the bill of complaint, setting up the judgment obtained by him against the Helena Power & Light Company in the state court, and alleging that the said company had at all times since the 1st day of January, 1895, and down to the time of the filing of the complaint, been engaged in operating lines of street railway in and over the streets of said city of Helena, in the state of Montana, and furnishing electric and gas light to the city of Helena and the inhabitants thereof, the electric light being furnished

by means of wires strung through the streets of the said city, and the gas by means of pipes and mains laid in the streets of said city, and that the company had for such purpose occupied the streets and conducted the said business under franchises granted to it by the said city under authority of acts of the Legislature of the state of Montana, and under franchises granted to it by virtue of the general laws of that state.

The bill of complaint was taken as confessed by the defendant the Helena Power & Light Company, and upon the answer of the defendant Warren a motion for decree notwithstanding his answer was made by the complainant. This motion the circuit court denied, and afterwards, on the 2d day of April, 1902, a decree was entered reciting that on and prior to January 1, 1895, the Helena Power & Light Company was, and at the date of the decree still continued to be, a corporation duly created and existing under and pursuant to the laws of the state of Montana; that the mortgage or deed of trust set forth in the bill of complaint bearing date January 1, 1895, was a valid and subsisting mortgage, and constituted a valid and subsisting lien on the mortgaged property, premises, and franchises, subject only to the lien of the judgment of the defendant John W. Warren upon the real estate of the defendant the Helena Power & Light Company; that the claim of the defendant Warren was a lien upon the real property of the Helena Power & Light Company prior to the lien of said mortgage or deed of trust; and after ordering the foreclosure of said mortgage or deed of trust, and the sale of the property therein mentioned, it was provided in the decree that the proceeds of such sale, after deducting the costs of suit and expenses of such sale, should be applied to the payment in full of the judgment of the defendant John W. Warren in the sum of \$2,663.89, with interest thereon to the date of payment from the date of decree at the rate of 8 per cent. per annum. Thereupon the appellants took the present appeal to this court from such part of said decree as adjudged that the claim of the appellee Warren was a prior lien to the mortgage or deed of trust, and whereby it was ordered that the judgment of the appellee Warren should be satisfied from the proceeds of the foreclosure sale before the payment of the amount found due upon the mortgage or deed of trust.

Butler, Notman, Joline & Mynderse and H. G. & S. H. McIntire, for appellant Central Trust Co.

H. S. Hepner, for appellant Helena Power & Light Co.

T. J. Walsh, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

Section 707 of the fifth division of the Compiled Statutes of Montana of 1887 (section 914 of the Civil Code, approved February 19, 1895) provides as follows:

"A judgment against any railroad corporation for any injury to person or property, or for materials furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recorded on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

In *Massachusetts Loan & Trust Co. v. Hamilton*, 32 C. C. A. 46, 88 Fed. 588, this court had occasion to consider this statute in a similar case, and held that it was not applicable to corporations formed for the purpose of operating street railways, and that a judgment rendered against a street railway corporation for personal injuries had no priority over the existing lien of a mortgage upon the corporate property. In that case the street railway company was a cor-

poration organized under the laws of the state of New Jersey, while in the present case the Helena Power & Light Company is a corporation organized under the laws of Montana. Does this fact make any difference in the application of the statute? We think not. The statute in question is section 707 of an act of the territory of Montana entitled "An act in relation to railroads," consisting of six sections. This act was in force when the Helena Power & Light Company was incorporated prior to January 1, 1895, and it is claimed by the appellee that the company was incorporated under this statute, and that the mortgage or trust deed became subject to its provisions. In *Massachusetts Loan & Trust Co. v. Hamilton*, supra, Judge Hawley, in delivering the opinion of this court, entered into an elaborate discussion of the entire "act in relation to railroads," and, after carefully considering all its provisions and relation to other legislation, reached the conclusion that the entire act, and each of its sections, was intended by the Legislature to relate to the railroads of commerce, and not to the street railways. We have carefully reviewed that opinion in the light of the argument submitted by counsel with respect to the question now presented, and have reached the conclusion that the opinion is a correct interpretation of the statute. As said by the court in that case:

"We have no power to insert 'street railways' into this section of the act, with the knowledge we have that all the other provisions of the act refer in clear, plain, and unequivocal terms to other kinds of railways or railroads. Especially is this true when we find acts passed at the same session where the word 'street' is used as a prefix to the word 'railway' or 'railroads' in all acts intended to apply to street railroads. It is true that the courts may in certain cases impute a legislative intent not expressed with perfect clearness, where the words used import such intent, either necessarily or by a plain and manifest implication. But it would be a dangerous exercise of judicial authority, not to be justified by any consideration, for a court to declare a law by the imputation of intent, when the words used do not import it, either necessarily or by plain implication, and when all the surroundings of the enactment clearly show that the construction claimed could not have been within the legislative thought."

It follows that, in our opinion, the Helena Power & Light Company was not incorporated under this statute, and that the mortgage or trust deed is not subject to its provisions. We are further confirmed in this conclusion by the fact that section 446 of chapter 25 of division 5 of the Compiled Statutes of Montana of 1887 provides sufficient authority for the incorporation of this company. The title of the chapter is "Corporations for Industrial or Productive Purposes," and section 446 reads:

"At any time hereafter any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical, or chemical business; of digging ditches, of building flumes or running tunnels, of purchasing, holding, developing, improving, using, leasing, selling, conveying or otherwise disposing of water powers and the sites thereof, and lands necessary or useful therefor, or for the industries and habitations arising or growing up, or to arise or grow up, in connection with or about the same; of purchasing, holding, laying out, platting, developing, leasing, selling, dealing in, conveying or otherwise using or disposing of townsites, or towns, or the lots, blocks, or subdivisions thereof, or lots, blocks, or subdivisions in any town, village, or city, or of carrying on any

other branch of business designed to aid in the industrial or productive interests of the country and the development thereof, or of one or more of the aforesaid branches of business, may make, sign and acknowledge before some officer competent to take acknowledgments of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of the territory, a certificate in writing," etc.

The remainder of the section and the following sections of the chapter provide for the formation of the corporation, place of business, officers' liability, etc. The authority of the territory to enact this statute was derived from section 1889 of the Revised Statutes of the United States, which provides that "the legislative assemblies of the several territories shall not grant private charters or special privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate for mining, manufacturing, or other industrial pursuits. * * *" The authority to form corporations for "industrial pursuits" has been held sufficient to authorize the formation of a corporation to carry on the express business (*Wells, Fargo & Co. v. Northern Pacific Ry. Co.* [C. C.] 23 Fed. 469), and to form corporations to carry on the mercantile business (*Carver Mercantile Co. v. Hulme*, 7 Mont. 571, 19 Pac. 213; *Bashford-Burmister Co. v. Agua Fria Copper Co.* [Ariz.] 35 Pac. 983). The formation of a corporation for the purpose of owning and operating a street railway is certainly as much an industrial pursuit as an express company or a mercantile business, and, more than either, is within the authority of a statute providing for an incorporation to carry on any "branch of business designed to aid in the industrial or productive interests of the country and the development thereof." This statute does not provide that a judgment for an injury to person or property shall be a prior and superior lien to that of a mortgage or trust deed, and, in the absence of such a provision, the priority does not exist under the general law. *Central Trust Co. of New York v. East Tennessee, etc., R. Co.* (C. C.) 30 Fed. 895; *Farmers' Loan & Trust Co. v. Green Bay, etc., R. Co.* (C. C.) 45 Fed. 664; *St. Louis Trust Co. v. Riley*, 16 C. C. A. 610, 70 Fed. 32, 30 L. R. A. 456; *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.* (C. C.) 74 Fed. 431.

It is further contended by the appellee that the priority of his judgment is secured to him under section 17 of article 15 of the Constitution of Montana. That section provides as follows:

"Sec. 17. The legislative assembly shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor or lessee or grantee contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges."

In what respect this prohibition upon the power of the legislative assembly has been violated by legislative act is not pointed out, and our attention has not been called to any statute enacted by the legislative assembly which this provision of the Constitution forbids. But, assuming that the prohibition applies directly, without legislation, to the leasing or alienation of a franchise contrary to the terms of the prohibition, the question arises, what act in this case is claimed

to be prohibited by the Constitution? It must be, if anything, the act of releasing or relieving the franchise and the property held thereunder from a liability of the grantor incurred in the operation, use, and enjoyment of the franchise. But in what respect did the execution of the mortgage or trust deed in this case release or relieve the grantor from such liability? The giving of a mortgage does not relieve or release the grantor or the property held thereunder from any liability; it merely provides a security for the debt for which the mortgage is given, and whatever other liability there may be remains as before. If the value of the franchise or property held thereunder is sufficient, all liabilities, including the mortgage debt, will be paid in their order, and paid in full. Whether any debt or liability will be paid depends upon the solvency of the corporation and the value of its property, and not upon the terms of the conveyance to the mortgagee. There is no relieving or releasing the franchise or the property held thereunder from any liability unless the mortgagor is insolvent, or unless the mortgage is given in anticipation of insolvency. But no such condition of the mortgagor at the time the mortgage was executed is alleged or claimed in this case. The mortgage was given for a valuable consideration and in due course of business, and it is not alleged that it was given for the purpose of hindering or delaying other creditors. It is true it is alleged in the bill of complaint that the mortgagor is insolvent, but this allegation has reference to the date when the bill was filed, on October 15, 1901, and not to the date when the mortgage was given, on January 1, 1895. For all that appears in this record, the mortgagor was solvent when the mortgage was given, and was also solvent when the appellee recovered his judgment, on June 4, 1901. There is, therefore, no act alleged tending to show that the mortgage was intended to release or relieve the franchise or the property held thereunder from the liability of the judgment obtained by the appellee, or that the enforcement of the mortgage lien was intended to have that effect. Indeed, it is clear that the right claimed by the appellee to have his judgment declared a prior lien to that of the mortgage is not provided for in the section of the Constitution under consideration. The section does not deal with the priority of liens, but has a different purpose, as has been determined by the Supreme Court of California in *Lee v. Southern Pacific R. R. Co.*, 116 Cal. 97, 100, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140, where a similar provision of the Constitution of the State of California was under consideration.

The decree of the Circuit Court is reversed in so far as it provides that the judgment in favor of the appellee is a lien upon the real property of the Helena Power & Light Company prior to the lien of the mortgage or deed of trust in favor of the Central Trust Company of New York.

COLUMBIA MFG. CO. v. HASTINGS et al.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 826.

1. REVIEW ON APPEAL—VARIANCE—WAIVER OF OBJECTION.

The objection of variance must be made when the evidence is offered, and the reason of the variance pointed out, so that, if it appears that a variance would occur, the plaintiff may amend his declaration or bill of particulars; otherwise the objection is waived and cannot be raised in the appellate court.

2. CONTRACT—RIGHT OF RESCISSION—WAIVER.

The fact that an agent through whom orders were sent to defendant for its acceptance was interested in a firm for which he sent in an order, if unknown to defendant at the time it accepted such order, might entitle it to rescind the contract within a reasonable time after obtaining knowledge of the connection; but, where it afterwards filled a portion of the order without any objection, it waived the right to object on that ground, and the contract became binding upon it.

3. APPEAL—REVIEW—REFUSAL OF INSTRUCTIONS ASKED.

Where the record in the appellate court fails to show that the entire charge given is set out in the bill of exceptions, the presumption is that the court gave, in substance, all proper instructions, and that the refusal to give special instructions asked was without prejudice.

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

John H. Hamline, for plaintiff in error.

Fred W. Bentley, for defendants in error.

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

BUNN, District Judge. This was an action brought by the defendants in error against the plaintiff in error, engaged in the manufacture of steel tubing for the making of handle bars for bicycles and other purposes, to recover damages for the nonfulfillment of certain contracts for the manufacture, sale, and delivery of steel tubing for the construction of handle bars. There were three counts in the declaration; the first and third counts founded upon one contract or accepted order, dated December 10, 1898, for 100,000 pieces of tubing for the construction of 50,000 handle bars. The second count was upon a distinct cause of action, founded upon a second contract or accepted order, of December 28, 1898, for a similar amount of tubing. The defendants in error (plaintiffs below) filed a bill of particulars, claiming damages for breach of the contracts: First. Damages by reason of inability to operate plaintiffs' factory by reason of shortage of tubing, arising from defendant's failure to deliver it. Second. Damages for inability to fill orders, for a like reason. These two grounds for damages were not pressed. Third. Damages on account of handle bars returned by customers, and rendered worthless in the market, because made of an imperfect gauge. Fourth. Because on account of brittle and unsuitable tubing,

¶ 1. See Pleading, vol. 39, Cent. Dig. § 1438.

which broke in bending after being partly manufactured into bars. Fifth. Difference between contract price and market value of tubing at the time of the failure to deliver.

The defendant below pleaded that it did not undertake or promise in manner and form as the plaintiffs had complained, and on the trial, after a jury had been impaneled, filed an additional plea, alleging that the clause in the contract giving the plaintiffs the option of ordering tubing for 50,000 additional handle bars, specifying deliveries 30 days prior to the time shipment was required, was contrary to the statute of the state of Illinois made against gambling contracts. When the bill of exceptions is looked into, it is seen that these pleas are equally futile and contrary to the truth of the case as presented by the evidence, the charge of the court, and the finding of the jury. There is no denial anywhere, by the defendant below—either in the pleadings or the testimony—of the alleged failure to deliver the goods agreed to be delivered. What the reason was, does not appear, except by conjecture. After the contracts were made, and a part of the goods delivered, the price of steel rose very materially; and this was one element, no doubt, of the damages found by the jury for nonfulfillment of the contracts. The undisputed evidence of plaintiffs shows that the amount of tubing called for by the two contracts was 276,875 lineal feet, of which but 115,363 feet and 11 inches were delivered, leaving the defendant in default for the nondelivery of 161,512 feet. The evidence shows that the contract price was $3\frac{1}{2}$ cents per foot, and that during the season and during the life of the contract the market price rose to $4\frac{1}{2}$ cents. There were other items of damage shown by the plaintiffs' evidence, equally obvious. The contracts required the tubing to be made of steel of a certain chemical analysis, and not too high in carbon, so as to make it too brittle and unsuitable for bending into handle bars. The evidence of plaintiffs tended to show that 10 per cent. of the tubing delivered was too brittle to allow of bending, and was worthless for handle bars. The contracts provided, also, that the tubing should be of uniform gauge, suitable for handle bars, while the testimony showed that, in some 5,000 of the bars shipped, the gauge was defective, so that the stems would not fit into the posts of standard bicycles, and so could not be used, but had to be sold at department stores at a loss of from 10 to 15 cents on a handle bar; the damage on this account amounting to \$625, at $12\frac{1}{2}$ cents a bar. Besides these items of damage was one for handle bars sold and returned as defective. These items of damage, amounting, according to plaintiff's testimony, to \$3,149.58, were undisputed by any testimony offered by defendant. The jury assessed the plaintiff's damages at \$2,250. The defendant denied the execution of the contracts sued upon in its plea, but no evidence was offered by it on that subject. The contracts were in writing, and are contradicted by the evidence, as is also the damage for nonfulfillment.

By its special plea, filed after the trial had begun, the defendant claimed that the contracts were gambling contracts, on account of the option given the plaintiffs to order an additional 50,000 of bars. But when the testimony contained in the bill of exceptions is looked

into, it is seen how slight foundation there is for such a plea, which was mainly abandoned on the hearing in this court. The order of the plaintiffs on defendant for handle bars of December 10th was as follows:

"You may enter our order for fifty thousand pieces of $\frac{7}{8}$ x18 g. handle bar stock; one half to be 27" long and one-half to be 28 $\frac{1}{2}$ " long. The tubing to be of good uniform quality, and smooth surface, suitable for the making of handle bars and for special polishing and plating. Also fifty thousand pieces of $\frac{7}{8}$ x18, g. 6" long, suitable for handle bar stems."

Then follow specifications for shipment on different days, from December 19th to January 25th, followed by a further provision that specifications for the balance of the 50,000 pieces to be given defendant on or before January 15, 1899; the extra 50,000 pieces to be specified for and taken during the season of 1899, or prior to June 15, 1899. Then follows the provision for an option on further orders, as follows:

"We are to have the privilege of an option from you for not to exceed 50,000 additional pieces of handle bar stock of above described quality by exercising said option, and specifying deliveries thirty days prior to the time of shipments as required. Price, three and one-half cents (3 $\frac{1}{2}$ cts) pr. foot. Terms, net spot cash F. O. B., Niles, Ohio. Shipments to be made for us to your Chicago representatives, F. A. Hastings & Co. Said stock to be delivered by them to us C. O. D."

The evidence is uncontradicted that this optional clause was afterwards turned into a binding contract between the parties for the manufacture and delivery of the additional 50,000 bars by the defendant, and their acceptance by the plaintiffs, an order in writing for the same being made by the one party and accepted by the other.

Entering upon the trial of the cause with such pleas as these, a general denial of the making of the agreements, against the obvious truth, and the claim that the agreement, if made at all, was a gambling contract, and with the evidence and merits of the case against it, it is no great wonder that the defendant should cling to every technical objection to defeat the plaintiff's case; and accordingly, upon reading the record and bill of exceptions, it is clear enough that, except that it was the province of the jury to assess the plaintiff's damages (and the trial amounted to little more than such assessment), the court might have ordered a verdict in the plaintiff's favor. The finding of the jury is conclusive, unless the plaintiff in error has been able to make good some one of the several exceptions and assignments of error. These assignments we have carefully and separately considered, and we find no substantial error in the record that can avail to affect the verdict of the jury, or the judgment of the court rendered thereon.

One exception is to the effect that there was a variance between the bill of particulars furnished and the proofs submitted, but we think there was no substantial variance. Besides, it does not appear that any objections on this ground were made on the trial, which would be necessary in order to make the objections available here. The objection of variance must be made when the evidence is offered,

and the reason of the variance pointed out, so that, if it appears that a variance would occur, the party may amend his declaration or bill of particulars. *Swift & Co. v. Ruthowski*, 182 Ill. 18, 54 N. E. 1038; *Swift v. Modden*, 165 Ill. 41, 45 N. E. 979; *Westville Coal Co. v. Schwartz*, 177 Ill. 272, 52 N. E. 276.

The objection made on the trial, of most apparent substance, was this: It appeared on cross-examination of some of the plaintiffs' witnesses that Hastings & Co., who acted for defendant in submitting orders to the company, and receiving the goods when shipped, and delivering them to plaintiffs, had some interest in the plaintiffs company. The fact was not pleaded, but came out in the testimony, and the question was fairly submitted by the court to the jury whether that objection had been waived by the subsequent conduct of the defendant in receiving further orders through them from the plaintiffs and going on with the contract. The evidence went to show this, and the jury must have so found. The court instructed the jury that, if they found defendant did not know of the connection between Hastings & Co. and the Cycle Bar Company when the orders were accepted, it could, upon discovering the fact, rescind the contract, unless it subsequently approved and ratified it. This instruction was asked by the defendant, and given by the court at its request.

The court also further instructed the jury, at the request of the plaintiffs' counsel, that if they should find from the evidence that the defendant had no knowledge of the connection between Hastings & Co. and the Cycle Bar Company at the time the contract was accepted, but afterwards discovered such relation, it thereupon became the duty of the defendant to rescind the contract within a reasonable time; and if the jury found from the evidence that, after knowing of Hastings & Co.'s connection with the Cycle Bar Company, the defendant recognized the contract as binding upon it, and acted upon the contract, it waived any objections thereto, and the jury should find the contract good. This instruction was objected to by defendant's counsel, as was each and all of the instructions given at the plaintiffs' request. But it was obviously correct. The evidence showed that, after knowledge of Hastings & Co.'s relations to the parties, the defendant went on filling orders, and nowhere made any sign of a wish to rescind or abandon the contract. The finding of the jury upon this, as upon all the other issues, was in favor of the plaintiffs, and cannot be questioned here, except for error in the record. The defendant was evidently willing that Hastings & Co. should continue to act in the capacity where they had been acting. Hastings & Co. were not acting as defendant's agents to make contracts. They could only submit orders to the defendant for its acceptance or rejection, so that there was no great chance for fraud, and there was no evidence that anybody was injured by reason of their relation to the plaintiffs.

Exceptions were regularly taken to each and all of the instructions given to the jury by the court at the request of the plaintiffs, but we find no error in these instructions, and think the case was fairly given

to the jury. Several special instructions, also, were asked by defendant's counsel, and refused by the court, as we think, properly.

The first was, in substance, that no damage could be recovered because of the inability of the plaintiffs to furnish work for their employes, occasioned by the defendant's failure to deliver the material covered by the contract. This was refused, probably because not applicable to the case, as no such damage was claimed on the trial or proven by the plaintiffs.

Another was that the court instruct the jury that there was no evidence to sustain the second count of plaintiffs' declaration, and the same in regard to the first count. These were properly refused, because clearly opposed to the truth of the case; there being evidence of damage under each and all of the counts.

Several other instructions were asked for, covering the same question—as that the jury should disregard all evidence of damage by reason of the failure of defendant to deliver 50,000 pieces of material 6 inches long, mentioned in the contract, and 100,000 pieces of handle bar stock called for by the contract, and 50,000 additional handle bars, as per specifications for shipment on December 28, 1898; also to disregard all evidence relating to breaking of handle bar stock, and on account of defects in handle bar stock. These instructions, if given, would be equivalent to taking the case from the jury and directing a verdict for the defendant. Also to instruct the jury to disregard all evidence of damage from plaintiffs having to shut down and ceasing to operate the factory. This last was properly refused, because no such damage was claimed on the trial or proven. We think all of these instructions properly refused on their merits. But there is another reason, of a more technical character, why exceptions to their refusal cannot avail in this court. There is nothing in the bill of exceptions to show that there were not other instructions given covering the same points. The instructions contained in the record, it appears, were all special instructions, given at the request of counsel on one side or the other. But there is nothing to show that there were no general instructions given by the court, or that the instructions so given were the only ones given in the case. The next proceeding after these instructions were refused was a notice by defendant's counsel for a motion for a new trial, which was overruled by the court. When the record fails to show that the entire charge given was set out in the bill of exceptions, the presumption is that the court gave in substance all proper instructions, and charged the law correctly. *Bennett v. Hardkrader*, 158 U. S. 446, 15 Sup. Ct. 863, 39 L. Ed. 1046; *Scaife v. Land Co.*, 33 C. C. A. 47, 90 Fed. 238; *Myers v. Sternheim*, 38 C. C. A. 345, 97 Fed. 625.

There were some other exceptions taken on the trial to the admission of evidence, which, if we do not notice in detail, it is not because they have not been fully considered by the court. The case seems to have been fairly tried, and properly submitted by the court, and the verdict of the jury abundantly sustained by the evidence.

The judgment of the court below is affirmed. Affirmed.

In re KELLOGG.

(Circuit Court of Appeals, Second Circuit. March 12, 1903.)

No. 23.

1. BANKRUPTCY—USURY AS DEFENSE BY TRUSTEE.

The defense of usury is available to the trustee in bankruptcy against a mortgage given by the bankrupt, though the bankrupt conveyed the property subject to the mortgage, and the grantee conveyed it to the trustee; the conveyance by the bankrupt having been within four months of bankruptcy, and void, and the trustee having repudiated the conveyance, and taken possession of the property, and the conveyance by the grantee to the trustee having been merely a rescission by their mutual consent of the conveyance by the bankrupt.

2. SAME—JURISDICTION OF BANKRUPTCY COURT.

Under Bankr. Act 1898, § 2, subd. 7 [U. S. Comp. St. 1901, p. 3421], giving the bankruptcy court jurisdiction to cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as otherwise provided, it has jurisdiction to determine in summary proceedings before the referee the validity of a mortgage on property of the bankrupt, of which the trustee has obtained possession and legal title; the controversies not within the jurisdiction of such court being where the trustee brings an independent suit to assert title to property not in his possession or control.

3. SAME—CONFLICT WITH STATE JURISDICTION.

A New York state court does not acquire jurisdiction of property of a bankrupt, to the exclusion of the bankruptcy court, by the filing of the summons, complaint, and notice of pendency of an action to foreclose a mortgage thereon, without service of a summons required by Code Civ. Proc. N. Y. § 416, for commencement of an action before the trustee was appointed; the bankruptcy court having previously acquired jurisdiction by the filing of the petition in bankruptcy and the appointment of a receiver, who had qualified and taken possession of the property.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of New York, in Bankruptcy. For opinion below, see 113 Fed. 120.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Clara E. Kellogg on June 6, 1900, executed a usurious mortgage for \$25,000 on certain real estate to Una R. Goslin, who afterwards assigned the same to Sophie La Grave, the petitioner herein. On January 29, 1901, said Kellogg transferred said real estate, subject to said mortgage, to the C. E. Kellogg Company. On February 14, 1901, involuntary bankruptcy proceedings were begun against said Clara E. Kellogg. On March 1st she filed a voluntary petition in bankruptcy, and was adjudicated a bankrupt, and a receiver was appointed, who immediately took actual possession of the mortgaged property; and on March 22, 1901, the receiver was duly made trustee. On March 20, 1901, a summons, complaint, and notice of pendency of a suit by petition to foreclose said mortgage was filed in the office of the county clerk. On April 2, 1901, said trustee commenced a proceeding to have said transfer to the Kellogg Company set aside as in fraud of creditors. On the same day the corporation rescinded said transfer on the ground that said claim of fraudulent transfer had been made, and said action

had been begun by the trustee, and reconveyed said property to the trustee. It does not appear that the summons in the foreclosure suit had at that time been actually served on any defendant. Thereafter, upon due hearing, the referee entered an order declaring said mortgage void on the ground of usury, and directing that said property be sold free and clear of incumbrances. The petitioner then filed a petition to review, and the referee certified the following questions to the District Judge:

"First. Is the defense of usury available to a trustee in bankruptcy, as against an obligation of the bankrupt?

"Second. Can the question of validity and amount of a mortgage lien upon property in the bankrupt estate be determined in a summary proceeding before a referee?

"Third. Did the Supreme Court of the state of New York acquire jurisdiction of the property, to the exclusion of the United States District Court, by the filing of the summons, complaint, and notice of pendency of action of foreclosure, before the trustee was appointed; the bankruptcy court having previously acquired jurisdiction by the filing of the petition in bankruptcy and the appointment of a receiver, who had qualified and taken possession of the property prior to the commencement of said action and foreclosure?

"Fourth. Where the mortgagor, with intent to hinder and delay her creditors, conveys the mortgaged property to a corporation participating in such intent, and the trustee repudiates such transfer on account of such fraud, and takes possession of the property, and by mutual consent the fraudulent grantee and the trustee rescind such conveyance, does the fact that the property upon which the mortgagor has an apparent lien was transferred by the mortgagor to the said corporation after the recording of the mortgage, and subject to the lien thereof, before the beginning of the bankruptcy proceedings, preclude the trustee from pleading usury?

"Fifth. Was the mortgage void for usury, as a matter of fact?"

The District Court affirmed the report, decision, and order of the referee, and answered the first, second, fourth, and fifth questions in the affirmative, and the third question in the negative; and the petitioner now brings these orders and decisions, except the answer to the fifth question, before this court for review, and assigns the following errors:

"First. In that said court, and the judge thereof, did determine in said proceedings that the defense of usury was available to this trustee in bankruptcy against the bond and mortgage held by Sophie Marchias La Grave, the appellant, against said bankrupt and her property.

"Second. In that said court determined that the question of the validity and amount of the said bond and mortgage could be determined in the summary proceeding instituted before the referee in bankruptcy herein.

"Third. In that said court determined that the Supreme Court of the state of New York did not acquire exclusive jurisdiction of the property covered by said mortgage by the filing of the summons, complaint, and notice of the pendency of action in foreclosure before the trustee was appointed.

"Fourth. In that said court determined that although the property in question had been transferred by the bankrupt to the C. E. Kellogg Company, subject to the lien of the said mortgage, and thereafter transferred by the said corporation to the trustee in bankruptcy, the defense of usury was still available to said trustee."

The first assignment of error is the decision that defense of usury was available to the trustee.

That a trustee who takes title solely by the operation of the bankrupt law is a privy in estate with the borrower, and stands in the same relation to the mortgagee as the bankrupt, so far as the defense of

usury is concerned, seems to be pretty well settled. The general rule, as stated in *Knickerbocker Life Insurance Company v. Nelson*, 78 N. Y. 150, is as follows:

"All privies to the borrower, whether in blood, representation, or estate, may, both in law and equity, by appropriate legal and equitable defenses, attack or defend against contract or security given by the borrower, which is tainted with usury, or on the ground of such usury, where such contract or security affects the estate derived by them from the borrower."

Under Bankr. Act, § 70a [U. S. Comp. St. 1901, p. 3451], the trustee is vested by operation of law with the title of the bankrupt to all "powers which he [the bankrupt] might have exercised for his own benefit." The plaintiff, as trustee, stands in the shoes of the bankrupt. *Wheelock v. Lee*, 15 Abb. Prac. (N. S.) 28; *Id.*, 64 N. Y. 243. He is the legal representative of the bankrupt. *Wright v. First Nat. Bank*, Fed. Cas. No. 18,078; *Tamplin v. Wentworth*, 99 Mass. 63; *Gray v. Bennett*, 3 Metc. (Mass.) 522; *Moore v. Jones*, 23 Vt. 739, Fed. Cas. No. 9,768; *Tiffany v. Boatman's Institution*, 18 Wall. 390, 21 L. Ed. 868.

But counsel for petitioner, in his fourth assignment of errors, relies on the fact that the trustee secured title by virtue of a conveyance from the Kellogg Company, bankrupt's grantee, to which the bankrupt had previously conveyed the property subject to the lien of the mortgage, and contends, therefore, that the trustee cannot avail himself of the defense of usury, which is personal to the borrower. But the question certified to us for decision on this point is not one of "title derived solely from that of the corporation," as contended by counsel for the petitioner. The case is one where the mortgagor, less than four months prior to her bankruptcy, "with intent to delay and hinder her creditors, conveys the mortgaged property to a corporation participating in such intent, and the trustee repudiates such transfer on account of such fraud, and takes possession of the property, and by mutual consent the fraudulent grantee and the trustee rescind such conveyance." And the question now presented is whether, in these circumstances, "the fact that the property upon which the mortgagee has an apparent lien was transferred by the mortgagor to the said corporation, after the recording of the mortgage and subject to the lien thereof, before the beginning of the bankruptcy proceedings, precludes the trustee from pleading usury." The transfer was confessedly fraudulent on the part of grantor and grantee, and was made within four months of the bankruptcy, and was void.

The second assignment of error raises the question as to the power of the bankruptcy court to determine the question of the validity and amount of said bond and mortgage in the summary proceedings instituted before the referee in bankruptcy. Did the bankruptcy court, after having acquired actual possession and control of the property, have power to determine the validity of the liens thereon? By subdivision 7, § 2, of the act [U. S. Comp. St. 1901, p. 3421], jurisdiction is conferred to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The decisions are somewhat conflicting as to the scope of this provision, and

as to the power of the bankruptcy court in cases of conflicting jurisdiction. As Judge Wallace said in *Re Baudouine*, 3 Am. Bankr. Rep. 651, 101 Fed. 574:

"The language of clause 7 would seem to be sufficiently comprehensive to authorize the determination by courts of bankruptcy of every controversy relating to the estates of bankrupts. * * * Nevertheless, it is capable of a narrower construction, and can be read as extending only to controversies about property which actually belongs to the bankrupt's estate, or which arises strictly in the bankruptcy proceedings, such as those in reference to the marshaling of assets, or the extent and priority of conflicting liens."

Leidigh Carriage Co. v. Stengel, 37 C. C. A. 210, 95 Fed. 637; *In re Chambers* (D. C.) 98 Fed. 865; *In re Russell*, 41 C. C. A. 323, 101 Fed. 248; *In re N. Y. Economical Printing Co.*, 49 C. C. A. 133, 110 Fed. 514; *In re Pittelkow* (D. C.) 92 Fed. 901; *In re Wells* (D. C.) 114 Fed. 222; *In re Tune* (D. C.) 115 Fed. 906.

In the consideration of this question, the decision of the Supreme Court in *Bardes v. Hawarden Bank*, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175, should not be overlooked. But this case "related exclusively to jurisdiction of a suit by the trustee after his appointment." *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. And in the light of the views expressed by the Supreme Court in *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, decided the same day, and in *Bryan v. Bernheimer*, *supra*, and *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, it would seem that the controversies in relation to the bankrupt estate, which, by reason of the limitations referred to in the clause "except as herein otherwise provided," do not come within the jurisdiction of the bankruptcy courts, are those where the trustee must bring an independent suit to assert title to money or property not in the possession or control of the trustee. These conclusions are in accord with the decisions under the former bankruptcy act. *Ray v. Norseworthy*, 23 Wall. 128, 134, 23 L. Ed. 116.

The final question is whether the Supreme Court of the state of New York acquired jurisdiction of the property, to the exclusion of the United States District Court, by the filing of the summons, complaint, and notice of pendency of the foreclosure action, before the trustee was appointed; the bankruptcy court having previously acquired jurisdiction by the filing of the petition in bankruptcy and the appointment of a receiver, who had qualified and taken possession of the property prior to the commencement of said action and foreclosure. Under the New York Code a civil action is commenced by the service of a summons. Code Civ. Proc. § 416. The effect of filing a notice of pendency of an action is to bind the person whose conveyance or incumbrance is subsequently executed or recorded, by all proceedings taken in the action after the filing of the notice, to the same extent as if he was a party to the action. Section 1671. A court can hardly obtain jurisdiction of parties until service of some kind is made upon them. The property was in the possession of the receiver under the bankruptcy proceedings, and so remained after the appointment of the receiver as trustee. The court in the foreclosure suit had not attempted to take possession. The adjudication was

equivalent to the commencement of an action and the filing of a lis pendens. It must be held that the bankruptcy court, upon such acquisition by the receiver of possession and undisputed legal title, had jurisdiction to determine the validity of the mortgage.

We find nothing in the opinion of the Supreme Court of the United States in *Metcalf Bros. & Co. v. Benjamin Barker, Jr., Trustee* (handed down since the argument of this case) 23 Sup. Ct. 67, 47 L. Ed. —, which conflicts with the conclusions above stated.

The action of the District Court is affirmed.

PATTON v. WELLS.

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

No. 1,752.

1. PARTNERSHIP—DIVISION OF PROFITS—CONTRACTS—NUDUM PACTUM.

Plaintiff alleged that defendant, who was the cashier of a bank of which plaintiff was president, agreed that they should reorganize a corporation largely indebted to the bank, and that they would divide the proceeds of the stock held by the bank as collateral after the debt of the bank was realized from a sale thereof. Plaintiff testified that defendant stated to him that when the matter was fixed up, and the bank's money was realized, "if there was something of a surplus there would be a fair division." *Held*, that the promise, if made, was nudum pactum and unenforceable.

2. SAME—EVIDENCE.

In an action by the president of a bank against the cashier to recover a share of profits alleged to have been made by the cashier in the sale of stock of a corporation held by the bank as collateral security for the corporation's debt, after the cashier had reorganized the corporation and the debt to the bank had been paid, mere general conversations between plaintiff and defendant concerning the bank's affairs, not tending to show that the cashier intended to contract to divide with plaintiff any surplus so arising, was insufficient to show the making of a contract to divide the profit.

3. SAME—ACTION FOR SERVICES—QUESTION FOR JURY.

Where plaintiff testified that defendant expressly promised to remunerate plaintiff for his time and services while he was acting as a director and officer of a bank, and that he entered upon the performance of his duties in pursuance of such promise, whether such contract was entered into, and whether plaintiff rendered services in compliance therewith, was for the jury.

4. SAME—COMPLAINT—SEPARATE COUNTS—VERDICT—APPEAL.

Where plaintiff sued defendant in two counts, and a verdict was rendered in plaintiff's favor, without stating on which count it was based, and it was subsequently determined on appeal that plaintiff was not entitled to recover on one count, and it could not be determined from the record on which count the verdict was based, a judgment rendered thereon will be reversed.

5. SAME—TRIAL—REQUESTED INSTRUCTIONS.

Where, in an action for services, the court did not charge concerning the facts which must be proven to warrant a recovery, but simply gave to the jury a general summary of the evidence, a request that it must be proven to the reasonable satisfaction of the jury, by a preponderance of the evidence, that there was an express promise on defendant's part that, if plaintiff would act as president of the bank, defendant would pay him for his services in so doing, was improperly refused.

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

Elijah Robinson (C. G. Saunders and D. W. Stuart, on the brief), for plaintiff in error.

John N. Baldwin (S. B. Wadsworth and George S. Wright, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. Lucius Wells, the defendant in error, brought this action against James A. Patton, the plaintiff in error; his petition containing two counts or causes of action. In the first count he alleged, in substance, that about October 1, 1896, he was elected president of the First National Bank of Council Bluffs, Iowa, and that the defendant was elected its cashier at about the same time; that the bank held claims against the Council Bluffs Gas & Electric Light Company amounting in the aggregate to about \$120,000; that he had several conversations with the defendant, Patton, about the different methods of collecting this claim against the aforesaid gas and electric light company, and that by an oral agreement entered into between the plaintiff, Wells, and the defendant, Patton, the plaintiff agreed to assist the defendant in the reorganization of the aforesaid gas and electric light company, and in the sale of a large block of the stock of that company which the bank held as collateral; and that in and by said oral agreement the defendant promised to share with the plaintiff in the profits which might be made in the reorganization of said company and the sale of its stock, after the bank had fully realized what was due to it. It was then averred that the reorganization of the gas and electric light company took place; that the defendant, Patton, has received as profits incident to the reorganization of said company and the sale of its stock a large amount of money, to wit, several thousand dollars, but that he had neglected and refused to pay a part of it to the plaintiff in compliance with his agreement. The answer to this cause of action was a denial of the alleged oral agreement.

In the second count of his complaint the plaintiff alleged that on or about October 1, 1896, the defendant, Patton, entered into a verbal agreement with him whereby he promised that in consideration of the plaintiff's becoming and acting as a director and officer of the First National Bank of Council Bluffs, Iowa, he, the said Patton, would compensate the plaintiff for any and all services which he might render during the time that he acted as an officer or director of said bank; that the defendant was at the time the cashier of the bank, and a stockholder therein; that by virtue of such contract the plaintiff became a director and president of the bank, and performed services as such continuously during the years 1896, 1897, and 1898, until the bank became merged with another bank at Council Bluffs, Iowa, known as the Citizens' State Bank; and that the services which the plaintiff performed in pursuance of said agreement were of the reasonable value of \$5,000, no part of which had been paid. The defendant answered this cause of action by denying that he ever entered

into a contract with the plaintiff to compensate him for his services as a director or president of the aforesaid bank.

Relative to the first cause of action, it is sufficient to say that we have examined the testimony which was adduced at the trial, and have failed to find any substantial evidence tending to establish the existence of such an agreement as is alleged in the first cause of action. We do find in the plaintiff's testimony a statement to the effect that he had frequent conversations with Patton concerning the progress which he was making in selling the stock of the Council Bluffs Gas & Electric Light Company, which was held by the bank as collateral security, in which, as he says, Patton "held out the inducement to me that when this gas matter was fixed up, and we realized the bank's money, if there was something of surplus there would be a fair division." This statement, however, as detailed by the witness, does not disclose any consideration for the promise to divide the surplus money which might remain after the bank's debt was paid, and, if regarded as a contract, it would seem to be in the nature of a nudum pactum. Moreover, the conversations to which the witness refers, in which, as he says, such an inducement was held out, seem to have been general conversations between the plaintiff and the defendant concerning the bank's affairs, in which both of the parties were more or less interested; and it does not appear, we think, that the statements alluded to were made by the defendant with a view of entering into a contract with the plaintiff, or under circumstances which fairly justified the plaintiff in supposing that the defendant intended to make a contract. Upon the whole, therefore, we conclude that there was no substantial evidence in the case such as would support a verdict in favor of the plaintiff upon the first cause of action, and that the trial court ought to have given an instruction which was asked by the defendant's counsel—that under the pleadings and evidence the plaintiff was not entitled to recover upon that count.

Respecting the second cause of action the case is different. In support of this cause of action the plaintiff testified to a distinct promise made by the defendant that he would remunerate the plaintiff for his time and services while he was acting as a director and officer of the bank, and that he entered upon the performance of his duties in pursuance of such a promise. It was doubtless the province of the jury to determine whether such a contract was entered into by the defendant, and whether the plaintiff had rendered services in compliance therewith. The difficulty with the case is that the trial court did not require the jury to make a separate finding on the two causes of action, but submitted them together, and the jury returned a verdict in favor of the plaintiff, assessing his damages at the sum of \$2,000, without stating in their verdict upon which count the finding was based. Besides, the trial judge gave no clear directions to the jury concerning the facts which must be proven to the satisfaction of the jury to warrant a recovery upon either count of the petition. The charge contained a general summary of the evidence which had been adduced by the respective parties, but it contained no specific directions relative to the facts which must be estab-

lished to warrant a recovery on either cause of action. The trial judge seems to have assumed that no directions on that point were necessary, and that it would suffice to recapitulate the facts that had been testified to, leaving the jurors to determine for themselves whether they would warrant a recovery. The defendant's attorney requested the trial court to charge the jury, in substance, that, before the plaintiff could recover on the second cause of action, "it must be proven to the reasonable satisfaction of the jury, by a preponderance of the evidence, that there was an express promise on the part of the defendant that, if plaintiff would act as president of said bank, defendant would pay him for his services in so doing." This, in our judgment, was a proper instruction, which, in view of all of the circumstances of the case, ought to have been given. As it was not given, and no equivalent direction was contained in the court's charge, the failure to give it cannot be regarded otherwise than as a reversible error. Moreover, upon this record we cannot tell whether the finding of the jury was based upon the first count of the complaint, which was not supported by any substantial testimony, or whether it was based upon the second count.

Upon the whole, we conclude that the judgment ought to be reversed, and the cause remanded for a new trial, and it is so ordered.

CLARKE et al. v. SHIRK.

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

No. 877.

1. VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT.

A contract for the sale of a lot recited that the consideration was \$40,000, to be paid when the deed was made. It further provided that the vendor should take a lease of the property for 99 years, at an annual rental of \$6,000, and should erect thereon a building of a certain size and character; that on the completion of the building free from liens the purchaser should pay to lessee a sum which, together with partial payments to be made as the work progressed, should make \$60,000 additional, which should be considered an additional consideration for the land because of the erection of the building, and the assurance that the property so improved would be adequate security for the rental; and that if it was not erected the purchaser should be under no obligation to pay more than the \$40,000. The conveyance was made, the consideration paid, and the lease executed; but after commencing the building the lessee died, the work was abandoned, and the lease forfeited by the lessor. *Held*, that the contract was not ambiguous, and that the heirs of the vendor were not entitled to recover thereunder the \$60,000 as a part of the original consideration for the land.

2. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—CONSTRUCTION OF CONTRACT.

A court of equity is without jurisdiction of a suit to construe a written contract and recover damages for its breach, where neither fraud nor mistake is alleged nor a reformation prayed for.

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

This suit is in equity and its purpose is to obtain construction of a contract in writing for the sale of certain real estate in Chicago, and to recover money

as a balance due on the purchase price. The contract was made between the intestate Clarke and Elbert W. Shirk, the appellee, in March, 1891. The bill claims that the terms of the contract are uncertain, indefinite, and ambiguous, and the court is asked to construe the contract so that its real meaning shall be that the consideration to be paid is \$100,000, instead of \$40,000, and that the balance of \$60,000 was by the contract to be held by Shirk as a penalty to secure the erection of the building named in the contract and the payment of any damages that appellee might sustain by reason of Clarke's default in constructing the building.

The record shows that Clarke, being the owner of property at 333 Michigan avenue, on the 28th day of May, 1891, entered into a contract of sale with appellee, which is set out in full in the bill. It provides that Clarke shall furnish appellee with an abstract of title, and, if on examination the title is found merchantable, Clarke will convey the lands to appellee by warranty deed on payment of \$40,000, which sum the contract states shall be in full payment for the property. It also provides that the appellee shall make, and Clarke shall take, a 99-year lease of the property at an annual rental of \$6,000, which lease was to be executed contemporaneously with the conveyance of the property and the payment of the purchase price of \$40,000. The contract further provides as follows:

"Said party of the first part [appellee] further agrees that if and when, within the time limited in said lease, which shall be before January 1, 1892, five stories of the building provided for in said lease, shall be erected and completed as far as it is possible to complete the same prior to the roof being on, and if and when all material and labor used and employed in said building up to that time is fully paid for so that the same shall be free from all liens and claims, he will pay to the said party of the second part, in further consideration for the conveyance aforesaid, the sum of \$15,000 in cash; and if and when the roof is on said building and all material and labor up to that point paid for, so that the same shall be absolutely free and clear of all liens and claims of every kind whatsoever, he will pay to said party of the second part the further sum of \$10,000; and if and when, within the time limited in said lease, the plastering in said building is entirely completed and paid for, so that the same shall be free from all liens and claims, he will pay to the said party of the second part the further sum of \$10,000; and if and when the building specified in said lease shall be, within the time therein mentioned, entirely constructed and completed and ready for occupancy and entirely paid for, so that the same shall be absolutely free and clear of all liens and claims of every kind whatsoever, he will pay in addition to the aforesaid sums and as further consideration for the conveyance aforesaid, the sum of \$25,000 in cash. Said party of the first part shall not, however, be required to pay the aforesaid sum of \$15,000 until he shall be furnished with a certificate of such architect as shall be agreed upon, certifying that five stories of said building have been erected and that all materials and labor used in said building up to that point have been paid for as hereinabove stated; nor shall said party of the first part be required to pay the said sum of \$10,000 until a certificate shall be furnished by said architect certifying that the roof of said building is entirely completed and paid for; nor shall said party of the first part be required to pay the said sum of \$10,000 until said architect shall furnish him with a certificate, certifying that the roof is on said building and that all material and labor used in said building up to that point has been paid for; nor shall said party of the first part be required to pay the said sum of \$25,000 until said architect shall furnish him with a certificate, certifying to the complete construction of said building in accordance with the terms and conditions of said lease, and that the same is ready for occupancy and entirely paid for and free and clear of all claims and liens as hereinbefore stated, and that the fees and charges of said architect have been paid.

"Said ninety-nine year lease shall provide for the erection by said party of the second part of a thoroughly fireproof apartment or flat building, which building shall cover the entire width of the front of said lot and shall not be less than eighty-five feet in depth. Said building shall be constructed of steel, brick, terra cotta and granite."

"The principal cause moving said party of the first part to purchase the aforesaid land, is the execution of the aforesaid lease and the expectation that the building therein specified will be fully erected and completed in conformity with the terms and conditions of said lease, so that the same will be a substantial and adequate security for the payment of the rent therein specified and the performance of the other conditions in said lease contained on the part of said lessee; and it is expressly understood and agreed that the said sum of \$40,000 which is to be paid by the said party of the first part upon the delivery to him of the deed of said real estate, is and shall be in full payment and satisfaction of the whole purchase price of said land, and that the payment of the said additional sums of \$15,000, \$10,000, \$10,000 and \$25,000 are to be made by said party of the first part only if and when said party of the second part shall become entitled thereto by the erection and construction by said lessee of the building specified in said lease and at the respective times hereinbefore in that behalf stated; and that in such case the aforesaid sums are to be taken and considered as additional consideration for the said land because of the erection and construction of the said building in accordance with the terms and provisions of said lease, and for no other reason; and that unless said party of the second part shall become entitled to the payment of said sums respectively as aforesaid the said party of the first part shall be under no obligation of any kind to make any further or other payment or consideration for the said land except the said sum of \$40,000."

It is then alleged that the title was examined and found merchantable, and the property was conveyed by Clarke and wife to appellee, and that the consideration of \$40,000 named in the contract was paid, though the consideration named in the deed was \$100,000.

It is also alleged that the lease was executed by the parties, and that shortly thereafter Clarke caused plans and specifications to be made, and entered upon the construction of the building provided for in the lease and contract; and that the building was begun about September 1, 1891, but that shortly afterwards Clarke died intestate, and that on the 2d day of November following his widow, Elizabeth Clarke, one of the complainants, was appointed administratrix by the probate court of Cook county, and she as administratrix, and the other complainants as heirs, of Clarke, prosecuted the work until about January 1, 1892, when they permanently abandoned the enterprise on account of the financial condition of the estate and certain alleged disputes about the plans and specifications.

It is then alleged that when the work was abandoned Clarke's estate had become involved in liabilities on contracts for work and materials to an amount exceeding \$40,000. It is also alleged that about July 1, 1892, appellee served notices upon appellants of an intention to forfeit the lease because of their failure to construct the building; and that he did afterwards, in pursuance of the provisions of the lease, declare such forfeiture and take possession of the property.

It is then alleged that at the time of the execution of the contract it was understood and agreed between the parties that the purchase price to be paid for the land was to be \$100,000, and that it was reasonably worth that sum. There is no charge in the bill of fraud or mistake. The court is simply asked to construe the contract, the claim of complainants being "that the terms, stipulations, and conditions in said contract are uncertain, indefinite, and ambiguous; and that more particularly the terms, stipulations, and conditions with reference to the payment of said \$100,000 by said Shirk for the agreed purchase price of said premises are vague, uncertain, indefinite, and ambiguous in their meaning." The complainants claim that the true meaning of the contract is that the consideration to be paid by the defendant (appellee) for the conveyance of the land was \$100,000, and that the \$60,000 balance of purchase money, was the money of Clarke, held by defendant as a penalty to secure the erection of the building and the payment of any damages that he might sustain for any defect in its erection; that he has not sustained any substantial damage by the failure of complainants to erect the building, but if he has they are ready to pay them. By the prayer for relief the court is asked to decree that the purchase price agreed to be paid

was \$100,000; that the \$60,000 is the property of the complainants, and held by the defendant as a penalty, as before stated. A general demurrer to the bill was sustained by the court below, and a decree rendered dismissing the bill, from which decree the appeal is taken.

John W. Walsh, for appellants.

Frederic Ullmann, for appellee.

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

Upon this statement of the case, BUNN, District Judge, delivered the opinion of the court.

The decision of the Circuit Court was correct, and must be affirmed. There is no allegation of fraud or mistake, and the suit is not brought to reform the contract. The gravamen of the complaint is the alleged vagueness, uncertainty, and ambiguity of the contract, and the court is asked to construe it according to the interpretation put upon it by the appellants, and assess damages against the appellee. But the court is of opinion that there is no uncertainty or vagueness or ambiguity in the contract; that it speaks for itself, and does not need a bill in equity to construe it. Indeed, the contract, which was in writing, seems to be as plain as language can make it. By its terms the contract price of the land was \$40,000. The parties put that construction upon it when the conveyance was made and the \$40,000 paid. If a building was built by Clarke according to certain plans and specifications, \$60,000 in addition to the \$40,000 was to be paid. But the building was never erected, and so by the terms of the contract the \$60,000 never became due or payable.

It is alleged that the land was worth more than the agreed price of \$40,000, but that is not a material allegation. That was a matter for the parties to settle, and which they did settle between themselves. The court cannot change the contract or make a new one for the parties.

Nor do we think the bill makes a case for equitable jurisdiction. If the contract needed the aid of a court to construe it, a court of law is as competent to do that as a court of equity, and in some respects is better adapted to assess the damages which the appellants seek to recover.

The decree of the court below is affirmed.

OWYHEE LAND & IRR. CO. v. TAUTPHAS.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1903.)

No. 883.

1. FOREIGN CORPORATIONS—CONTRACTS—PRESIDENT—AUTHORITY—EVIDENCE.

Where a corporation executed a certificate under seal which recited that P., who signed the same as president, was the president of such corporation, and that the certificate appointed certain persons in another state as the corporation's agents on whom process might be served, as required by the laws of such state, such certificate was admissible as

evidence that P., who signed the contract on behalf of the corporation, was in fact its president.

2. SAME.

In an action on a contract with a foreign corporation, evidence that plaintiff had been requested to go to the corporation's office, and there attended a meeting of the board of directors, which was held in the office of the person who signed the contract as president of the corporation, which was in connection with the corporation's office, was admissible.

3. SAME—VALIDITY OF CONTRACT—ESTOPPEL TO DENY.

Where a corporation accepted the benefit of a contract executed by its president in its behalf, and repeatedly recognized the contract by payment of a large part of the consideration, it could not question the validity of the contract after full performance by the other party thereto.

4. SAME.

In an action on a contract with a foreign corporation for the construction of an irrigation canal, evidence as to what occurred at a meeting held in the office of the alleged president, adjoining the office of the company, attended by persons purporting to be directors of the company, and letters purporting to be written at the company's office, and signed by persons transacting its business there, and in control of its funds, was admissible.

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

Wyman & Wyman, for plaintiff in error.

Hawley & Puckett and E. M. Wolfe, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. There is no merit in this appeal. The action was brought to recover a balance alleged to be due from the defendant below (plaintiff in error here) on a written contract alleged by the plaintiff below to have been entered into between him and the defendant for the construction by the plaintiff for the defendant of a certain canal in Owyhee county, Idaho, for which the defendant agreed to pay the plaintiff \$150,000, of which sum three-fourths, or \$112,500, was to be in lawful money of the United States, and one-fourth, or \$37,500, in the bonds of the company at par, with accrued interest. It is not disputed that the plaintiff fully performed his contract, and that from time to time during the progress of the work the defendant company delivered to the plaintiff all of the bonds and paid him all of the money stipulated to be paid, except \$40,831. Notwithstanding these facts, which were expressly found by the court below (before which the case was, by the stipulation of the respective parties, tried without a jury), the plaintiff in error insists that no competent authority was shown for the execution of the contract on the part of the company, and therefore that there can be no recovery upon the complaint upon which the action is based. The answer having put in issue the averment in respect to the making of the contract, the plaintiff on the trial put in evidence the written contract, signed by the plaintiff as contractor, and, on the part of the defendant company, "Owyhee Land and Irrigation Company, by Whipple V. Phillips, President," and witnessed by "Charles L. King and Andrew J. Wiley." There was a written modification indorsed on the contract,

similarly signed, and witnessed by "Edwin E. Phillips, witness for Whipple V. Phillips."

The bill of exceptions recites:

"The plaintiff, to maintain the issues on his part, introduced evidence showing that he had entered into the contract in question with W. V. Phillips at Grand View, Idaho; that Phillips claimed to be the president of the defendant corporation; that no resolution, or other action of either the board of directors or of the stockholders of the defendant, authorizing the contract in any way, was made or had, but evidence was admitted showing the contract, and the work under it, to have been within the knowledge and with the consent of certain persons whom the plaintiff claimed to be officers of the defendant, and members of its board of directors.

"And the plaintiff, further to maintain the issues on his part, offered in evidence a certified copy of the appointment of Wiley and Wing as agents upon whom service of process may be had under the provisions of the Constitution and statutes of Idaho, which said certificate bears the signature 'W. V. Phillips,' as president, and a seal purporting to be the seal of the defendant. They were offered for the purpose of proving that said Phillips was president of the defendant corporation.

"To the introduction of each of these instruments the defendant objected on the ground that each is incompetent for the purpose offered, and as not being the best evidence. Defendant claimed the best evidence to be the minutes of the board of directors and of the stockholders' meetings, and called for the same. But the objections were overruled, and to each of said rulings the defendant excepted for the reasons aforesaid. Whereupon the certificates were read in evidence. The material parts thereof are as follows:

" 'Exhibit A.

" 'Know all men by these presents, that the Owyhee Land and Irrigation Company, a corporation organized and existing under the laws of the state of Rhode Island, does hereby, in pursuance of the laws of the state of Idaho, make this certificate, and does hereby designate Owyhee county in the state of Idaho as the county in which the principal place of business of said corporation in the said state of Idaho shall be conducted, and does hereby designate Charles L. Wing, residing at Grand View in said Owyhee county, as the authorized agent of said corporation in said state of Idaho, on whom process issued by authority of or under any law of the state of Idaho may be served under article XI, section 10, of the Constitution of the state of Idaho.

" 'In witness whereof, the said Owyhee Land and Irrigation Company has caused this certificate and acceptance to be executed and acknowledged and delivered in the name and on its behalf by its president, and to be attested by its secretary, and have caused its corporate seal to be hereunto affixed at Providence in the county of Providence, and in the state of Rhode Island, this 10th day of May, 1893.

" '[Seal]

Owyhee Land and Irrigation Company,
" 'By Whipple V. Phillips, President.

" 'Attest: Clarke H. Johnson, Secretary.'

"(Duly acknowledged.)

—Which instrument was filed in the office of the Secretary of State of the state of Idaho on June 14, 1893.

"And Exhibit B is the same in form and substance, except that it is dated January 20, 1894, filed in the Secretary's office on February 5, 1894, and designates Andrew J. Wiley as such statutory agent."

The plaintiff testified that he entered into the contract in Idaho with Phillips, who represented himself to be the president of the defendant company, and that the modification was made at Providence, R. I., where the plaintiff went at Phillips' request, and where, at the office of the company, the plaintiff met the president, treasurer, and a number of the directors of the company. The plaintiff

in error objected to this testimony on the ground that the minutes of the corporation were the best evidence of who constituted its officers. The witness Wiley testified, in part, as follows:

"I was at the company's offices at Providence at one time during the building of the canal. The meeting of the board of directors was had in Mr. Phillips' office, in connection with the company's office. Question. State who were present on that occasion? Answer. I cannot remember all of them; perhaps five or six. It was supposed to be a full meeting of the board of directors."

The defendant moved to strike out that portion of the witness' answer in respect to its being "a full meeting of the board of directors," on the ground that it was not the best evidence, nor responsive to the question. The witness Wiley also stated that, according to his recollection, five directors were present—among them, one Potter and one Blanchard, both of whom he testified were directors, and the latter also treasurer, and that Phillips was president, and presided at the meeting. The witness further testified:

"The meeting discussed pursuance of the work. I had come East at the request of the president. The contract between the plaintiff and defendant was discussed very fully."

To all of this testimony the defendant objected. The objections were overruled, to which ruling the defendant excepted.

The plaintiff was also permitted to introduce two letters—one dated, "Providence, R. I., October 16, 1894," with the heading, "Office of the Owyhee Land and Irrigation Company. W. V. Phillips, President and General Manager," and purporting to be signed, "Owyhee Land and Irrigation Company. Edwin E. Phillips," addressed to the plaintiff, and inclosing him a draft for \$1,025 on account of work performed under the contract, and informing him that the company would send the bonds by the next mail. The plaintiff testified that he did not know the handwriting of said Edwin E. Phillips, but knew him as the secretary of the company, and received the letter in due course of mail. The court admitted the letter in evidence over the objection of the defendant that it was "incompetent, being written by some one not shown to be an officer of the company." The other letter was dated, "Providence, R. I., April 24, 1895," with the heading, "Office of the Owyhee Land and Irrigation Company. W. V. Phillips, President," and purported to be signed, "Owyhee Land and Irrigation Company. H. K. Blanchard, Treas., pr. C. G. Moore," addressed to the plaintiff, and inclosing him a draft for \$2,025, "being cash payment in full for work performed in Idaho during the month of March as per contract," which letter, with the draft inclosed, the plaintiff testified he received in due course of mail, and which letter was admitted in evidence over the defendant's objection that "it was not shown that Blanchard was an officer of the company, or that he ever signed or ever saw the letter."

The above rulings of the court in the admission of testimony and evidence, to all of which the defendant reserved exceptions, constitute the only grounds for the appeal. None of them, in our opinion, are well taken. There could be no better proof of the

fact that Whipple V. Phillips was the president of the defendant corporation than the certificates issued under its seal, reciting the fact that he is president, signed by him as president, and attested by its secretary, and designating, pursuant to a provision of the Constitution of the state of Idaho, certain named persons residing in Owyhee county, of that state, as the authorized agents of the corporation therein, on whom process issued pursuant to the laws of the state might be served. Moreover, a corporation, on whose behalf a contract has been executed by its president, cannot be allowed to question its validity after its full performance by the other party thereto, the acceptance of its benefit, and repeated recognition of its binding character by the payment by the corporation of a large part of the consideration for the work done thereunder. Such acts constitute a complete ratification, even if the contract was originally unauthorized. And persons shown to have acted as officers of the corporation in such negotiations, to have met in its office, there transacted its business, and to have been in control of its funds, may properly be held, in such cases as the present, to be at least its de facto officers.

The judgment is affirmed, with 10 per cent. thereon as damages for frivolous appeal.

SOUTHER et al. v. SAN DIEGO FLUME CO.

(Circuit Court of Appeals, Ninth Circuit. February 16, 1903.)

No. 814.

1. WATER COMPANY—CONTRACT—CONSTRUCTION—APPORTIONMENT OF WATER AMONG CONSUMERS.

A water company, being a public service corporation, and engaged in supplying for domestic, irrigating, and other purposes water appropriated under the laws of California, contracted to furnish a certain amount of water, "subject to such reasonable general rules and regulations" as it might adopt. The contract provided that if the company's supply of water was shortened by act of God, drought, etc., the lands to which the water was attached should be entitled "to only such water as can be supplied * * * after the full supply shall have been furnished to all cities and towns" dependent on the company for water, and the company "shall not be responsible for any deficiency of water occasioned by any of the above causes." *Held*, that the consumer was subject, in time of drought, to an apportionment of water among all consumers, and he was not entitled to his full quota as soon as cities and towns were supplied.

2. SAME—REASONABLENESS OF REGULATION.

The clause authorizing reasonable rules and regulations by the company alone authorized such apportionment.

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

Bicknell, Gibson & Trask, for appellants.

Works, Lee & Works, for appellee.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. This action was originally brought by the appellants to cancel a contract made between them and the ap-

pellee, by which they purchased from the appellee the right to a continuous flow of water, and also to recover damages for the failure of the appellee to furnish the same. The appellee answered, and also filed a cross-complaint, in which it prayed for a judgment for the amount which it alleged was due it from the appellants by the terms of the same contract, and also for a decree that the real estate described in the contract be sold to satisfy such judgment. Such proceedings were had in the action that the original bill was dismissed by the Circuit Court, and the case was finally tried upon the appellee's cross-complaint and the answer of the appellants thereto, and a decree was rendered in favor of the appellee for the relief demanded in the cross-complaint. 112 Fed. 228. This is an appeal from that decree. The cross-bill alleges that on March 12, 1890, the appellee entered into a contract with the appellants by which it sold and conveyed to them a water right of and to 15 inches of water, continuous flow, for the sum of \$9,000, and an additional semiannual payment for each inch of water so conveyed. The contract is set out in the cross-bill in full, and contains the following, among other, provisions:

"The party of the first part [that is, the appellee] covenants and agrees for itself, its successors and assigns, to furnish, subject to the restrictions and conditions herein contained, a continuous flow of water, equivalent to 12,960 standard gallons in every twenty-four hours, for each inch of said fifteen inches of water, miners' measure, under a four-inch pressure, hereby conveyed, subject always, however, to such reasonable general rules and regulations as the said corporation may from time to time adopt.

"Provided, however, that if said corporation's supply of water be at any time shortened, or its capacity for delivering the same impaired, by the act of God or by the elements, or by drought, or by the failure of the average amount of rainfall in the mountains, or by operation of law, riot, insurrection, or public enemies, or by accident or willful injury to any part of the system of waterworks, the above-described land and the lands to which said ten inches of water, or any portion thereof, may be attached, as hereinbefore provided, shall, during the period of such shortage or impairment, be entitled to only such water as can be supplied to and for it after the full supply shall have been furnished to all cities and towns that are or may be dependent either in whole or in part upon said system of waterworks for their supply of water for municipal purposes and for the use of their inhabitants.

"And the said party of the first part shall not be responsible for any deficiency of water occasioned by any of the above causes, but the party of the first part shall use and employ all due diligence at all times in repairing and protecting its said flume and in maintaining the flow of water therein."

In the cross-bill it is further alleged:

"That during the winter 1893-94 and the summer of 1894 a severe and prolonged drought prevailed throughout the said county of San Diego, and covering the entire watershed of your orator, and there was a failure of the average amount of rainfall in the mountains from which your orator obtained its water supply; and by reason of said drought and failure of the average amount of rainfall, and for no other reason, your orator was, without fault or neglect on its part, unable to supply to the consumers of its water, and to whom it had become liable to furnish water, the full supply to which they were entitled; and by reason thereof, and for no other or different cause, your orator duly notified all consumers, including the defendants, that in order that all might suffer as little as possible from the scarcity of water the supply to be furnished to all consumers during the continuance of said drought would be reduced one-half; and in pursuance thereof the gates connecting the flumes and pipes of your orator with the pipes and flumes of

consumers, including the defendants herein, were so set and maintained as to furnish during said time only such one-half of the full supply of water; but that immediately upon said drought being broken, and as soon as your orator was able to do so, it gave notice to all said consumers, including the defendants, that it was ready to and would again furnish the full supply of water."

The answer to the cross-bill admits "that during the summer of 1894 a drought prevailed throughout the said county of San Diego, covering the entire watershed of cross-complainant, and that there was a failure of the average amount of rainfall in the mountains from which cross-complainant obtains its water supply," but denies that for this, "and for no other reason," the cross-complainant was, "without fault or neglect on its part," unable to supply the full quantity of water to those to whom it had become liable to furnish water, and in this connection the answer alleges that the appellee's system did not have a capacity of more than 375 inches, and that prior to June 7, 1894, it had contracted to furnish 600 inches; and, continuing, the answer alleges:

"And defendants further aver, on information and belief, that by reason of the said cross-complainant having prior to October 2, 1894, sold and tried to furnish more water, for compensation, than it had the capacity to supply, and for no other reason, the cross-complainant was unable to, and failed to furnish the defendants, from June 7, 1894, until October 2, 1894, with their 15 inches of water, under said contract of March 12, 1890."

The answer further alleges that by reason of such failure upon the part of the appellee to perform the obligations of its contract the appellants gave notice to the appellee on October 2, 1894, that said contract was rescinded by them. The Circuit Court found that appellee furnished to appellants only $7\frac{1}{2}$ inches of water from June 7, 1894, to December 10, 1894, and that the failure to supply the full quantity of 15 inches was because of the drought which prevailed during the summer of 1894, and that by reason thereof the appellee was, "without fault or neglect on its part, unable to supply to the consumers of its water, and to whom it had become liable to furnish water, the full supply to which they were entitled, and by reason thereof, and for no other or different cause, the cross-complainant duly notified all consumers, including the defendants to the cross-bill, that, in order that all might suffer as little as possible from the scarcity of water, the supply to be furnished to all consumers during the continuance of said drought would be reduced one-half." This special finding is fully supported by the evidence. The court also found "that the cross-complainant has fully and in all things complied with and performed all of the terms, covenants, and conditions of said contract on its part to be done and performed." It is urged by appellants that this general finding is not sustained by the evidence, and whether it is or not depends upon the proper construction of the contract above referred to. The contention of the appellants is that by the terms of that contract the appellee became absolutely bound to furnish them with 15 inches of water, continuous flow, unless because of drought the appellee should not have that amount of water to deliver after supplying all cities and towns that were dependent, in whole or in part, upon its system of waterworks for their supply of water for domestic purposes and for the use of their in-

habitants. If such was the obligation assumed by the appellee, then the finding that the contract was fully performed by the appellee is not sustained by the evidence. The Circuit Court, however, construed the contract otherwise, and held that the appellee was excused from furnishing to the appellants the 15 inches of water named in the contract, because of the drought, which made it impossible for the appellee to furnish to all of the consumers of its water, during the summer of 1894, the full supply of water to which they would otherwise have been entitled. We cannot say that this construction is wrong. In arriving at the meaning of the provision that the appellee was not to be responsible for any deficiency of water occasioned by drought or failure of the average amount of rainfall, and the other provision by which the appellee reserved the right to furnish appellants with water under such reasonable general rules as it might from time to time adopt, the court must take into consideration the facts and circumstances surrounding the parties at the time, and in view of which the contract was made. *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75. The appellee, the San Diego Flume Company, was a corporation organized under the laws of this state for the purpose of supplying water for domestic irrigation and other uses in the county of San Diego for compensation, and was then engaged in the business for which it was incorporated. The water which was the source of its supply had been acquired by it by appropriation under the Constitution and laws of the state of California, and in the matter of its sale and distribution the appellee owed a duty to the public. The appellants were not the only persons dependent upon the appellee's system for their supply of water. The contract was made with reference to these facts, and while it doubtless contemplated that the appellee was not to make sales of water beyond its ordinary capacity to supply, it certainly contemplated that the appellee should, even if it had not already done so, have the right to contract to make delivery of water to other persons up to that limit; and, foreseeing that there would probably be times of drought occasioned by the failure of the average rainfall, it was stipulated that cities and towns dependent upon appellee's system should be first supplied, and that in no event was it to be responsible for any deficiency of water occasioned by drought or any of the other causes named in the contract. It was also provided that the appellants were to have their supply of water, "subject to such reasonable general rules and regulations" as the appellee might "from time to time adopt." This provision gave to the appellee the right to make pro rata distribution of its water to the appellants and its other consumers as the court found that it did, when by reason of drought it was unable to furnish them with the full number of inches which they would otherwise have been entitled to receive under their contracts.

It is conceded by the appellee that by reason of a mistake in the calculation of interests the decree should have been for \$685 less than the amount therein given, and it consents that such mistake may be corrected by a modification of the decree.

The decree of the Circuit Court is modified by deducting therefrom the sum of \$685 as of date of December 30, 1901, and as thus modified is affirmed, with costs.

KANSAS CITY SOUTHERN RY. CO. v. MOLES.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1903.)

No. 1,773.

1. RAILROADS—ACCIDENT FROM KICKING CARS—RES GESTÆ.

The statement of the conductor of a train, who was on the cars kicked onto the siding that caused the accident, that he knew the car was on the siding to be unloaded, but thought the workmen were at dinner, made at the time and place of the accident, while the cars were still in motion, and while plaintiff's leg was still pinioned—the crash of the cars and the cries of plaintiff and others having brought him to the spot instantly—is admissible as part of the *res gestæ*.

2. SAME—OBLIGATION OF RAILROAD COMPANY—INSTRUCTIONS.

While ice was being removed from a car to an icehouse by a slide, plaintiff, in the icehouse, was injured by the slide being moved by cars being kicked against the car. *Held*, that a requested instruction limiting the obligation of the railway company to exercise ordinary care in switching its cars to persons engaged in work in or about the cars on the track was too restricted.

3. SAME—NEGLIGENCE.

The jury was justified in finding that to send loaded cars by a flying switch onto a siding without warning, and without adequate means of controlling them, whereby a car is struck, and a person unloading it is injured, is negligence.

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

The complaint alleges, in substance, that on the 12th day of July, 1900, the plaintiff, in company with Henderson and Dollarhide, at the invitation of the defendant railway company and W. S. Morris, entered a car loaded with ice, which had been set out on a side track at the town of Dequeen, Ark., for the purpose of unloading the ice into W. S. Morris' icehouse, situated a few feet from the side track on which the car stood; that for the purpose of unloading the ice the plaintiff was stationed in the icehouse to receive the ice as Henderson, who was in the ice car, sent it to him over a slide made for the purpose out of timbers fastened together by slats; that while so engaged in unloading the ice the trainmen of one of defendant's trains negligently caused the same to be pulled down the main track to the side track, and then negligently and suddenly, without any precaution, and without keeping any lookout whatever, and without any warning being given by bell or whistle or otherwise, kicked, shoved, or pushed a car from the main line up the side track into and against the car which plaintiff and his companions were unloading, with such force and violence that it propelled the car forward to such a distance that it caused the slide running from the icehouse to the car to catch the plaintiff's leg between itself and a sill of the icehouse, thereby causing a fracture of the bone of plaintiff's leg and laceration of the flesh, making a serious and severe wound; that the defendant and its agents and trainmen were aware of the presence of the plaintiff and his companions in the icehouse and car; that it was the custom of the defendant company to cause cars of ice to be set out on this siding for the purpose of being unloaded into this icehouse, and defendant knew that it was the custom for the ice to be unloaded there, and the trainmen and the agents of the company knew, or by the exercise of reasonable prudence would have known, of the presence of plaintiff at the time and place, and that the car was kicked up the switch track without any brakeman manning the same or to control its movements. The answer was a general denial and a plea of contributory negligence. The testimony substantially supported the case made

¶ 1. See Evidence, vol. 20. Cent. Dig. §§ 331, 365.

by the complaint, but went much more into detail. There was a trial to a jury, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

James B. McDonough (Gardiner Lathrop, Thomas R. Morrow, and James F. Read, on the brief), for plaintiff in error.

James D. Head (Oscar D. Scott, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

It is assigned for error that the court permitted the plaintiff to prove the statements of the conductor concerning the accident, to the following effect: The witness Dollarhide testified as follows:

"Q. State to the jury what the conductor said when he got to you? A. He said he didn't want any of us to think hard of him; that he didn't intend to kill a man on purpose. Q. State all he said. A. He said he knew the car was set there for the purpose of being unloaded and he thought, it being noon, that we was to dinner."

Another witness testified that the conductor said:

"'I thought you all had gone to dinner;' that he ought to have been on the lookout, but he thought we had gone to dinner."

These statements were made at the very time and place of the accident, while the cars were still in motion, and while the plaintiff's leg was still pinioned between the slide and the interior wall of the icehouse. The crash of the cars and the cries of the injured man and others brought the conductor, who was on the cars "kicked" in that occasioned the accident, to the spot instantly, and what he then said was clearly part of the *res gestæ*. *Peirce v. Van Dusen*, 24 C. C. A. 280, 78 Fed. 693, and cases cited in footnote.

No exception was taken to the charge of the court. The defendant preferred several requests for instructions, all of which were rightly refused. By the terms of the first request, the obligation of the railway company to exercise ordinary care in switching its cars was restricted to persons "engaged in work in and about the cars on the track." This was restricting the defendant's obligation within too narrow limits. Moreover, the charge in chief stated accurately and fully the degree of care the defendant was required to exercise.

The third and fifth requests relate to the defense of contributory negligence, but, as there was not a particle of evidence to support such a defense, they were rightly disregarded by the court. By the fourth and seventh requests the railway company, in effect, sought to apply to the case the doctrine of inevitable accident. Upon the proof in the case, it is difficult to treat such a suggestion seriously. The conductor who had charge of the defendant's train was called by the defendant as a witness, and testified:

"We had come to Dequeen at the dinner hour for dinner. We had two loads of ties to set out on the cotton track; and one of my head brakemen cut the cars off and kicked them in, and I rode them, and did not stop just in the clear, and they rolled down and struck the car which was supposed to hurt Mr. Moles."

Asked why he did not stop the cars, he answered, "They were heavy cars, and hard to stop."

The accident in this case resulted from that fruitful source of accidents—a running or flying switch—which has uniformly met with judicial condemnation, and which is prohibited by rule of some, if not all, railroad companies. Shearman & Redfield on the Law of Negligence (5th Ed.) §§ 461, 463, and cases cited; Beach on Contributory Negligence (2d Ed.) § 217; 1 Thompson on Negligence, 423, 452.

In this case, without warning to persons working on or near the track who were liable to be injured by the cars "kicked" in on the switch track, two cars loaded with ties were sent speeding down the track by a flying switch without any adequate means of controlling them, as the conductor of the train, who says he was riding the cars, admits.

The jury were entirely justified in finding that it was an act of negligence to make this flying switch under these circumstances, and that the railway company was liable to the plaintiff for the damages resulting to him therefrom.

The judgment of the Circuit Court is affirmed.

RICHTMAN et al. v. HALEY.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1903.)

No. 1,689.

1. CARRIERS—STEAMBOAT—INJURIES TO PASSENGERS—RES IPSA LOQUITUR—STATUTES—APPEAL—FINDINGS—REVERSAL.

Where, in an action for injuries to a passenger resulting from an explosion of one of the boilers of a steamboat, findings of a commissioner in favor of the plaintiff were based on Act Cong. July 7, 1838, c. 191, § 13 (5 Stat. 305), providing that in actions against proprietors of steamboats for injuries arising from the bursting of the boiler, etc., the fact of such bursting should be taken as full prima facie evidence sufficient to charge the defendant with negligence, after such section had been expressly repealed by Act Cong. February 28, 1871, c. 100, § 71 (16 Stat. 440, 459), and it could not be ascertained to what extent the findings had been influenced by the supposition that the section was still in force, a judgment in favor of plaintiff entered thereon will be reversed.

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

George G. Bowman, for appellants.

E. A. Baird (Frank E. Brown, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Caleb Haley, the appellee, filed his libel against the steamboat Jacob Richtman, alleging, in substance, that on the 13th day of September, 1900, he was a passenger on the boat, and was injured by the explosion of one of its boilers, and

that the explosion was due to the negligence of those in charge of the boat and to defects in the boiler, which were, or should have been, known to those in charge of the boat. Jacob Richtman, Jacob M. Richtman, Simon P. Richtman, and James J. Richtman, doing business as Jacob Richtman & Sons, owners of the boat, filed their claim and answer denying the material allegations of the libel. By consent of parties the cause was referred to S. R. Rush, commissioner, "to take the proofs and report his findings of fact and law to the court." After taking a large volume of testimony, the commissioner reported to the court his findings of facts and conclusions of law, to which the claimants filed exceptions, which were overruled, the commissioner's report confirmed, and a decree entered in conformity therewith awarding to the appellee damages to the amount of \$1,860.

Section 13 of chapter 191 of the act of Congress approved July 7, 1838, 5 Stat. 305, reads as follows:

"Sec. 13. And be it further enacted, that in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam, shall be taken as full *prima facie* evidence, sufficient to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

The commissioner, in his report, cited and relied on this section, and the decisions made under it, in support of his findings of fact, and presumably the lower court did the same in confirming the commissioner's report, for in this court the case was argued and submitted by counsel on both sides on the assumption that the section we have quoted was still in force. Upon examination we find the whole of the chapter containing this section was expressly repealed by section 71 of chapter 100 of the act of Congress of February 28, 1871, 16 Stat. 440, 459. For this reason the section is not found in the Revised Statutes of the United States, and we do not find that it has been re-enacted. We are unable to determine to what extent the findings of fact and conclusions of law of the commissioner and the lower court were influenced by the erroneous supposition that this section was still in force. In this class of cases, particularly where the reference is made by agreement of the parties, as it was in this case, the findings of the commissioner, when approved by the lower court, are extremely persuasive, and will be adopted by the appellate court, unless manifestly erroneous. But in this case we do not know whether the findings and conclusions of the commissioner and the lower court would have been the same if they had been advised of the repeal of this statute, and for this reason we are unable to determine what weight, if any, we should give to their finding. The parties are entitled to have the opinion of the commissioner and the lower court upon the facts of the case uninfluenced by any consideration of the repealed statute, and this court is entitled to have the opinion of the commissioner and the lower court on the facts uninfluenced by that consideration. Under the circumstances we think the ends of justice will be best attained by reversing the decree

and sending the case back to the lower court, with directions to refer it back to the commissioner with instructions to report his findings of facts and law to the court upon the testimony heretofore taken, and any new and additional testimony the parties, or either of them, may offer.

Ordered accordingly.

ADSIT v. KAUFMAN.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1903.)

No. 866.

1. USE AND OCCUPATION—ADVERSE HOLDING—ASSUMPSIT.

Where defendant was in possession of real estate claiming under a third person adversely to plaintiff, and no relation of contract existed between the parties, plaintiff was not entitled to maintain assumpsit against him for use and occupation.

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

Alfred Sutro, for plaintiff in error.

Malony & Cobb, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was plaintiff in the court below in an action to recover rent alleged to be due from the defendant for the use and occupation of a certain lot in the town of Juneau, Alaska, from April 1, 1894, to July 1, 1896, by "permission of the plaintiff." The defendant in his answer admitted the alleged ownership of the plaintiff of one-half of the lot at the time of the bringing of the action, but denied any ownership in him during the time of the defendant's occupancy of the premises, and denied that the defendant's occupancy was by permission of the plaintiff, or in any way under him or in recognition of his title, but, on the contrary, alleged that during the period for which rent is claimed by the plaintiff the lot was in the possession of a third person, who claimed adversely to the plaintiff, and from whom the defendant rented. These averments of the defendant were put in issue by the plaintiff.

The evidence showed, without conflict, that in April, 1894, one Malony was in possession of the lot in question, and rented it to the defendant; that at that time the present plaintiff had pending an action in the District Court of Alaska against Malony to recover possession of the premises, in which action he finally prevailed, and in 1897 obtained possession thereof for the first time, under the judgment rendered in that action. The evidence further showed, without conflict, that the occupancy of the defendant was under lease from Malony, and that he at no time got "permission" from the plaintiff to occupy the premises. But it was shown that at some time, not

stated, the plaintiff caused to be served upon the defendant a written notice dated April 23, 1894, to the effect that the plaintiff owned an undivided one-half of the lot, and "requesting" the defendant to pay to the plaintiff one-half of the rent due from him for the use of the premises, and to no one else, unless upon the written order of the plaintiff. Upon the case as thus presented the court below directed a verdict for the defendant, which was accordingly returned, upon which judgment was given for the defendant. The appeal is from that judgment.

The court below was clearly right. "An action in the nature of assumpsit, for the use and occupation of real estate, will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes a defendant a trespasser." *Hill v. United States*, 149 U. S. 593, 598, 13 Sup. Ct. 1011, 37 L. Ed. 862; *Lloyd v. Hough*, 1 How. 153, 159, 11 L. Ed. 83; *Carpenter v. United States*, 17 Wall. 489, 493, 21 L. Ed. 680; *Pico v. Phelan*, 77 Cal. 86, 19 Pac. 186; *Espy v. Fenton*, 5 Or. 423; *Dixon v. Ahern* (Nev.) 24 Pac. 337; *Taylor on Landlord & Tenant*, § 31; 1 *Wood on Landlord & Tenant*, § 1.

The judgment is affirmed.

JUNEAU FERRY & NAVIGATION CO. v. ALASKA S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1903.)

No. 868.

1. EQUITY—REVIEW OF FACTS—DECREE—WANT OF SUPPORT IN EVIDENCE—MODIFICATION.

Where, in a suit to restrain the driving of piles on a water front, the evidence shows no possession in complainant warranting the relief asked, but also fails to show any ownership in defendant, on review of the decree denying the injunction, and adjudging title and possession in defendant, it will be modified to one merely denying the injunction and dismissing the suit.

Appeal from District Court of the United States for the District of Alaska, Division No. 1.

Malony & Cobb, John Flournoy, and L. S. B. Sawyer, for appellant.
Ira Bronson, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a suit for an injunction, brought by the appellant to restrain the appellee from driving piles in front of a strip of water front at Juneau, Alaska, of which the complainant alleged it was possessed and had used as a landing place for its own and other vessels, and on which it had erected "a cradle or landing and tying-up place for small vessels, and the necessary piling" for those purposes. The defendant to the suit put in issue those averments, and

as an affirmative defense alleged that the strip of land described in the bill lies wholly below high-water mark, and abuts on upland of which the defendant and its grantors had long been in possession, and of which the defendant was at the time of the commencement of the suit the owner and actually possessed, and that the purpose of the defendant was the building of "a wharf and suitable warehouses and approaches from said upland over said premises (described in the bill), and out to the deep waters of Gastineaux channel, suitable for the accommodation of ocean-going craft, and to the benefit of commerce and shipping."

Evidence having been given on behalf of the respective parties, the case was submitted to the court below, which made certain findings of fact and conclusions of law, and decreed, among other things, "that defendant was at the commencement of this action the owner of and entitled to the possession of all the premises hereinbefore described, and that plaintiff had no right, title, or interest in or to said premises, or any portion thereof, at the date of the commencement of this suit."

The suit being one in equity, we must decide it upon the evidence; and we are of the opinion that while the evidence undoubtedly shows that the complainant and its predecessors in interest used the strip of water front in controversy from time to time, yet it falls far short of establishing such possession thereof on the part of the complainant as would justify the injunction prayed for. It is still clearer that there was no evidence of any ownership of the premises in question by the defendant to the suit, and therefore that portion of the decree adjudging it the owner thereof is erroneous. The appropriate decree, in view of the evidence, is one to the effect that the complainant take nothing by its suit, and dismissing the bill at the complainant's cost.

The decree appealed from will be so modified, and as so modified it will stand affirmed.

BISSELL CHILLED PLOW WORKS v. T. M. BISSELL PLOW CO. et al.

(Circuit Court, W. D. Michigan, S. D. October 2, 1902.)

1. UNFAIR COMPETITION—CORPORATE NAME—RIGHT TO USE NAME OF PERSON.

Complainant corporation was organized in 1881 under the name of "The South Bend Pulp Company," and engaged in business at South Bend, Ind., in the manufacture of wood pulp, and also in the manufacture and sale of plows. Its largest stockholder, who was president and general manager, was T. M. Bissell, who had been in the manufacture of plows for some years, and was the holder of patents for improved methods of making the same, which he transferred to the corporation. Its plow business was separate, and was always conducted under the department name of "The Bissell Chilled Plow Works," and all of its plows were marked with the name "Bissell," in connection with other designations, and became known to the trade by such name. The making of plows was or became its principal business, and in 1891, with the consent of Bissell, its name was changed, through statutory proceedings in the court, to "The Bissell Chilled Plow Works," and it continued its business from that time under such name. About that time, Bissell, having sold a part of his stock, retired from the management, and he

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

thereafter organized a corporation under the name of "The T. M. Bissell Plow Company," which engaged in the manufacture and sale of plows in South Bend, making substantially the same plows as complainant, and marking them with the name "Bissell." After a year or so Bissell died, and the business of such corporation was discontinued. Subsequently certain of defendants residing at Eaton Rapids, Mich., purchased a part of the stock, patterns, etc., of the corporation, taking an assignment of the right to use its corporate name, and organized the defendant corporation under the same name which engaged in making plows at Eaton Rapids. Circulars were issued, stating the removal of the company from South Bend, and containing pictures of Bissell, and referring to him as "the inventor of chilled plows, once made in South Bend, Indiana, now only by The T. M. Bissell Plow Co., Eaton Rapids, Mich." Its plows were also all marked with the name "T. M. Bissell," and were similar in design and appearance to those of complainant. The original Bissell patent for chilling was owned, and the process used, by complainant, which also held shop rights for the use of later patents, some of which were afterward owned and used by defendant. No one by the name of Bissell, or connected with the prior Indiana corporation of the same name, had any connection with defendant. There was evidence that retail purchasers in many cases did not know the difference between the two makes, and would accept either as a Bissell plow. *Held*, that the second Indiana corporation had no right to use the name "Bissell" as it did, either in its corporate name or as a mark on its product, as against complainant, which had acquired the prior right, and that defendant obtained no right by the attempted assignment; that the action of defendant in the use made of the name in both respects constituted unfair competition.

2. SAME—CORPORATIONS IN DIFFERENT LOCALITIES.

The fact that two corporations are located in different communities does not affect the right of one to an injunction restraining the other from unfair competition by adopting a similar corporate name, where they are engaged in the same business, and their products are both sold in the same open markets.

3. SAME—RIGHT TO RELIEF—FRAUDULENT INTENT.

The right to relief against unfair competition is not dependent upon an actual fraudulent intent, where the conduct of defendant was such as would naturally deceive the public as to the origin of its goods, and where it is shown that such deception actually resulted.

4. SAME—EFFECT OF LACHES.

Simple laches in the institution of a suit for unfair competition, as by a delay of six years, with knowledge of defendant's acts, will not defeat the right of a complainant to an injunction, where the right is clear, although it may preclude the recovery of damages for the past wrong.

In Equity. Suit for unfair competition in trade.

This is a suit by the Bissell Chilled Plow Works, an Indiana corporation, engaged in the business of selling plows and wood pulp of its own manufacture at South Bend, Ind., against the T. M. Bissell Plow Company, a Michigan corporation, engaged in the business of selling plows of its own manufacture at Eaton Rapids, Mich., and certain officers thereof. The relief sought is an injunction restraining defendants from using the proper name "Bissell" as part of the name of the defendant corporation, or upon the plows sold by it, and a recovery of damages for past use thereof in such connection. The question to be determined is whether the facts shown by the evidence in the record are such as to entitle complainant to all or either part of this relief.

¶ 2. Corporate or firm name as trade-name, see notes to *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 579; *Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co.*, 27 C. C. A. 357.

Complainant was incorporated and organized January 11, 1881. Its name at first, and until June 2, 1891, was "The South Bend Pulp Company." On that date it was changed to "The Bissell Chilled Plow Works," its present name, by the judgment of the circuit court of St. Joseph county, Ind., of which South Bend is the county seat, in proceedings had in pursuance of the statutes of Indiana, begun February 21, 1891. Its business has always been as before stated, but the principal part thereof for from some time before the change in name, if not always, has been the sale of plows, and, if it still continues to sell wood pulp, it is only to a small extent. These two departments of its business have always been kept separate and distinct. Before the change in corporate name, it had a trade-name for its plow department, to wit, "The Bissell Chilled Plow Works," the same which so became its corporate name. This was the trade-name of that department before that change, from the very beginning. There was nothing done by it in connection therewith that was not done in that name. All correspondence, bill heads, letter heads, price lists, advertisements, and contracts in relation thereto were in that name. Its plow business could not have been done more completely in that name had such been its corporate name, and was not done less completely than all its business has been done therein since the change. The plows sold by it have always been marked in this manner: Stenciled upon one of the handles of all plows, except an old-style cast plow, are the words "Bissell's Improved," and upon the beam of most all having wooden beams the words "The Bissell Chilled Plow, South Bend, Ind.," and upon the beam of some the words "Bissell Chilled Plow Works," "Bissell Cast," or "The Bissell Patent Chilled Plow." The different styles are designated by numbers or letters. These plows have always been advertised, known in the plow trade, and called for by intending purchasers, by the name of "Bissell Plows," and these words thus used mean and have always meant plows made and sold by complainant.

The way in which complainant came to use the proper name "Bissell" in said connection was this: The moving spirit in its incorporation and organization was one T. M. Bissell. He was its principal stockholder, and, upon its organization, became its president and general manager. He had theretofore, for a period of over 20 years, been engaged in the business of making plows for sale with and for others at South Bend, had invented a process for chilling the moldboards of plows, known as a "hot water chill," whereby a substitute for steel, having its hardness and polish, yet cheaper, was provided, for which he had obtained a patent May 18, 1880. By reason of these facts he had acquired a reputation as a plow manufacturer. Upon the organization of complainant, he sold and transferred to it his stock of tools, machinery, iron, and other chattels, and said patent, and thereafter, until shortly before the change in name, and just after the application therefor had been made, he devoted his entire time, services, and attention to its business. During this time he invented three separate devices to be used in the manufacture of plows, one of which was a bolt with an oblong or oval head, and he assigned to complainant shop rights in each one of said patents. It was with his knowledge and consent, and through his active instrumentality, that his name was used in connection with the plow department of its business, and upon the plows made and sold by it, in the manner hereinbefore stated. In the year 1887 one E. C. Westervelt became a stockholder in the complainant. Its capital stock was increased to \$60,000, owned or controlled one-half each by said Bissell and Westervelt. In the course of time Westervelt acquired charge of the financial affairs of complainant, and Bissell's duties became confined to supervising the manufacture of the plows. Finally, upon a proposition to buy or sell one-fourth of the stock at a certain figure, Bissell sold to Westervelt, and on March 31, 1891, resigned all official connection with complainant; retaining, however, one-fourth of its stock, which is still held by his estate. It was on the 21st of February preceding that the proceedings for a change in name were instituted, and the probability is that they were instituted in view of the coming severance of connection of Bissell with complainant. Mr. Westervelt testifies that the change in name was with Mr. Bissell's consent, and it is certain that he interposed no objection thereto.

At the time of this severance of connection, complainant's business covered

22 states, and in the year 1891 it sold 9,595 plows, as against 4,090 in 1885. In the manufacture of the plows which it was then making, and has since continued to make, it used said hot water process of chilling, and an improvement thereon not patented, and said patented devices. The plows which it has made and sold are largely chilled plows, though it has made, to a considerable extent, steel and cast plows.

On 16th day of July, 1891, said T. M. Bissell, in connection with others, incorporated and organized, under the laws of Indiana, a corporation with the corporate name of "The T. M. Bissell Plow Company," to carry on the business of selling plows of its own manufacture at South Bend, and at once entered upon said business, with said Bissell in charge, and continued in business until the latter part of 1892 or early part of 1893. It made and sold chilled, steel, and cast plows. In making the chilled plows it used a process known as "hot iron process," invented by said Bissell, and in making all its plows it used said patented devices, shop rights to which, at least, were assigned by said Bissell to said new company. The plows which it made were exact duplicates of those made by complainant. The parts of the plows made by it were capable of interchanging with like parts of like plows of complainant's. They were painted exactly like them, and had the same words, letters, and numbers which the corresponding plows made by complainant had. It issued circulars advertising its plows, of the same character, as to color, size, and shape, and containing the same statements and warranties, as those used by complainant in advertising its plows. Soon after it began business, complainant complained to it in regard to its manner of doing business. The complaint seems to have been limited to the manner of painting the plows, the use of the same words, numbers, and letters in marking them, and the issuance of said circulars. Upon said complaint being made, said corporation ceased to so paint or mark its plows, or to issue said circulars. No complaint seems to have been made of the corporate name of said company, or of its right to use it, or the name of said Bissell on the plows. Perhaps such complaint was not in order, so far as the use of the name of said company, or of said Bissell upon the plows was concerned, until it began to use them in another manner than it had theretofore used them. Thereafter it marked its plows in this manner: Upon one of the handles of all its plows it stenciled the words "T. M. Bissell," or "The T. M. Bissell," and upon the other of those that were chilled plows the word "Chilled." Upon the beams of those having wooden beams it stenciled the words "The T. M. Bissell Plow Co., South Bend, Ind.," or the words "The T. M. Bissell Plow Co.," and to the numbers it prefixed the number "1" and to the letters it affixed the letter "X." It also placed upon the handle or beam, or, perhaps, upon both, a mark which consisted of the head of a bolt made in accordance with said patent, and similar to the bolts used by it and complainant in making their plows. No complaint seems ever to have been made of this manner of marking the plows.

On the 23d day of July, 1892, Mr. Bissell died, and it was because of this fact, and probably, also, because it was financially embarrassed, said company ceased to do business, as hereinbefore stated. Thereupon complainant purchased from it certain beams and belting, a good many patterns, and a patent for a device in connection with making of plows, obtained by Mr. Bissell on the _____ day of _____, 1892, and which he had transferred to said company. These were all its effects which complainant deemed of any value to it, and it paid therefor the sum of \$4,475.18.

One James Gallery had been engaged in the foundry and machine business at Eaton Rapids, Mich., from 1848 until his death, in 1882. For four years preceding his death, his son, the defendant Arthur D. Gallery, was in partnership with him, and they did business under the firm name of James Gallery & Son. Upon his death his son and widow succeeded to the business, and carried it on under the name of James Gallery's Sons. In connection with it they made and sold plows and repair parts in a small way; the plows which it made being known as the Curtis and Gallery plows. The output prior to 1893 of the Curtis plow was about 25 plows a year, and of the Gallery plow, which they began making in 1891, not more than 100 in all. In March, 1893, said Arthur D. Gallery learned through S. T. Green, of Charlotte, Mich., who

had been agent for complainant before the incorporation and organization of the T. M. Bissell Plow Company by said Bissell, and thereafter for said company, at said place, in the sale of their plows, and that said company had ceased its business, and had certain effects to dispose of. He visited South Bend, and negotiated with said company for the purchase of the remnant of its effects which had not been purchased by complainant, and the right to use the name "The T. M. Bissell Company." On April 14, 1893, said Gallery, in connection with certain other citizens and residents of Eaton Rapids, Mich., incorporated and organized the defendant the T. M. Bissell Plow Company. On the 19th day of April the South Bend corporation executed to the Eaton Rapids corporation a written transfer of the right to use said name, and the remainder of said effects described therein, as consisting of patterns, patents, models, templates, and dies. The legal title to the three patents for devices, including said bolt with the oblong or oval head, was in the personal representative of said T. M. Bissell, his widow, and in pursuance of said sale she assigned them to said corporation. The consideration for said transfer was the sum of \$1,500. At that time said South Bend corporation had a stock of manufactured plows at South Bend, Charlotte, Mich., and two points in Pennsylvania—those at Charlotte being in charge of said Green—and on the 5th or 6th of May thereafter it sold same to said Eaton Rapids corporation for a sum which, with said \$1,500, amounted to \$5,175.82. Upon said purchase being completed, to wit, on May 5, 1893, the defendant corporation caused to be printed and mailed from South Bend to the customers of the South Bend corporation a circular in these words:

"Office of the T. M. Bissell Plow Co.

"South Bend, Indiana, May 5th, 1893.

"To Our Patrons: We have disposed of all our patterns, chills, flasks, patents, manufactured stock and good will to the T. M. Bissell Plow Company of Eaton Rapids, Mich., where under the direction of the same skilled mechanics they will continue the manufacture of the T. M. Bissell Plows and repairs. We thank you for the liberal patronage accorded us in the past, and would ask a continuance of the same for our successors.

"Yours truly,

The T. M. Bissell Plow Company,

"By F. E. Bissell, Treasurer."

And the same date said S. T. Green caused to be printed and mailed from Charlotte to the plow trade in Michigan a circular in these words:

"Charlotte, Mich., May 5, 1893.

"To the Michigan Trade: It has come to our knowledge that certain parties have reported that we had sold out our plant to parties in South Bend, and that we were not building plows any more. This is a mistake and never had any foundation for truth. We simply shut down our works for a few days to make our removal. Wishing to increase our capital and enlarge our business we formed a large stock company at Eaton Rapids, Michigan, and removed our entire plant to Eaton Rapids (which enclosed circular fully explains). It seems that certain parties have taken advantage of this and reported that we had quit business. We now have everything moved to Eaton Rapids and in a very few days we will be in running order and with largely increased capital and a large plant we will be enabled to give you not only the celebrated T. M. Bissell Plows as before, but will improve our goods in every way that skilled mechanics and labor can conceive. It will be our aim to make various improvements and to keep pace with the times, and we hope to merit your continued patronage and good will.

"T. M. Bissell Plow Co.,

"Per S. T. Green, Charlotte, Mich.

"N. B. We wish to state further that Mr. S. T. Green of Charlotte, Mich., will continue in charge of the Michigan trade the same as before. Soliciting your continued patronage and good will, we remain as ever,

"Very truly yours,

T. M. Bissell Plow Co.,

"Eaton Rapids, Michigan."

It is claimed that this circular was issued by said Green without the authority, consent, or knowledge of the defendant corporation. It is significant, however, that it was issued simultaneously with the circular issued by it from South Bend, that Green was the person through whose instrumentality the purchase was brought about, and that he then had possession of its manufactured stock in Charlotte. He entered into a written contract to act as agent for the defendant corporation on December 26th thereafter. Thereupon the defendant corporation began to make and sell chilled, steel, and cast plows at Eaton Rapids of the same character as those made by the South Bend corporation, and to paint and mark them in the same way that it did, save that where it had stenciled on the beams of the plows the words "The T. M. Bissell Plow Co., South Bend, Ind.," the defendant corporation stenciled the words "The T. M. Bissell Plow Co., Eaton Rapids, Mich.," and that it removed the prefix "1" and affix "X" in all instances except 5, and has continued to do so ever since. And it now makes and sells at least 16 plows of the same style as those made by complainant, which are exact duplicates of those made by complainant. As soon as it began to do business, and as long as they lasted, it circulated price lists of the South Bend corporation, received from it at the time of the purchase, upon the margin of which it had placed the words "Office and works removed to Eaton Rapids, Mich." It also caused to be printed and circulated in the plow trade circulars in its name in which it described itself as "formerly of South Bend, Ind.," and also other circulars on which was a picture of T. M. Bissell, and reference is made to him in these words: "The inventor of chilled plows once made in South Bend, Ind., now only by The T. M. Bissell Plow Co., Eaton Rapids, Michigan." In addition to this, in the way of advertisement, it caused to be printed and circulated catalogues of the plows made and sold by it, and has ever since done so. On the front page of these catalogues is a picture of T. M. Bissell. Preceding a description of the plows referred to in it is a warranty which is word for word the same as the warranty in use by complainant long before T. M. Bissell severed his connection with complainant, and ever since, and an introduction in these words:

"The name of T. M. Bissell is as well known to the chilled plow trade as the name of Washington is to the people at large, and it is, therefore, unnecessary, in calling attention to the plows to which he gave his name and which contain the latest creations of his genius, to give in detail a history of his discovery of a successful method of chilling iron moldboards, or of the long years of unremitting study and experiment through which he toiled to bring to its present state of perfection a complete line of Chilled Plows. Neither does it seem necessary to relate the causes which resulted in the formation of an entirely new company after Mr. Bissell's death in 1892, and the removal of the works from South Bend, Ind., the scene of his activities for many years, to Eaton Rapids, Michigan, in the summer of 1893. For the purpose of general information and correcting any misapprehension or wilful misstatement in regard to the genuine quality of our goods, we beg to submit the following statement of facts:

"(1) We are the sole owners of all original patterns used in the manufacture of T. M. Bissell Plows in South Bend, Ind.

"(2) We are sole owners by virtue of assignment to us of all patents issued to T. M. Bissell used in constructing these plows, said original patents being in the possession of this company and subject to inspection at its office in Eaton Rapids.

"(3) We use the latest Improved Chill, devised by Mr. Bissell, and the mixture of metals and method of manufacture which after years of experiment, he finally adopted as being by far the best.

"(4) We employ skilled workmen, who were educated under the supervision and personal instruction of Mr. T. M. Bissell.

"(5) Every part of the T. M. Bissell plows will interchange with a like part of any plow of like number bearing the name of Bissell, and at the same time contain improvements not found in the old style Bissell Plows."

On two of the cuts of the plows contained in these catalogues are the words "T. M. Bissell Plow Co., South Bend, Ind." Upon all the circulars and every

page of the catalogues issued by the defendant corporation since its organization there is a cut of the head of said bolt, and until the fall of 1893, after it had received notice that complainant intended to sue it, on same was printed the words "The T. M. Bissell Plow Company, South Bend, Ind." Thereafter they were changed to "The T. M. Bissell Plow Co., Eaton Rapids, Michigan." In all the circulars, catalogues, and other advertising matter issued by the defendant corporation since its organization the plows made and sold by it were and are referred to as "T. M. Bissell Plows."

Since the organization of defendant corporation, no descendant of said T. M. Bissell, or any one bearing the name of Bissell, has had any connection with defendant. In the introduction to the catalogues, hereinbefore quoted, it is stated that the defendant corporation employs skilled workmen, who were educated under the supervision and personal instruction of Mr. T. M. Bissell. The facts in regard to this are these: When the defendant commenced business it had with it three employes who had been with the South Bend corporation, and whom it brought from South Bend to Eaton Rapids. One of these acted as foreman or instructor, and the other two were molders. The foreman or instructor remained about three months. One of the molders was with defendant for about two years, though not continuously, and the other for a shorter period of time. For three or four years prior to the bringing of this suit, in 1899, no person who had ever had connection with the South Bend corporation has had any connection with defendant corporation.

Complainant became aware of the entry of defendant corporation into business at Eaton Rapids shortly after it started. In some way it obtained some of the circulars which had been sent out from South Bend May 5, 1893, to the customers of the South Bend corporation. It made no complaint or protest against anything that the defendant corporation was doing until about the year 1898. It consulted with attorneys in regard to its rights against said defendants as early as 1895, or perhaps earlier, and about the year 1898 it caused a bill to be prepared on its behalf against the defendants, by certain attorneys, to be filed in the state court, and a copy thereof to be mailed to the defendant corporation. Otherwise no complaint or protest was made by complainant prior to the institution of this suit in 1899.

Stuart MacKibbin (Edward Bacon and Dallas Boudeman of counsel), for complainant.

J. B. Hendee and Garry C. Fox, for defendants.

COCHRAN, District Judge, after making the foregoing statement, said:

These are the essential facts of this case. Are they such as to entitle complainant to all or either part of the relief sought?

There can be no doubt but that, when Mr. Bissell severed his connection with complainant, it had the right thereafter to continue to transact its plow business in the name of the Bissell Chilled Plow Works, and to mark its plows as it had been doing, against him as well as everybody else. In the case of William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co. (C. C.) 11 Fed. 498, Judge Lowell said:

"Both parties have fallen into the mistake of supposing that it was important to have a Rogers and his son, to authorize them to use the trademark, 'Rogers & Son.' The law is not so. Any one might use that trademark for the first time that it was used, and, if there was no Rogers in the same business, no Rogers could complain. *Levy v. Walker*, L. R. 10 Ch. D. 436; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748."

When it began to use said trade-name and to so mark its goods, there was no Bissell in the same business. The only Bissell who had been in the same business ceased to do such business, became connected with complainant, and gave his name to it. His thereafter

ceasing connection with complainant to the extent stated in no way affected its right to continue to use his name as it had been doing. Having that right, it certainly had the right to make the trade-name of its plow business its corporate name, and that apart from any consent of Mr. Bissell. But not only did complainant have such right (i. e., to use the name of Bissell in such ways); it also had the right to prevent the use of that name by others in the same business to the extent and upon the grounds now to be set forth.

It is well settled that, where two persons are engaged in selling goods of like character, one of them has no right to represent the goods which he offers for sale as the goods of the other, in order to facilitate the sale of his goods. Such a representation is an actionable wrong. Damages sustained thereby can be recovered, and its continuance can be enjoined. It is on this ground that a seller of goods, having a technical trade-mark, which he affixes thereto, can complain of another seller in the same business for affixing the same trade-mark, or an imitation thereof, to his goods. In the case of *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581, Mr. Justice Strong said:

"In all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities."

And again:

"The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator or the manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is, in effect, representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public—by inducing the public to purchase the goods and manufactures of one person, supposing them to be those of another."

In the case of *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, Mr. Justice Clifford said:

"Equity gives relief in such cases upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture; he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods, or from the higher price the public are willing to give for the article rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp, because by doing so he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy."

Indeed, what makes a mark affixed by a seller to goods produced or selected by him a technical trade-mark (i. e., one whose exclusive use

by him in marking goods of the same or like character will be protected) is that when it is affixed to goods of that character it amounts to a representation that they are the goods of the person who has adopted it as his trade-mark. If it does not amount to such a representation, it is not a technical trade-mark. In the case of *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599, Judge Duer said:

"The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

And in the case of *Canal Co. v. Clark*, *supra*, Mr. Justice Strong said:

"The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or, in other words, to give notice who is the producer."

It is because they do not amount to such a representation that the various names which cannot be made use of as technical trade-marks are held not to be capable of such use. In the case of *Canal Co. v. Clark*, *supra*, Mr. Justice Strong said:

"Nor can a generic name, or a name merely descriptive of an article of trade, or of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection."

And again:

"And it is obvious that the same reasons which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and, could they be appropriated exclusively, the appropriation would result in mischievous monopolies."

It is on this same ground that proper names can never constitute technical trade-marks. A person of the same name may lawfully engage in the same or like business in which another is already engaged, and the use of the name will not necessarily denote that the goods to which it is affixed are the goods of such other person. But as it is a wrong for one trader to pass off his goods as another's, and it is only because the use of another's technical trade-mark amounts to such a wrong that it is justiciable, it follows that, if such a wrong is done in any other way, it must be equally justiciable. It is evident that such a wrong may be done by a rival trader to another—by a second comer to the first comer in the same trade—in other ways. He may dress his goods in the same way in which the other does; he may mark them with the same name with which the other marks his goods, even though such name may not be capable of being made use of as a technical trade-mark; and he may do business in the same name. Either

one of these things may be done by him in such a way and under such circumstances that the doing of them amounts to a representation that his goods are the goods of the first comer—just as much so as if he had marked his goods with a technical trade-mark belonging to the other. His action in such a case is not the violation of such a trade-mark, but is what is termed “unfair competition.” In determining whether what he is doing or has done in either of these ways amounts to such a representation, and therefore constitutes unfair competition, the test is whether it is calculated to deceive intending purchasers of such goods—that they are the goods of the first comer. It is not necessary that it should be calculated to so deceive first or intelligent purchasers. It is sufficient that it is calculated to deceive ultimate or ordinary purchasers. And ordinary purchasers include incautious, unwary, and ignorant purchasers. The law has gone further than this, and prescribed a rule by which it can be determined whether what is done by the rival trader is calculated so to deceive such purchasers. That rule is that, if what is done by such trader causes his goods to be known in the trade by the same name by which such other goods are already known therein, it is calculated to deceive such purchasers. In the case of *Seixo v. Provezende*, L. R. 1 Ch. App. 192, Lord Cranworth, in referring to what resemblance to a technical trade-mark will constitute an infringement thereof, said:

“It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule, so restricted, would be of no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device.”

The principle stated in the last sentence of this extract has often been quoted with approval or applied in subsequent cases. *Johnson v. Bauer* (C. C.) 79 Fed. 954; *Read v. Richardson*, 45 L. T. (N. S.) 54; *Orr-Ewing v. Johnston*, 40 L. T. (N. S.) 309; *Id.*, L. R. 13 Ch. Div. 434; *Johnston v. Orr-Ewing*, L. R. 7 App. Cas. 219; *In re Barker's Trade-Mark*, 53 L. T. (N. S.) 23; *Anglo-Swiss Condensed Milk Co. v. Metcalf*, 3 R. P. C. 28; *Wilkinson v. Griffith*, 8 R. P. C. 370; *Hutchinson v. Blumberg* (C. C.) 51 Fed. 829; *In re Worthington & Co.'s Trade-Mark*, L. R. 14 Ch. D. 8; *Cartier v. Carlile*, 31 Beav. 292; *Edelsten v. Edelsten*, 1 De G., J. & S. 185.

The reason why it is held that the adoption by a second comer of any mark that will cause his goods to be known in the market by the same name as that by which the first comer's goods are already known, on account of his technical trade-mark, is an infringement thereof, is that thereby purchasers will be deceived into purchasing his goods for the goods of the first comer, the same as they would be by the use of an actual copy of the latter's technical trade-

mark. If, then, the use of any mark that will cause such an effect is an infringement of a technical trade-mark, it would seem to follow that, where no such trade-mark is involved, if what the second comer does in relation to his goods or business will have such an effect, it amounts to unfair competition. As in the other case, it causes his goods to be known in the market by the same name by which the first comer's goods are already known, and hence is calculated to deceive purchasers into buying his goods for that trader's goods, which is the test of unfair competition, as well as of infringement of a technical trade-mark. And it has been so held. It has been so held in cases where the first comer has marked his goods with a geographical name to such an extent and for such a length of time that they have become known in the market by that name. Cases of this sort are the cases of *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, L. R. 41 Ch. D. 35; *American Waltham W. Co. v. U. S. W. Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263. The two former cases were cited with approval by the United States Supreme Court in the case of *Lawrence M. Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997. It has also been so held where the first comer has marked his goods with a personal name, either with his own or that of another, to such an extent and for such a length of time that they have become known in the market by that name. In cases where the second comer, who has so marked his goods or carried on his business that his goods have or are likely to become known by the same name, has been a person not of that name, but one who has adopted it as a business name, and marked his goods with it, it has been unhesitatingly held that his conduct amounted to unfair competition, and he has been made to pay damages for it, and enjoined from further use of such name in any respect whatever upon his goods or in connection with his business. Where the second comer is a corporation that has adopted such name as a part of its corporate name, the case has been treated as one where a person not of that name has adopted it as his business name, and marked his goods with it, even though some or all of its incorporators, stockholders, or officers may be of that name. For in such case it is the corporation, and not the individuals connected with it, that is doing business in that name, and marking its goods with it, and, before the adoption of the name by it, it had no such name. Cases of this sort are the cases of *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.* (C. C.) 11 Fed. 495; *Le Page Co. v. Russia Cement Co.*, 2 C. C. A. 555, 51 Fed. 941, 17 L. R. A. 354; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.*, 7 C. C. A. 558, 58 Fed. 884; *William Rogers Mfg. Co. v. R. W. Rogers Co.* (C. C.) 66 Fed. 56; *Clark Thread Co. v. Armitage* (C. C.) 67 Fed. 896; *R. W. Rogers Co. v. William Rogers Mfg. Co.*, 17 C. C. A. 576, 70 Fed. 1017; *Investor Publishing Co. v. Dobinson* (C. C.) 72 Fed. 603; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 74 Fed. 936; *Fuller v. Huff*, 43 C. C. A. 453, 104 Fed. 141, 51 L. R. A. 332; *Wyckoff v. Howe Scale Co.* (C. C.) 110 Fed. 520; *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.*, 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39

N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *De Long v. De Long Hook & Eye Co.* (Sup.) 32 N. Y. Supp. 203; *Penberthy Injector Co. v. Lee*, 120 Mich. 174, 78 N. W. 1074; *Holmes v. Holmes Booth & Atwood M. Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Meriden B. Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401; *Williams v. Brook*, 50 Conn. 278, 47 Am. Rep. 642. In cases where the second comer is of that name, and therefore has a right to do business therein, his use of the name in his business has been restricted. He has been required to refrain from characterizing his goods by that name by marks upon them, and in other ways to exercise precautions to prevent, so far as possible, his goods from being known in the market by such name. Cases of this sort are the cases of *Pillsbury v. Pillsbury-Washburn F. M. Co.*, 12 C. C. A. 432, 64 Fed. 841; *Walter Baker & Co. v. Baker (C. C.)* 77 Fed. 181; *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 80 Fed. 889; *Walter Baker & Co. v. Baker (C. C.)* 87 Fed. 209. The case of *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72, hardly seems to be in accord with the other cases. A case showing what use a second comer of the same name may make of his name in this business is that of *Duryea v. National Starch Mfg. Co.*, 25 C. C. A. 139, 79 Fed. 651.

Such, then, being the law of unfair competition in relation to the use of personal names, it follows that the original T. M. Bissell Plow Company, the South Bend corporation organized by Mr. Bissell after he severed connection with complainant, had no right to adopt that as its corporate name, or to do business in that name, or to mark the plows manufactured by it with the name "Bissell" in any connection whatever. The fact that it was organized and managed by Mr. Bissell conferred no such right upon it. It was precisely the same as if one not of that name had undertaken to manufacture plows under that name, and to mark them with it. Much more did the defendant corporation have no right to adopt that name as a part of its corporate name, or to transact its business in that name, or to mark its plows with it. No one of the name of Bissell was ever connected with it, and the South Bend corporation, itself having no right to use the name in any way, had no power to confer the right to use it upon said defendant. The want of right in the South Bend corporation and its alleged successors, the defendant corporation, to use the name, was due to the fact that at the time of the organization of the former, by reason of the extent and length of time that complainant had used the name "Bissell" in connection with its plow business, the plows manufactured by it had become known in the market as "Bissell Plows," and the use of such name by said corporations would cause the plows made by them to be known in the market by the same name. The use of the name by them, therefore, was calculated to deceive purchasers of plows into believing that their plows were the plows of complainant, and thus pass them off as complainant's plows. The fact that they always prefixed "T. M." to the word "Bissell" when used on the plows, and they advertised their plows, is a witness to the fact that complainant's plows were known in the market as "Bissell Plows." It is an attempt to make a distinction from something al-

ready existing. Yet that distinction was not sufficient to cause the plows manufactured by them to be known in the market as "T. M. Bissell Plows," as distinguished from "Bissell Plows," or to prevent them from being known in the market as "Bissell Plows," the same as complainant's plows were. That in fact the plows of the defendant corporation did become known in the market simply as "Bissell Plows" is shown by at least two items of evidence in the record. They show that the defendant corporation itself was in the habit of referring to the plows manufactured by it by the name of "Bissell." One is a letter from the defendant corporation to the Hinsdale Transfer Company, of Hinsdale, Mich., dated March 29, 1894. The opening sentence of that letter is in these words:

"In reply to your favor of yesterday we beg to say; we are pleased to hear that the Bissell Plows in your territory are giving good satisfaction and that for that reason you are led to wish to secure the agency; so far as our knowledge extends that is the universal verdict, except where the use of inferior material has caused breakage of parts."

The other is contained in the form of contract with its agents in use by the defendant corporation. In that contract the articles covered by it are referred to as "Bissell Plows and Repairs."

No doubt, Mr. Bissell had the right, upon severing connection with complainant, to go into the plow business again on his own account, and transact it in his own name, with such restrictions and precautions in regard to the use thereof, in relation to his business, as would prevent, as far as possible, his goods being taken for complainant's, and thus avail himself of his reputation as a plow manufacturer. But that he did not do. And whether he did so or not, this is not a case against him, but against the defendant corporation. It is not a case involving the right of a person to use his own name, but the right of a corporation formed and managed by persons not of that name to use the name. The line of authorities cited by counsel for defendants, involving the right of a person to use his name in his own business, are not, therefore, pertinent to this case.

Counsel for defendant urges that the fact that complainant and defendant corporation are not located at the same place, affects complainant's right to complain of said defendant's use of the name "Bissell," and they cite in support of this contention the cases of *Cady v. Shultz*, 19 R. I. 193, 32 Atl. 915, 29 L. R. A. 524, 61 Am. St. Rep. 763; *Nebraska L. & T. Co. v. Nine*, 27 Neb. 507, 43 N. W. 348, 20 Am. St. Rep. 686; *Investor Publishing Co. v. Dobinson* (C. C.) 82 Fed. 56; *Hazelton Boiler Co. v. Hazelton Tripod B. Co.*, 137 Ill. 231, 28 N. E. 248; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72. In the first three cases the rivals were not engaged in the business of selling goods. In the first case they were rival dentists; in the second, rival bankers; and in the third, rival publishers of a newspaper. What was complained of in each case was the doing of business by the second comer in the same, or substantially the same, name. The fact that the rivals were engaged in separate communities was alluded to as a circumstance bearing upon the question as to the right of the first comer to enjoy the second comer from using the same business name. These

cases have no bearing upon a case where the rivals are engaged in selling goods in the same open market, and are marking their goods with the name in which they are doing business. That in such a case the fact that the rivals live in separate communities, more or less distinct from each other, should have no special significance, was recognized in the Nebraska case. Judge Reese said:

"It cannot be that the same reason for the rule exists in cases of this kind as in cases of trade-marks. In trade-mark cases there is a commodity manufactured, or in some way prepared for the general market. In such cases it is due both to the public and to the first manufacturer that, if he furnish a superior quality of goods or wares, the former be protected from fraudulent imitation; the latter, from the destruction of a trade he has built up at great expense and labor, and by honesty in his manufacture. The products of the new enterprise should stand upon their own merits in their race for favor in the markets to which they are sent. In *Spring Co. v. Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82, an injunction was granted against the defendant for bottling and placing upon the market a water with a name similar to that of the water bottled and sold by the plaintiff. The plaintiff was the owner of what was denominated the 'Congress Spring' property in Saratoga, and for a number of years it had been engaged in bottling and selling 'Congress Water.' The defendants were organized as 'The High Rock Congress Spring Company,' and were engaged in bottling and selling 'High Rock Congress Spring Water,' and so labeling its products. An injunction was allowed, for the reason that the word 'Congress,' from long use by the plaintiff, became its legitimate property as a trade-mark, and as indicating the origin and ownership of the water flowing from the Congress spring. *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589, was to restrain the defendant from the appropriation of a trade-mark upon the label of manufactured cigars, and an injunction was allowed. *Pierce v. Guittard* (Cal.) 8 Pac. 645, 58 Am. Rep. 1, was to restrain an infringement upon a trade-mark used for manufactured chocolate, and the same principles were held to apply. The rule applied to the above cases runs through the line of cases where the manufactured or prepared product is placed upon the open market in competition with other articles of the same character or kind. But we think it does not apply to the case at bar. In this case a different principle is involved. The damages, if any, inflicted upon the public, could not be by the devices referred to. The place of business of defendant, being so remote from plaintiff, would seem to preclude the idea of such damage resulting to plaintiff, considering the character of the business in which the parties desire to engage. The nature of the business transacted by the companies is such that, considering the distance between their principal offices, there can be no substantial conflict of interest."

In the Illinois case the rivals were sellers of boilers—one being located in New York, and the other in Chicago. The defendant was the first comer. But that apart, the thing complained of was that the defendant was doing business in substantially the same name as complainant. There was no complaint that defendant was otherwise doing anything that would affect complainant's business. It did not appear that complainant's goods had become known by the name in which it did business. Bailey, J., said:

"There is evidence tending to show that the boilers which Kennedy and Hazelton manufactured and sold were known from the first, to some extent, at least, as 'Hazelton Boilers,' and that said firm so denominated them in their advertisements and circulars; but these facts do not show the adoption of those words or of the word 'Hazelton,' as either a trade-mark or trade-name. A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity. *Browne Trade-Marks*, § 31. There is no evidence, or, if there is any, it is exceedingly slight, that the words 'Hazel-

ton Boiler' or 'Hazelton' had been actually affixed to the boilers as a trade-mark prior to July 10, 1884. The mere adoption of said words in advertisements and circulars gave said firm no exclusive right to their use."

And again, as a further distinction, the goods of the respective rivals were not sold in the open market. Bailey, J., said:

"We are also of the opinion that there is a failure by the complainant to show any improper interference by the defendant with the complainant's business of manufacturing and selling steam boilers. The complainant's place of business is in the city of New York, while that of the defendant is in the city of Chicago. Neither puts its steamboilers on the market to be sold by retailers or middlemen to the final purchaser, but both deal directly with customers who purchase boilers for their own use, and who give their orders directly to the complainant or defendant, as the case may be. In this way the liability of intending purchasers to be deceived into mistaking boilers of the defendant's manufacture for those of the complainant, if not wholly obviated, is reduced to the minimum. It is difficult to see how purchasers of ordinary intelligence, dealing directly with the manufacturers, could be misled into confounding two such establishments, situated nearly 1,000 miles apart."

Then as to the Fish Case, that, as we have heretofore pointed out, was a case involving the right of the second comer to use his own name in his business, and is hardly in line with the weight of authority applicable to cases of that kind. This is a case of two rivals engaged in the same business, selling their goods in the same open market, and each using the same name to mark their goods as well as doing business in the same name; i. e., the name of "Bissell." I don't think that the fact that their places of manufacture are in separate communities affect their rights, and no authority has been cited to the effect that it does.

Counsel for defendant urges further that complainant is not entitled to any relief because the defendant corporation have been free from fraudulent intent to appropriate to its use any part of complainant's business. It must be conceded that in the circulars that were issued on May 5, 1893, and the further circulars and catalogues which were issued by it in advertising its business, it stretched the truth in regard to its connection with the T. M. Bissell Plow Company, of South Bend, and T. M. Bissell, if not in relation to the complainant. This, however, it is claimed it did in order to hold on to business which it was believed to belong to said South Bend corporation, and perhaps to get the benefit also of Mr. Bissell's reputation. This is possibly true, and it is further possible, if not probable, that the defendant believed in good faith that it had a right to do business in the name of T. M. Bissell Plow Company, and to mark its plows with the name of Bissell. But it is not reasonable to suppose that the defendant corporation did not know that by the use of the name of Bissell it must necessarily obtain a part of complainant's business, and that it intended thereby to realize all the benefits which might accrue to it out of its use. However this may be, it knew that complainant's plows were widely and extensively known as Bissell Plows; that that name had become impersonalized, and had come to mean plows made by complainant; and, with this knowledge, it gave its plows the same name, and put them on the market with it. This it had no right to do. In so doing it entrenched upon complainant's rights, and counsel for de-

defendant concedes that, where the conduct of a rival trader is necessarily a wrongful injury, the question of fraudulent intent ceases to be important.

In the case of *McLean v. Fleming*, supra, Mr. Justice Strong said: "Positive proof of fraudulent intent is not required where the infringement is clear, as the liability of the infringer arises from the fact that he is enabled, through the unwarranted use of the trade-mark, to sell a simulated article as and for that which is genuine," and cites, in support of this the case of *Wotherspoon v. Currie*, supra, which, as we have seen, is a case of unfair competition.

In the case of *Walter Baker & Co. v. Baker* (C. C.) 77 Fed. 181, Judge Paul said:

"The respondent, in his answer and in his testimony, avers that he had no intention of infringing on the rights of the complainant. He has taken the testimony of a number of witnesses to prove his high character as a citizen and business man. In the argument great stress is laid upon this testimony by respondent's counsel, as negating the idea of a fraudulent purpose on the part of the respondent in dressing up his goods in imitation of the complainant's. The court cannot give to this evidence the weight to which counsel insist it is entitled. It must in this case, as in every case where intent is the subject of investigation, deduce the intent from the acts of the respondent. These constitute the proof as to the purpose of the respondent, and by them the court must be guided."

In the case of *The Le Page Co. v. Russia Cement Co.*, supra, Judge Putnam said:

"The plaintiff in error submits that, in order to maintain this suit, it is necessary to show that it knew of the existence of a trade-mark, that it intended to palm off its goods as those of the Russia Cement Company, and that the public was deceived thereby. This might be true if the only case shown by the proofs was that of an actual purpose to mislead the public to the injury of the Russia Cement Company; but, as we place the case on the proposition that, under the circumstances, the use of the words 'Manufactured by The Le Page Company,' in connection with the word 'Glue,' is necessarily a wrongful injury to the Russia Cement Company, which ought to have been foreseen by Le Page and the Le Page Company, we have not deemed it necessary to go into the controverted question of actual fraudulent intent or artifice, or to weigh the evidence on that point. Positive proof of fraudulent intent is not required where the proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled to sell a simulated article as and for the one which is genuine."

In the case of *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658, Van Fleet, V. C., said:

"He further says that in designing the defendant's labels he had no purpose or design of palming off the defendant's goods for those of the complainant. Admitting all this to be true, it is manifest it constitutes no defense. The vital question in cases of this kind is not, what did the defendant mean? but what has he done? The legal quality of an act resulting in injury must be decided, not by the motive with which it was done, but by the consequences which have necessarily resulted from it. The law, in civil cases, does not attempt to penetrate the secret motive which induced the act brought in judgment, but judges of its legal quality solely by the consequences which have naturally and necessarily proceeded from it. It is no less a dictate of justice than of sound reason that every person must be understood to have intended to do just what is the natural consequence of his act deliberately done. The aggrieved person, in cases of this class, is not required to show intentional fraud, but he makes a sufficient case to give him a right to pro-

tection when he shows that the defendant is using his label, or one so nearly like it as to render deception of the public and injury to himself probable."

Counsel for defendant further urge that complainant has failed to make out a case because there is no evidence of any purchaser having been actually deceived into purchasing defendant's plow believing it to have been complainant's. This however, was not necessary, so far as its right to injunctive relief is concerned. In the case last cited *Van Fleet, V. C.*, said further:

"Neither is he required to prove that persons have actually been deceived, and that his adversary's goods have been purchased under the belief that they were his. If it appears that the resemblance between the two labels is such that it is probable, in the sale of the goods of the parties, the one will be mistaken for the other, enough is shown to make it the duty of the court to interfere."

In the case of *Von Mumm v. Frash (C. C.) 56 Fed. 837*, Judge Benedict said:

"It is further to be observed that, although in the case decided by the New York Court of Appeals there was no testimony from witnesses that in the trade the defendant's manufacture had been taken for the other, the danger of such mistake was held sufficient to call for the interference of the court. See, also *Braham v. Beachim*, 7 Ch. Div. 856. That case, therefore, overthrows the objection taken here that there is no evidence of any instance where a person has been defrauded by the method adopted by the defendant in dressing up their manufacture. In a case like the present it would be too much to require the complainants to prove instances of such deception. It is not likely that the knave who perpetrates the fraud upon the ultimate consumer will disclose himself to the complainants; and the ultimate consumer, if cognizant of the fraud practiced upon him, could not, unless by mere accident, be known to the defendants. Such testimony is unnecessary where, as here, the proofs warrant the conclusion that the only reason for the dress adopted by the defendants for their product is that it can be successfully used to defraud the ultimate consumer. Moreover, it is not to be disputed that danger of injury to the complainants is created by the defendants' method of dressing up their article, and danger of injury is sufficient ground for the interposition of a court of equity."

And in the case of *Fuller v. Huff*, supra, Judge Shipman said:

"It is not necessary for the complainant to attempt to discover whether a purchaser had been actually deceived, for a manifest liability to deception exists."

This case, however, is not wanting in evidence of deception, slight though it may be. The defendants introduced one R. H. Hupp, a former traveling salesman of complainant, as a witness. He testified that he never knew of any confusion between complainant's and defendant's goods. On cross-examination he identified six reports made by him to complainant whilst acting for it. In one, dated October 7, 1891, whilst the South Bend corporation was doing business, is this statement:

"Robertson was here over night, and contracted with them, selling them four plows. When I called on them this a. m. they said, 'Why, one of your men just contracted with us this morning.' On looking at contract I saw who it was. They thought they were contracting with us."

In another report, dated November 28, 1893, after defendant corporation began business, is this statement:

"This is the first place I have found where the T. M. people have been. J. L. W. contracted with them, thinking he was contracting with us. He bought quite a lot of goods from them in the fall, not knowing the difference. I believe it a good idea to mail a letter to each dealer telling them that you have not moved away, etc., etc. I have been asked the question several times."

The defendant, Arthur D. Gallery, was asked on direct examination this question:

"State whether or not defendant corporation experienced any trouble in the way of confusion of mail, that is, in the way of receiving mail which should have gone to complainant corporation?"

To it he answered:

"Very little. From 1893 to 1896 we received not more than six letters intended for complainant corporation. These were immediately forwarded to it, but we never received any which had been by mistake sent to complainant."

Frank E. Brown, a jobber and retailer of plows at Grand Rapids, Mich., and a witness for defendants, testified on cross-examination:

"Q. You say that you always explain the difference between the defendants' and complainant's plows? A. I did not say that I explained the difference between the plows. Q. What did you say? A. That we explained the difference between the companies; that we were selling the T. M. Bissell Plow made at Eaton Rapids. Q. You find it necessary to explain that there are two companies? A. It was for a year or two, until people got acquainted with the fact that there were two companies."

Samuel E. Bolton, a witness for complainant, who at one time sold plows for both complainant and defendants at Niles, Mich., testified on cross-examination:

"Q. The T. M. Bissell Plow Company's plows were plainly marked, were they not, 'The T. M. Bissell Plow Company, Eaton Rapids, Michigan'? A. They were. Q. And the Bissell Chilled Plow Works plow was plainly marked 'Bissell Chilled Plow, South Bend, Ind.'? A. Yes, sir. Q. Do you claim that you were able to sell customers the T. M. Bissell plow, marked as it was, as being a Bissell chilled plow of South Bend manufacture? A. The farmers seemed to be unable to recognize the difference without their attention being called to it. (Question repeated.) A. I said the farmers seemed to be unable to recognize the difference without their attention being called to it. And I will add, further, that we sold both as Bissell plows. (Question repeated.) A. The farmers failed to recognize the difference without their attention was called to it. (Question repeated.) A. I answer it as I answered before. Q. During the four years that you were engaged in business there about how many Bissell chilled plows were you enabled to palm off upon your customers as being T. M. Bissell plows? A. I, of course, perhaps haven't the right to object, but the question looks a little as though we were trying to show deception. I will simply state that if we failed at the time a customer wanted a certain number of plow, and we did not have it in stock, we would come over and buy one of the Bissell Chilled Plow Company and deliver it to the customer. Q. And would the customer suppose he was buying a T. M. Bissell plow? A. The customer would suppose that he was buying a Bissell plow, would know he was buying a Bissell plow, and would know no difference unless we had called his attention to the plow being marked 'T. M. Bissell.' Q. Now I will ask you again how many plows you were enabled to palm off in that way upon your customers; how many Bissell chilled plows? A. I am not prepared to answer definitely. Q. About how many? A. Perhaps a dozen plows."

This evidence shows that purchasers have been deceived into buying defendants' plows for complainant's; just what one would ex-

pect to have been the case if there had been no direct evidence of it.

And, finally, it is urged by defendants' counsel that complainant has lost all right to any relief by reason of laches. It appears from the evidence that complainant became aware of the fact that defendant corporation had entered into the plow business shortly after it commenced, and continued aware of its being in that business, and its method of doing business, ever afterwards. This suit was not brought until 1899, about six years after the defendant corporation commenced business. About 1895 complainant began to advise with counsel as to its rights, but it never informed defendant corporation of any question as to its rights until the year 1898, when it caused to be sent to said defendant a copy of a bill that it intended filing in the state court against it. The effect of laches in cases of this character is so well settled by the decisions of the Supreme Court in the cases of *McLean v. Fleming*, *supra*; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, and *Saxlehner v. Eisner*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, that the question is not open for discussion.

Simple laches, without more—which is the case here—is not sufficient to interfere with a complainant's right to injunctive relief, though it may affect his right to damages for past infringement. Counsel for defendants urge that it will affect complainant's right to injunctive relief where there is an absence of fraudulent intent on defendants' part, and that in this case there was absence of such intent. If fraudulent intent involves knowledge that it did not have a right to do as it did, there may have been an absence of fraudulent intent in this case. As I have before said, it is possible, if not probable, that defendants in good faith believed that they had a legal right to do as they have been doing. However this may be, it is certain that it intentionally adopted complainant's trade name—invaded his property—and that, in itself, in the eye of the law, was a fraud on its part. They must have known, also, that what they were doing had a tendency to, and in all reasonable probability would, pass off their goods as complainant's, and thus enable it to obtain a part of complainant's trade. It is a presumption that one intends the reasonable and probable consequences of his acts, so that I cannot avoid the conclusion that the defendant has intentionally appropriated to itself so much of complainant's business as it has been enabled to attract to itself by the means complained of. As said by Mr. Chief Justice Fuller in the case of *Menendez v. Holt*, *supra*:

"The intentional use of another's trade-mark is a fraud, and, when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent, and the wrong is a continual one, demanding restraint by judicial interposition when properly invoked."

But it does seem to me that the laches has been sufficient to defeat complainant's right to damages for past infringement within the doctrine of the cases of *McLean v. Fleming*, *supra*, and *Menendez v. Holt*, *supra*.

My decision therefore is that complainant is entitled to the injunctive relief prayed, and that its claim for damages be dismissed.

BOYLE v. HENNING.

(Circuit Court, W. D. Kentucky. March 31, 1902.)

1. CONTRACTS—WAGERING TRANSACTION—BURDEN OF PROOF.

A telegram sent to a New York stock broker, directing him to "sell 100 shares Northern Pacific common at 83," on its face imports an actual sale of the stock for future delivery, and not a wagering transaction; and the burden rests upon the party alleging otherwise to prove that no actual sale and delivery of the stock was intended, and that both parties so understood. If such is shown to be the fact, however, the form of the transaction is immaterial.

2. STOCK BROKERS—RELATIONS TO CUSTOMERS—USAGES OF EXCHANGE.

An order by a customer to a New York stock broker to sell stock must be considered as having relation to the usages of the New York Exchange, and where the same are shown they will govern the rights of the parties in their relations to and dealings with each other.

3. SAME—DEMAND FOR MARGINS.

Where, by the usages of a stock exchange, a broker instructed by a customer to sell stock, where the customer does not furnish the stock, is authorized to borrow the same for delivery to the person to whom it is sold, being protected against loss in the transaction by security or margins deposited by the customer, he may demand additional margins when unwilling to longer stand bound to repay the borrowed stock without further protection; and unless the same is furnished within a reasonable time after notice to the customer he has the right to take such fair and reasonable steps for the purchase of the stock to repay that borrowed as may be necessary to prevent loss to himself and to charge the cost thereof to the customer's account, being liable only for a failure to exercise reasonable care and skill in the matter of making such purchase.

4. SAME.

All demands by a stock broker upon his customer for margins must be specific, definite, and certain, and the customer is entitled to a reasonable time, under all the circumstances of the case, and taking into consideration the amount demanded, within which to comply with such demand.

5. SAME.

No demand made by a broker on his customer for margins is specific, unless it mentions a particular sum of money, or unless it states facts from which a particular amount of money may be certainly ascertained.

At Law.

Plaintiff was a resident of Louisville, Ky., and defendant was a stock broker in New York. His brother S. C. Henning, while not connected with defendant in partnership, executed most of his orders on the stock exchange of New York through defendant. Plaintiff had for years bought and sold stock through both offices as a matter of convenience, sending his orders to New York over the private wire of S. C. Henning. In December plaintiff directed defendant to sell 100 shares of Northern Pacific common. Defendant sold the stock himself, furnishing it for delivery, and credited plaintiff's account with the proceeds. The stock gradually rose until May 6, 1901. While it was selling at \$120 a share on that day plaintiff sold short 200 shares at \$120 through S. C. Henning, who executed the order through defendant, who borrowed it for delivery, and credited the proceeds of the sale to the account of S. C. Henning. Northern Pacific stock continued to rise, until on May 9th it sold at \$1,000 per share. During that time J. W. Henning was continually calling by telegraph for margins and borrowing stock, paying very large premiums daily for the loan, and made various efforts to obtain some definite response from plaintiff as to the matter of closing out the stock which he held. S. C. Henning, on request of defendant, made many efforts to find plaintiff, and being unable to do so telegraphed defendant to that effect, and authorized him to proceed independently in the matter. Fri-

day, May 10th, plaintiff went to New York, and remained there for a week, during which time he did not call on the defendant, but returned to Louisville, and on the 24th of May notified defendant that he repudiated the purchase of the Northern Pacific stock made by the defendant in order to cover the shares sold him at plaintiff's request. At 11 o'clock Thursday, May 9th, plaintiff's account was about \$50,000 deficient in margins on the stock sold, and when the stock was covered he was about \$26,000 deficient. Plaintiff subsequently sued to recover \$25,030.61, the amount of the margins which he had on deposit with defendant, eliminating the Northern Pacific trade entirely. Defendant thereupon filed a counterclaim for \$45,537.50, being the amount of plaintiff's debit after the credit on account of the margin on hand. A verdict was rendered on the counterclaim for the amount of such deficit in favor of the defendant.

Humphrey, Burnett & Humphrey, Helm, Bruce & Helm, Fairleigh, Straus & Eagles, Hornblower, Bryne, Miller & Potter, and Charles A. Boston, for plaintiff.

Wm. Marshall Bullitt and Charles H. Gibson, for defendant.

EVANS, District Judge (charging jury). Without going into details, it may be well to summarize in a general way the respective contentions and claims of the parties as shown by the pleadings, so as possibly to assist you in understanding the issues of fact now to be submitted for your determination.

The plaintiff in his petition asserts demands against the defendant amounting in the aggregate to \$25,030.61, made up of \$9,830.61, which he alleges the defendant held for him on April 30, 1901, as the result of certain transactions in buying and selling sundry stocks other than the 100 shares of Northern Pacific, \$5,000 deposited by plaintiff with defendant on May 8, 1901, \$3,000 deposited by him with defendant on May 9, 1901, and \$7,200, the proceeds of the sale by defendant for plaintiff of 100 shares of the capital stock of the Chicago, Indianapolis & Louisville Railroad Company. These claims in plaintiff's favor, amounting, as stated, to \$25,030.61, are all admitted by the defendant to be due from him to the plaintiff.

The defendant, however, while admitting on the one hand the justness of the plaintiff's demands, says, on the other, that the plaintiff owes him over \$46,000, and that after deducting therefrom the \$25,030.61, which he owes the plaintiff, the plaintiff is indebted to him a balance of \$21,117.40. The nature of the defendant's counterclaim against the plaintiff may be briefly stated thus: He claims that the plaintiff as principal, in December, 1900, employed the defendant as a broker to sell for the plaintiff 100 shares of the common stock of the Northern Pacific Railroad Company at \$63 per share; that the plaintiff agreed to pay him therefor a commission of one-eighth of 1 per cent. on the par value of the stock, and such other expenses as might be properly and necessarily incurred by the defendant in the transaction; that, plaintiff not supplying him with the said 100 shares of stock the defendant, pursuant to said employment, and by the authority and under the directions of the plaintiff, sold said 100 shares of stock at the price named, and borrowed the same from another person, and delivered it to the purchaser, who thereupon paid him \$8,300 therefor, with which sum, less \$12.50 commissions, the defendant credited the plaintiff; that he at once notified and informed the plain-

tiff of said sale and of the borrowing of said stock, and that plaintiff ratified and confirmed the same; that the situation respecting said stock remained thus until May 7, 1901, on which day the defendant, having been called upon to return the stock thus borrowed, did so, and again borrowed the same number of shares thereafter and replaced it, of which the plaintiff was notified, and which he ratified and approved, and that the defendant was compelled to pay and did pay for the said loan of said stock \$500, and that on May 8, 1901, having been called upon to return the stock thus borrowed, did so, and again borrowed the same number of shares therefor and replaced it, of which the plaintiff was notified, and which he ratified and approved, and that defendant was compelled to pay for said loan thereof the further sum of \$3,500, both of which sums are claimed to have been expenses proper and necessary to be incurred in the execution of the plaintiff's order, and to have been authorized by him; that though notified and required to do so the plaintiff did not supply the defendant with said stock either to deliver to the said purchaser or to the person from whom the defendant had borrowed it for the purposes aforesaid; that the persons from whom it was borrowed demanded its return, of which demand the defendant notified the plaintiff; that defendant required of the plaintiff, and so notified him, that he should deposit two further sums—one on May 8, 1901, of \$10,000, and one on May 9, 1901, of \$15,000—to protect the defendant against loss on account of said transaction, but the plaintiff, excepting \$3,000 on the 9th, neither sent either of said sums nor supplied the defendant with the shares of stock, but that instead the plaintiff authorized the defendant to terminate the transaction, and to buy 100 shares of the common stock of the Northern Pacific Railroad Company, and that on May 9, 1901, the plaintiff telegraphed defendant to make the best settlement he could unless he could see his way clear to carry it without too much cost; that under these circumstances, and not seeing his way to carry it, the defendant went upon the market, and bought the 100 shares of said stock at the best price at which he could obtain it; that in doing so he exercised his best judgment and discretion; that he had to pay and did pay therefor the sum of \$50,000, being at the rate of \$500 a share; that this was the lowest price at which he could at the time procure the stock, and that with the stock thus bought he replaced the stock he had borrowed in the execution of the plaintiff's order; that the plaintiff was properly notified of all this, and ratified and approved it; that after charging the commissions agreed upon and the \$4,000 expenses incurred, and after giving credit by the \$8,300 received for the stock in December, 1900, and after giving credit by another small item named, and after then deducting the \$25,030.61 admitted by the defendant to be due to the plaintiff, there still remained owing from the plaintiff to the defendant the balance stated of \$21,117.40.

You will observe, gentlemen, that there is no dispute between the parties concerning the plaintiff's claim of \$25,130.61. That sum is admitted by the defendant to be due from him to the plaintiff. The only contentions are those which grew out of the counterclaim of the defendant against the plaintiff for the forty-six thousand and odd dol-

lars, and which is contested by the plaintiff in three several defenses.

Those defenses may be stated separately, and are, first, a general denial by the plaintiff of all that the defendant alleges upon the subject.

The second defense to the counterclaim is that on the 7th, 8th, and 9th days of May, 1901, there existed what is called a "corner" on Northern Pacific stock; that by reason of that fact practically all the stock of that railroad was withdrawn from the market; that the defendant knew it, and that the plaintiff did not; that the plaintiff gave the defendant no order to buy the stock nor to incur the expenses claimed to have been paid by the defendant for borrowing it, and that the purchase by the defendant of the stock, if he purchased it at all, was in bad faith and without authority, and that it was done recklessly, unskillfully, and negligently under the circumstances then existing; that the plaintiff repudiated the purchase and all the transactions connected with it, and so notified the defendant; and that for all these reasons he is under no liability upon the counterclaim.

As to this defense made by the plaintiff to the counterclaim, the defendant insists to the contrary, and claims that in all he did he acted pursuant to the authority given him by the plaintiff, and within his rights, under the relations existing between him and the plaintiff respecting said transaction, and after the demands for margin made upon the plaintiff and already referred to, and the defendant denies that he made said purchase in bad faith or without authority, or recklessly, unskillfully, or negligently, under the circumstances then surrounding him. He claims to have kept the plaintiff fully advised of the exact situation as far as it was possible to do so; that he frequently telegraphed to the plaintiff or to his agent, and gave him notice of the amount required to protect the stock and the transaction respecting it, but he could get no specific instructions other than those already alluded to; that he acted under his best judgment and in the exercise of his best discretion in making said purchase and in incurring the expenses referred to, and as the plaintiff had authorized him to do. He denies the existence of the alleged "corner" and his knowledge thereof. He denies that the plaintiff repudiated the purchase of the stock or disapproval of the same until long after it had been paid for, although defendant promptly notified the plaintiff of the purchase and of all of the facts concerning it.

To enable you to understand the third defense of the plaintiff to the defendant's counterclaim, it may probably be sufficient to state it in the plaintiff's own language, as found in one of the amended pleadings. That language is as follows:

"The money derived from the short sale was to belong and did belong to the defendant, and he was not to account and did not account for the use thereof. The plaintiff was not to be called upon to furnish any stock for delivery, nor to come under any obligation for such stock, and the plaintiff was not to receive, and did not receive, any stock bought to cover such short sale, nor own or have any interest therein. It was to be left and was left to defendant to accomplish the said transaction in selling the said stock, in procuring it for delivery, if it had to be delivered, and in purchasing it again and receiving any payment for it—all in his own way. The stock so sold was not to be nor was it stock which the plaintiff owned, furnished, or had any interest in, and the proceeds were to be and were the defendant's own prop-

erty, in which plaintiff was to have and had no interest. The plaintiff was to have and had no relation to or contract with any other person than the said defendant, and the defendant had no authority to make any contract whatever with any other person on behalf of or binding upon the plaintiff. The transaction as to plaintiff was only to receive or pay the difference in price as above set forth, and such settlement was to be made in Louisville, Ky."

If these averments be true, the law would require the conclusion that the whole transaction respecting the 100 shares of Northern Pacific Railroad stock was mere wagering upon the rise and fall of the price of that stock, and, being for that reason illegal and unenforceable, the plaintiff would not be liable for any loss resulting to the defendant from anything alleged by him to have been done in respect to that transaction. The defendant in his pleading has explicitly denied the allegations of the plaintiff just read, and insists not only that the intention and understanding of the parties was that the 100 shares of stock was to be actually delivered, but that in fact it was actually delivered pursuant to that intention and understanding. These allegations and denials, and possibly others in the pleadings relating thereto, raise an issue upon this aspect of the case which you will be called upon to settle, and the court will first state the rules of law by which you should be guided in determining it.

A sale of stock "short" means a sale of stock which the seller does not at the time possess, but which, by the future date or time agreed upon for its delivery to the purchaser under the terms of the contract, the seller must in some way acquire for the purpose of such delivery. The parties to this action seem to agree that the initial and only authority given to the defendant is contained in four telegrams, which may be correctly reduced to one in these words, viz.: "Sell 100 shares Northern Pacific common at 83."

The telegram thus reduced on its face does not show or indicate of itself a gambling transaction. That characteristic of the transaction respecting the deal in this 100 shares of stock, if it existed at all, must depend upon other considerations. The telegram purports to order the defendant to sell for the plaintiff 100 shares of Northern Pacific common stock at 83; being sent to New York to a broker there, must be considered as having been intended to have relation to the usages in the New York market for executing such orders. On their face such transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. The burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the plaintiff.

A person may make a contract for a sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be.

The proof must go further, and show that this understanding was

mutual; that both parties so understood the transaction. If, however, at the time of entering into a contract for a sale of personal property for future delivery, it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade.

Though, as I have stated, the burden was upon the plaintiff to establish the truth of the allegations made by him in the part of his pleading which I have just read to you, I recall no testimony which was offered by him on that subject, and certainly no direct testimony upon it; but, on the cross-examination of the plaintiff, the defendant, after identifying that portion of the plaintiff's pleading, himself read it and the statements it makes as evidence.

Under these circumstances, and in view of the arguments made to you upon the subject by the defendant's counsel, I call your attention to this defense to the counterclaim, and charge you that if, upon a careful consideration of all the evidence in the case bearing directly upon this proposition, you shall find that all the statements made in that part of the plaintiff's pleading just read to you are true, then, and not otherwise, you would be authorized to conclude that the transaction was one of mere wagering, provided you also find from the evidence the existence as facts of the other elements which I have charged you were necessary to make it a wagering transaction. As already indicated, however, the understanding and intention of one party alone that it should be so would not be sufficient to make the transaction one of wagering or gambling unless the understanding and intention of both were the same. In other words, the intention and understanding of the parties, in order to constitute a wagering transaction, must be mutual, to the effect that there was to be no actual delivery of the stock, but only a settlement of differences between the contract price and the price of the stock at the time fixed in the contract of its delivery. And the fact, if it be so found, that the defendant was acting only as a broker, executing the orders of the plaintiff, should be carefully considered and given its due weight in reaching a conclusion in this connection.

You should remember, however, that the mere form of the transaction is not the only thing to be considered; for the form of it, if the evidence so warranted, might be found to be a cover for a wagering transaction. So that if you should conclude from the evidence that there should be only a settlement of differences, as I have described that, and a mere speculation upon the rise and fall of prices, instead of a legitimate and valid transaction, as the telegram on its face indicated, then the mere form of the contract would not change that result, though unless there was such mutual intention and understanding it was not a wagering transaction.

I have first alluded to this phase of the case, because, should you find from the evidence that the transaction respecting the 100 shares of stock was a wagering and gambling transaction under the rules

for your guidance which I have laid down, then it will be your duty in that event to find for the plaintiff the amount claimed in the petition, without regard to the counterclaim, which, in that event, cannot be maintained to any extent.

But, on the other hand, should you find this issue for the defendant, and conclude from the evidence that there was no such mutual agreement as would make it wagering, then there are other questions of fact to be determined to which you should give attention, and to all of the evidence bearing upon which you should give the most careful and painstaking consideration. These questions are not quite so easily stated as was the other. They grow out of the rights, duties, and obligations of principal and agent, the one to the other. An agent such as a broker owes certain important duties to his principal, and the principal employing a broker may come under certain important obligations to him. Generally speaking, it is the duty and also the right of an agent to obey the instructions of his principal, and this fact should always be borne in mind; but it is important for you also to remember that there are certain circumstances under which an agent has a right to act for his own protection. In the event that before reaching this point in your deliberations you shall find from the evidence that the transaction respecting the 100 shares of Northern Pacific stock was not one of wagering, I think you may assume from the evidence (though it is altogether for you and not for the court to say) that the order telegraphed by the plaintiff to the defendant in New York to sell 100 shares of that stock was intended to be executed in the New York stock market, and according to the usages and customs of the brokers there, and that those usages authorized the broker on selling the stock "short"—that is, for future delivery—if it is not supplied by the principal, to borrow it and deliver it to the person to whom it was sold, provided that satisfactory security against loss in the transaction be given to the broker or be deposited with him by the customer. If at any time thereafter the broker becomes unwilling to stand any longer bound to deliver or to return the stock borrowed without additional margin or security being deposited to secure him on his obligation to do so, he has the right to notify his principal of that fact, and to demand of him the payment or deposit of such additional margin or security as the broker may require and definitely specify; and if, after demanding of his principal such further deposit of money as security against loss to himself, the principal does not promptly, and within a reasonable time after receiving such notification, make deposit of such additional margin as had been required, then the agent has the right, as will presently be more specifically charged, to take such fair and reasonable steps for the purchase of the stock to cover the contract as may be necessary to prevent loss to himself, and this right, under those conditions, in a case like this, is equivalent to an instruction by the principal to the agent to purchase stock for the purpose indicated. There does not seem to have been any dissatisfaction upon the part of the broker in this case with the amount of margin deposited by the plaintiff until the approach of May 9, 1901. As that time approached certain of the telegrams which have been

read in evidence were sent, and it is entirely for you to say upon the evidence when they were sent and when received, and which and what parts of those sent by S. C. Henning were sent by the authority of the plaintiff; for such telegrams are binding upon him only to the extent that they were sent by the plaintiff's authority, or with his subsequent approval. If the plaintiff did not, by the telegrams presently to be read, when fairly interpreted by you, give instructions to the defendant to purchase the 100 shares of stock, or if the defendant had not given to the plaintiff notice of the requirement of an additional margin of a definite amount, and had not made a demand for the deposit of the amount of additional margin so required of the plaintiff within such reasonable time before proceedings to purchase as would give the plaintiff a fair opportunity to comply with such demand, or if those telegrams when fairly interpreted by you only authorized what has been spoken of in the evidence as a private settlement of the transaction, then the defendant had no authority to purchase the 100 shares of stock on May 9, 1901, and the plaintiff would not be bound by anything done by the defendant in making or attempting to make such purchase unless he afterwards ratified or approved the same.

The defendant claims that the plaintiff gave him express authority to purchase the stock, and in order to show that to be the case relies upon certain telegrams from the plaintiff and other evidence which has been heard. Two of the telegrams read in connection and orderly sequence with two others from the defendant to plaintiff are as follows:

"New York, May 7th, 1901. Time sent, 4:18 p. m. To Stephen, care S. C. Henning, Louisville, Ky. Northern Pacific practically cornered, loaning at five per cent. per day. J. W. Henning."

"Louisville, Ky., May 8th, 1901. Time received, 11:23 p. m. To J. W. Henning. Will remit you 5,000 to-day. If N. P. corner not complete carry short sale best terms you can. If you cannot carry it settle best you can."

"Boyle."

"New York, May 8th, 1901. Time sent, 4:34 p. m. To St. John Boyle, care of S. C. Henning, Louisville, Ky. Northern Pacific is securely cornered and loaned to-night as high as fifty per cent. I paid thirty-five per cent. premium over night for 100 short in your account. Something should be done. I am not willing to stay short of the stock for customers unless it is margined 100 points and kept good. Please reply and telegraph margin."

"J. W. Henning."

"Louisville, Ky., May 9th, 1901. Time received, 9:36 a. m. To J. W. Henning. Make best settlement you can unless you can see your way clear to carry without too much cost. Sent you through Sam 5,000 yesterday and 3,000 this morning. Treat stock in Sam's account just like yours."

"Boyle."

You will consider those telegrams in connection with all the other evidence in the case, and in view of the possible latent ambiguity therein the court will leave it to you to say whether those telegrams, considered together and in connection with the other telegrams and all the other evidence, authorized the defendant to settle the deal in some other way than by a purchase of the stock, or whether they authorized the defendant, either peremptorily or in the exercise of his

discretion, to buy the 100 shares of stock, as was done by him, or whether they required the defendant to purchase the stock at the market price, either promptly upon their receipt or at any time during May 9, 1901.

The court charges you that if you shall conclude from the evidence that the defendant was positively ordered unconditionally to purchase the stock and close the deal—that is to say, if you shall conclude from the evidence that that was the meaning of the telegraphic directions given by the plaintiff when that meaning is ascertained by you—then it was the duty of the defendant to obey the order and promptly buy the stock; and if without any unreasonable delay, considering all the circumstances surrounding him and the case, he did so, he is entitled to recover the full amount of the price paid for the stock in addition to his agreed commissions for making the purchase, but less the sum of \$8,300 which was received by him as the price of the stock when he sold it in December previously. But if there was any unreasonable delay in so doing, or if there was negligence or a lack of diligence or skill in so doing, then you should consider the question from the other points of view to which I will presently call your attention.

The court charges you that if you shall believe from the evidence that the defendant was authorized or instructed to purchase the stock in his discretion—that is to say, if you shall conclude from the evidence that that was the meaning of the telegraphic directions referred to when that meaning is ascertained by you—then if you believe from the evidence that, with the exercise of such care, skill, and prudence as would have been exercised by a reasonably prudent and cautious person under the existing circumstances surrounding him and the case, the defendant made the purchase of the stock in the exercise of such discretion, he would, in that event, be entitled to recover the full amount of the price paid him for the stock, in addition to the commissions agreed upon therefor, but subject to a deduction therefrom of the sum of \$8,300 which was received by him as the price of the stock when he sold it in December previously.

If you believe from a consideration of all the evidence that those telegrams did not of themselves direct or authorize the defendant to buy the stock, then he has not shown any authority to do so from the telegrams nor from anything else appearing in the evidence, unless you believe from the testimony that the defendant notified the plaintiff of the requirement of additional margin of a definite amount within such reasonable time before the purchase of the stocks as would have given the plaintiff a reasonable opportunity to comply with the demand before such purchase. Unless you believe from the evidence that the defendant in one or the other ways pointed out—that is, either by the force of the telegrams as they may be construed by you or such notice and demand as I have already pointed out for additional margin within a reasonable time before the purchase—received and had authority to purchase the 100 shares on that day, then his action in so doing was not binding upon the plaintiff, and would not be so binding unless the plaintiff after being fully informed of all the material facts concerning such purchase, either expressly

or by his silence or failure to object thereto within a reasonable time thereafter, ratified and confirmed the same. In this connection the court tells you that a ratification of the acts of an agent may be made in express terms by approving the same in language, or it may be done by implication, but that a ratification to be implied from silence or failure to object must consist of a failure within a reasonable time to object to what had been done after information of all the material facts had been given to the principal. Before the principal in this respect is required to manifest his disapproval of an act of his agent, he is entitled to have a reasonable opportunity to acquire information of all the material facts of the case, and this general principle, as applicable to this case, would entitle the plaintiff to a reasonable time in which to inquire into the facts not only of the purchase itself, but also those which would enable him to form an intelligent judgment upon what had occurred in New York respecting that purchase, and until he had this reasonable time he was not required to repudiate the transaction in order not to be considered as ratifying it. What would be a reasonable time in respect to each of the matters referred to in this connection and in all others mentioned in this charge is for the determination of the jury after a fair consideration of the evidence and of all the circumstances surrounding the parties at the time. The fact, if it be a fact, that the situation in the New York stock market was abnormal and unusual should be carefully considered from the standpoint of both parties. You will bear in mind what I have charged you in the contingency that you shall find from the evidence that no authority or instructions were given to the defendant to purchase the stock, and also in the contingency that you shall find from the evidence that he had no authority to do so by reason of a failure of the plaintiff to deposit additional margin. But if you shall find that the defendant was authorized in his discretion or otherwise to make the purchase of said shares, then another most important question will arise upon the issues presented by the pleadings, and that question you must determine. The law imposes upon an agent authorized to do an act the duty of performing the same with reasonable skill and diligence, and this is quite as true when his compensation is small as when it is large, if he undertake to do the act at all, and it is true also in cases where an agent has discretion as to the time or manner of performing that duty. The question of what is reasonable skill and diligence should also be considered from the standpoint of the character and importance of the duty undertaken by the agent. The test by which you are to determine whether the agent's manner of exercising the duty was reasonably skillful and diligent is this: Would a reasonably prudent and careful man have so performed that duty under the circumstances surrounding him at the time. The situation at the time and the circumstances then surrounding the agent are always to be carefully considered, and when they are considered the question is to be determined by the test of whether a reasonably careful and prudent man would then have acted as the agent then did. If he would have so acted, then the jury would be authorized to say that there was neither negligence nor unskillfulness in the performance of his duty.

In this case I do not mean by the words "at the time" to limit you to the exact moment when the purchase of the 100 shares was made, but the question is a little broader, and should include this further element: If the defendant had the authority and the discretion to buy the stock, would a reasonably careful and prudent man have exercised that authority on the 9th day of May, or would he have waited, under all the circumstances surrounding him, until a later time? or if such person had bought on that day would he have done so at the time defendant purchased, or would he have done so at an earlier or later hour? are all questions which should also be included among those you should consider in an effort to solve the problem.

It is contended on the one side and denied by the other that if the defendant had borrowed the 100 shares of stock, and had paid \$3,500 for doing so, its return by him was not demandable until 15 minutes past 2 o'clock of the afternoon of May 9th, and that upon those further grounds it was reckless, negligent, and unskillful conduct on the agent's part to purchase the stock before that hour, by which time it is claimed that the stock had greatly declined in price. I charge you also to carefully consider this phase of the case and all the evidence bearing upon it in reaching your verdict.

You have heard the evidence on the subject, and you have heard all of the arguments, and it is for you to say whether a reasonably prudent and careful man, under the circumstances surrounding the agent and the case, would have bought the stock on the 9th day of May, or whether he would have bought it about 1 o'clock of that day instead of at an earlier or later hour, or whether he would have stayed out of the market on that day and have exercised his discretion at a subsequent day, say not later than the 10th. In reaching a conclusion on this subject you should carefully consider all the circumstances bearing upon it, and all the circumstances then surrounding the agent who had a difficult problem to solve. If you conclude from the evidence that the defendant was authorized to purchase, and also that a reasonably careful and prudent man would have purchased, the 100 shares at the time on the 9th of May when he bought, then you should find in his favor on that account for the net sum of \$41,725, or such part thereof as you may believe from the evidence was expended by him in such purchase, including his commission on the transaction; but this is subject to what I now also charge you, namely, that should you find that the defendant had the authority in his discretion to purchase the stock as the plaintiff's agent and for his account, still if you find from the evidence that in making such purchase he did not do so at a time or in a manner or at a price such as a reasonably prudent and careful man would have done under the circumstances then existing, then the defendant is not entitled to recover all of the said last-named sum, nor any greater part thereof than would have been expended in the execution of such authority to purchase (if it existed) by the exercise of such reasonable care and diligence as would have been used by a reasonably prudent and cautious person in exercising such authority, and in that event you should make an estimate of what sum would have been expended in such purchase (if authorized) by a reasonably pru-

dent and cautious person within a reasonable time after the authority was given; and the jury in determining this question and in estimating this amount may take into consideration the amount at which such purchase could have been made promptly after the authority to make such purchase was given by the plaintiff, or after the right to make such purchase had arisen upon any notice and demand for additional margin, such as I have referred to, if any such was made, and also the amount that would have been expended at a later hour. In other words, if the defendant had orders or authority in his discretion to purchase the stock, and undertook to do so, it was his duty to do it with reasonable skill and diligence, as I have explained to you; and, if he failed to exercise such reasonable skill and diligence in making the purchase, then the plaintiff, under the issues made by the pleadings, should not be required to pay for the stock bought any amount in excess of the price which the defendant would have had to pay for it if in making the purchase he had exercised that degree of care and skill which an ordinarily prudent person would have used in executing such order and authority under the circumstances surrounding the defendant, and from any amount thus found you should, of course, deduct the \$8,300 in his hands.

You have heard evidence of the market price and value of Northern Pacific common stock on May 10, 1901, and also as to the price paid for that stock on that day in private settlements outside of the stock exchange—of transactions respecting "short" sales of that stock by persons other than parties to this suit. Inasmuch as the court has left it to you to interpret the meaning of the orders given, and to ascertain whether or not, properly interpreted, their force, if they are discretionary, would extend over a period of time including May 10, 1901, I will also leave it to you, if you find that to be true, also to determine whether a reasonably cautious and prudent man, in executing such orders, would have done so on May 9, 1901, or whether if the force of the orders, as that meaning may be ascertained by you, would extend beyond that day, such a man would have delayed executing it until May 10th, because if you should find that the orders to the defendant were such as that they might, within their proper meaning and scope, operate during a period long enough to include the 10th of May, then the evidence referred to would be proper and important for you to consider; but I charge you that unless you should interpret the orders to have such a meaning as might embrace time for their execution after May 9, 1901, then you should entirely disregard all of that evidence, because, in that event, you should in no wise hold the defendant responsible for anything that occurred on the 10th of May. His responsibility in that event should depend alone on what had occurred on the 9th, and his conduct should be judged by what occurred then and by the circumstances then surrounding him, and in no sense by what occurred after May 9th.

I shall not undertake to define the word "corner," nor to ascertain the rights of persons involved in one, because it does not seem to me that there is sufficient evidence to connect the defendant either with forming or conducting a corner; but it is apparent from his telegram that he knew of the existence of a state of facts which he

therein called a "corner," and that is one of the elements of the evidence which you are to consider in determining whether a reasonably cautious and prudent man would have made the purchase under the circumstances then surrounding the defendant, including those which were called by the defendant a "corner."

There does not seem to me to be sufficient proof of any actual bad faith on the part of the defendant in making the purchase, and you should disregard that phase of the case altogether, and consider those only which I have submitted to you.

There are three other items embraced in the defendant's counterclaim, one of which is an item for \$12.50 commissions for the purchase of the stock, another is an item of \$500 for premiums paid for carrying the stock on the 7th day of May, and another is an item of \$3,500 for premiums paid for carrying the stock paid on the next succeeding day.

These sums are said by the defendant to be entitled to a credit of \$187.50 otherwise due to plaintiff. If the defendant was authorized to purchase the stock of course he was entitled to the \$12.50 commission therefor. The other two items are sums alleged to have been paid by the defendant for carrying or borrowing the 100 shares after the sale in December and before the purchase in May. If you shall believe from the evidence that the plaintiff authorized the defendant to carry the stock and make the necessary expenditures to enable him to do so, and if you further believe that he did make the expenditures (and I may say that there was no contradiction of the evidences of payment), and if you believe from the evidence that they were in whole or in part necessary and proper, then to the extent that you should find from the evidence that they were authorized and were necessary and proper you should find on that issue for the defendant, and charge the plaintiff with the amount so found. But if you should conclude from the evidence that they were not authorized by the plaintiff, or, whether authorized or not, if you find from the evidence that they were not necessary or proper expenditures, then to the extent that they were not so authorized or proper you should find on that issue for the plaintiff.

To briefly summarize, you should in any event charge against the defendant the sum of \$25,030.61 which he admits he owes to the plaintiff. Having done that, you should then determine upon the evidence and pursuant to the principles I have stated to you what, if any, sums you should charge against the plaintiff, namely: First, what amount, if any, for commissions, not exceeding \$25; second, what amount, if any, not exceeding \$4,000, you should charge against him for premiums alleged to have been paid by the defendant for borrowing the stock; and, third, what part, if any, of the \$50,000 alleged to have been paid by the defendant for the stock should be charged to the plaintiff. After you have settled as to these three items the amounts, if any, which should be charged against the plaintiff, you should deduct therefrom \$8,300 and also \$187.50, and the balance, if any, you should charge against the plaintiff. Having thus ascertained the amounts to be charged against the parties, respectively, your verdict should be in favor of the one or the other as the balance

may appear, and in your discretion you may add thereto interest upon the balance from the time it should have been paid.

Gentlemen, you should endeavor to remember and fully consider all the testimony in the case. Upon the evidence, and upon it alone, you must settle the important issues of fact submitted to you. That you will endeavor to do so fairly and with a just regard to the rights of both parties I do not doubt. You, and you alone, are the judges of the weight and credibility of the evidence. With that phase of the case the court has nothing to do. Ordinarily I might attempt to give you some aid by commenting upon the evidence, but in this case its volume is so great that I shall not attempt it.

The parties, respectively, have asked the court to further charge you upon certain points. As I think I have adequately charged you upon the rules of law by which you are to be governed upon every applicable hypothesis, I do not find it proper to further charge you at the instance of either party, with these exceptions, namely, the plaintiff requests the court to charge you as follows:

"(1) All demands by a stock broker upon his customer for margins must be specific, definite, and certain, and the customer is entitled to a reasonable time, under all the circumstances of the case, within which to comply with any demand which may be made by his broker upon him.

"(2) That no demand for margins is specific unless it mentions a particular amount of money, or unless it states facts from which a particular amount of money may be certainly ascertained."

I do so charge you, and make this additional remark: The reasonable time referred to might be of greater or less extent in proportion to the amount of margin demanded, if a specific demand was made, and it might also depend upon the other circumstances of the case, all of which should be considered by the jury.

STACKPOLE v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Oregon. March 13, 1903.)

No. 2,716.

1. JUDGMENT ON FAILURE TO ANSWER—HEARING AS TO DAMAGES—STIPULATION.

In an action for personal injuries, it was stipulated that a trial should be had "by the court, without jury, to assess the amount of damages, if any, to which the plaintiff is entitled in the suit; the defendant filing no answer and making no defense on the question of negligence, and the procedure to be in all respects in accordance with the provisions of section 249 of Hill's Annotated Laws of Oregon, as amended (section 185, B. & C. Comp. 1901)," etc. *Held*, that there was not only an admission of negligence, but of injury as the result of such negligence, and at least nominal damages.

2. DAMAGES—SIMULATING INJURY—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* insufficient to establish that injury to a passenger in a railroad collision, apparently resulting in hysteria, accompanied by a contracture of the right foot, was simulated.

J. C. Moreland, for plaintiff.

C. H. Carey and B. S. Grosscup, for defendant.

BELLINGER, District Judge. This is an action for damages for injuries alleged to have been sustained in an accident on the Northern Pacific Railway Company's line on the 9th of October, 1901. The cause is tried under the provisions of section 185, B. & C. Comp. 1901, and in pursuance of the following stipulation:

"At this time appears the plaintiff, by J. C. Moreland, her attorney, and defendant appears by Carey & Mays, its attorneys, and in open court it is stipulated by the parties that, in consideration of the general appearance now entered by the defendant corporation, a trial shall be had by the court, without jury, to assess the amount of damages, if any, to which the plaintiff is entitled in this suit, the defendant filing no answer and making no defense on the question of negligence, and the procedure to be in all respects in accordance with the provisions of section 249 of Hill's Annotated Laws of Oregon, as amended (section 185, B. & C. Comp. 1901), which statute, for the purposes of this case, shall be deemed the rule of practice of this court."

Plaintiff was a passenger on the cars of the defendant company on the day in question; having taken passage thereon, with her husband and daughter, about 8:30 o'clock in the evening, at Deer Lodge, Mont. She had been on the cars probably 20 minutes. She was occupying a seat in the Pullman car, and, as she alleges and testifies, was standing up, arranging parcels, when, as the train approached the town of Garrison, a station 11 miles distant from Deer Lodge, the passenger train collided with a freight car upon the main track. The plaintiff claims that the shock of the collision threw her against the side of the car, injuring her back, with the result that while she did not experience much, if any, pain at first, except a muscular soreness or bruised feeling in the back, as time went on she gradually became worse, until finally her condition became that of hysteria, accompanied by a contracture of the right foot.

The defendant denies that plaintiff suffered any physical injury as the result of the accident, and claims that, if she is suffering as now appears, it is due solely to her predisposition to hysterical attacks, and that this condition has been brought about, if it exists, by suggestion. The defendant, however, does not concede that plaintiff is injured, but says that she is simulating injury. The defendant's contention is that the plaintiff is what is called a "malingerer"; that she is simulating the symptoms of the injury which she claims to have sustained.

As to the location of the injury received in the accident, the plaintiff's impression, derived from the sensation she experienced, is that she was struck on the left of the spine, near the shoulder blade; that the injury so received caused her "excruciating pain to get up," and when she was up "it was hard to get down"; that her foot "gradually got stiffer and stiffer," until she no longer had control of it; that it is not now as rigid as it has been, and has more sensation than formerly, but is just as helpless. The plaintiff was first treated by Dr. Coffey, the company's surgeon. Thereafter Dr. Wells became, and still is, her physician. Dr. Coffey was first called to attend the plaintiff about October 11th, two days after the accident. He examined her, but found nothing to indicate any injury. He took her to the company's hospital, where she remained under treatment until about the 18th of January, when she was removed to Dr.

Coe's sanitarium, where she was treated by Drs. Gillespie and Coe until about the 6th of February, when she was taken to her home, in the city, where she has since remained.

Dr. Coffey testifies that while he treated plaintiff she complained of pain in the back and limbs; that he could see no evidence of this, and thought that she laid more stress "upon the pain feature of the case" than was justifiable; that when she had been in bed some three or four or five weeks he assisted her to get up, in the expectation that she would gradually gain strength and be able to walk. At that time her foot turned, and this was the first that he noticed anything wrong with it. It was not very rigid, and still it was turned down some. About this time she began to talk of a claim against the railroad company. The doctor does not remember the amount of the claim talked about, but it was a considerable sum. His impression is that she wanted some damages, but not a great amount, in addition to her expenses.

About the 20th of January Dr. A. C. Smith, at the company's instance, examined plaintiff. In answer to his inquiry, plaintiff informed him that her most pronounced symptom was an inability to flex the right foot. The doctor testifies: That on examination of that foot he found it extremely extended, with the toes flexed; the muscular contraction in the effort of this extreme extension and flexion being so pronounced that it produced a slight tremor. That he proceeded, cautiously and gently as possible, in the endeavor to try to flex the foot, but without avail. The contracture of the muscles of the calf was so pronounced that it was impossible to flex the foot, even while using considerable force. That he then tried to flex the knee, which he found also stiff and rigid, and all the muscles of the thigh, both anterior and posterior, rigidly contracted. That the plaintiff here made exclamations of pain, as well as at the ankle, declaring that any effort to flex the knee was very painful. He then proceeded with tests to determine whether there were any anæsthetic areas, and found, as she reported, lack of sensibility in most of the leg, and all of the outer surface of the leg, and the lower third of the outer surface of the thigh. He found no disturbance of special senses, as to pulse rate, condition of heart, and as to the digestive and other intestinal functions, all of which he found normal. He found no pathognomonic symptom of hysteria, except this contracture. He was suspicious that there was a certain element of simulation in the case, and, with the idea that this contracture was too forcible for any person of ordinary muscular development to maintain voluntarily for any length of time, he sat down at the bedside, leaving the patient's feet uncovered, but with his back to the feet, and his face toward the patient, and engaged her in general conversation concerning many topics, the principal of which was her son. After this had progressed probably a half hour, he suddenly turned and looked at the feet, both of which were in a normal position; but the right quickly went down to a state of extreme contracture, as before. He then assisted her into a sitting posture, which seemed to cause her much pain, according to her own statements, and found that the rigidity of the muscles which produced fixation of the knee in the

extended position, when once overcome, and she was in a sitting posture on the side of the bed, was no longer painful to her; that, on the contrary, she sat in a perfectly normal position, with the foot still extended. In testing for loss of sensation or hypersensation by finger applications of slight pressure, demonstrations of pain were, in his opinion, rather extravagant. To determine whether there was some exaggeration of these responses, he suggested to the nurse that a certain point on the back is always excessively tender in cases of this sort, and he thereupon placed his finger on that point, with the effect of producing violent demonstrations of pain at once at a point usually not subject to that excessive sensitiveness. Except while in a sitting posture, the knee was rigid. While in bed it was in the extended position and extremely rigid. It was overcome with difficulty, and with apparent pain to her. After leaving the bed, in making the step or two from the bed to the chair, this extreme rigidity of the knee gave way to the very opposite condition, and the knee, with the foot fully extended, so much so that the dorsal aspect of the toes came in contact with the floor, gave way down with each effort to make a step—the very opposite of the condition that had prevailed earlier in the examination.

A few days later a second examination was made of the plaintiff by Dr. Smith, assisted by Dr. George Wilson and Dr. Coffey. The same violent contracture existed as before. The extended position of the knee was even more pronounced, and the exclamations of discomfort, or of actual pain, from endeavors to flex the knee, were more pronounced. The anæsthetic areas differed from those on the former examination, and were more widespread. Her reports of pain here, and sensitiveness there, were more variable. The application of the test tube to a certain spot would produce a response, and then later in the same examination an application of some other material—for instance, a match—would elicit the response that she could not feel it at all. The plaintiff was assisted to the side of the bed in order to test the sensibility of the surface of her back, and to test for her reflexes. In this position, and while her feet were hanging down, her knees in a natural pose, flexed at right angles with the thigh, without pain at any time, Dr. Wilson asked her various questions relating to the history of the case. While plaintiff's attention was thus engaged, Dr. Smith went round to the opposite side of the bed, and, looking under, saw that both of plaintiff's feet were at right angles with the leg. Dr. Coffey's attention was called to the same circumstance. Thereafter, while the patient's attention was engaged by Dr. Smith, Dr. Wilson made a similar examination, with the like result.

While at Dr. Coe's sanitarium, tests for anæsthesia were made at different times by Dr. Coe and by Dr. Harry Lane. The variability of the results produced by these examinations led both of these physicians to arrive at the conclusion already reached by Drs. Coffey, Smith, and Wilson—that the plaintiff was either simulating injury, or was greatly exaggerating it.

Some time after these examinations were made, and in the early

part of March, the plaintiff was examined by Drs. Josephi, Wells, Williamson, and Giesy. The examination lasted about an hour, during which time an effort was made by physical force to flex plaintiff's foot; but these doctors, succeeding one another in this effort, and using all the strength of which they were capable, were unable to make any impression upon the contracture. Dr. Josephi made a second examination within a day or two, with the same result. These physicians also made tests for sensation. Their conclusion was that the case was one of traumatic hysteria, and that there was neither simulation nor exaggeration by the plaintiff.

Testimony was introduced on defendant's behalf to the effect that plaintiff was not standing up, but was seated, when the accident occurred, and that she received no physical injury from it. The fact, however, of such injury as a result of the accident, is not in issue. The defendant's default admits it. It admits negligence, and injury as the result of such negligence, and at least nominal damages. The stipulation of the parties does not affect the operation of the statute under which the case is submitted to the court without a jury upon the question of damages. The stipulation attempts to interpret the statute, not to control it.

The questions to be decided relate to the extent of the injury suffered, and the compensation to be made therefor if such injury is of a character to entitle plaintiff to more than nominal damages.

If it is assumed that the plaintiff did not receive physical injury at the time of the accident, it does not follow that she is attempting a deception. Medical authors state not only that hysterical contracture may appear after trifling injuries, but that psychic shock alone may be the exciting cause of it. The mental disturbance created by a condition of hysteria from this, as from other causes, is sufficient to account for statements not in fact true, but honestly believed to be true by the person afflicted. It is in evidence that plaintiff's daughter, who was on the platform of the car when the shock came, was thrown down, although not injured. The excitement and worry that would result from such an incident to a person of hysterical temperament, such as I conclude the plaintiff to be, might have a contagious effect upon her. If not in itself a sufficient exciting cause to account for plaintiff's condition, it would re-enforce the influence of the shock experienced in her own person. It is known that the profound disturbances of hysteria may follow insignificant exciting causes, and such disturbances are sufficient to account for what would otherwise be unaccountable in the conduct of the person affected.

Plaintiff testified that some of the nurses told her that there was a bruise on her back. That there was no such bruise is shown by the testimony of Dr. Coffey. The nurses were not called to testify as to such an appearance. It is probable, however, that a statement of the character referred to was made to plaintiff, or is believed by her to have been made, as she testifies. Such a statement necessarily implies physical injury, and suggests the explanation of the occurrence as testified to by the plaintiff. She does not state positively that she was thrown against the car. She says:

"I was thrown, as near as I know, to the best of my knowledge, against the window sill or casement, or possibly some hard substance of the seat. I cannot tell exactly how it happened, for it was sudden."

This statement is apparently an inference which the witness draws from her symptoms. If the symptoms are real, it is reasonable that she should attribute them to physical violence of some kind; and the idea that she was thrown by the shock of the accident against the side of the car, or some hard substance in the seat, would naturally occur to her. Such in fact is necessarily the explanation of physical injury under the circumstances. The case admits of no other.

Is the plaintiff pretending an injury that she has not received? Is she a malingerer? The examinations made by the physicians employed by each side have led to opposite conclusions. In other words, the "doctors disagree." Upon each side the witnesses are all men of high character, professionally and otherwise. The examination made in the defendant's behalf was shortly after the accident. That made for the plaintiff was several months later. The opinions of the physicians can be reconciled only upon the theory that the plaintiff was malingering at the time she was examined by the physicians whose conclusions are unfavorable to her, and that, having begun with dissimulation or exaggeration of symptoms, by suggestion and environment she gradually became in fact hysterical; that a constant effort, in other words, to maintain a simulated contracture, has produced a real, and possibly a permanent, one. But there is an insuperable difficulty in the way of this theory: What suggested to the plaintiff this form of dissimulation? What did she know about traumatic hysteria, or about contracture as a symptom that sometimes attends it? These are not matters of common knowledge. They are known only to the medical class, and possibly to a few others who through some chance have had opportunity to acquire such information. There is nothing in plaintiff's antecedent life to indicate that she had any information, or opportunities for information, in respect to them, and there can be no presumption of exceptional information in order to discredit her. Moreover, if she had this exceptional knowledge, she knew that disturbance of the vision is one of the most frequent symptoms of hysteria, and that the other special senses—of taste, hearing, and smell—are frequently involved. Why did the plaintiff mimic a contracture, and not assume a disorder of one or more of these senses—a deception practically impossible of discovery?

It is evident that the plaintiff did not think of damages in the beginning of her complaint, as she must have done if she was a malingerer. She spoke slightly of her injury, and, when symptoms of serious disorder appeared, placed herself in the hands of the railroad company's physician, and went to the company's hospital. It was not until after the chief surgeon of the company, watchful of his employer's financial interest, wired Dr. Coffey, from Missoula, that the plaintiff's case would not be treated as a railroad case, that the idea of damages appears to have occurred to her. When informed of the chief surgeon's order, she said she thought the company ought to stand her expenses, and that "we would wait." This last statement

probably referred to an intimation which Dr. Coffey says he had given to the plaintiff about her bill. When the chief surgeon, figuratively speaking, had turned her out of the hospital doors, and Dr. Coffey began the experiment of helping his hysterical patient along with "intimations" about his bill, the question of fair treatment in the payment of her medical expenses occurred to her, and later became the claim for damages she now makes.

The variableness of the localities of sensation when tests were made for anæsthesia, and the exclamations of pain, in localities not subject to sensitiveness, upon finger pressures made by the physician, accompanied by his statement—made to mislead the patient—that pain usually resulted from pressure at that point, are relied upon by the defendant to prove that plaintiff was pretending what she did not feel. But as to this there is complete answer in Bailey on Accident and Injury—a medical work cited by the defendant—which says:

"Hysterical anæsthesia may come and go, be permanent or transitory, or may frequently change its situation, and may disappear during the various intoxications. Its locality can frequently be made to change during the hypnotic sleep, and suggestion received during waking hours may cause it to disappear or to assume different topographical distributions."

And Oppenheimer on Diseases of the Nervous System says that:

"It should not be forgotten that the phenomena of the neuroses are subject to great variability, so that the results of examinations made at different times need not be exactly similar."

There is a further explanation by Janet, an author quoted in Bailey on Accident and Injury, of—

"The apparent contradiction of hysterical phenomena by the theory of a limitation of the field of consciousness. Mental actions go on, but are independent of the patient's knowledge."

The exclamations of the patient, when finger pressures by the physician were accompanied with the statement that pain in indicated localities usually followed such pressure, are what was to be expected. Hysteria is said to be a disease of suggestibility. The pain in these instances was suggested by the physician, but it was none the less real on that account.

The fact that plaintiff's foot returned to its normal position, as testified to by Drs. Smith, Wilson, and Coffey, does not admit of doubt. The explanation made in her behalf is that, these examinations having been made in the early stage of the disease, the contracture had not then acquired the persistence it now has. But this explanation does not account for the fact that the foot was absolutely rigid and straight when under examination, resisting all efforts to flex it by force, and that it was only when the patient's attention was diverted for a considerable time, and when the foot was not under observation, that its condition became normal. As already stated, contractures may often be made to relax by suggestion, and it may be that the conversation by which plaintiff's mind was diverted from her condition operated, by way of suggestion, to produce the conduct mentioned. It must be admitted, however, that the facts referred to create a suspicion that plaintiff was exaggerating her

symptoms—a thing a morbidly sick person might do without any fraudulent intent.

I am convinced that the present serious character of the hysteria from which plaintiff suffers is due in large part to her environment, and to circumstances related to the present action; and for these the defendant is, of course, not responsible. The idea of injury is fixed by the desire for damages. As stated by Bailey, on the Relation of Accident and Injury to Diseases of the Nervous System:

"The constant questionings and examinations by lawyers and doctors are most potent suggesting influences. They render the consciousness still more limited, and give an increased permanency to the fixed idea of the hysterical patient."

The force used by the medical witnesses who have testified for plaintiff probably made plaintiff's condition worse than it would otherwise have been. The use of force, according to Oppenheimer, another medical authority cited in the case, is never advisable. "The attempt to reduce a contracture by force always leads to a worse condition." There were four of these physicians who attempted to overcome plaintiff's contracture by force. They took turns as rapidly as possible. Each one "pushed and pulled" until "tired out." Each used his "utmost muscular effort" to overcome the contracture, and this effort was kept up for about an hour. This athletic performance resulted in failure, as might have been expected, unless there was reason to suppose that plaintiff was simulating injury; and, with or without a suspicion of such a thing, it goes without saying that any test likely to aggravate the disease, if there was disease, was ill advised. Furthermore, I doubt whether plaintiff's condition now is as serious as she believes, and as those who have interested themselves in her behalf as relatives and friends have, without question as to motive, led her to believe it to be. As already stated, there is no disorder of any of the special senses, and her pulse rate, condition of heart, digestive and other intestinal functions, are normal. There is no impairment of will power, no loss of flesh, nor atrophy of the affected limb. She testified with clearness and without nervousness. She was what may, under the circumstances, be called a robust witness—all of which, tending strongly against dissimulation, are hopeful indications in her case.

The damages which the plaintiff has sustained as a result of the injuries complained of are assessed at the sum of \$3,000, and in addition thereto the sum of \$377 for the professional services to the plaintiff rendered by Dr. Coffey.

CHISOLM et al. v. CAINES et al.

In re HUCKS et al.

(Circuit Court, D. South Carolina. March 2, 1903.)

1. CONTEMPT OF COURT—ACTS CONSTITUTING—WILLFUL DISREGARD OF INJUNCTION.

A person may be guilty of a contempt of court in doing an act which he knows the court has prohibited by injunction—as by willfully trespassing on lands, with knowledge that the court had adjudged them to be private property, and had enjoined the defendants in the suit, and “all persons whomsoever.” from trespassing thereon—although he was not a party to the suit, and is neither the agent or servant of, nor in privity with, any of the parties. In such case he is not technically guilty of a violation of the injunction, but of an independent act of disrespect to the court, and disregard of its decree, which constitutes a contempt of the court, and may be punished as such without reference to its effect upon the rights of the suitors.

Proceedings for Contempt of Court against J. Jenkins Hucks and others. On rule to show cause, and returns thereto.

J. P. K. Bryan, for petitioners.

Smythe, Lee & Frost, for respondents.

SIMONTON, Circuit Judge. The record discloses that on 31st October, 1893, Alexander R. Chisolm and others filed their bill of complaint in this court against Edmund A. Caines, commonly known as Ball Caines, and certain other parties, citizens and residents of the state of South Carolina. The bill alleged that the complainants were lessees of a person holding under the grant of the Carteret Barony, dated in 1733, the same being for a large body of land and marshes on the waters of Winyah Bay, in the province of South Carolina; that they had procured said lease for the purpose of securing the exclusive right to hunt and shoot the wild game upon said lands and marshes, and had gone to great expense in building houses and employing gamekeepers, posting notices over all of the said marshes warning trespassers off said marshes, and forbidding all persons to shoot thereon; that in despite of said notices the persons named as defendants had persisted each year in trespassing on said marshes, shooting game thereon, frightening them away, and by every means more or less interfering with the exclusive rights of complainants, and destroying the value of their property; that Edmund A. Caines had combined and confederated with all the defendants above named, and others whose names were unknown to complainants, and who, when discovered, they pray may be inserted, to continue said trespassing in manner aforesaid, with the injurious results aforesaid.

The bill prayed an injunction and process. Upon the filing of the bill a rule to show cause, with the usual restraining order, was issued and served. Upon return to the rule, cause was shown, in effect, that the lands in question were common property of all the citizens of the state who had equal rights thereon, and denied any exclusive

¶ 1. See Injunction, vol. 27, Cent. Dig. § 495.

right or property in complainants; that this common right had been enjoyed by all the citizens of the state from the settlement of the colony, and had never been disputed until this bill was filed. The acts of alleged trespass were admitted. On the 13th April, 1894, presumably having been notified for this purpose, the state of South Carolina intervened in order to protect the alleged common right, and was made a party defendant. On the 3d September, 1894, the state, by the Attorney General, filed a disclaimer, stating that its previous action was based on a misapprehension of facts, and admitted the title of the complainant lessees. Answer was filed by the defendants to the original bill, setting up the same defense as the return to the rule. Issue was joined, testimony taken, and the cause came to a full hearing. Counsel of character and ability represented the defendants, and made exhaustive argument in their behalf. After hearing pleadings, testimony, and argument, a perpetual injunction was issued by this court, restraining the defendants, and each of them, from entering on the marsh lands and the creeks permeating the same, except certain creeks by name declared to be navigable streams, and from shooting game thereon. 67 Fed. 285. The decree of the court recognized fully the exclusive right claimed by the complainants. No appeal was taken from this decree, and it now stands unreversed. On the 28th November, 1896, the complainants filed their petition in the cause, stating that they had charged the defendants therein with conspiring and confederating with certain parties unknown, but whose names, when discovered, they pray may be inserted; that they have discovered some of the persons who were thus combining and confederating with said defendants, to wit, M. T. Doig, and certain other parties named, and praying that they may be made parties. A rule was granted against these persons named in the petition, and on the return to this rule they were also enjoined. On the 23d of August, 1901, a similar petition was presented by the complainants, naming A. J. Westbury and certain other parties as engaged in the same conspiracy, and with a similar prayer. A rule was issued, and on the return thereto they were also enjoined, and in the order enjoining them were included in the same all persons whomsoever. On the 11th December, 1902, the complainants filed an affidavit against J. Jenkins Hucks and Frank Hucks, and on the same day an affidavit was filed against Robert H. Spencer, Barney Bassert, alias Bassant, J. E. McQuade, Herbert McDonald, J. B. Johnson, and Ben Tamplet. The affidavits in both cases alleged that the parties named therein on that same day entered upon the property of the complainants, trespassing and shooting ducks thereon. Thereupon rules were issued upon each of the persons named, calling upon them to show cause why they should not be attached for contempt of the injunction of this court. The affidavits and the rules are the same in each case, and are, at large, as follows:

"On hearing and filing the affidavits of James R. Powell, hereto annexed, and on motion of J. P. K. Bryan, solicitor for complainants herein, it is ordered that [here the names were inserted] do show cause before this court at Charleston, S. C., at the United States courthouse, on Thursday, the 18th day of December, 1902, at ten o'clock a. m., why they, the said J. Jenkins Hucks and Frank Hucks, and each of them, should not be attached and com-

mitted for contempt of this court, for violation of the order and decree of this court heretofore rendered in this cause, enjoining the defendants and all persons from trespassing or entering upon the premises of complainants herein, more particularly upon Duck creek, within the boundaries of said Friendfield, property described in the bill of complaint herein. It is further ordered that a copy of this order and affidavit of James R. Powell, hereto annexed, be served forthwith upon the said parties."

"Personally appeared before me, W. T. Turbeville, a notary public for South Carolina, James R. Powell, game warden for the Annandale Gun Club, and makes oath that he has been for some time past, and is now, game warden of the Annandale Gun Club, lessee of the premises known as 'Friendfield,' in the county of Georgetown, state of South Carolina, being the same premises described in the bill of complaint herein; that on the 24th day of November, 1902, while in the discharge of his duties as such game warden, he saw [here the names of the parties are inserted] shooting ducks in Duck creek, same being one of the creeks mentioned in the final decree in the above-entitled cause, in which the injunction issued perpetually enjoined defendants therein, their agents, attorneys, and all persons whomsoever, from trespassing in same, and from shooting ducks therein; that said Duck creek is, and has been, posted with printed notices warning all persons from shooting or trespassing upon said lands and waters, and notice given of the decree and such final injunction by this court, of which the said J. Jenkins Hucks and Frank Hucks were well aware at the time of such trespasses; that the said trespasses were committed by the said J. Jenkins Hucks and Frank Hucks willfully, knowingly, and deliberately, and in defiance of the injunction of this court in the above-entitled cause."

It will be noticed that this is a proceeding essentially different from the others above referred to. The former proceedings were on petitions based on the special prayer of the bill. This makes no reference to that prayer, and simply states the facts of the trespass and the violation of the injunction.

A return was made by each of these parties, each adopting identically the same return. Leaving out the formal parts, the return is as follows:

"And for a further return to the said order and rule, this respondent, not admitting the allegations contained in the affidavits of James R. Powell, filed herein, and upon which the said order is based, says that he is advised by his counsel, and respectfully submits, that, even admitting said allegations to be true (which, however, he does not admit), there is no order or decree in this cause, whether of injunction or otherwise, which in any way binds or affects this respondent, and that this court is without jurisdiction to issue the order and rule of December 11, 1902, or to enforce it against the person of this respondent in this cause, because he says that this is a civil case between private individuals, wherein the complainants claim to be in lawful possession, under lease from a landlord holding title, of certain marsh and high lands upon which the defendants were alleged to be trespassing at the date of the filing of the said bill, to wit, on October 31, 1893; that the original bill herein prayed only an injunction 'directed to the said Edmund A. Caines, Archy Thompson, Aleck Thompson, W. B. Smith, and George Mills,' the defendants named in the bill; this injunction was asked solely for the individual benefit and protection of the complainants; that the preliminary injunction granted by this court, and made permanent by its final order and decree in the cause, filed March 19, 1895, only provided 'that the defendants, Edmund A. Caines, Archy Thompson, Aleck Thompson, W. B. Smith, and George Mills, be, and each and every one of them is, hereby restrained and enjoined from trespassing,' etc.; that said injunction thus, in terms, failed to be extended against any parties other than the named defendants, nor could it have been of effect against any such other persons than the parties defendant, their agents, employes, etc., even if general words to this effect had been used; that the term of the court at which the

final decree was rendered adjourned sine die on the 30th day of March, 1895, and that thereupon the said decree passed beyond the control of this court, and could not by it be modified, extended, or discharged, save, perhaps, by bill of review properly filed, which has not been done; that this respondent is not a party defendant in this cause, nor is he the agent, employé, or privy either in law or in estate, of any party, nor is his title or claim in any way derived from the defendants, or any or either of them."

This return is practically a demurrer to the jurisdiction and denial that they are liable for contempt. The facts stated in the affidavits must, therefore, for all present purposes, be taken as true—the facts, not the adjectives characterizing them.

Contempt of court is a specific criminal offense. The judgment is a judgment in a criminal case. In *re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207. The rules in this case are based on affidavit. To the affidavit we must look for the indictment. These respondents are charged with shooting ducks on these marshes and in Duck creek—one of the creeks mentioned held by the court to be, with the marshes, exclusive property of the complainants. From the posted notices they had full notice of the existence of the injunction and of the order of this court. The bill upon which the original injunction was granted was directed against the parties named in the bill. The bill prayed leave to add other parties also charged with confederating with Caines, before then unknown, on the discovery of their names. The affidavits now under consideration do not charge these respondents with combining and confederating with Caines and the others named with him, nor do they charge them with being agents or attorneys of them, or any of them. They do charge that the injunction ran against all persons whomsoever trespassing on these marshes. There can be no doubt that, in granting full relief under the original bill, the court, whilst entering final judgment against the parties named, could, in accordance with a prayer like this in the bill, as to parties then unknown, on proper application at the foot of the decree, enter orders binding on the parties then unknown, whose names, when discovered, were brought to the attention of the court; that is to say, parties charged with conspiring and confederating with Caines and his associates. To this extent the general words "all persons whomsoever" certainly could be used and applied. Can they be extended further, so as to reach these respondents who are not charged in the affidavits with combining and confederating with Caines and others?

There are cases in which, because of the great number of the persons against whom relief is sought, who ordinarily would be made parties, complainants are allowed to select some as the representatives of the class, and a decree made thereon would bind all who come within the class. *U. S. v. Old Settlers*, 148 U. S. 480, 13 Sup. Ct. 650, 37 L. Ed. 509. "In this class of cases there is usually a privity of interest between the parties. But such privity is not the foundation of the exception. On the contrary, it is sustained in some cases when no privity exists. However, in all of them there always exists a common interest or a common right which the bill seeks to establish and enforce, or a general claim or privilege which it seeks to establish or to narrow or to take away." *Story, Eq. Pl. § 120*. See, also, *Mit-*

ford on Pl. § 170. The reason is given by Story in the book above quoted (section 285): "For in all of them there is a common interest centering in the point in issue in the cause." In the original suit the issue was as to a common interest of the public in these lands. The defense rested wholly on that. The issue in the case was, have the complainants an exclusive right to these marshes, or was that right subordinate to the interest of the public? The case was ably and learnedly presented and argued. The conclusion was reached after careful consideration. But in a note, "x," to the page quoted from Mitford, Pl., above, it is said, "Where it is attempted to proceed against some individuals representing a numerous class; it must be alleged that the suit is brought against them in such representative capacity." For this is quoted as authority 5 Maddox, 13. There is no such allegation in the original bill. It is true that the state came into the suit because of this alleged public right. But she withdrew before the issue was decided, leaving the individual defendants to defend themselves, disclaiming the public right. It can very reasonably, therefore, be said that these respondents were not parties nor privy in the original suit. They had ample notice, however, that the court had by decree established the exclusive right of the complainants in these marshes, and that by its process of injunction it had sought to protect its decree. In despite of this, they invaded the marshes covered with notices of the action of the court.

A person may be in contempt either by violating an express restraining order issued to him in a suit to which he was a party by name or privy, or by adequate representation, or, if he be not such a party to the suit, he may be in contempt either by aiding or abetting a party to the suit in disobeying or resisting the injunction, or by independently and intentionally interfering with and preventing the execution of the decree of the court, thereby thwarting the administration of justice, rendering nugatory its action, and contemning the authority of the court. "It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and, as such, is and ought to be treated as a contempt of the court which issued the order." In *re* Reese, 47 C. C. A. 90, 107 Fed. 942. The record shows that on the same day, engaged in the same practices, McQuade, McDonald, Johnson, Tamplet, J. Jenkins Hucks, and Frank Hucks entered on the territory of the complainants, shooting and trespassing. They had around them everywhere notices that the court had declared this territory the exclusive property of complainants, and had enjoined all persons from going upon, shooting over, and trespassing upon these marshes. It would not be going too far to believe that there was a concert of action between these men, led by one of them who was a

lawyer and trial justice. They paid no regard whatever to these notices. One would have supposed that J. Jenkins Hucks, Esq., a member of the bar, would have known better; that at least he would not have encouraged by his example such a disregard of the decree of this court. True, it was a circuit decree. But it was a decree in the full exercise by the court in its jurisdiction, and was made, certainly, within its jurisdiction; a decree rendered after full consideration and argument from both sides; and a decree, until reversed by some appellate tribunal, is the law within this jurisdiction, entitled to full faith and credit. *Johnson Co. v. Wharton*, 152 U. S. 256, 14 Sup. Ct. 608, 38 L. Ed. 429. One would suppose, from all that occurred in this case, that a member of the bar would not stand upon his opinion against the decree of a court, preferring his private judgment to a solemn adjudication. *Wellesley v. Mornington*, 11 Beavan, 181, is a case cited with approval both in the Circuit Court in *Phillips v. Detroit*, Fed. Cas. No. 11,101, and then by the Supreme Court in *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, and also in *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union* (C. C.) 90 Fed. 598. In this case an injunction was granted against A., restraining him from cutting timber, but it did not include either his agents or servants. B., who was the agent of A. with full knowledge of the injunction, cut the timber. Held, B. might be committed for the contempt, though not for the breach of the injunction. This, clearly, was the principle which induced the Supreme Court, in *Re Lennon*, 166 U. S. 554, 17 Sup. Ct. 658, 41 L. Ed. 1110, to state, without qualification, this proposition:

"To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

The purpose of proceedings for contempt is not to afford a remedy to the party complaining, and who may be injured by the acts complained of. Its purpose is to vindicate the authority and dignity of the court. *Vanzandt v. Argentine Min. Co.* (C. C.) 48 Fed. 771. The question we are discussing was elaborately reviewed in *Seaward v. Paterson* [1897] vol. 1, Law Rep. Chan. Div. 549, etc. It first came up before Lord North, one of the judges of the high court attached to the Chancery Division, and went up by appeal to the Lord Justices of the Court of Appeals. The judge below and all the judges of the Court of Appeals took the same view of the question in careful opinions. Each of them answered and overruled the position taken by counsel for the respondent, which was "that there was no jurisdiction to commit for breach of an injunction a person who is not enjoined by it, who is not a party to the action, and who is not even a servant or agent of the person enjoined. There has been no contempt by interference with an officer of the Court. No one can be committed for a breach of an injunction who is not a party to the injunction, and enjoined by it." Each judge declares that this is not a correct statement of the law. In the course of his discussion, Justice Lindley said:

"Let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him. He is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him, must be this: not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt, as distinguished from a breach of the injunction, which has a technical meaning."

Then, later on, in differentiating a dictum of Lord Iveson v. Harris, 7 Vesey, Jr., 251, he says:

"The law is defined in a way which is familiar to anybody accustomed to the procedure in chancery. A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the court for the benefit of the person who got it. In the other case the court will not allow its process to be set at naught and treated with contempt."

The returns made to the rule in these cases are insufficient.

GAUT et ux. v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, M. D. Tennessee. December 10, 1902.)

1. ASSESSMENT LIFE INSURANCE—CONTRACTS—POWER TO INCREASE ASSESSMENTS.

Where the charter of a mutual assessment life insurance company gives it the power to change the rate or basis of assessments upon its policy holders from time to time, and its contracts do not prohibit such change, the fact that it changes its method and graduates its assessments according to the age of the policy holder when each assessment is made, instead of basing them on his age when the policy was issued, which was the method pursued for a number of years, does not entitle a policy holder to refuse to pay the same, and to recover damages for breach of contract, unless it is shown that the increase was fraudulent or unnecessary, although the change increased the assessments to such an extent as to render them prohibitive to persistent members.

At Law. Action for damages for breach of contract. On motion of defendant for direction of verdict.

The following is a copy of the plaintiffs' declaration, with the exhibits attached thereto:

The plaintiffs sue the defendant, a corporation existing under the laws of the state of New York, but doing business in the state of Tennessee under its laws, upon the following cause of action:

On the 12th day of August, 1885, defendant entered into a contract with plaintiff J. H. Gaut to insure his life for the sum of \$5,000 on the co-operative or installment plan, and executed and delivered to him its policy of insurance, or certificate of membership, whereby it agreed to pay said sum to plaintiff Ella L. Gaut, should she be living at the time of his death, and, if not, to pay the same to his legal representatives. Said payment was to

be made within 90 days after the receipt of satisfactory evidence of his death, during the continuance of said certificate. Said policy of insurance or certificate is here to the court shown, and made part of this declaration. The consideration of said agreement was the promise upon the part of said J. H. Gaut to pay an admission fee of \$20, which he did, and to pay \$10 annual dues on the 12th day of August of each year, and to further pay all mortuary assessments within 30 days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of this certificate. It was further provided in said certificate that, if at such date fixed for making an assessment the death fund was insufficient to meet existing claims by death, an assessment should then be made "upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates, according to the age of each member, as may be established by the said Board of Directors." In said certificate it is further provided that "this contract * * * shall be subject to all the provisions and conditions contained in the constitution and by-laws of this association, with the amendments made, and that may hereafter be made, thereto": "the entire contract contained in this certificate and said application, taken together, shall be governed by, and subject to, and construed only according to the constitution, by-laws, and regulations of said association, and the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the City of New York." Defendant was organized under a general statute of the state of New York, passed in the year 1883 (being chapter 175 of the statutes of that year): "The corporators, trustees, directors, members, members or representatives, as the case may be," were by said act empowered "to make such by-laws as may be deemed necessary for the government of its officers and the conduct of its affairs, and the same, when necessary, to alter and amend." Said statute contains no provision authorizing the adoption of a constitution, rules or regulations. Under said act, in the year 1885, defendant undertook to adopt a constitution, as well as by-laws. Article 10, § 5, of the constitution, provided for the levying of bimonthly assessments "upon the entire membership in force at the date of the last death, * * * the same to be apportioned among the members according to the age of each member." Defendant's constitution, by-laws, rules, and regulations, as they existed on the 12th day of August, 1885, when said certificate was issued, contained no provision other than the one quoted above, determining the basis on which assessments should be made; and hence said certificate and said constitution, if valid, constituted the entire contract as to said basis. The proportion of each assessment to be paid by members of different ages, as fixed by said contract, is set forth on the back of said certificate. The amount fixed by defendant to be paid by plaintiff J. H. Gaut on mortuary call No. 22 (the first call after the date of the certificate) was \$25. He paid this and all other assessments as made, down to and including assessment No. 95 (the latter paid on the 29th day of December, 1897), amounting in all to \$4,020.45. He also paid the annual dues beginning August 12, 1885, and ending August 13, 1897, 13 years, at \$10 per year, making \$130. He paid the entrance fee of \$20 making a total payment to December 29, 1897, \$4,170.45. On the 12th day of June, 1895, defendant's board of directors undertook to pass a resolution, copy of which is here to the court shown, marked "Exhibit No. 1," and made part of the declaration. By said resolution the attempt was made to constitute a separate class of the members admitted prior to January 1, 1890, and assess them, not on the basis of their age at date of entry, but on the basis of that age with the addition of one-half the number of years which elapsed from January 1 of the year of admission to January 1, 1890, while other members continued to be assessed on the basis of their age at the date of entry. Said board also undertook to fix the rate upon the class mentioned at an amount sufficient to meet all the death losses in the class, without the aid of assessments on the members outside of that class. On the 12th day of December, 1897, defendant's board of directors undertook to pass a resolution, copy of which is annexed hereto, marked "Exhibit No. 2," and made part of this declaration, whereby it was

resolved that all members of said class, which are termed "members holding a policy upon the 15 years plan," should be assessed upon the basis of their ages at the time of the various assessments, instead of upon their ages at date of entry, or the ages fixed by the resolution of June 12, 1895; all other members continuing to be assessed upon the basis of age at date of entry. Plaintiffs aver that defendant had no power, under its charter and contract with plaintiffs, by amendment of its constitution or by-laws, or otherwise, to so change the contract; and they aver further that no attempt was ever made to so change it, by such amendment or amendments or otherwise, except by said resolutions. Plaintiffs aver that there is no provision in defendant charter, constitution, by-laws, rules, or regulations for any amendment thereof which empowered said board to change the basis of assessments, or to discriminate in any way between members holding old certificates and those holding new ones, and said action was in violation of said contract and contrary to law. In the year 1892 the Legislature of the state of New York passed an act making it a misdemeanor for "any insurance company or officer, or agent thereof," to make any discrimination in favor of individuals of the same class, or of the same expectation of life; and the Legislature of the state of Tennessee in 1897 (chapter 127, § 8), passed an act of substantially the same import. On February 1, 1898, defendant notified plaintiff J. H. Gaut that an assessment or mortuary call of \$100.20 (being No. 96) had been made upon him, payable March 3, 1898, which he paid in due time, under protest, making the total payment, exclusive of interest, \$4,270.65. On the 1st day of April, 1898, he was notified of another assessment of the same amount (No. 97), payable May 2, 1898, which he refused to pay. On the back of said notices was printed a schedule of rates, showing that plaintiff's bi-monthly assessments for the seven years following would be, per year, as follows, on a \$5,000 policy:

74 years of age.....	\$652 80	78 years of age.....	\$ 936 30
75 " " "	707 70	79 " " "	988 70
76 " " "	766 50	80 " " "	1,083 60
77 " " "	833 10		

Said certificate provides that, if any assessment is not paid on or before the date fixed for the payment thereof, the contract shall be deemed to have failed, and the certificate "shall be null and void." Defendant undertook to declare plaintiff in default, and canceled his policy or certificate, because of his failure to pay said illegal call. Plaintiff J. H. Gaut was at that time, viz., on the 2d day of May, 1898, about 73 years of age,—8 years above the insurable age in defendant's company, and above the insurable age in any reliable insurance company,—and was in impaired health. Defendant's reserve fund, according to its own representations, amounted in 1898, and still, to over three millions of dollars. Defendant has violated its contract with plaintiffs, and has collected illegal and excessive assessments from plaintiff J. H. Gaut; has rendered it impossible to carry out its contract with plaintiffs; has ceased to recognize plaintiffs, or either of them, as members or policy holders; and has canceled and declared null and void their certificate or policy, to plaintiffs' damage five thousand dollars; and hence they sue.

Exhibit No. 1.

Resolution of June 12, 1895.

Resolved, that the rates of assessment for all members of this association, admitted prior to Jan. 1, 1890, be, and the same hereby are, reapportioned in accordance with the table of assessment rates now in use, to rates indicated by adding to the age of entry, one-half in number of years from Jan. 1st of the year of admission to Jan. 1, 1895, fractions of years resulting from the division to be counted as full years, and that said reapportionment rates of assessments, together with the present rates of assessment for all members admitted since Dec. 31, 1899, continue the rates of assessment of this association, beginning with call No. 81 until otherwise ordered by this Board, provided, however, that any increase beyond the rate indicated for more than 70 yrs., may, at the member's option, be debited to his policy, and deducted from the amount payable thereunder, instead of being paid in cash.

Exhibit No. 2.

Resolution of December 15, 1897.

Resolved, that pursuant to the terms of the contract with the members, and in virtue of the power reserved to the association, for call No. 96, to issue and become payable Feb. 1, 1889, and for all subsequent calls until otherwise ordered by the Board of Directors the rate of assessment to each member of this association, holding a policy or policies upon the 15-year plan, shall be determined from the table, and of assessment rates now in use, and under which said policy have hitherto been assessed, and upon the basis of the completed age in years of each member respectively, and of the amount of insurance by him carried at the rate of each call.

To this declaration defendant filed pleas of the general issue, and alleging that the policy was canceled for nonpayment of assessments in accordance with the terms of the contract.

J. M. Gaut, for plaintiffs.

T. B. Turley, H. A. Chambers, George Burnham, Jr., and S. T. Tyng, for defendant.

HAMMOND, J. It is the opinion of the court that the motion of the defendant to direct a verdict in its favor should be granted, and the verdict will be so entered. I might now close the case, and leave the question where the law puts it; but it would be intolerable to counsel on either side, and to you, that I should make no explanation for taking that course. But what I am saying is not a charge upon which any exceptions can be taken, or of which any error can be predicated, as I am simply explaining to you the reasons why I direct your verdict in favor of the defendant, for your own information, and as a matter of courtesy to you and counsel.

I only wish I had time to take this record out, and go quite carefully over the details of it, in order to fully justify that judgment; but that is a matter of impossibility, under the circumstances under which we are trying this case here and now. But I may say to you that when the plan of assessment assurance was first commenced among our people and those of England, where it has obtained for some time, it was denied by the writers upon the subject, and those who are familiar with the philosophy and science of insurance, that it was a practicable and workable scheme of insurance; and it was attacked from the beginning as being an absurd system, as being one that would result just as this policy has resulted, and for just the very reasons that have been given here in reference to the outcome of it to this disappointed plaintiff. Originally the same objections were urged against assessment insurance as those which we find exhibited by the facts of this case and to considering it a desirable or effective plan or means of accomplishing the purpose of life insurance. That controversy and conflict among those who know something of the scientific values of plans of life insurance has been raging ever since. The assessment plan was a very attractive system, and, if it could be worked, it would undoubtedly be more attractive than other forms of insurance which are regarded as more

excellent and efficient. Its cheapness was its chief value, and there were such other attractive features that the benefit societies based on that plan, and the mutual insurance companies using the same plan, had an immense rush of business,—a kind of boom or craze for that sort of insurance, which is a familiar fact in the history of life insurance. It was seen in the beginning, in the first years of the scheme, that it worked out very well; that it was very attractive and very satisfactory; but as the company grew, and the average of the generations of human life, somewhere in the neighborhood of 30 or 35 years, approached, it was realized that a constantly increasing death rate would become so enormously large that the cost of insurance in the end would be disastrous. I speak with some reserve as to the history of it, but my recollection is that the history of assessment insurance in this country and in England has pretty well justified what was said of it in the beginning. Some of the societies and companies have gone into the hands of receivers to wind up, and lost everything for every one that went into it. Some of the old-line companies, it is true, have done the same thing. But all these assessment companies have got into trouble, and they have all been doing everything and struggling in every way they could devise to save themselves against this defect that existed, but was not fully appreciated, in the start. We have a very significant indication of that fact in the proof here that this defendant company has changed or attempted to change its policy, and convert itself into an old-line company. Nevertheless, it had this large body of persons insured on the assessment plan, and had to take care of them; and it felt that it must do what they were authorized to do to meet and provide for and against the losses to which I have called your attention. Theoretically a great deal could be planned about it. For instance, it was believed and said that new blood could be brought into it; but, when the people already insured got to be old, the young men on the outside would say: "It is not worth while for us to go into this class of old people ready to die, for we will go in only to carry their insurance, and so we will keep out." Therefore new blood did not come in, and there is the inherent defect. The idea that the scheme would be worked out by an influx of new and young people has been a disappointment.

Now, that is what has happened to Mr. Gaut, the plaintiff, in this case. He has been bitterly disappointed in the outcome, no doubt; but that does not give him a right to recover the money he paid into this company—one which he selected on account of its attractiveness; and this misfortune of his cannot give him a right to get back money which voluntarily he paid into an ill-devised scheme of insurance. The only thing he can do, or has a right to do, is to recover any damages that may have accrued to him by reason of the company's violation of their contract, and hence he says that which has been done under the contract is a violation of it, and is illegal. The court does not think so. The court does not think there is any illegality in the procedure or practices of this company, as shown by the proof, in making these assessments. Undoubtedly it started out with the idea it would apportion the assessments from

time to time, according to the age of the member at the time that he entered the company, and to that extent the company has undoubtedly given a practical construction to the contract; but, after all, it was not so much a matter of construction of the contract, as it was a selected method of doing the business of raising funds to meet losses by making assessments. All started out with the idea that they could keep the assessments down to something like the amount that was originally required to pay losses by the influxion of new blood, as just explained, and at the same time they hoped to keep to the analogies of old line companies of a fixed premium at the entrance age; but, when the company was disappointed about that, as was Mr. Gaut, evidently it had to resort to some kind of a scheme or plan, within its chartered powers and within its contracts, to save the company, and those connected with it, from loss. Whether, in what this company did, it acted wisely or unwisely, we are not here to inquire. Every man who goes into a company submits himself to the wisdom of those governing it—the board of directors or the stockholders, or to whomever is appointed to govern the corporation; and everything they do unwisely is not necessarily a matter of just complaint or cause or ground of damages to the members, because they must submit to the discretion of somebody, and the policy holders of this company submitted to the board of directors the problem of doing the best they could to get out of this inadequacy of funds to pay the death losses. The directors in this case resorted to what all the companies usually and principally do. They increased the assessments. Mr. Gaut, the plaintiff's counsel, does not deny, on the part of the plaintiff, that they had a right to increase the assessments. He says they have not increased them according to the original scheme and plan, and according to their experience with the actual results of the scheme, as they were bound to do. But we have no proof here showing that this company has not assessed the losses or premiums upon their actual experience as they found it in the operation of the company. If Mr. Gaut could show by a bill in equity, or in this action in law, that the company, in the process of assessing these premiums, had assessed the plaintiff in this case a larger sum than their experience in the management of the company's business actually necessitated, and more than the actual requirements under their scheme of insurance demanded, then he would have a good cause of action; but he has not gone into that; has not gone to New York and examined the books of this company, or otherwise shown how many deaths there were, and how many losses, and the amount, and how many assessments were necessary to be made, and what amount each member should pay, and thus enable the jury—if they could practically make such an inquiry as that—to determine that the payments demanded of the plaintiff were too large; but he has not brought such evidence as that before us, and has rested on the fact that the plaintiff in this case has been required to pay in a larger sum of money than is agreeable to him, and a larger sum of money than would be justified by good business considerations in paying for life insurance. That may be so, and greatly disappointing to him, and, no doubt, it is; but it is not shown to have come from any wrongdoing on

the part of the company, and therefore we cannot give him any judgment on that ground.

Now, as to the rates of insurance. The taproot of this whole controversy is that Mr. Gaut claims that by this contract he had secured to himself the right to have, during all his lifetime or during the continuance of this policy, assessments made against him as of the age of 61, when he entered the company, and not as of any advanced age, and that when the company came, according to its experience and necessities, to assess any needed sum upon all members of the company, it must assess his share as of the age of 61, and not at his then attained age. The court does not think that is one of the stipulations of this policy. He has not been accorded by the charter the right to demand that method and rate of assessment, if you call it so, or ratio of assessment. He has not had secured to him, by any expressed words of the contract, the right to have any assessment made as of the age of 61. It is true that this company assessed him at that age for 12 years, but it was its right to do that, and then to abandon that method at any time. It was not a construction by the company of their contract with the plaintiff; but it was a method chosen, by which the company hoped to make its business attractive, and so attractive that it might last as a rule of assessment always, no doubt; but when the time came that it was confronted with changed conditions, and confronted with the fact that it did not have enough money to pay constantly increasing losses, it was within the province of their contract, and strictly within its provisions, and wholly within the competency of the charter, for the company to devise a means by which these assessments could be increased; and then, likewise, under the terms of the contract and the charter, it was permissible to have changed the method or proportion of assessments from the age of entry to the age attained at the time the assessment was made. I think there is no doubt but that that construction of the contract and the charter is correct, and, this being so, to thus make the assessments would not violate the contract. As to whether that change was wise or not, it is not for us to say. There is nothing here to show it was fraudulently done; nothing to show it was unnecessarily done; nothing even to show that it could have been done in some way that would have been better; and we must take it, in the absence of such proof as that, and assume it to be true, that the company did the best its judgment dictated; and this plaintiff cannot complain if the company was acting within the exercise of its charter powers and rights, and within the terms of the contract, no matter how disastrous the change was to him at his greatly advanced age. He has outlived the value of his insurance on the plan which, unfortunately, he selected when he was younger.

The next question is whether it is an excessive assessment. If that were so, he might refuse to pay the premium, and recover the money back, but it has not been shown that it was excessive. How can we say it was excessive, unless we know all the facts of the assessment No. 97 which he refused to pay? It is true, we can see that it is high, and quite prohibitive to continuance in the company

for a member who is called in the proof "a persistent member"—that is, one who keeps up his policy, keeps on paying his premiums, instead of forfeiting those already paid and getting out of the way; and the question was, "How much shall we assess this member as he grows old?" That which they did may indicate a harsh mode of dealing with a "persistent member," but unless we have an insight into the true condition of the company's operations, and go into the vitals of it, and see how it was constituted, and what was the basis of it, no matter how good may be our business capacity, we could not tell whether the assessment made was an excessive assessment or not. That the plan of assessing according to the age attained at the time of making the assessment is burdensome to the oldest men goes without saying, and also that it increases the burden of all members with advancing age. But that fact, or the fact that it was burdensome to Mr. Gaut, would not show it was excessive, and that is all he has to rely upon. It may be that the burden and absurdity come from the absurdity of the insurance itself—from the natural infirmity in the scheme of assessment insurance; and the plaintiff cannot recover until he goes further, and shows by some proof, brought before us, that it was outside and beyond the necessities of the company, which he has not shown.

Another complaint is that the plaintiff has been wronged, and his contract violated, in the manner in which the company has treated its reserve fund. I do not see any proof of that. So far as we have any proof, it rather shows to the contrary, but we are not sufficiently advised by the proof to say, as to the reserve fund, just what the scheme was; but, as far as Mr. Gaut was concerned, he had a provision in his contract relating to that reserve fund, or to his share of it, and he got the two bonds to which he was entitled, and used them; and the testimony of the witnesses of the company is that it would have gone on and delivered to him whatever bonds he was entitled to under the contract, if he had continued his insurance. It was a bond which assigned to him his share of the reserve fund, and which he might use or make available to that amount on certain conditions mentioned in the bond. He got that benefit for some time. It is not necessary to say how much, but he certainly got two bonds, and some part of them was used by him. There is no proof to show he was entitled, under this new scheme of assessments, to any more of the reserve fund, or that he was in any way injured by the company's treatment of that fund. There were to be new issues of bonds on plans of five and ten year series. Also there were made some different arrangements about the process of distributing this reserve fund, than that Mr. Gaut had; but until he has shown by the proof that these differences in arrangement, whatever they were, resulted in some denial to him of his right or share in the reserve fund, he has no right to complain.

Another complaint suggested is that the company might have paid some of its losses out of the reserve fund, under the terms of his contract, but I do not see that that has been established by the proof. We cannot say by any proof before us that in 1898, or at any time,

there was a condition existing as to the reserve fund which enabled the company to exonerate the plaintiff from any of the burdens of this policy of insurance by paying death losses out of the reserve fund; and until the plaintiff has shown us, by sufficient proof, and by examining the operations of the company in its details, such a result as that, we cannot see how he could have a right to recover.

The outcome of it all is that the plaintiff relies upon the fact that this company has assessed him at the rate of 73 years instead of at 61, which it had done for 12 or 15 years after his insurance commenced. Unfair as that may have been to Mr. Gaut, burdensome and a hardship as it was, it was a right that the company had, to assess him that way, under the charter and the contract; and having that right, and not having shown that the company violated its discretion or judgment in the premises, I do not see how he has any cause of action because of the hardship. The law does not relieve against hardships of that kind in the bargains that are made by the parties to the contract.

There are judicial decisions that have been read in our hearing, on both sides of the question, as to the proper construction of the charter of this company and the contracts of insurance under it; but, until it is settled by the Supreme Court, there will be differences of opinions, for judges differ like other people. There seems to have been in Virginia and Georgia and in New York one view, and in North Carolina and Minnesota another. The opinion in North Carolina is a very strong opinion, and possibly is the sound one, but I do not think so. It proceeds upon the theory that this company and Gaut had made a contract which forbade the company to make any assessment other than at the age of entry into the company; but, from what I have said, you will understand that I do not concur in that view, but agree with the Court of Appeals in the Eighth Circuit that the company had abundant power under its charter and under the plaintiff's contract to do what it did do, and that it was bound to do what was required to raise the funds for its losses according to the circumstances of its operations and the necessities that confronted it, and that these requirements of the company were to be met as it appeared best to them at the time they arose; and we do not see, from any proof we have here, that the company violated that duty; and I feel compelled to say, notwithstanding the loss to Mr. Gaut, that he has not shown such a case as would authorize us to give him a verdict upon any showing he has made in that behalf.

Mr. Gaut, of course you desire to take an exception. It is not required that you should take any exception to the language of the court in giving its reasons for directing a verdict, for that is unnecessary. The stenographer will enter on the record an exception on the part of Mr. Gaut to the court's action in directing a verdict in this case for the defendant.

In re KAHN.

(District Court, S. D. New York. September 24, 1902.)

1. BANKRUPTCY — COMPOSITION — PARTIES — SECURED CREDITORS — CONTINGENT CLAIMS.

Where a bankrupt had executed and assumed various mortgages on real estate, which had not been foreclosed, and on which his liability for a deficiency was contingent and unliquidated, such contingent claims not being provable in bankruptcy, the holders were not necessary or proper parties to a composition between the bankrupt and his creditors; and their absence was no objection to the confirmation of the composition, otherwise found to be for the best interest of creditors having provable claims against the estate.

On Question Certified by Referee.

The following is the opinion of Referee Morris S. Wise:

The questions certified to the Honorable District Judge are not submitted from a mere academic point of view, but the situation in this case is of a character which, in my opinion, deserves the immediate and serious consideration of the court, and the questions so certified are, in my judgment, properly to be disposed of by the learned District Judge, because of the fact that under the Act, the confirming of a composition is vested exclusively with the District Judge, and he has personal and absolute control of such proceedings.

The bankrupt, who was a dealer in diamonds and jewelry, and who also in the course of his business career, ventured to speculate in real property in the city of New York, was adjudicated a bankrupt upon his own petition on June 10, 1902.

The schedules filed by the bankrupt herein disclose that he owes debts amounting in the aggregate to nearly four hundred thousand dollars, of which upwards of one hundred and seventy-five thousand dollars are unsecured and provable against the estate.

The nominal value of the assets amount to two hundred and twenty-five thousand dollars, but the large proportion of these assets are in the shape of outstanding accounts to the extent of nearly one hundred and thirty thousand dollars, of which possibly fully one hundred and twenty thousand dollars thereof will prove to be uncollectible.

The balance of the assets have been to the greater extent, pledged as security, and are held by various secured creditors.

The composition offered by the bankrupt is twenty per cent. in cash, and this proposed composition has been accepted by a large majority, in number and amount of all the unsecured creditors of the bankrupt.

It is stated and as appears from the record in the proceedings herein, that if said composition is not consummated, and if the estate is administered in bankruptcy, that possibly not five per cent. will be realized by the creditors, and this opinion is shared to the greater extent, by the large majority of all the creditors in the case, who have appeared herein.

It is therefore very evident that it is for the best interests of the creditors that this composition should be effected, if it possibly can; and it seems to become the duty of the court, in protecting the best interests of all the creditors, to aid them, by assisting in the consummation of such composition, if the same can be done without violating any of the provisions of the Bankrupt Law.

The only obstacle which appears to exist at the present time to the carrying out of the said composition has arisen in the suggestion, that inasmuch as the bankrupt has become liable on certain mortgage bonds to a considerable amount of money, and as his pendens have been filed and actions commenced for the foreclosure of the mortgages, to secure which the bankrupt gave his bonds, or the payment of which mortgages the bankrupt assumed,

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 578.

and the said creditors holding such security, not having been made parties to the proceedings, and not having assented thereto, or appeared herein, the question has been noted whether the composition can be lawfully carried through and receive the approval of the court in the face of such existing circumstances.

If the securities held by these mortgage creditors were capable of being immediately liquidated, or if the value of such securities could be ascertained at the present time, no trouble would be experienced, because the act has provided (section 63, subd. "b," Act July 1, 1898, c. 541, 30 Stat. 562, 563 [U. S. Comp. St. p. 3447]) that unliquidated claims against the bankrupt may pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate; and there is a further provision (section 57, subd. "h"), that the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claim, and a dividend shall be paid only on the unpaid balance.

Subdivision "e" of the same section also provides that claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings, held prior to the determination of the value of their securities or priorities but shall be allowed for such sums only as to the court seem to be owing over and above the value of their securities or priorities.

Theoretically it would seem as if the Act afforded abundant means of solving the questions involved herein, but practically, all these several provisions of the Act fail to give prompt answer to such questions, for the very excellent reason that until there shall have been a sale under foreclosure of the mortgaged premises, the amount of the deficiency which may arise, can be only a mere matter of conjecture.

It is true that expert valuations may be obtained as to the value of the property, but as such valuations would be of no binding force, unless such secured creditors participated in the proceedings, the court is apparently without present power to act in such direction, or if it has the power, the exercise of it would consume so much time as to practically defeat the present immediate object which confronts the court, to wit, the putting through of the proposed composition.

It is very plain that if the said premises should upon sale bring the amount of the mortgage debt and expenses, that there will be no deficiency, and that there will be no creditors in that direction; and if these composition proceedings could be halted to await the result and determination of such foreclosures and sales, then the questions would receive their own answer; but the urgency of the situation requires that the questions involved as to the rights, if any, of the mortgage creditors, should receive immediate determination; and hence, resort must be had to other sections of the Act, as well as to decisions of the courts to determine whether such mortgage creditors really have a present interest in these composition proceedings, and whether they are proper and necessary parties thereto.

I am of the opinion that they are not either proper or necessary parties to this composition proceeding, and such composition may proceed duly and regularly without such creditors either assenting to it, or being calculated for the purpose of ascertaining whether a majority in number and amount of the creditors do assent to the confirmation of such composition, and for the following reasons:

Section 12, being the first section of the composition part of the Act, provides as follows:

"A. A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court, etc."

This provides that the composition shall be offered to his creditors. When we refer to the definition or what is known as the "Dictionary Section" of the Act, we find that section 1, subd. 9, defines a "creditor" as follows:

"'Creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, etc."

Debts which are provable are defined by section 63 of the Act to be

"A1. A fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as are not then payable and do not bear interest.

"2. Due as costs taxable against an involuntary bankrupt etc.

"3. Founded upon a claim for taxable costs incurred in good faith etc.

"4. Founded upon an open account or upon a contract expressed or implied.

"5. Founded upon provable debts reduced to judgment after the filing of a petition and before the consideration of the bankrupt's application for a discharge etc."

It is very evident that such mortgage creditors have no present provable claims and are not therefore creditors within the true meaning of section 12 of the Act, because as already shown section 57, subd. "e," only provides for the allowance of claims of secured creditors upon the determination of the value of their security and the amount of which claim to be allowed only as the court finds is owing over and above the value of such security.

When we come to subdivision "b" of section 12 of the composition section of the Act, we find that there the law decides that "the application for the confirmation of a composition may be filed in court after but not before it has been accepted in writing by a majority in number of all creditors, whose claims have been allowed;" and then there is a further provision that "the consideration to be paid by the bankrupt to his creditors and the money necessary to pay all debts which have priority and the costs of the proceedings must be deposited."

Now debts having priority are considered in connection with secured claims in section 57, subd. "e," and the omission therefore of "secured claims," from section 12, subd. "b," when claims having priority are cared for, is at least significant; and the clear intendment of the law is that in case a claim shall not be provable or shall not be in such a condition so as to be capable of being proved and allowed, that it is not to be considered in connection with a composition.

The courts and text writers seem to agree that this is the proper construction. In *Loveland on Bankruptcy*, page 563, we find the principle stated that "the confirmation of a composition releases a bankrupt from such debts only as a discharge; a discharge in bankruptcy releases a bankrupt from all his provable debts, except such as are due as a tax levied by the United States etc.;" and on page 564, the same author holds that "composition proceedings will not operate to deprive a secured creditor of the right after exhausting his own security, to assert against the bankrupt a claim for a deficiency; such proceedings will not effect a vested right or security; secured creditors are not parties to the composition."

Brandenburg on Bankruptcy, at page 212, says:

"The confirmation of a composition discharges a bankrupt from his debts other than those agreed to be paid by its terms and those not effected by a discharge."

A similar question arose under the Act of 1867, in which a composition was effected by the bankrupt and where certain creditors holding security on real estate, were claimed to be fully secured at the time the composition was effected, and it afterwards transpired that a considerable balance or deficiency arose after the sale of the security; it was there held:

"I am of opinion myself that the compromise provisions of bankruptcy design that every creditor shall receive the same proportion of his debt; and I am of opinion as regards the parties who shall receive, that the secured creditor is a creditor for that purpose for all that is not satisfied by his security; and I am of opinion that whenever this fact is ascertained, even after the compromise, that remainder constitutes a debt against the bankrupt, of which he shall pay the same proportion to that creditor that he has paid to the unsecured creditors." *Paret v. Ticknor*, 16 N. B. R. 315, Fed. Cas. No. 10,711.

This case was approved in *Cavanna v. Bassett*, 3 Fed. 215, where it was held as follows:

"Composition proceedings do not operate to deprive a secured creditor of the right, after exhausting his own security, and ascertaining the amount unpaid, to assert against the bankrupt a claim for the deficiency, and such claim may be enforced through the instrumentality of an execution issued against the property of the debtor on the deficient judgment; complainant had a right to hold on to her security and as a secured creditor she could not properly participate in the composition proceedings; she could not be compelled to surrender her security, and then come in and prove her claim, nor was it incumbent on her to have her security valued and then to make proof of any balance; the bankrupts knew or should have known that there was a liability that the security would not pay the indebtedness; they were chargeable with notice that such a contingency might arise, and if they desired to put complainant in position where the complainant's proceedings would operate upon hers, they might have applied to the court for proceedings compulsory in their nature, to have the security valued; not having done so, there remained a liability that in case the security should prove inadequate, complainant would have the right as to any deficiency, to compel payment of the same to the extent of the percentage paid to unsecured creditors under the composition."

It thus would appear that the bankrupt must be willing in view of the situation to assume the risk and liability of being compelled to make good hereafter to such mortgage creditors, the same percentage of such deficiency, if any should arise, as he is now offering to pay to his body of creditors; and the mortgage creditors are not injuriously affected by the composition, because as is pointed out in the last case cited, they could by proper proceedings in the court, have their security valued and present a provable claim for the difference between the amount of their security and the amount of their respective debts.

The record shows that they have notice of the proceedings and have not availed themselves of such opportunity. I am therefore of the opinion, that the first and highest duty of the court, when such a case arises as the one under present consideration, is to protect the interests of the large majority of the creditors; they should not have a loss put upon them, because certain obstructive creditors refuse to assist in ridding the situation of any of its technical difficulties; such creditors should not be considered in any higher light or regarded with more favor than are a minority of creditors, who refuse to accept or assent to a proposed composition.

If the court reaches the conclusion that the composition offered is for the best interests of all creditors, the court will confirm the composition, even though there be objection and a refusal to assent on the part of a minority of creditors, and to my mind, the law would be very incomplete and impracticable, if a situation such as this could not be met and overcome by the broad equity powers conferred upon the District Court; more especially as the concluding paragraph of chapter 2 of the Act, expressly provides that "nothing in this section contained (and that is the jurisdiction section of the Act) shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Dated, New York, September 19, 1902.

G. W. & F. L. Crawford, for creditors.

Hays & Hershfield and D. P. Hays, for trustee and for creditors.

Myers, Goldsmith & Bronner, for bankrupt.

ADAMS, District Judge. The following questions are certified to me for my opinion:

"Are secured creditors, who hold mortgages on land, formerly owned by the bankrupt, and for the payment of which mortgages the bankrupt has executed his bond or has in the purchase of such real property, assumed the payment of existing mortgages, and where no present liability has arisen, which debts, if any, are purely contingent and subject solely to the contingency of a de-

fiency arising in case the mortgaged premises shall be sold under foreclosure of such mortgages, and whose contingent debts, if any, are therefore not provable in bankruptcy, and the value of whose securities is not capable of present determination, necessary or proper parties to composition proceedings instituted by the bankrupt with his creditors? And should such a composition, if it be determined that the same is for the best interest of all creditors, having provable claims against the bankrupt estate, be refused the approval of the court, because such secured mortgage creditors are not made parties to the composition proceedings or refused voluntarily to become parties thereto."

I am satisfied that the referee has correctly answered the questions in his careful opinion and I adopt it in deciding that the secured creditors mentioned are not necessary or proper parties to this composition proceeding, and that it should not be refused approval because they are not parties; but as I have not heard them, or other parties than those who appeared before me and desired the confirmation of the referee's report, this decision is made without prejudice to the rights of such creditors as have not been given proper notice of the submission of the matter to me nor waived the same nor appeared herein.

LANGBEIN v. SWIFT et al.

(Circuit Court, W. D. Tennessee. January 20, 1903.)

1. INSTRUCTIONS—FORM—SUBMITTING ISSUE OF CONTRIBUTORY NEGLIGENCE.

In submitting to a jury the question of plaintiff's contributory negligence in an action for a personal injury, where there are a number of facts to be determined bearing on the issue, it seems the better practice to instruct the jury as to the principles of law by which they are to be controlled, leaving them to apply such principles to the facts found, rather than to instruct that, if the jury find certain enumerated facts to be established by the evidence, those facts would constitute negligence, as matter of law.

2. DAMAGES—PERSONAL INJURY—EXCESSIVE VERDICT.

A verdict for \$7,500 damages for a personal injury to plaintiff, amounting at most to a partial displacement or dislocation of his knee cap, *held* excessive.

At Law. On motion for new trial.

L. M. T. Canada and John E. Bell, for plaintiff.

John P. Edmondson and Malone & Malone, for defendants.

HAMMOND, J. At the trial of this case no exceptions were taken by either side to the instructions given by the court to the jury, except certain formal exceptions not pertinent to this application for a new trial. But while the jury were considering the case they came in, and propounded in writing a question which, in effect, asked the court to decide for them the issue of contributory negligence on the part of the plaintiff. The court submitted this question to counsel on either side, and asked their advice as to the answer to be given to the jury. The plaintiff's counsel submitted an answer that, in effect, told the jury that the question they had propounded was the very issue submitted to them for decision, and that it was not proper for the court to decide it. The defendants' counsel submitted two special

instructions, either of which was, in effect, a direction to the jury to find the issue of contributory negligence in favor of the defendants. The court gave the answer submitted by the plaintiff, but repeated substantially the original instructions given to the jury upon the question of contributory negligence. Later they returned a verdict of \$7,500 in favor of the plaintiff.

The motion for a new trial goes upon several grounds, but we need not consider more than two of them, except to say that, so far as the objection to the verdict is based on the contention that it is contrary to the weight of the evidence, it is sufficient to point out that there have been two verdicts against the defendants on the issues of their own negligence and that negligence they impute to the plaintiff; and a court, therefore, should be slow to set up its judgment against that of the two juries on that question.

First, we will consider the ground taken that the court should have given either one or the other or both of the two answers the defendants submitted in response to the jury's question, and should not have given the response it did give to the jury. Perhaps it will be best to quote in full the question of the jury, and the special instructions asked by the defendants in response to it.

The Question of the Jury.

"If a person, knowing that a building was being remodeled or rebuilt, saw brick and debris on the sidewalk, and did not know of any hole in sidewalk, and in passing along the sidewalk, with no barrier to prevent him, is he guilty of contributory negligence, even if he knew of improvements going on, if he should fall in a hole? With this previous knowledge of improvements and attendant dangers, can he recover under the law in case of accident?"

Response Submitted by the Plaintiff.

"The law has impaneled the jury to answer the very question which you asked the court. You are the sole judges of the question as to whether or not a man of ordinary prudence would have used this sidewalk as plaintiff did under these circumstances."

Response Submitted by the Defendants.

"(1) If plaintiff had knowledge of the building being repaired, which he had received by seeing brick and debris on the sidewalk, and having seen the inner walls torn out, this was sufficient to put a prudent man on his guard, and especially at night, when it was dark. His walking on this sidewalk under these circumstances was negligence, and would be contributing to his own injury, and therefore contributory negligence, and he cannot recover.

"(2) If the jury find that the plaintiff and his companion, Soverans, were walking on the sidewalk, where he could plainly see debris, etc., and knew the walls of the building were torn down, and that he wished to get in this path where Soverans was walking, and which was light, and instead of stepping short off, to allow Soverans to pass on, and then himself step behind Soverans in the path, he (the plaintiff) stepped over towards the wall, and in the dark fell in the hole, then this was contributory negligence which would prevent the jury from rendering a verdict for the plaintiff, and you should find for the defendant."

Analyzing the question of the jury, and the defendants' proposed responses to it, and we can see that all of them ignore quite entirely important circumstances disclosed by the evidence bearing upon the issue of the plaintiff's contributory negligence. The question of the jury assumed, as we infer, that the plaintiff did not know of the

hole in the sidewalk; also that there was no barrier to prevent his taking the sidewalk; and so far it suggests facts in his favor on this issue of his contributory negligence; but it makes no mention of other facts in the proof. Particularly (and this is mentioned as a sample, only), it does not notice the evidence which tended to show that there was on the sidewalk, notwithstanding the brick and débris upon it, an open space, fit for walking, along which pedestrians constantly did pass, notwithstanding the obstructions and the appearance indicated by the structures connected with the work that was being done by the contractors. The proposed responses of the defendants not only ignore this last-mentioned and other evidence, tending likewise to show indications of safety to the plaintiff in using the sidewalk, but also they ignore even the facts suggested by the jury's question in favor of the plaintiff on the issue of contributory negligence. These are defects which almost invariably accompany special requests, and quite as invariably justify their rejection by the court. Such omissions constitute the infirmity which inheres in the plan of instructing a jury upon an issue of negligence which adopts a form of stating that, if the jury find certain enumerated facts to be established by the evidence, those facts would constitute negligence, in law. That method of instruction, whether the charge be formulated by counsel or the court, usually degenerates into a more or less specious invitation to the jury to consider a part of the evidence only. It is very urgently insisted in the argument on this motion that this "hypothetical" method of submitting the issue of negligence to the jury is the only proper method, and that it was error in the court not to give these two proposed responses to the jury's question. I do not find that the question of the proper mode of submitting the issue of negligence to the jury by the charge of the court has been at all settled by the supreme court of the United States, nor that there is any common agreement of authorities upon the question.

My own opinion has been that a court may adopt either method of submitting the issue to the jury, and that, for the reason already suggested, it is better to submit it "under proper directions as to the principles of law by which the jury should be controlled," to use the words of Mr. Justice Harlan in his opinion in the case of *Railroad Co. v. Converse*, 139 U. S. 469, 472, 11 Sup. Ct. 569, 570, 35 L. Ed. 213. If one party should submit an hypothesis of a series of facts in his favor to be found by the jury, and ending with an adjudication by the court that such a finding would, as a matter of law, constitute negligence, and the adverse party should submit another hypothesis of a series of facts, ending with another adjudication by the court that such a finding would constitute due care, the jury then might get both sides of the question. Or if the court should carefully construct an hypothesis—one or more—impartially embodying all the results of the evidence on both sides, with an alternative adjudication as to which would be negligence and which due care, the jury might get a comprehensive view of both sides of the issue. But in the case of special instructions submitted by counsel generally, it would be a mere combat of skillfulness on their part; the most skillful getting his side of the case to the jury, while the other might in some degree or wholly

fail to present his side of the issue. The most careful and intelligent judge, in constructing such hypotheses as this practice demands, is likely to give undue weight to some facts, and possibly omit altogether other important facts bearing more or less on the issue. His skillfulness might not be always quite equal to the task of presenting both sides of the issue impartially to the jury by complete selections for the series of facts to be found by the jury. Therefore I am inclined to follow the practice of giving proper instructions as to the principles of law by which the jury should be controlled, rather than the other.

It may be said that such remissness of court or counsel is equally incident to either plan, and the consequent possibilities equally inseparable from both; but, considering the particular function of the jury, is not the danger of undue influence by the court, or of misleading the jurors by some imperfect construction of the hypothetical series, greater in the one plan than in the other? In the case now under consideration, since neither party lodged any exceptions to the instructions that were given by the court in the premises, I am the more disinclined to grant this motion upon the ground that the court erred in following its ordinary practice, and refusing the special requests of the defendants in response to the jury's question. Even if the proposed special instructions had been faultless in their soundness and impartiality, it might have misled the jury thus to change the method of instructing them in answer to their question, and so adherence to the original instructions that were unexcepted to was thought to be best.

The ordinary method followed by me in this case was used and approved by the supreme court in the case of *Railroad Co. v. Ives*, 144 U. S. 408, 412, 433, 12 Sup. Ct. 679, 36 L. Ed. 485; *Ives v. Railroad Co. (C. C.)* 35 Fed. 176. See, also, *Railroad Co. v. Leak*, 163 U. S. 280, 288, 16 Sup. Ct. 1020, 41 L. Ed. 160. It was also approved by the court of appeals in this circuit in the case of *Railroad Co. v. Farra*, 13 C. C. A. 602, 66 Fed. 496. See, also, *Mining Co. v. Berberich*, 36 C. C. A. 364, 94 Fed. 329, 333; *Spurr v. U. S.*, 31 C. C. A. 202, 87 Fed. 701, 706; and *Bronson v. Oakes*, 22 C. C. A. 520, 76 Fed. 734, 738, 739. The opinion in *Railroad Co. v. Stout*, 17 Wall. 657, 663, 21 L. Ed. 745, instructively indicates the several categories into which cases concerning negligence may be grouped in their relation to the question of its adjudication as a matter of fact by the jury, or as a matter of law by the court. And it is a deduction from this decision which, in my judgment, seems to preclude the plan of instructing a jury that a particular series of the facts constitute negligence when the case falls within that class of cases "that the law commits to the decision of a jury"; but it must be admitted, I think, that the supreme court of the United States has never definitely decided the point of practice here involved. If the court is to pass more directly on the issue of negligence as a matter of law, it seems to me better to have a special verdict finding the series of facts directly testified to by the witnesses, as well as those to be found as inferences of fact from the others, and then let the court pass upon the law arising out of these findings after they are made by the jury, rather than before.

But this motion for a new trial must be granted upon the other

ground that the verdict of the jury is enormously excessive. Two verdicts have been had against the defendants in this case, and I should not give another new trial if the amount of the damages assessed by the jury were at all reasonable. When our Brother Clark tried the case at the last term, there was a verdict of \$500 in favor of the plaintiff, which he vacated because, in his opinion, it was inadequate. He then advised me of the amount which he thought would have been fair and just, and for which he would have sustained the verdict; but, to make sure of his judgment on that question, I have submitted to him this finding of the jury, and he agrees with me that it is largely excessive, thus supporting my own judgment in the premises. The testimony of the plaintiff himself, his wife, and his physician, does not support so large a verdict as this. Ordinarily, where death ensues from such negligence, less amounts than that of this verdict are given; rarely more. I abstain from any particular commentary upon the proof as to the plaintiff's injury, because there must be another trial of the issues, including that of the character of those injuries. It is sufficient now to say that he has not lost his leg, and has sustained only a more or less serious injury to the knee cap, amounting, at most, to its partial displacement or dislocation.

Motion granted.

THE DAUNTLESS.

(District Court, N. D. California. February 19, 1903.)

No. 12,290.

1. COLLISION—STEAMERS MEETING IN NARROW CHANNEL—VIOLATION OF RULES.

A steamer passing down a river met two steam launches made fast together. The steamer gave a signal of two whistles, and, receiving no answer, starboarded her helm, and turned toward the left-hand side of the channel, a collision occurring shortly afterward, in which both launches were sunk and the persons on board drowned. *Held*, that the steamer was in fault for failing to have a lookout, and for violation of article 25 of the inland navigation rules (30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring every steam vessel in narrow channels, when safe and practicable, to keep to that side of the channel which lies on her starboard side; and that, in the absence of evidence that it was not safe and practicable to do so, or of credible evidence of fault on the part of the launches, the collision must be attributed solely to such fault of the steamer.

2. WRONGFUL DEATH—MEASURE OF DAMAGES RECOVERABLE—CALIFORNIA STATUTE.

Under Code Civ. Proc. Cal. § 377, authorizing actions to recover damages for wrongful death for the benefit of the next of kin, and the recovery of such damages as, under all the circumstances of the case, may be just, the ages and expectancy of life of the beneficiaries, where they were dependent in whole or in part on the deceased, may properly be taken into account in fixing the damages.

In Admiralty. Suit to recover damages for death in collision.

F. R. Wall, Marshall B. Woodworth, and E. J. Banning, for libellant.

Campbell, Metson & Campbell, for claimant.

¶ 2. See Death, vol. 15, Cent. Dig. § 113.

DE HAVEN, District Judge. This action was brought against the steamer *Dauntless* by Sharon P. Doane, as administrator of the estate of John T. Doane, deceased, to recover damages for the death of said deceased, caused by a collision between that steamer and a steam launch of which the deceased was master. The collision occurred on the night of September 14, 1900, on the Mokelumne river. The steamer at the time was proceeding down the river, and the steam launch was going up against the current and tide, made fast to the side of another launch, which she was towing. The launch, when sighted by the steamer, was about a half mile distant, and on the starboard side of the steamer. When the launch was sighted, the steamer gave two blasts of her whistle, and, without receiving any answer from the launch, put her helm to starboard, and swung toward the opposite bank of the river. The launch kept its course and struck the starboard side of the steamer just forward of the gangway, and immediately sank. There were three persons in the launches, all of whom were drowned, and the only witnesses who testify in relation to the collision are those who were on the steamer at the time.

My conclusion from the evidence is that the steamer *Dauntless* was in fault in two particulars: First, she did not have a lookout stationed at her bow immediately preceding the collision; second, the steamer, in starboarding her helm and attempting to pass the launches near the left-hand bank of the river, violated article 25 of the act of June 7, 1897, "for preventing collisions upon certain harbors, rivers, and inland waters of the United States." 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]. The article 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."

In commenting upon this article, it is said in *Hughes on Admiralty*, p. 250:

"This is really a branch of the port-helm rule. The latter rule applies when the vessels are meeting end on, no matter whether they are in a harbor or a narrow channel, no matter whether they are following a channel or crossing it. The starboard-hand rule emphasizes this duty as to narrow channels. It means that each must keep along its own right-hand side, no matter how the relative bearings may be from sinuosities or other causes."

The Mokelumne river is a narrow channel within the meaning of this rule, and, while it may be true that the channel was deepest near the left bank of the river, still the evidence does not satisfy me that it was not practicable for the steamer to have kept on the right-hand side of the river, and the burden of showing that she could not have done so with safety is upon her. The steamer, being in fault in the respects mentioned, is responsible for the collision, unless the evidence is such as to clearly show that it was due to some other cause, for which she is not responsible, or that the negligence of the deceased contributed thereto. The principle applicable here is thus stated by the Supreme Court in the case of *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148:

"The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no

more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

The evidence is not, in my opinion, sufficient to show that there was any other cause for the collision than the fault of the steamer in star-boarding her helm when approaching the launch, and in not maintaining a proper lookout. The evidence is not very satisfactory as to the precise manner in which the collision occurred, but I am unable to accept the statement of the pilot of the steamer that the launches came "straight up in the middle of the river, almost," and when they got abreast of the steamer "they whipped right around and headed right straight for the Dauntless." Although this statement is not contradicted by any witness it appears to me to be so unreasonable that the court would not be warranted in finding that such was the fact. There is some force in the argument that the collision could not have occurred without contributory negligence upon the part of the deceased, who was in charge of the launches; that the steamer ought to have been seen, and the course upon which she was going observed by him in ample time to have enabled the launches, which were small, and easily managed, to have avoided the steamer. The answer to this contention is that it does not appear with certainty that the deceased had time to avoid the danger after it became evident that the steamer's course was changed. The launches were on the proper side of the channel, and were not required to change their course until it was apparent that there was a necessity for so doing. It is not improbable that the collision occurred while the steamer was swinging to port, and before those on the launches had time to fully realize the danger of their position.

There remains for consideration only the question of damages. The action is based upon section 377 of the California Code of Civil Procedure. "This statute," as was said by the court in the case of *The California Nav. & Imp. Co.* (D. C.) 110 Fed. 670, "does not authorize damages to be given for the suffering of the deceased, nor for grief and sense of bereavement upon the part of the surviving relatives. Only the direct pecuniary loss to the heirs of the deceased can be considered in estimating the damages which may be recovered in actions under this statute. *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143. The language of the statute is that 'such damages may be given as, under all the circumstances of the case, may be just.' This, in effect, means that the damages shall rest in the sound discretion of the court or jury; a discretion to be exercised in view of the fact 'that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.' *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 Pac. 601; *In re Humboldt Lumber Mfrs.' Ass'n* (D. C.) 60 Fed. 428." It is shown that the deceased was about 41 years of age, and in good health; that he left dependent upon him a father 73 years of age, a mother aged 72 years, and a sister 22 years of age. The sister is an

invalid, suffering from a spinal disease. For some years prior to and up to the time of his death the deceased earned \$100 per month, of which he had given his father, for the support of the family, about \$40 a month. The American Tables of Mortality show that the life expectancy of deceased was 27½ years, or thereabouts; but the life expectancy of those dependent upon him is a material fact in this case. The question is, what pecuniary damages have they sustained by his death, and it is manifest that the damages must be less when the life expectancy of the surviving dependent relatives is only a few years than could properly be awarded in a case in which the life expectancy of the surviving relatives is for a longer period of time. The life expectancy of the mother of the deceased is only about 7½ years, that of the father less, and that of the invalid sister a matter wholly of conjecture. Taking into consideration all of the facts bearing upon the question of damages, libelant is, in my judgment, entitled to recover the sum of \$1,200 and costs.

Let a decree for that amount be entered.

THE PINMORE.

(District Court, D. Washington, N. D. February 27, 1903.)

No. 2,191.

1. SALVAGE—RESCUING ABANDONED BARK—AMOUNT OF AWARD.

Libelants tug *Tyee*, worth \$90,000, was sent to the assistance of a vessel reported to be in distress off the Washington coast. The weather was stormy, and navigation dangerous. She found the British bark *Pinmore* anchored, and in a leaking and helpless condition, near a dangerous shore, in the stormy season, and deserted by her captain and all the crew, with nothing except the fact that she was anchored to indicate that she was not a derelict. She was promptly and skillfully rescued and taken into port, some of the officers and crew of the tug undergoing considerable peril and hardship. After being salvaged, the *Pinmore* was worth \$63,000. *Held*, that the master of the *Tyee* was justified in regarding the *Pinmore* as a derelict, and in taking possession of and salvaging her, and that she should be treated as legally derelict in awarding salvage; that libelant was entitled to an award of \$12,000, besides expenditures made in caring for the vessel, and the crew to \$6,200 additional.

In Admiralty. Libel in rem against a four-masted bark worth \$63,000 for salvage, the bark having been found at anchor near a dangerous shore, in the stormy season, and in a leaking and helpless condition, and apparently deserted by her master and crew. Heard on the merits. Salvage aggregating \$19,610 awarded to the owner of the rescuing vessel, her officers and crew.

Struve, Allen, Hughes & McMicken, for libelant.
Preston, Carr & Gilman, for claimant.

HANFORD, District Judge. The four-masted bark *Pinmore*, a British vessel, on a voyage from the port of Santa Rosalia, Mex., to

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

Portland, Or., in the month of November, 1901, having sand ballast and no cargo, sprung a leak, and the water was permitted to increase in the hold to such an extent that it washed the sand ballast into the limbers, and after she had been leaking about three weeks the sand clogged her pumps, so that it became impossible to discharge the water as fast as it came in. In this condition the vessel encountered heavy weather off the mouth of the Columbia river, and was driven northward, and the rolling of the vessel with the water in her hold caused her ballast to shift so that she listed over to an angle of 45 degrees, and became unmanageable, as she could not be steered nor maneuvered. In her helpless condition, as described, the vessel drifted towards the coast of this state, until she was about 20 miles north of Gray's Harbor, and between 75 and 80 miles south from Cape Flattery, and 3 miles off shore, when her anchors were dropped in 14 fathoms of water. After dropping the anchors, her captain and crew remained with the ship all of one day, with signals of distress flying, and continued calling for help after dark by sending rockets, but without success in calling any vessel to their assistance. The captain consulted with his officers, and also with the entire crew, and it was their unanimous opinion that they were unable to do anything to improve the situation of the ship, and that their lives were in danger if they remained on board during the night, as the barometer was falling, indicating a storm coming.

The hatches were open, and they were not able to close them on account of the vessel being nearly upon her beam ends, so that leaking as she was, and rolling heavily, it was to be expected that she would soon become water logged, and sink by the water pouring into her hold through the open hatches. In his evidence, Capt. Jamieson testified that the hatches were all battened down, but I am obliged to disbelieve that statement, as the evidence to the contrary is convincing. The captain believed his vessel was lost, and, rather than leave her afloat, he gave orders to open one of her side ports, so that she would be sooner filled and sunk, and pursuant to his order the sailmaker went into the hold and partly removed the fastenings, when the captain changed his mind, believing that if the vessel were sunk in fourteen fathoms of water she would be a greater menace to other vessels navigating along the coast than if she continued afloat, and he countermanded his order to scuttle the ship. At 10 o'clock at night, December 4, 1901, the entire ship's company left the vessel in two of the ship's boats, but on account of the surf rolling on the beach they did not risk a landing in the darkness, and before morning they drifted some 15 miles to the northward, and then in making a landing one of the boats was capsized, and eight of the crew were drowned in the surf. The others traveled along the beach until they were able to find a conveyance which took them to Hoquiam, on Gray's Harbor, and upon arrival there they learned that the ship had been rescued and towed into Puget Sound. The controlling motive under which the master and crew left the vessel in the nighttime was self-preservation. Any idea which may have been in the minds of any of them of seeking assistance to save the vessel was vague and indefinite, and amounted to nothing more than a mere hope, based upon a mere possibility.

The manager of the Puget Sound Tug Boat Company, libellant in this case, upon receiving information that a four-masted bark was at anchor in a dangerous position, sent the tug Tyee to her assistance, and the rescue was promptly and gallantly accomplished. The Tyee having a ship in tow, bound outward, was returning to Clallam Bay, for the reason that the conditions of wind and weather were such that it was deemed unsafe to go out, when the orders were brought to her by a messenger boat to go to the relief of a vessel in distress, and without unnecessary delay the order was obeyed, the Tyee going out when the conditions were such that her captain would not have proceeded upon any other mission. The Pinmore was found in the condition in which she was left as before described. Her captain did not even leave a notice posted on the vessel, or in the cabin, that he retained any control of the ship, or indicating an intention on his part to return. The ship was afloat, and in a helpless condition, near a dangerous shore, in the stormy season, and deserted by her captain and every member of her crew, with nothing whatever to repel the natural presumption that she was derelict, except that she was held by her anchors.

It is my conclusion that the captain of the Tyee was legally justified in taking possession of the vessel without a request from her owners or master, as a derelict, and that in awarding salvage she should be treated as being legally derelict. 9 Am. & Eng. Enc. of Law (2d Ed.) 395-6; *The Coromandel*, 1 Swab. 205; *The Laura*, 14 Wall. 336-345, 20 L. Ed. 813.

The evidence shows that the officers and crew of the Tyee were all willing, courageous, and skillful in effecting the rescue, and some of them were exposed to peculiar perils and performed arduous labor. I will not recite the particulars, but in the sums awarded I intend to indicate my opinion of their meritorious services. The libellant put at risk the tug Tyee, which was at the time worth \$90,000, besides employing others of their vessels as messenger boats and assistants to the Tyee, and also expended, in completing the salvage service and in paying the watchmen who were rightfully employed in guarding the vessel until she was taken in custody by the marshal, sums of money aggregating \$1,410.

I find the value of the Pinmore in the condition in which she was after being salvaged, and before necessary repairs were made, to have been \$63,000. In consideration of all the facts and circumstances, the following sums are deemed to be reasonable and just salvage, to wit: To the libellant, \$13,410; to Capt. Bollong, \$1,200; to O. Beaton, mate of the Tyee, \$800; to Lars Rasmussen and John Horgan, quartermasters, each \$600; to G. Wiman, sailor, \$500; to A. N. Holcomb, chief engineer, \$700; to J. A. Sheld, assistant engineer, \$500; to John Coulter, Gustav Osthenyck, James Frasier, Gilbert Hobbs, John Flynn, and A. A. Elwood, each \$200; and to John Murray, cabin boy, \$100; and I direct that a decree be entered allowing the said amounts, with interest thereon at the rate of 6 per cent. per annum from the 1st day of January, 1902, and costs.

ANSGAR S. S. CO., Limited, v. WILLIAM W. BRAUER S. S. CO.

(District Court, S. D. New York. February 13, 1903.)

1. ADMIRALTY—RIGHT TO CANCEL CHARTER—FRAUDULENT REPRESENTATIONS.

There are no fraudulent representations as to the capacity of a vessel authorizing the charterer to redeliver her, the charter being negotiated and concluded on the basis of a plan of her contained in a book of plans of vessels, and all statements as to capacity being qualified by notices in the printed descriptions of the vessel, "not accountable for errors in description," and "particulars of steamer believed correct but not guaranteed."

2. SAME—ABSENCE OF BULKHEAD.

Absence of a bulkhead between holds of a steamer is a mere matter of inconvenience, not justifying cancellation of the charter by the charterer, the plan of the vessel on which the charter was made showing no such bulkhead.

3. SAME—VENTILATION OF BRIDGE DECK.

The charterers cannot cancel the charter because her bridge deck was not ventilated, this compartment being intended to be used, ordinarily, for coal space, which the owner was entitled to, and in lieu thereof some of the coal being carried on deck, and the space yielded to the charterer.

4. SAME—BREAKING OF WINCHES.

The breaking down of the winches not affecting the seaworthiness of the vessel, and not requiring sufficient time for repairs to call for a deduction of hire, gives the charterer no right to cancel the charter.

Convers & Kirlin, for libellant.

Warren, Warren & O'Beirne, for respondent.

ADAMS, District Judge. The libel in this action was filed to recover the damages alleged to have been sustained by the libellant, the owner of the Norwegian Steamship Ansgar in consequence of a refusal on the part of the respondent to fulfil the terms of a charter party, dated New York, April 26, 1901.

The charter provided for twenty-four months' employment of the steamship at £1300 per month and went into effect by a delivery of the steamship to the respondent at Philadelphia on the 1st of July, 1901. She made one round trip in the service of the respondent from Philadelphia to Hamburg and return to Philadelphia and thence again to Hamburg, where she was re-delivered by the respondent to the owner on the 30th day of September, 1901.

In justification of such re-delivery, the respondent alleges certain fraudulent representations on the part of the owner in inducing the contract, to the effect:

(1) That the steamship had a greater bunker capacity than was found to be the fact; (2) that she was fitted for the respondent's business of carrying general cargo between Hamburg and Philadelphia, when in fact she was not fit for such service, because she had no bulkheads between the third and fourth holds; because her bridge deck was not properly ventilated and the owner refused to permit suitable ventilation for the carrying of cargo therein, and because her winches were not efficient and broke down when in use; (3) that her average speed was $9\frac{1}{2}$ knots on a consumption of 20 tons of coal per day when in fact her consumption was 31 tons per day.

In further justification of the re-delivery, the respondent alleges subsequent breaches of the charter by the owner in refusing to discharge the captain and the chief engineer for incompetency and misconduct, and breaches of various stipulations about the efficiency of the winches and about continuous service, with full use of vessel.

The respondent also makes counterclaims for money paid by it for the use of the steamship and for damages resulting from various omissions and neglects of the captain.

1. With reference to the bunker capacity, I do not find that the representations claimed by the respondent that the steamer had a dead weight capacity of 6250 tons, including bunkers, were made. It appears that the charter was negotiated and concluded on the basis of a plan of the steamer, contained in a book of plans of Norwegian vessels, which gives the dead weight, inclusive of bunkers, at 6100 tons, and all statements as to the capacity were qualified by notices in the printed descriptions of the vessel, "not accountable for errors in description" and "particulars of steamer believed correct but not guaranteed." There were no representations in this respect which can in any sense be deemed fraudulent.

2 (a) There were no representations with respect to bulkheads which the respondent was entitled to rely upon in justification of cancellation. Like many other Norwegian steamers, there were no bulkheads between the third and fourth holds of the steamer but that constituted no defence to the libellant's claim. The plan of the vessel upon which the charter was made showed no such bulkhead and its absence was a mere matter of inconvenience, at the best, which it was in the power of the charterer to remedy to suit its own purposes. (b) The claim with respect to ventilation of the bridge deck is likewise without foundation. The compartment was not intended to be used, under ordinary circumstances, for cargo but rather for coal space, which the owner was entitled to, in whole or in part, in view of the length of the Hamburg voyage and the provisions of the contract. In lieu thereof, some of the coal was carried on deck and the space yielded to the charterer but no claim could exist because it was not properly ventilated for the carriage of oil, to which it was not adapted. (c) The breaking down of the winches was probably due to improper use by the charterer but in any event the seaworthiness of the vessel was not affected thereby and no cause of damage arose, as the time required for repairs was not sufficient to call for a deduction of hire. (d) The claim of representations respecting speed on a certain consumption of coal is likewise without merit. Even if such representations were made, it appears that they were true in fact when the proper kind of coal was furnished.

The alleged subsequent breaches of the charter are also without merit. It has not been satisfactorily shown that the officers were incompetent or misconducted themselves. The charge is mainly based on the fact that the captain, when on a voyage to Philadelphia from Hamburg, took the vessel into Newport, Rhode Island, when short of coal, instead of seeking it at Halifax or Cape Breton. The economical method of obtaining it was apparently at Newport, as compared with the other places, and the result does not show even

an error of judgment. In any event, the master was responsible for the navigation of the vessel, and if there were fault, it was his fault and not the engineer's and he was subsequently discharged by the owner to meet the wishes of the charterer.

Nor do I find any merit in the alleged counterclaims, which in admiralty would be treated as offsets, excepting as to the coal on board when the vessel was given up and a charge of \$78.33 for rope furnished to the steamer at Hamburg. These will be allowed in reduction of the libellant's damages.

It is impossible to avoid the conclusion that the vessel was re-delivered to the owner rather because of a falling market, which rendered the contract a burdensome one to the charterer, than on account of any violation of the charter's provisions by the owner.

Decree for the libellant, with an order of reference.

MARSHALL v. McNEAR.

(District Court, N. D. California. February 27, 1903.)

No. 12,485.

1. SHIPPING—CONSTRUCTION OF CHARTER PARTY—LIABILITY FOR DELAY IN DISCHARGING.

A provision of a charter that "the cargo to be brought to, taken from alongside of the vessel at port of loading and discharge, at charterer's risk and expense," where no time was fixed for loading or discharging, does not impose upon the charterer liability for delay in discharging, caused wholly by a general strike among stevedores and teamsters at the port of discharge, for which he was in no way responsible, but merely requires him to discharge the vessel with reasonable diligence under the existing circumstances.

Andros & Hengstler, for libellant.

Page, McCutchen, Harding & Knight, for respondent.

DE HAVEN, District Judge. The libellant is the owner of the ship John Cook, and seeks in this action to recover from the charterer damages for his failure to discharge her cargo within the time which it is alleged he agreed to do, and for the consequent detention of the ship. The provision of the charter in relation to unloading the ship's cargo is as follows: "The cargo to be brought to, taken from alongside of the vessel at port of loading and discharge, at charterer's risk and expense." The libel alleges that, after the arrival of the John Cook at the port of San Francisco, it was agreed between her master and the defendant, as charterer of said vessel, "that the average of one hundred tons * * * per day for each weather working day, exclusive of Sundays, should be taken and admitted to be a reasonable quantity for the daily discharge and delivery of said cargo." The defendant, in his answer, denies that he entered into any agreement with the master of the ship to discharge her cargo at the rate of 100 tons per working day, "or that such or any rate of discharge should be taken for the reasonable quantity:

for daily discharge and delivery of said cargo." The defendant admits there was delay in unloading the cargo, but alleges that such delay was caused by the fact of the general strike of stevedores and teamsters in the port of San Francisco, which made it impossible for him to proceed with greater dispatch in the work of removing the cargo from the vessel. I do not think the evidence sufficient to show that the master and defendant made any agreement by which defendant became absolutely bound to discharge 100 tons of cargo per day. The burden of proving that the charter was thus modified is upon the libellant, and upon that question of fact I accept the testimony of Carpentier, the defendant's agent. This testimony undoubtedly shows that it was thought that, under the conditions prevailing at the time the ship commenced to unload, the defendant would be able to remove 100 tons per day, but there was no absolute agreement so to do under any and all conditions which might thereafter arise. It is, however, claimed by the libellant that, in any event, defendant is liable, under the terms of the charter, for the detention of the ship beyond a period which would be reasonable for her discharge under ordinary circumstances. This contention is based upon the provision of the charter that the cargo was to be "taken from alongside the vessel at port of loading and discharge at charterer's risk and expense." It is argued that, in thus stipulating, the defendant, as charterer, agreed to find the labor necessary to take the cargo from alongside the vessel, and assumed the risk of not being able to do so because of unforeseen and extraordinary events, such as strikes. I am, however, unable to place this construction upon the clause in question. The clause released the owner from the duty of delivery at any point beyond his vessel's side, in providing that thereafter the expense of discharge should be borne by the charterer, and the cargo be at his risk; that is to say, when once over the side of the ship, or delivered on the wharf, the cargo ceased to be at the ship's risk, but was at the risk of the charterer, and to be removed at his expense; but the clause was not intended to impose upon the charterer any other duty or risk in relation to the cargo. Inasmuch as the charter party did not fix any definite time within which the defendant was required to discharge or remove the cargo, the defendant is not liable for delay, unless such delay was unreasonable under the circumstances existing at the time. Where the charterer agrees to unload the vessel, but no time is fixed within which it shall be done, the law implies an agreement upon his part to discharge the cargo within a reasonable time. *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 77 Fed. 920, 23 C. C. A. 564, 35 L. R. A. 623; *Fulton v. Blake et al.*, 5 Biss. 371, Fed. Cas. No. 5,153; *Cross v. Beard*, 26 N. Y. 85; 1 *Parsons on Shipping and Admiralty*, p. 311. In the case first cited, it is said:

"This implied contract to discharge the vessel in a reasonable time is, in effect, a contract to discharge her with reasonable diligence;" and "the burden is on him who seeks to recover damages for the delay of a vessel, under such a contract, to prove that the charterer did not exercise reasonable diligence to discharge her, under the actual circumstances of the particular case."

Such being the law applicable to the contract of the defendant, the question of defendant's liability in this action is easy of solution. That defendant exercised reasonable diligence to remove the cargo placed upon the wharf, under the conditions then prevailing, does not admit of doubt. It is not disputed that the sole cause of defendant's delay in receiving and removing the cargo was a strike of teamsters and stevedores then existing, which greatly interfered with the removal of freight. It is in evidence, and not disputed, that but few men could be found to take the places of the striking teamsters, and these could only work with safety when guarded by special policemen. In short, as a result of the strike, there was at the time almost a complete stoppage of the work of removing freight from the various docks in the harbor. The defendant is not, under the charter party, responsible for the delay in removing the ship's cargo under such circumstances.

The libel is dismissed, with costs.

SCOWS NOS. 21 AND 59.

(District Court, S. D. New York. February 21, 1903.)

1. ADMIRALTY—SALVAGE.

A tug worth \$35,000, which discovered drifting scows worth \$25,000, that had broken from their mooring on a windy, freezing night, rendered services for five or six hours keeping them from the danger of being injured or injuring anchored vessels in the line of drift. She used all her power, and in doing so was damaged to the amount of \$300. *Held*, that \$2,000, with \$200 for the damages, should be awarded her; one-third of the \$2,000 to go to the master and crew in proportion to their wages, after allowance of \$100 to the master.

In Admiralty. Action to recover salvage.

John F. Foley, for libellant.

Robinson, Biddle & Ward, for claimants.

ADAMS, District Judge. This is an action to recover salvage. On the 31st day of December, 1901, dumping scows Nos. 21 and 59, with other scows, were lying fast to the claimants' stake boat; about half a mile from Robbins' Reef Light. Nos. 21 and 59 were loaded with mud. It was a cold and very stormy night, with a high north-west wind, causing a choppy sea, which froze as it blew on the boats. About three o'clock in the morning of January 1st, all the scows broke away from the stake boat and drifted, with an ebb tide, to the southward, until they brought up against a schooner, which was lying anchored off Stapleton, Staten Island, and caused her to drag her anchor. While the scows were drifting towards the schooner, the tug Eli B. Conine, under the command of the libellant Conine, who was the master and one of the owners thereof, was going down the bay, light, and those on board discovered the scows. Finding they were

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

not under control, those on the Conine prepared to take them in tow but before they could do so, the scows drifted foul of the schooner, part on one side of her and part on the other. After some difficulty, on account of the high wind and the freezing weather, the Conine succeeded in getting the scows away from the schooner but was unable to tow them, although she was a good sized and powerful tug, and they all went down the bay together, to the neighborhood of the Quick Step Buoy, near the West Bank, a distance of about five miles, when some other tugs came to the assistance of the Conine and the scows were towed back to the stake boat. This was about 8 o'clock in the morning. The weather had then moderated, so that the Conine was able to hold the boats against the wind with her own power and any danger was practically over. The tide had shortly before changed to flood but was still young. During all the time from about 4 o'clock, the Conine had been able to keep the scows in the channel, so as to prevent injury to them from stranding or otherwise and from injuring other vessels by collision, which would probably have happened without the tug's assistance, as two steamers, one a few hundred yards behind the other, were anchored below the schooner and in the line of the drift.

The services were very opportune and meritorious. There can be little doubt that the scows, as well as being in danger of becoming liable for collisions with the steamers, were in considerable danger themselves, either of drifting to sea and being lost, or of being wrecked upon Coney Island, in the vicinity of Norton's Point. There was no other assistance to be had at the time and the scows had no available means of assisting themselves. There is some confusion in the testimony with respect to the scows having anchors but it appears, in any event, that the men on board were unable to use them, because ice, from the spray, continued to form upon them and their chains, and the decks of the scows, in such a manner as to prevent the drift from being stopped in such a way.

The two scows were worth \$25,000 and were saved without injury. The Conine was worth \$35,000. She used every pound of her allowed power for several hours and thus injured herself, so that she was obliged to undergo repairs to her steam pipes and furnace, costing, with the time she was laid up in making them, about three hundred dollars. The services, however, while attended with some danger to the tug and the men on board were not particularly hazardous, but still of a kind, having the severity of the weather, as well as the skill and endurance shown, in view, that merits commendation and substantial reward. I conclude that \$2,000, with \$200 for the proportion of repairs which should be paid by these scows, will be a proper award under the circumstances. One-third of the \$2,000 will be allowed to master and crew of the tug and two-thirds to the owners. Of the one-third, \$100 will be awarded to the master and the rest distributed among him and the other members of the crew, in proportion to their wages.

Decree for libelants accordingly.

In re DANVILLE ROLLING MILL CO.

(District Court, E. D. Pennsylvania. April 3, 1903.)

No. 877.

1. BANKRUPTCY—SUM DUE STATE—CHARACTER AS TAX—DECISION OF STATE COURT—EFFECT—PROPRIETY OF ALLOWANCE.

The annual license fee imposed by P. L. N. J. p. 232, on corporations, having been held by the court of last resort of that state not to be a tax, but an arbitrary imposition laid on corporations as a condition of continued existence, is not provable under Bankr. Act, § 64, cl. "a," Act July 1, 1898, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], requiring the trustee to pay all taxes legally due and owing to the United States, state, etc.

2. SAME—CONTRACTUAL OBLIGATION.

An annual license fee imposed by a state on corporations is not a contractual obligation attaching by implication from the inception of the company, so as to be provable under Bankr. Act, § 64, cl. 4, Act July 1, 1898, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], including debts founded on contract, express or implied, against the estate of a corporation becoming a bankrupt before the fee for the year is assessed or collectible.

In Bankruptcy.

Arthur Dickson, for State of New Jersey.

John Dickey, for trustee.

J. B. McPHERSON, District Judge. The learned referee was right, I think, in disallowing the claim of the state of New Jersey, founded upon its revenue act of April 18, 1884, for a license fee, or franchise tax, for the year 1901 (P. L. p. 232). The court of errors and appeals of New Jersey, in the U. S. Car Co.'s Case, 60 N. J. Eq. 514, 43 Atl. 673, has used this language concerning the annual sum exacted from corporations under the provisions of this statute:

"Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact, it is not, strictly speaking, a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence."

In the state of New Jersey, therefore, the sum in dispute is not a "tax," and accordingly cannot be allowed under section 64, cl. "a," of the bankrupt act (Act July 1, 1898, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]); for, after a declaration by its highest court that the annual charge was not a tax, properly speaking, the state could not be permitted to claim in another forum that the charge was nevertheless included in the language of the bankrupt act, that requires the trustee to pay "all taxes legally due and owing to the United States, state, county, district, or municipality."

But it is urged on behalf of the state that the claim is a provable debt under clause 4 of section 63, which includes debts "founded upon * * * a contract, express or implied." It is argued that when the corporation was created a continuing contract was immediately im-

plied that it would pay whatever sum the state might legally require from it thereafter. This being so, it made no difference (thus the argument proceeds) that, when the petition in bankruptcy was filed in January, 1901, followed by an adjudication in the next month, the so-called tax for the year had not been ascertained or assessed, nor that the statutes of the state did not make it demandable until the first Monday of June, because the implied contract is to be regarded as making the corporation, at the moment of its creation, contingently liable for all future taxes and charges that might be imposed by the state. The ascertainment of the amount for 1901 was a mere liquidation of a liability that had existed from the birth of the corporation, and therefore the obligation to pay existed when the petition was filed, although the precise sum to be paid had not yet been ascertained. This argument is ingenious, but I do not regard it as sound. In my opinion, clause 4 of section 63 does not refer to any such implied contract, as, for the purposes of this case, may be conceded to exist between the corporation and the state. As I read the statute, the subject of "taxes," whatever may be the scope of the word, is dealt with by the bankrupt act in clause "a" of section 64, and is not referred to at all in clause 4 of the preceding section. Certainly, the ordinary meaning of the phrase, "a contract, express or implied," does not include the public duties that a corporate creature owes to its sovereign creator. If it includes the duty to pay lawful annual charges, it also includes the duty to obey all other laws; and since "debt," in the bankrupt act, means "any debt, demand, or claim provable in bankruptcy," it would follow logically that any money claim of the state against a corporation, arising out of a violation of law, would be also provable. It seems to me impossible to stretch the language of this clause so far as to include the subject now under consideration.

The disallowance of the claim is approved.

BOARD OF TRADE OF CITY OF CHICAGO v. CONSOLIDATED STOCK
EXCH. OF BUFFALO et al.

(Circuit Court, W. D. New York. April 29, 1903.)

No. 201.

1. BOARD OF TRADE—CONTINUOUS QUOTATIONS—USE—INJUNCTION.

Where a board of trade sought to restrain the use of "continuous quotations," which were alleged to have been surreptitiously obtained by defendant, and such term was defined in contracts between complainant and telegraph companies for the transmission of the same as meaning prices electrically and uninterruptedly transmitted from complainant's exchange to such telegraph companies, and thence to their patrons at intervals of less than 10 minutes, and it did not appear that the quotations received by defendant were continuous quotations, as so defined, or that they had been received prior to their having been dedicated to the public, an injunction would not be granted *pendente lite*.

Henry S. Robbins and Ansley Wilcox, for complainant.
Charles W. Strong and Harvey L. Brown, for defendants.

HAZEL, District Judge. The bill of complaint seeks to enjoin the defendants from using continuous market quotations at Buffalo, N. Y., as published on the exchange floor of the complainant in the city of Chicago. This motion for a preliminary injunction is founded upon the bill and affidavits. The basis of the application is a contract between complainant and several telegraph companies and the alleged unlawful use by the defendants of the quoted market prices. The relations established by the contract restrict the publication by the telegraph companies of continuous quotations to companies and individuals who are their patrons, and subject to certain stipulated conditions. The wrongful act alleged to have been committed, a continuance of which is threatened, is the theft by the defendants of the continuous quotations as they are electrically transmitted over the wires to the telegraph companies, or that such continuous quotations are surreptitiously received by them from patrons of the telegraph companies. It may be that the quoted prices are unlawfully received by the defendants in the manner charged in the bill, but the moving papers are equally open to the inference that the prices quoted are not continuous quotations of prices as that term is defined by the contract between the complainant and the telegraph companies, and which is annexed to the bill of complaint. Has not the complainant, by the arrangement with the telegraph companies, established a precise time during which it retains a property right in the quotations? Have not the telegraph companies, by the terms of the agreement, an optional right, after the expiration of the restricted period, to distribute to the general public the prices announced on the exchange floor? Upon this point I express no opinion, as the restraining power of the court in the case at bar is sought solely by reason of the unauthorized and illegal use by the defendants of "continuous quotations." No other construction may be given the papers submitted. The contract in evidence defines that term as one referring to prices electrically and uninterruptedly transmitted from complainant's exchange floor to the office of the telegraph companies, and from thence to their patrons in the larger cities of the United States, where the price of the commodity is quoted oftener than at intervals of 10 minutes.

The bill of complaint asserts that the continuous quotations published to the telegraph companies and their patrons are transmitted to the larger cities within 15 to 20 seconds from the time the prices are established in complainant's pit. The affiant, Mayfield, who was several times in defendants' office on the opening of the Chicago market, does not testify that the quotations received in his presence were continuous quotations, as defined by the contract in question. It does not clearly appear at what precise time the prices were received by the defendants relative to the hour when the market opened or their several publications in Chicago. Although Mayfield was in defendants' office 30 minutes each time, the inferences that may be

fairly drawn from his observations induce the belief that such prices may have been received subsequent to the voluntary publication by complainant, and beyond the time limit stipulated in the contract. If such was the case, the law affords no protection. *Board of Trade of City of Chicago v. C. B. Thomson Commission Co.* (C. C.) 103 Fed. 902. It is undoubtedly the law beyond dispute that complainant not only has a property right in original quotations of prices for a limited period of time, but it may also control the publication thereof. The unauthorized use of the continuous quotations is an infringement of such right. I am of opinion, however, that the bill and supporting affidavits do not disclose such use of continuous quotations by the defendants as is defined or forbidden by the agreement. The complainant seeks relief simply because of a violation of this contract right. Under such circumstances the facts will not permit disposing summarily of the merits. I have not overlooked the assertion that the automatically unrolled tape on the ticker was identical with the tape of another quotation ticker directly in connection with complainant. Nevertheless, I am unable to decide from the meager evidence before me that the complainant retained a property right in the prices quoted, which, from some unexplained source, were electrically transmitted to the office of the defendants. For the foregoing reason I am of the opinion that at this stage of the case a decision directing the issuance of an injunction should be deferred until the hearing upon the merits.

Motion for injunction pendente lite denied.

TILLINGHAST v. CHACE et al.

(Circuit Court, D. Rhode Island. March 19, 1903.)

No. 2,609.

1. BILL IN EQUITY—WAIVER OF OATH—DISCOVERY.

Upon a bill in equity which waives an oath to the answer, the complainant cannot have discovery.

In Equity.

Philip Tillinghast and Comstock & Gardner, for complainant.
Arnold Green, for defendants Chace and Ingraham.
Amasa M. Eaton, for defendant Baxter.

BROWN, District Judge. This case is before the court upon exceptions of the complainant to the joint answer of the defendants Chace and Ingraham, and the individual answer of Baxter. The exceptions to the answer of Chace and Ingraham, both for impertinence and insufficiency, are each and all overruled.

The complainant contends that he is entitled to discovery upon a bill which waives an oath. In the *Union Bank of Georgetown v. Geary*, 5 Pet. 99, 112, 8 L. Ed. 60, it was said by the Supreme Court:

"We are inclined to adopt it as a general rule that an answer not under oath is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations."

In *Patterson v. Gaines*, 6 How. 588, 12 L. Ed. 553, this language was quoted. In *Huntington v. Saunders*, 120 U. S. 80, 7 Sup. Ct. 357, 30 L. Ed. 580, the Supreme Court said:

"It is not a bill of discovery, because the answer under oath of the defendant is expressly waived; no interrogatories are propounded to either of the defendants; no effort made to obtain from them or either of them, by way of sworn answer, anything which could be used as evidence in the case. The issue of a general denial to the bill would leave nothing on which evidence could be introduced."

In the *Excelsior Wooden Pipe Co. v. City of Seattle*, 117 Fed. 140, the Circuit Court of Appeals for the Ninth Circuit said:

"The discovery feature of the bill may be disregarded: First, because an answer under oath is expressly waived in the bill; and, secondly, because the bill propounds no interrogatories. *Huntington v. Saunders*, 120 U. S. 78 [7 Sup. Ct. 356, 30 L. Ed. 580]; 6 Enc. Pl. & Pr. 732."

Equity rule 43 prescribes the form and effect of words preceding the interrogating part, and contains the words, "upon their several and respective corporal oaths." There is no indication in the rules that interrogatories can be propounded to be answered otherwise than upon oath; and it has generally been regarded as established law that a complainant waiving an oath to a respondent's answer cannot have discovery, and that he cannot except to an answer for insufficiency in its failure to give discovery. *Story's Eq. Pldg.* § 875; *Harrington v. Harrington*, 15 R. I. 341, 5 Atl. 502; *McCulla v. Beadleston*, 17 R. I. 20, 26, 20 Atl. 11; *Starkweather v. Williams*, 21 R. I. 55, 41 Atl. 1003; *Ward v. Peck*, 114 Mass. 121; *Badger v. McNamara*, 123 Mass. 117, 120; *McCormick v. Chamberlain*, 11 Paige, 543; 1 *Daniell*, Chanc. Plead. and Prac. 749 (3d Amer. Ed. 1865, by Perkins); *United States v. McLaughlin* (C. C.) 24 Fed. 823; *Sheppard v. Akers*, 1 Tenn. Ch. 326; *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Field v. Hastings & Bradley Co.* (C. C.) 65 Fed. 279.

The complainant contends that the waiver of an oath does not deprive the complainant of his right to a full answer and a full discovery from the defendants. This contention finds some slight support in *Bates on Federal Equity Procedure*, vol. 1, § 355, and cases cited: *Kittredge v. Claremont Bank*, 1 Woodb. & M. 244, Fed. Cas. No. 7,859; *Whitemore v. Patten* (C. C.) 81 Fed. 527; *Nat'l Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* (C. C.) 83 Fed. 26; *Uhlmann v. Arnholt & Schaeffer Brewing Co.* (C. C.) 41 Fed. 369; *Gamewell Fire-Alarm Tel. Co. v. Mayor* (C. C.) 31 Fed. 312; *Colgate v. Compagnie Francaise* (C. C.) 23 Fed. 82; *Reed v. Cumberland Mut. Ins. Co.*, 36 N. J. Eq. 393; *Manley v. Mickle*, 55 N. J. Eq. 567, 37 Atl. 738. See, also, section 118. But there is presented no decision of the Supreme Court, or of any circuit court of appeals, for this position; and it seems contrary to principle. The cases cited by Bates cannot be accepted as sufficient authority to

overthrow so well-established a principle as that a complainant who waives an oath cannot have discovery. The waiver of the oath, which reduces the answer to a mere pleading, must also require that "every fact essential to the plaintiff's title to maintain the bill, and obtain his relief, must be stated in the bill, or the defect will be fatal." Story's Eq. Pldg. § 277. Precise allegations, however, are unnecessary as to a subject which is a part of discovery sought by the bill. Story's Eq. Pldg. §§ 255-257. An allegation of fact may be put in issue by an unsworn answer, but an interrogatory propounds a question, and neither at common law nor in equity can an issue be framed upon a mere question.

The complainant also claims the present right to an account on the charges of his bill. He must first establish his right to an account, and cannot, by the mere filing of the bill, require the defendants, who dispute this right, to set forth an account in their answers.

The following exceptions to the answer of the defendant Baxter for impertinence, are allowed: Second, third, fourth (as to the part beginning with "that formerly" and ending with "died as aforesaid"), sixth, seventh, eighth, and ninth. The remaining exceptions for impertinence are overruled. The exceptions as to the answer of the defendant Baxter for insufficiency are overruled.

The defendants' demurrers are overruled.

ROSASCO et al. v. PITCH PINE LUMBER CO.

(District Court, S. D. New York. February 26, 1903.)

1. SHIPPING—CONSTRUCTION OF CHARTER PARTY—CANCELING DATE.

A provision of a charter party requiring the vessel to sail in ballast for the port of loading within 48 hours after notice from the charterer is not a condition precedent, a breach of which entitles the charterer to cancel the contract, where there is a subsequent provision for a canceling date if the vessel shall not have arrived at the port of loading, and she arrives within the time so fixed. In such case the breach of the first condition merely gives a right of action for damages.

In Admiralty. Suit for breach of charter party.

Convers & Kirlin, for libellants.

Wing, Putnam & Burlingham, for respondent.

ADAMS, District Judge. This is an action brought by the libellants to recover damages for an alleged breach of a charter party of the Italian bark *Giulia R*, made at New York on the 31st day of July, 1901. The contract provided, *inter alia*, that the bark was then lying in the harbor of Venice and should proceed thence to Ship Island or Pensacola, charterers' option, for a voyage to "Montevideo, Buenos Ayres, or Bahia Blanca, A. R., orders on signing B/L. Loading port to be named before vessel leaves Venice, but vessel to sail 48 hours after orders are given," with a full cargo of lumber at specified rates. It was also provided that the vessel should proceed with all possible dispatch from Venice to loading port as ordered, in ballast, to enter upon the charter, and that the charterers

should have option of "cancelling charter if vessel not arrived at loading port by Nov. 15th, 1901."

On the 13th of August, 1901, the respondent gave orders, in conformity with the provision to that effect, for the vessel to proceed to Ship Island for cargo. She was not, however, able to comply with the orders within the forty-eight hours thereafter, owing to the desertion of about half of her crew, and she did not sail until the 22nd day of August, 1901. She reached her destination and reported for cargo on the 12th day of November, 1901. The respondent was not aware that the bark had failed to comply with the orders in the stipulated time, until after she had arrived at Ship Island, when the respondent immediately notified the master of the bark that it elected to cancel the charter, because of the violation of the provision for sailing.

Prior to this notice, the charterers' agent at Ship Island sent two letters to the master, the first of which contained instructions to report to a Mr. Ladnier, a stevedore, who was deputed by the respondent to report the arrival to it. The letter also recommended Mr. Ladnier for employment as stevedore in the loading of the cargo. The second letter was similar to the first in the latter respect. As these were written without knowledge on the respondent's part of the late sailing, they can have no effect upon the matter.

The question presented for decision is, whether the provision for sailing within forty-eight hours was a condition precedent, the breach of which entitled the respondent to cancel the contract.

The respondent contends that the breach of the provision gave it an absolute right to refuse the vessel when tendered.

The libellants contend that the covenant for sailing was not a condition precedent, in view of the subsequent provision in the contract for a cancelling date and as the vessel reached the loading port before the expiration of the time fixed for cancellation. The first provision must be regarded as an independent covenant, which entitled the charterers to damages, if they had suffered any.

I consider that the libellants' contention is the correct one. Standing alone, the provision for sailing would be deemed a condition precedent. *Pedersen v. Pagenstecher* (D. C.) 32 Fed. 841; *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885. The subsequent provision for a cancelling date, however, showed that it was not the intention of the parties, that the first provision should be so regarded. Time was of the essence of the contract and the provisions required the vessel to sail in season to prevent a frustration of the objects of the voyage, under pain of cancellation of the contract, but as it appears that notwithstanding the delay, she did sail in time for this purpose, and reached the loading port before the cancellation date fixed by the subsequent provision, there can be no cancellation because of the breach but merely a right of damages.

My attention has not been called to any authority directly in point but this conclusion seems to be in conformity with the general principles governing the construction of such provisions in charter parties. *Scrutton on Charter Parties* (4th Ed.) p. 68.

Decree for libellants, with order of reference.

KESSLER v. BEST.

(Circuit Court, S. D. New York. January 3, 1903.)

1. WITNESSES—PRIVILEGED MATTER—DOCUMENTS BELONGING TO RECORDS OF FOREIGN CONSULATE.

Documents which are a part of the archives of a foreign consulate are privileged, and a witness cannot be compelled to disclose their contents.

2. SAME—EXAMINATION IN ANOTHER DISTRICT—POWER OF COURT ISSUING SUBPENA.

A circuit court of one district, under whose subpoena a witness has been brought before an examiner to give testimony in a suit pending in another district, has power to strike out from his testimony anything which violates the privilege of a foreign government by disclosing the contents of documents which belong to the records of its consulate, where the privilege was claimed and sustained after the witness had incautiously or inadvertently violated the privilege by some of his answers.

Motion to compel a witness to answer cross-questions. He is being examined here under section 863 [U. S. Comp. St. 1901, p. 661]; the action—for libel—being at issue in the United States Circuit Court for the Eastern District of Wisconsin.

Herbert R. Limburger, for the motion.

Jno. Brooks Leavitt, opposed.

LACOMBE, Circuit Judge. The witness claims that the documents about which he is interrogated are part of the archives of the German consulate, and therefore privileged. The objection is well taken, but defendant cannot be allowed to retain so much of the direct examination as deals with these same documents. The passages marked in blue are therefore stricken out of the direct. It is difficult to understand upon what theory the rest of the direct could be admitted, except, perhaps, to the extent that witness put stamps on four bottles of wine, and delivered them to the shipbuilding company. Conversations between Dingwell and Downey on the one side, and the secretary of the German consulate on the other, at which plaintiff was not present, seem to be manifestly incompetent against him. However, that is a question to be settled by the trial court. This court deals only with the question of privilege.

(January 10, 1903.)

Memorandum on settlement of order sustaining the refusal of the witness Theodore Jakel to answer certain questions, and directing that certain answers already made by him should be struck from the record:

LACOMBE, Circuit Judge. The memorandum submitted on behalf of the defendant has been carefully considered. The court's understanding of the matter is that upon the hearing counsel for the German government asked, not only that the witness be excused from answering certain questions with regard to documents belonging to the German consulate, on the ground that they were privileged by statute and by treaty, but also that some answers which the witness

had already incautiously made, purporting to give the contents of part of such documents, should also be stricken out. The "privilege" was that of the German government, not of the witness, and inasmuch as the witness attended under the compulsion of the subpoena issued out of the Circuit Court, Southern District of New York, and answered under constraint of an apprehension of commitment by the same court, should he refuse, it was assumed to be within the power of this court to strike out any part of the testimony which violated the "privilege" of the German government.

In order that the situation may be presented to the Circuit Court in Wisconsin precisely as it is, the examining officer will certify the record which was before this court on the motion, and also the order now signed. It is thought that the result will be the same, whichever court disposes of the question, because of the manifest unfairness of allowing a party to avail himself of part of a "privileged" document which he has by chance got upon the record, when the assertion of the "privilege" prevents his adversary from introducing the rest of the document.

ERIE R. CO. v. OCEANIC STEAM NAV. CO.

(District Court, S. D. New York. February 26, 1903.)

1. SHIPPING—NEGLIGENT OBSTRUCTION OF SLIP—LIABILITY FOR INJURY TO ANOTHER VESSEL.

A ship lying at a pier, was in fault for stretching a hawser across a slip to the opposite pier in the night without any warning to other vessels having occasion to use the slip, and liable for the damage to another vessel caused by her striking the hawser without contributory fault.

2. SAME—CONTRIBUTORY FAULT.

The absence of a lookout on a tug while entering a slip held not a fault contributing to her injury by striking a hawser stretched across the slip by another vessel, and which, owing to the darkness, could not have been seen by the lookout if he had been in his proper place.

In Admiralty. Action for damages for injury to vessel.

Wilcox & Green, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This is an action brought by the libellant to recover damages caused to its tug Shohola by collision with a hawser, which was stretched by the respondent across the entrance to the slip between piers 48 and 49 North River. The respondent was the lessee of the piers. The accident happened a little after 4 o'clock in the morning of January 8, 1902. The hawser was stretched from the respondent's steamer Celtic, lying on the northerly side of pier 48, to the other pier and was made fast so that it was an obstruction to vessels desiring to use the slip. The tug was entering the slip for the purpose of taking in tow a barge which was lying at the bulkhead. No light was exhibited on the hawser or other warning given of its presence.

There can be no doubt of the respondent's liability. It was in fault for obstructing the slip so as to prevent its safe use by vessels navi-

gating the waters in the pursuit of their business, without giving adequate warning of the obstruction. The Fulda (D. C.) 31 Fed. 351.

The tug had no lookout and the question is whether she has sufficiently excused herself for the omission. In the proper exercise of his duties, the lookout should have been located about 15 feet ahead of the pilot house, where the pilot was stationed while navigating the vessel. The lookout would have had a somewhat better view ahead than the pilot and should have been exclusively engaged in watching. Nevertheless, I think it sufficiently appears that his presence, and the proper performance of his duties, would have made no difference in the result. It was a very dark night. The hawser was about $2\frac{1}{2}$ inches in diameter and could only be made out for a very short distance, when directly ahead. It struck the tug several feet above where the lookout's line of vision would have been, so it is not likely he would have seen it, even if duly vigilant, as he would not naturally expect danger from above. But if he had seen the hawser as soon as possible and given the pilot due warning, there would not have been time to stop the tug in season to avoid the danger. The hawser struck the pilot house, near the pilot, and he, though carefully watching ahead, did not see it until immediately before the contact. He then stopped and reversed the tug's engine without substantially affecting the headway of the tug before the collision, and the upper part of the pilot house was torn off. The tug, though going at reduced speed, could not have been stopped in a less distance than about 100 feet, so that any warning which could have been given by a lookout would have been useless.

Decree for the libellant, with an order of reference.

RENVY, SCHMIDT & PLEISSNER v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1903.)

No. 10.

1. CUSTOMS DUTIES—APPEAL FROM APPRAISEMENT—PRODUCTION OF IMPORTATION.

An importer is entitled to have no greater portion of the importation produced and examined on appeal to the board of general appraisers than Rev. St. § 2939 [U. S. Comp. St. 1901, p. 1938], directs shall be sent to the appraiser.

2. SAME—DISCRETION OF APPRAISER—PRESUMPTION

An appraiser, in exercising discretion as to the production of packages for examination, is presumed to have acted fairly, unless the contrary is shown.

Stephen G. Clarke, for appellants.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. The importation was of six cases of lambskins advanced more than 10 per cent. above valuation, upon which additional duty was assessed. The protest is, first, "that there has been no legal appraisement or reappraisement of said goods by reason of which any additional duty could accrue"; and, second, "that the appraisers, including the general appraisers, advanced the value of said goods without any actual examination of the same, and without

seeing them." The evidence taken by order of this court shows that one case of the lambskins was before the appraiser, and that the importers appeared on appeal by attorney before the board of general appraisers, and claimed that they should order the whole before them for examination on reappraisal, which was refused, whereupon the attorney withdrew. As no evidence appears to have been offered to the board to show that the case designated by the collector was not a fair sample of the importation, the question here seems to be whether an importer is entitled, on appeal to the board of appraisers, to have on request the whole importation produced. If so, the whole importation might so be required on every appeal. The statutes do not seem to require examination of any greater portion of the importation on appeal, or for additional duty, than otherwise, but only that the collector of this port shall not "direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser or any assistant appraiser, deem it necessary." Rev. St. § 2939; U. S. Comp. St. 1901, p. 1938. Whether an appraiser should deem a greater number of the packages necessary for a fair valuation would always be a matter of discretion, to be fairly exercised upon what should be made to appear in the course of the performance of their duties. Without some showing, only a fair examination of the packages designated would be required. *Greely v. Burgess*, 18 How. 413, 15 L. Ed. 455; *Oelbermaun v. Merritt*, 123 U. S. 356, 8 Sup. Ct. 151, 31 L. Ed. 164. The appraisers, like all others required by law to exercise discretion, are presumed to have acted fairly unless the contrary is shown; and, nothing appearing otherwise here, their proceedings must be taken as correct.

Decision of board affirmed.

A. STEINHARDT & BRO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 5, 1903.)

No. 3,215.

1 CUSTOMS DUTIES—BINDINGS.

A narrow woven tape of cotton, used largely for covering the seams of underwear and waists, if a braid, within Tariff Act July 24, 1897, par. 339 (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]), placing a 60 per cent. duty on braids not otherwise provided for, is also a binding or tape, and therefore otherwise provided for by, and dutiable under, paragraph 320 (30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]), placing a 45 per cent. duty on bindings and tapes.

Albert Comstock, for appellant.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. Paragraph 339 of the tariff act of July 24, 1897 (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]), places a duty of 60 per cent. ad valorem on "embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings,

and bands," "composed wholly or in chief value of cotton flax or other vegetable fiber," not otherwise provided for, and paragraph 320 (30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]) for one of 45 per cent. on "bandings, beltings, bindings, bonecasings, cords, garters, lining for bicycle tires, ribbons, suspenders and braces, tapes, tubings and webs or webbing," made of cotton or other vegetable fiber. The articles in question appear to be narrow woven tapes of cotton used largely for covering the seams of underwear and waists. The Standard Dictionary gives one definition of a "braid" as "a narrow, flat tape or woven strip for binding the edges of fabrics, or for ornamenting them." If these articles are braids within this or a like definition, they are also bindings or tapes within paragraph 320, and, being provided for there, are otherwise provided for than in 339. In *Hiller v. U. S.*, 106 Fed. 73, 45 C. C. A. 229, cited, the articles were shoe laces, which were distinctively braids, and the question here was not involved.

Decision reversed.

MERCHANTS' DESPATCH TRANSP. CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 3, 1903.)

1. CUSTOMS DUTIES—ALBUMEN.

An article which is not an albumen in the technical language of chemists, though one in common speech, is not within Tariff Act 1897, par. 245 (30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]), putting a duty on "albumen, egg or blood," but within paragraph 468 [page 1679], putting on the free list "albumen not specially provided for."

Albert Comstock, for appellant.
D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. The tariff act of 1897 lays a duty (paragraph 245, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]) on "albumen, egg or blood," and puts on the free list (paragraph 468, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]) "albumen not specially provided for." The assistant appraiser reported that the importation in question "assimilates to albumen of egg." It was classified as egg albumen. The importer protested "that the said merchandise is free of duty, under paragraph 468 as albumen, N. S. P. F." The board of general appraisers found "that the merchandise is not albumen," and overruled the protest accordingly.

Evidence has been taken under order of this court. It seems to show well enough that this article is in common speech an albumen, of which there are many kinds, although not an albumen in the technical language of chemists. It is, therefore, an albumen not specially provided for, under paragraph 468. *Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777, 38 L. Ed. 651. Upon this evidence the decision of the board seems to confine albumen too narrowly.

Decision reversed.

In re ROEBER.

(District Court, E. D. New York. May 27, 1902.)

I. BANKRUPTCY—MECHANICS' LIENS—EFFECT OF BANKRUPTCY OF PRINCIPAL CONTRACTOR.

An adjudication of voluntary bankruptcy against a building contractor who has an unpaid claim for the construction of a building, and the appointment of a trustee for his estate before the filing of notices of lien by subcontractors, does not defeat the right of the latter to a lien given them by the mechanic's lien law of the state, where they file their notices within the time allowed by the statute, even in a state where it is held that a transfer of his claim by a contractor before notice filed defeats the subcontractors' right to a lien, since the trustee takes title only for the purpose of distributing the property under the bankruptcy law, and the passing of the title to him does not enlarge the rights of general creditors as against special creditors to whom the state statute has given a lien; nor can the bankruptcy proceedings be used by the contractor to defeat the equitable provisions and purpose of such statute.

In Bankruptcy.

Kenneson, Crain, Emley & Rubino, for trustee.

Sackett & Lang, for Otto E. Reimer Co.

J. Stewart Ross, for L. Bossert & Son.

THOMAS, District Judge. The following events occurred in 1901: On September 13th Roeber was adjudged a voluntary bankrupt. The trustee was selected on October 3d; and qualified on October 24th. Prior to September 13th, Roeber, pursuant to contract, erected a building on the land of one Leiser, and on that date the consideration was unpaid, but has been paid into this court for disposition. On September 17th Louis Bossert & Co. and the Otto E. Reimer Co. filed notices of lien against the land. The question involved is whether notices of lien against the land of Leiser filed by the subcontractors subsequently to the adjudication of the principal contractor as a bankrupt are effective against the title of the trustee. The trustee's argument is this: The lien of a subcontractor can be made effective against the land only during such time as the owner of the land remains a debtor of the principal contractor. Hence, if the owner pay the contractor, or the latter assign the debt to another, or the title to the debt vest in another by operation of law, as by the appointment of a receiver, or by a general assignment for the benefit of creditors, or finally by adjudication of the contractor as a bankrupt, followed by the appointment of a trustee, a notice of lien filed after either event is ineffective as against the person taking the title. The authorities cited to sustain or illustrate this claim seem to hold the following propositions:

First. If the owner of property pay the debt before notice of the lien is filed, no valid lien is obtained. *Carman v. McIncrow*, 13 N. Y. 70; *Keavey v. De Rago*, 20 Misc. Rep. 105, 45 N. Y. Supp. 77. (1) A sub-subcontractor is limited to the amount due from the contractor to the subcontractor. *Lumbard v. Syracuse, Binghamton & N. Y. R. R. Co.*, 55 N. Y. 491; *French v. Bauer*, 134 N. Y. 548, 32 N. E. 77, 20 L. R. A. 560.

Second. If the contractor transfer the claim against the owner, even in payment of a precedent debt, before notice of lien is filed, the lien is ineffectual. *Gibson v. Lenane*, 94 N. Y. 183; *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229.

Third. If the contractor transfer the claim against the owner, any subsequent attempt of a general creditor to reach the debt by legal proceeding is unavailable. *Greentree v. Rosenstock*, 61 N. Y. 583; *Williams v. Ingersoll*, 89 N. Y. 508.

Fourth. A receiver in supplementary proceedings based upon a judgment against the contractor, and instituted before the notice of lien is filed, takes as against the lien. *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948. But see *Deady v. Finck* (City Ct. N. Y.) 5 N. Y. Supp. 3; *Matter of The Christie Mfg. Co.*, 15 Misc. Rep. 588, 36 N. Y. Supp. 923; *Reading Hardware Co. v. City of New York*, 27 Misc. Rep. 448, 59 N. Y. Supp. 253.

Fifth. If a contractor make a general assignment for the benefit of creditors, the assignee's title is preferred: (1) To that acquired under an attachment subsequently levied. *Smith v. Longmire*, 24 Hun, 257. (2) To a notice of lien subsequently given. *Craig v. Smith*, 37 N. J. Law, 549, cited in *McCorkle v. Herrman*, 117 N. Y. 305, 22 N. E. 948; *Armstrong v. Borden's Condensed Milk Co.*, 65 App. Div. 503, 72 N. Y. Supp. 1014, on appeal 66 N. E. 1104; *Kane v. Kinney*, 68 App. Div. 163, 74 N. Y. Supp. 260, on appeal 66 N. E. 619; *Ryerson & Son v. Smith*, 152 Ill. 641, 38 N. E. 1032. See, contra, *Oates v. Haley*, 1 Daly, 338; *Smith v. Baily*, 8 Daly, 128; *Mandeville v. Reed* (Ct. App. 1850) 13 Abb. Prac. 173; *Henderson & Reed v. Sturgis*, 1 Daly, 336; *McMurray v. Hutcheson*, 10 Daly, 64. It is urged that the last three cases are not adverse to the trustee's contention, because in each of them it appears that there was nothing due at the time of the assignment, and the assignee finished the contract. It is not understood how such change of fact makes the decisions irrelevant.

Sixth. No lien exists, inchoate or otherwise, until notice of lien is filed. *Payne v. Wilson*, 74 N. Y. 348; *McCorkle v. Herrman*, 117 N. Y. 297, 303, 22 N. E. 948; *Quimby v. Sloan*, 2 E. D. Smith, 594, 609, 610.

It is claimed, by virtue of the foregoing propositions, that any transfer, not collusive or colorable, of title to another, either by the voluntary act of the contractor, or by operation of law, or a full payment by the owner to the contractor, renders nugatory any notice of lien subsequently filed by a subcontractor. From this it is argued that the title of a trustee in bankruptcy is preferred to a lien of which notice is subsequently filed. This is adverse to the holding in *Re Dey*, 9 Blatchf. 285, Fed. Cas. No. 3,871, and in *Re Adam Huston*, 7 Am. Bankr. Rep. 92. It is also contrary to good conscience, the spirit of the mechanic's lien law, and the policy that inspired its enactment.

The statute makes a solemn promise of a lien in behalf of such special creditors as, under conditions named, should devote their property to the improvement of real estate. Thus:

"A contractor, sub-contractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor, or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article."

And the statute states the time within which notice of such lien may be filed. The statute, within limits sufficiently definite, appoints the fund to certain creditors, and distinguishes them as a class from all other creditors. The present contention is that the contractor may appoint the fund to general creditors, and that he effects this when he vests the title to the debt in a trustee in bankruptcy. If this be true, what is the result? A lien law which is enacted, in part, that subcontractors may have the security of the res to the extent of the contractor's claim, added to the personal liability of the contractor, is subject to the power of the contractor to destroy the security by appointing, through legal machinery, a person to distribute the property among his general creditors. That is, the contractor may annul the promised benefit of the statute in favor of those who come under it, not only by collecting or selling his debt, but also by appointing a trustee to take it for general distribution. Of what value, then, is the statute to subcontractors? Only this: If the contractor suffer the notice of lien to be filed, he cannot defeat it, but before such filing he may defeat it at will. This leaves the power with the contractor, and its exercise to his volition. And while the statute intends that those creditors who have put some valuable thing into the property shall be paid first out of the debt owing by the property, the contractor, by the trustee's contention, may ordain that his general creditors shall be paid ratably. The statute commands the owner to the limit of her indebtedness to apply the property to the payment of such creditors of the contractor as shall claim liens within a certain time in the manner pointed out; the contractor commands by voluntary proceedings in bankruptcy, that the fund intended by the statute for specific creditors, whose property such fund contains, shall be paid only to the whole body of his creditors, irrespective of any relation which they may have to the fund. This places the whole matter at the bankrupt's disposition. If the decisions had left anything valuable for lienors, which seems doubtful, this claim would destroy all similitude to a protective statute. For of what avail is a statute intended to appoint a fund to creditors whose property has been converted into it, if the debtor may, with the court's aid, distribute the fund to general creditors? The statute hands the fund to specialized creditors. The contractor would hand it to all his creditors. There would be no validity nor purpose nor worthy aim in the statute, so interpreted. One ostensible purpose was to protect subcontractors against the contractor, but the construction claimed would place the subcontractors at the mercy of the contractor, and enable the latter to bestow upon his general creditors what the statute promised should be used to secure certain creditors specifically pointed out.

The court is unwilling to adopt the construction claimed by the

trustee, because it would result in a simple nullification of the statute. So far as it relates to subcontractors, it would defeat its purpose, reverse its promise, and enable the person against whom it was aimed to do the very thing that it intended should not be done, viz., distribute the specific fund to general creditors, rather than to more meritorious, and hence a preferred class of, creditors. Why call it a lien law, in part, for subcontractors, if there can be no such lienors under it except by the first contractor's permission? Why does it exist, if it cannot be beneficially invoked when needed? If the contractor be solvent, it is unnecessary for a subcontractor. If the contractor is insolvent, it is useless, if it may be avoided by the contractor taking insolvency proceedings. The fact is clear enough that the statute promised the parties in question that, if they supplied material for the improvement of the land, they should have a lien thereon, if they filed a notice within due time. The present petitioners did both. Now, the claim is that the lien was promised on the condition that it should not be good if the first contractor intervened, and pending the filing of the lien vested the fund in the bankruptcy court for distribution to his general creditors. It is desired to illustrate that the trustee's contention is *per se* erroneous by emphasizing and repeating the statement that such claim runs counter to the policy which prompted and animated the enactment of the statute, to any reason or propriety for its existence, to its capacity for usefulness, or the possibility of its affording any reasonable security to persons who trust to it. The contention of the trustee subverts the statute, and puts into the contractor's hand what the Legislature intended to take out of it, and disables persons whom the Legislature intended to enable, by giving them capacity to acquire liens. The court is not constrained by any analogy between an executed transfer of the claim to a creditor and an employment of the bankruptcy act by the contractor.

The present bankrupt by his voluntary act has invoked proceedings that have called the trustee into existence for the purpose of distributing property to creditors according to their several rights. The trustee represents the bankrupt and the creditors, and he holds the property for the mere purpose of sale and just distribution to them. The legal title has, indeed, passed from the bankrupt to the trustee, but merely to enable him to exercise a power whereby the bankrupt's obligations to his creditors shall be discharged. The ability or right of any creditor is not enlarged. No creditor is entitled to a different priority of payment or to enlarged payment. As the bankrupt was entitled to use his property to pay his debts, the trustee may use it. If an executed transfer by the contractor would have cut off liens, such a transfer by the trustee would have a like effect. This statement is modified by certain provisions of the act cutting off liens of certain creditors. But it should be kept in mind that the trustee is a simple intermediary, empowered to dispense the bankrupt's property, and to facilitate the execution of his powers the title is vested in him. His title is no more than adequate to the fulfillment of the trust reposed in him. If now the trustee takes the power to do what the bankrupt might have done, and no more (par-

ticular enlargement of power by the statute being disregarded as here immaterial), and creditors have no greater rights than they formerly had against the bankrupt, the trustee has no power, after notice of lien, to take property which the state statute has conferred on special creditors, and transfer it for the benefit of other creditors, who before the bankruptcy proceedings had no right to it as against such special creditors. It is true that, when the petition in bankruptcy was filed, notice of lien had not been filed; but the materialmen had put their property into the land, on a promise that the lien should be good when filed, and when so filed it would have been good against the person afterwards bankrupt, and against his creditors. The lien would have been good against A., the contractor, and B., a general creditor; but the contention is that if C. become a trustee in bankruptcy for the purpose after sale of vesting the proceeds of A.'s property in B., so far as needed to pay A.'s debt to B., C. may deliver to B. the lienor's property rights, after notice of lien duly filed. How does C. obtain this increased advantage—this augmented title, which A. or B., or either of them, did not possess? Does the grantee of the power possess more plenary ability than his grantor and the creditors combined? It may be, within the decisions cited above, that if A. transfer his claim to B., creditor, with or without an intermediary, subsequently filed notices of lien would be cut off. But transfer to an intermediary is not equivalent to a transfer to a creditor. It is but a step in an unfinished transfer. A. asks the court to appoint an officer who shall take A.'s property, such as it is, and distribute it to A.'s creditors. Does A. ask that the court will, in addition, take a fund into which special creditors have placed their own property, upon the assurance of a lien therefor, and distribute it to A.'s creditors, when the lienors are not in default? And if A. ask a thing so unconscionable, in what particular section does the bankruptcy act justify the proposed spoliation? If A. may transfer his claim to B. to deprive materialmen of their liens, he certainly should not be allowed to ask this court to furnish the machinery for effecting that result. Because A. is potential to defraud if he will, this court is not constrained to furnish him the cover of legal protection.

Therefore it is concluded that the lienors in part created the fund in dispute, the statute promised them payment out of it, they have, in law and equity, a lien on it for such payment, and the contractor should not be allowed to deprive them of it by transferring the fund to his general creditors through the machinery of this court. The court is constituted to restrain, and not to facilitate, the avoidance of lawful and honorable obligations.

In re ROEBER.

(Circuit Court of Appeals, Second Circuit. December 2, 1902.)

No. 86.

1. BANKRUPTCY—ASSETS GOING TO TRUSTEE—MONEY DUE ON BUILDING CONTRACT—LIENS OF SUBCONTRACTORS—PRIORITY.

New York Mechanic's Lien Law (Laws 1897, p. 514, c. 418) confers on subcontractors liens "from the time of filing a notice of such lien," and the courts of that state have held that such a lien is effective as to funds due from the owner only from the filing of notice, prior to which the contractor may assign his claim against the owner, to the prejudice of subcontractors. *Held*, that a contractor's trustee in bankruptcy took a fund due from an owner free from the claims of subcontractors previously furnishing labor and materials, but notices of whose liens were not filed till after the bankruptcy petition.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of New York, in Bankruptcy. For opinion of District Court, see 121 Fed. 444.

Thaddeus D. Kenneson, for petitioner.

J. Stewart Ross, opposed.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. September 13, 1901, there was due from the owner of certain real property to Roeber the sum of \$4,494.51 under a contract for the erection of a building, and on that day Roeber filed a voluntary petition in bankruptcy, and was adjudicated a bankrupt. Prior to the filing of the petition certain subcontractors with Roeber had furnished labor and material for the building, and on September 17, 1901, these subcontractors filed notices of lien against the property pursuant to the provisions of the lien law of New York (chapter 418, p. 514, Laws 1897). This petition of review presents the question whether the trustee in bankruptcy takes title to the money due under the contract to Roeber subject to a lien of the contractors, or whether his title is not subject to any lien.

The statute provides that the subcontractor shall have a lien for the value or the agreed price of such labor or materials upon the real property "from the time of filing a notice of such lien as is prescribed by this article"; declares that it shall not be for a sum greater than the sum unearned and unpaid on the contract at the time of filing the notice of lien and any sum subsequently earned thereon; authorizes the notice to be filed at any time during the progress of the work, or within 90 days thereafter; provides that, if an action shall not be brought to enforce the lien within a specified time, the lien shall be discharged; and prescribes the procedure in an action to enforce the lien. When the notice is filed, provided it is filed within the period prescribed, the lien binds the property to priority of payment in favor of the lienor as against subsequently acquired rights or title derived from the owner or the contractor. The statute is a reproduction of previously existing statutes, with some changes not affecting the present question, and, according to the settled construction by

the courts of New York, creates a lien only from the filing of the notice. "The filing of the notice originates the lien. Anterior to this act, the laborer or materialman has no preferential right to be paid for his labor or material out of the sum which is due from the owner of the building to the contractor, but stands in the position of other creditors." *McCorkle v. Herrman*, 117 N. Y. 297-303, 22 N. E. 948. If the contractor transfers his demand against the owner, whether for a present consideration or in payment of a precedent debt, before the notice of lien is filed, the lien is ineffective. *Gibson v. Lenane*, 94 N. Y. 183; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229. In the latter case the court said:

"There is no provision in the statute forbidding a contractor to pay his creditors out of the money due or to become due to him from the owner to the exclusion of the laborers and materialmen who have not filed liens. This may be an omission, but, if so, it can only be supplied by the Legislature, for the courts cannot extend these purely statutory rights beyond the terms of the statute by which they are created."

Until the subcontractor or materialman has filed his notice, he is a creditor at large. He can file his notice at any time, and perfect a lien day by day concurrently with the progress of the work. If he does not choose to avail himself of the benefit of the statute he occupies no better position than the other creditors of the contractor.

It has been held by some of the lower courts of the state that, if the notice is filed within the statutory time, the materialman obtains a lien which is prior to the title of an assignee under a voluntary assignment for the benefit of creditors. But these decisions have not been approved by the later adjudications (*Armstrong v. Borden's Condensed Milk Co.*, 65 App. Div. 503, 72 N. Y. Supp. 1014; *John P. Kane Co. v. Kinney*, 68 App. Div. 163, 74 N. Y. Supp. 260. The question seems never to have been considered by the court of last resort, although it arose in the case of *Mandeville v. Reed*, 13 Abb. Prac. 173, a case which is not reported in the official series, is not cited in any of the later decisions of that court, does not proceed upon any distinction between an assignment for the benefit of creditors generally and an assignment for a single creditor, and which, if it proceeds upon considerations applicable to the statute as it has since been changed, is inconsistent with the construction of the statute which now obtains in that court, and which is that, until the notice is filed, the contractor is left at full liberty to dispose of the moneys due or to become due from the owner as he sees fit, provided he does so in good faith. Upon principle there can be no distinction between a case where the transfer is to a single creditor and one where it is to a class of creditors or to all the creditors of the assignor, nor between a case where it is made directly to the creditor and one where it is made to a trustee or intermediary for him; and, in the absence of an authoritative construction of the statute to the contrary, we are of the opinion that such a distinction does not exist. The Supreme Court of Illinois, in a case arising under a similar statute (*Ryerson & Son v. Smith*, 152 Ill. 641, 38 N. E. 1032), held the title of the assignee under a general assignment to be paramount when acquired prior to the filing of the notice by the lienor. If a contractor is at

liberty to dispose as he chooses of the moneys due or to become due to him from the owner until the filing of the notice, we cannot understand why he may not do so by filing a petition in bankruptcy and procuring an adjudication which will invest his trustee in bankruptcy with title as of the date of the filing of the petition. By this course he distributes the fund equally among his creditors, and the sub-contractor or materialman obtains his ratable proportion, and if the latter has not availed himself of the summary method which the statute provides for securing a preference he cannot reasonably complain of the result.

We conclude that the trustee in the present case took the fund in controversy free from the liens asserted, and it follows that the order of the court below must be reversed, with costs, and with instructions to decree conformably to this opinion.

ROCCIA v. BLACK DIAMOND COAL MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1903.)

No. 795.

1. INJURIES TO MINER—OBVIOUS DANGERS—ASSUMPTION OF RISK—INSTRUCTIONS.

In an action by an experienced coal miner, who was employed to timber the mine and look out for and remedy dangers from caving, for injuries sustained by falling coal and dirt, where it was shown that he had discovered the dangerous situation and continued to work there after he had requested and been promised assistance, an instruction that, if the dangers and defects were so obvious and threatening that a reasonably prudent man would have avoided them, plaintiff was guilty of contributory negligence and assumed the risk of injury, was proper.

2. SAME—FAILURE TO CHARGE—RIGHT TO ALLEGE ERROR.

It was not error of which plaintiff could complain for the court to fail to charge at plaintiff's request that if the jury found that the danger, while not so threatening and obvious as likely to cause injury at any moment, was so imminent and manifest as to prevent a reasonably prudent man from risking it on a promise of assistance, defendant would not be liable.

Ross, Circuit Judge, dissenting.

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

Governor Teats, for plaintiff in error.

Struve, Allen, Hughes & McMicken, for defendant in error.

Before GILBERT, MORROW, and ROSS, Circuit Judges.

GILBERT, Circuit Judge, with whom concurred MORROW, Circuit Judge. The court below, in charging the jury on the subject of the dangers and defects in the mine, and the assumption of risk by the workmen therein, remarked: "The dangers and the defects must be so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the workman with contributory negligence or the assumption of the risk." But it is contended that,

¶ 1. See Master and Servant, vol. 34, Cent. Dig. §§ 645, 686.

while this instruction correctly states the law applicable to the general subject of the assumption of risk by the workman, it was not given to the jury with reference to the precise situation in which, according to the evidence, the plaintiff in error was placed just prior to the accident, when he had discovered the dangerous situation of the place where he was injured, and had sent for and received the promise of assistance; and it is contended that the instruction which was in fact given with reference to the situation while the plaintiff in error was proceeding with the work in the expectation of promised assistance was error, for the reason that the court failed, in that connection, to submit to the jury the question whether a reasonably prudent man would have remained at the work under the circumstances.

In the case of *District of Columbia v. McElligott*, 117 U. S. 622, 6 Sup. Ct. 884, 29 L. Ed. 946, the Supreme Court has expressed the doctrine which, in our judgment, sustains the instructions given to the jury by the court below. In that case the plaintiff, who was in the employ of the District, was injured while at work on a bank of gravel. There was evidence tending to prove that he discovered that there was danger of the bank caving in, and sent to the supervisor of the District for more men to do the work, and for one man to watch the bank, and that he received the information that such assistance would be sent. Before the assistance arrived the bank caved in, causing his injury. The court said:

"Assuming that the District might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so imminent or manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose would be removed."

The court then, after referring to the experience which the plaintiff had had in that kind of business, said:

"And it was not implied in the contract between him and the District that he might needlessly or rashly expose himself to danger. On the contrary, if liability might come upon the District for the negligence of its officers controlling his services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment—he would, notwithstanding any promises or assurances of the District supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received."

Here are expressed the extent and limit of the rules which control the questions now under consideration. First, if the workman expose himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding any promise of his employer, guilty of contributory negligence if he remain at the work. In other words, he assumes the risk of the danger which he knows and appreciates, and, if the danger be so obvious or threatening as likely to cause injury at any moment, he has no right to continue at such work in the expectation that promised assistance will be sent. This principle of law the decision formulates without qualification, and irrespective of what a reasonably prudent man would or would not have

done under the circumstances. The opinion elsewhere goes further to say, in substance, that if the danger be not obviously threatening of present injury, but yet if it be so imminent or manifest as to prevent a reasonably prudent man from assuming it, even with the promise of assistance, the master will not be liable.

Now, the court in the present case charged in substantial compliance with the first of these rules, and informed the jury that the plaintiff in error must be deemed to have assumed the extra hazard of the dangers which he knew or believed to be imminent, and that the defendant in error would not be liable for an accident resulting in his injury from a danger which he himself believed was imminent, and to which he voluntarily exposed himself, unless that danger was enhanced by the failure on the part of the foreman to keep his promise to send materials and men to his assistance promptly. There can be no doubt of the correctness of that charge as given. It is true that the court might properly have proceeded further, and might have instructed the jury that if they found that the danger, while not so threatening and obvious as likely to cause injury at any moment, was nevertheless so imminent and manifest as to prevent a reasonably prudent man from risking it on the promise of assistance, the defendant would not be liable. Such an instruction might have been requested by the defendant in error, and its defense to the action might have been aided thereby. But the fact that it was not given at the request of the plaintiff in error was not error of which he can complain. The jury must have understood from the charge that, if they found that the dangers were not so obvious or threatening as likely to cause injury at any moment, the defendant in error would be liable. The jury brought a verdict against the plaintiff in error, evidently upon their belief that the dangers were so obvious or threatening as likely to cause injury at any moment, and that he knew and understood the peril of remaining at work while awaiting the promised assistance. If, indeed, the danger was such, and he had knowledge of his danger, there was no occasion for the jury to inquire further. The obvious danger was his warning, and the general rule applied to his case, that a workman assumes the dangers which are obvious to him. It is only where the dangers are of a character that is not obviously threatening, that it becomes necessary to inquire what a reasonably prudent man would have done, and to refer to a general standard by which the conduct of the workman, as of all workmen in like circumstances, should be governed. The charge as given to the jury was more favorable to the plaintiff in error than it would have been with the requested addition. It permitted the jury to return a verdict for the plaintiff in error, if they found the facts otherwise than as recited in the charge. The wisdom and the justice of the rule as laid down by the Supreme Court, and as followed by the trial court, is illustrated by the facts of the present case. Plaintiff in error was an experienced miner, and had been for years at work in the mine. It was his special duty to timber the mine and to look out for and remedy the very dangers which caused his injury. No one in the mine knew so well as he the perils to which in this particular occupation he was exposed. This is not a

case where an employé, unaware of the perilous nature of his employment, remains at work under a request for or promise of assistance of the master, nor is it the case of one who was under disability or was incapable of estimating the danger. The dangers were such as in his regular employment it was his duty to deal with. They were confessedly visible and obvious to him. They were the natural result of the progress of the work of mining. The defendant in error received its knowledge and information of these dangers from the plaintiff in error. The court in this connection properly instructed the jury that, "when it is necessary, in order to remedy a condition of insecurity, the employer has the right to contract with men to go and do what is necessary, and the men who with knowledge of the peculiar danger accept the employment are to be considered as having assumed the extra risks." Upon what theory of the law should the defendant in error be held liable, when it was true, as the jury must have found, that the injury to the plaintiff in error resulted from "an accident which he himself believed was imminent," and that he "assumed the extra hazard" of the dangers which "he knew and believed to be imminent"?

In *Showalter v. Fairbanks, Morse & Co.* (Wis.) 60 N. W. 257, the superintendent had assured an employé that there was no danger, and had told him to return to his work. The court held that the employé was not relieved of the assumption of risk. The court said:

"Upon these facts we are clearly of opinion that the plaintiff must be held to have assumed the risk. He was of ordinary intelligence. He knew that trenches of this depth were liable to cave in. He knew that this very trench had just partially caved in at a distance of a few feet. He came out of the ditch because of that very fact. He knew all the facts which the superintendent knew, and had fully as much experience as the superintendent. No expert engineer could have given him any additional information as to the probability of the ditch caving in. In fact, he was fully informed of the peril, and chose to continue his work. No principle is better established than that under such circumstances the risk is assumed. *Naylor v. Railway Co.*, 53 Wis. 661, 11 N. W. 24; *Johnson v. Water Co.*, 77 Wis. 51, 45 N. W. 807; *Paule v. Mining Co.*, 80 Wis. 350, 50 N. W. 189. But it is said that the assurance of safety given by the superintendent, and the command to return to work, relieve the plaintiff of the consequences of his assumption of the risk. This is not the case where the employé is of full age and capacity, and knows the danger as fully as the superintendent. *Toomey v. Steel Works* (Mich.) 50 N. W. 850; *Linch v. Manufacturing Co.*, 143 Mass. 206, 9 N. E. 728; *Kean v. Rolling Mills* (Mich.) 33 N. W. 395, 11 Am. St. Rep. 492; *Bradshaw's Adm'r v. Railway Co.* (Ky.) 21 S. W. 346. Plaintiff had the right to refuse to obey the order, and if he chose to obey he took the risk, of which he had full knowledge."

The judgment of the Circuit Court will be affirmed.

ROSS, Circuit Judge (dissenting). The plaintiff in error was plaintiff in the court below in an action for damages resulting from personal injuries received by him while at work in the defendant's coal mine at Black Diamond, King county, Wash. The complaint states that the main body of the coal constituting the mine consists of a coal vein of 61 inches, covered with 14 inches of shale and 3 inches of bone, on top of which bone and shale is deposited a vein of coal having streaks of bone of various thickness through it; that the vein of coal

and bone above the main vein is of a poor quality, and is so gaseous that the coal therein cannot be mined; that the defendant company well knew of the large quantities of gas contained in such upper vein of coal and bone, but that the plaintiff was ignorant thereof; that the mine is worked by what is known as the breast system, that is to say, "breasts are mined up from the gangways into the vein of coal toward the upper gangway, and said breasts are from 24 to 30 feet in width, and during the mining of the same the breasts are timbered by collars and posts." It is alleged that during the three weeks before and on the day of the plaintiff's injury, which was February 21, 1900, the plaintiff was at work under the supervision of the pit boss, D. B. Davis, in breasts 25, 27, and 28 of the sixth level, engaged in timbering the same; that those breasts are next to and in a fault in the vein, of which fact the defendant was aware, breast No. 28 being against the rock formation in the portion of the separated vein; that in driving the breasts mentioned the roof thereof indicated that it would be liable to crumble and fall, which weakness and unsafe condition was noticed by the plaintiff, who "repeatedly asked of the said defendant, through its said pit boss, Davis, for more men and better timbers, so as to timber the same so that the same would be safe from caving in; that the said defendant did not furnish more men and more timber, and did not properly timber the same and prevent the same from caving in." It is alleged that on the 21st day of February, 1900, while the plaintiff was at work in breast 28, he noticed that the indication of caving was more prominent than before, and, thinking that the same was unsafe, went to the pit boss, and complained that the breast was unsafe, and required better and more timbers, and more men to protect it; that the pit boss then requested the plaintiff to return to his place of work, promising to send him more men and more timbers with which to properly timber the said breast, and that the plaintiff, "believing and thinking that the danger from the lack of the said timber and the timbering, and the lack of men to place the same in the breast, was not so imminent and immediate but what he could return to his work for a reasonable length of time without danger to himself, and not knowing of the gaseous condition of the coal above the said vein they were then mining, went back to his place of work, and under said assurances and with his lack of knowledge of the conditions, and proceeded to work as requested by the defendant, and worked for a period of an hour and a quarter, when the roof of breast number 25 caved in, bringing down with it large volumes of gas from the broken up coal above the said roof, as herein described, and the current of air, then being in the direction of the plaintiff from said breast number 25, brought the gas down and dissolved the same in the air to an explosive point, and down upon the open lamp of the said plaintiff, causing a terrific explosion, killing one man and burning and mutilating the plaintiff" in a terrible manner. It is alleged that the mine was worked by the miners with open lamps, under the instructions of the defendant company, and that the plaintiff was so working at the time of the accident; that the defendant "well knew that in case of a cave-in the gas would come down upon the said lamp, and cause an explosion, but

plaintiff did not know these things, as he was ignorant of the scientific proposition herein set out as to the gaseous condition of the vein above, and the liability of the gas coming into the working place in case of a cave-in"; that the defendant did not inspect the working places, and did not inspect breasts 25, 27, and 28, for the purpose of seeing the defects of the timber or the liability of a cave-in, but carelessly and negligently and wantonly allowed the conditions to exist without inspection or attempting to remedy the same; that the defendant was fully warned of the impending danger, notwithstanding which it negligently allowed the plaintiff to remain in his place of work, without furnishing the men and timbers promised, and without any warning of the impending dangers.

In its answer the defendant put in issue all of the averments of negligence on its part, and as an affirmative defense alleged that the roof of the mine was of strong and firm rock formation, of a uniform width of 12 to 14 feet; that abundance of suitable timber was furnished and used in supporting all the gangways and roofs of the different breasts as the same were being mined; that after the coal had been removed no further support was given to the roof of the breasts except along the passageways; that the mine had at all times been free from gas, and had at all times been operated with open lamps, though the company furnished abundance of properly covered miners' lamps, which were at all times placed at the disposal of all the operatives, including the plaintiff in error; that the mine was at all times properly ventilated and regularly and frequently inspected; that the management and superintendency of the mine was under skilled and experienced men; that plaintiff in error had been for many years engaged in mine work, and for four years had been employed in this mine, and at the time of the accident and for the two years prior thereto had been the boss timberman of the mine, whose duty it was to timber and support the roof of the mine along the gangways and other places so as to render the same secure for himself and the other operatives; that with the assistance of the men under him he had placed all the timbers along the passageways and different breasts at the place of and in the vicinity of the accident, and that the quantity and extent of the timbering was left to his judgment; that the mine had been carefully inspected on the morning of the day of the accident, and found free from gas and in every way secure before the operatives had entered it; that a hundred feet or more from where the plaintiff in error was at the time employed, and in a breast which had been mined out, from an unknown and undiscovered cause, the roof caved in, accompanied by an escape of gas, which passed to where the plaintiff in error was at work, and was exploded by his open lamp; and that the explosion was entirely accidental, and could not have been anticipated or prevented by the defendant in error, and that the hazard was an incident to the employment.

The testimony shows that the plaintiff had not only worked in this mine for four years, but for about two years immediately preceding his injury had been its head timberman, whose duty it was, subject to the supervision and direction of the mine foreman, to so timber the breasts, roofs, etc., as to make them safe. His own testimony

shows that when his attention was called on the morning of the accident to the tendency of the roof, in breasts 25, 27, and 28, to squeeze and cave, he recognized the peril to which he would be exposed in working at the place where he was injured. His testimony tends to show that upon making that discovery he went to the foreman, and told him of the danger, and also informed him that there was a lack of men and of timber with which to keep those breasts from caving, and that to make them safe it was necessary for him to have more men and more timber; that thereupon the foreman promised to send the plaintiff more men and more timber for that purpose, and requested the plaintiff to return to his working place in breast No. 28, which the plaintiff at once did, and proceeded to work as requested by the foreman, relying upon his promise to send him more men and more timber. Based upon that and similar testimony, the plaintiff requested the court below to give to the jury this instruction:

"I instruct you that if you should find that there was not a sufficient number of men furnished to properly timber breasts 25-7-8, and keep the same from caving in, and that the plaintiff reported these facts to the mine foreman, and the mine foreman promised the plaintiff that he would send more men to properly timber the said breasts, and upon this promise the plaintiff returned to his place of work in breast 28; and if you should find further that the dangers from caving in or otherwise, known and apparent to the plaintiff, were not so imminent that a reasonably prudent and careful man would not return to his place of work; and you should find that after the plaintiff has (had) returned to his place of work and within a reasonable time which the defendant promised he would send men, and plaintiff was not furnished a sufficient number of men to properly protect the roof from caving, a cave occurred and the injury suffered by plaintiff—you will find for the plaintiff."

While this instruction is somewhat confused and inaptly expressed, it is quite manifest that what the plaintiff asked the court to instruct the jury as the law was that, if the danger impending his return to work was not so imminent or manifest as to prevent a reasonably prudent man from risking it upon the promise by the foreman to send the required men and timber, the plaintiff's return to work, and his injury while awaiting, for a reasonable time, the fulfillment of the unfulfilled promise of the foreman, entitled the plaintiff to a verdict for damages sustained. The court below refused the instruction requested by the plaintiff, and upon the point indicated specifically instructed the jury as follows:

"That the plaintiff would have the right to trust the foreman to carry out his promise in good faith to furnish him timber and furnish him sufficient men promptly to remedy the defect and to make the mine safe, and upon relying upon that promise, and with the knowledge which he himself had communicated to the foreman, the plaintiff, by going back to his place of work voluntarily, would be assuming the extra hazard of the dangers which existed in his own mind—that is, dangers which in his own mind he knew or believed to be imminent—and the defendant would not be liable for an accident resulting in his injury from a danger which he himself believed was imminent, and which he voluntarily exposed himself to, unless that danger was enhanced by a failure on the part of the foreman to keep his promise to send materials and men to his assistance promptly. You will take this, however, in connection with another instruction I will give you, that if the plaintiff went to his place of work voluntarily, and after going back to work there was a change occurred in the condition of the mine by

gas coming out which he did not know of, that there would be a duty on the part of the defendant company to communicate any knowledge which came to its managing officers, or the superintendent or the foreman at work near there, or whoever was charged with the inspection of the mine, to communicate the knowledge immediately, or as soon as it could be, to the plaintiff. The duty of furnishing material and additional help, and of furnishing intelligence of the plaintiff in the situation in which he claims he was placed, carries with it a right to have time and opportunity to perform that duty, and the defendant would not be chargeable for any wrong in the matter, if it failed to furnish materials or men, to give information instantly. It would only be chargeable for the failure to do those things promptly, and that means as quick as men of prudence and having due regard for the safety of others could act. Though you should find that the plaintiff gave notice to the foreman that the roof of the mine in the airway at breast 25, 27, and 28 leading to breast No. 28 was not safe and liable to fall, owing to the insufficient timbering, the defendant would not be liable for not strengthening and not adequately supporting the roof until it had reasonable time and opportunity to do so; and if you believe, before such reasonable opportunity had been afforded to the defendant, the plaintiff voluntarily went back into the mine and exposed himself to the dangers resulting from the roof giving way, which he knew or supposed to be imminent, he cannot recover because he voluntarily assumed the hazard; and this would more particularly be the case if you find from the evidence that the plaintiff was the head timberman in that part of the mine where that accident occurred, concerning which he gave notice, and that it was a part of the plaintiff's employment to place timbers and keep them in proper position."

I do not understand, as is contended by the learned counsel for the defendant in error, that the court there instructed the jury that the dangers must have been so obvious and threatening that a reasonably prudent man would have avoided them before the plaintiff in error could be properly charged with contributory negligence or the assumption of risk. It is true that the court in one part of its lengthy charge told the jury that "the dangers and defects in the mine, that to the eye of the operator or foreman and superintendent portend unnecessary and unreasonable risks and great danger, may have no such significance to the laborer or miner, who has not the knowledge or experience which the operator must have in the operation of his mine, unless a reasonably intelligent and prudent man would, under the circumstances, have known and apprehended the risk which certain conditions indicated; the dangers and the defects must be so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the workman with contributory negligence or the assumption of the risk;" and also instructed the jury that "the plaintiff, in accepting employment from the Black Diamond Coal Mining Company, and proceeding to work, was not compelled to know or investigate its modes of business or methods of operating its mines, and did not assume any of the risks or dangers resulting from the methods of mining used by the defendant, save and except such risks and dangers which were obvious and apparent, and the perils of which were apparent to the mind and understanding of a reasonably prudent man in his position." But the instruction of the court herein first quoted was, as stated by the court, specifically given to meet the contention on the part of the plaintiff that the mine foreman had been by the plaintiff informed of the impending danger, and of the necessity for more men and more timbers with which to make the place where the accident oc-

curred safe, and that the plaintiff returned to work at the place of the accident at the request of the foreman, and upon his promise to send him the required men and timbers.

Without reference to what a reasonably prudent man would have done situated as the plaintiff in error was, the specific instructions of the court given in respect to that contention were, in one place, to the effect that the plaintiff, in voluntarily going back to his place of work with the knowledge which he himself had communicated to the foreman, and relying upon the latter's promise to furnish the required men and timbers, assumed "the extra hazard of the dangers which existed in his own mind—that is, dangers which in his own mind he knew or believed to be imminent—and the defendant would not be liable for an accident resulting in his injury from a danger which he himself believed was imminent, and which he voluntarily exposed himself to, unless that danger was enhanced by a failure on the part of the foreman to keep his promise to send materials and men to his assistance promptly"; and, again, that if they found that, before a reasonable opportunity had been afforded the defendant to adequately support the roof, "the plaintiff voluntarily went back into the mine, and exposed himself to the dangers resulting from the roof giving way, which he knew or supposed to be imminent, he cannot recover because he voluntarily assumed the hazard."

These specific instructions, given, as has been said, with reference to the contention of the plaintiff in respect to the principal point in the case, not only omitted any and all reference to the question whether the danger was so imminent that a reasonably prudent man, situated as the plaintiff in error was, would or would not have returned to work upon the promise of the foreman, and remain at it for a reasonable length of time, awaiting fulfillment of that promise, but were, as above shown, to the effect that the defendant would not be liable if the plaintiff himself voluntarily exposed himself to a danger that he himself believed was imminent, unless that danger was enhanced by a failure on the part of the foreman to keep his promise to send materials and men to his assistance promptly; and again, omitting the latter qualification, that the defendant would not be liable if the plaintiff voluntarily went back into the mine and exposed himself to the dangers resulting from the roof giving way, which he knew or supposed to be imminent. The rule of law applicable to such a case is, in my opinion, that, if the danger is not so imminent or manifest as to prevent a reasonably prudent man from risking it, upon a promise by the proper authority to provide for the removal of the cause from which the peril arose, an exposure to such danger for a reasonable time, and a consequent injury during that time, while awaiting the fulfillment of the promise, cannot defeat a recovery for the injury. *Hough v. Railway Co.*, 100 U. S. 224, 25 L. Ed. 612; *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946.

I am of the opinion that the specific instructions above noticed were erroneous, and were also inconsistent with the general portions of the charge of the court also set out herein. The judgment should therefore be reversed, and the cause remanded for a new trial.

ROBB v. SECURITY TRUST CO.

(Circuit Court of Appeals, Third Circuit. March 9, 1903.)

No. 26.

1. INDEMNITY—RIGHTS OF INDEMNITOR—APPEAL.

An indemnitor, who has been vouched to defend in a suit brought against a surety whom he has agreed to indemnify, is entitled, at his own expense and charges, to fully defend such suit, and to conduct in good faith the whole litigation from beginning to end. Such litigation, in our opinion, includes the right to prosecute, under the laws and practice of the jurisdiction in which the suit is brought, an appeal from, or writ of error to, an adverse decree or judgment of the court of first instance.

2. SAME—DISCHARGE OF INDEMNITOR—PREVENTING PROSECUTION OF APPEAL—QUESTION FOR JURY.

An indemnitor of the S. Co., surety on a forthcoming replevin bond, was notified to defend an action thereon, which he did. After an adverse judgment it was agreed that a writ of error should be sued out, and the indemnitor made arrangements with a surety company satisfactory to the S. Co. to execute the necessary bond. During the 10 days within which the bond could be filed and the supersedeas obtained, the S. Co., with knowledge, acquiesced in the arrangements, and on the last day on which the bond could be executed a bond properly drawn and executed by the surety company was presented to the S. Co. for its signature, according to the uniform practice, when it for the first time refused to execute the bond or continue the litigation. The indemnitor sued out the writ of error in the name of the S. Co., without a supersedeas, to which the S. Co. subsequently objected, and, after paying the judgment appealed from, notified the indemnitor that, unless further security was given, it would move to dismiss the appeal, whereupon the writ of error was discontinued by the indemnitor. *Held*, that whether such facts showed an unjustifiable interference by the S. Co. with the indemnitor's right of appeal, sufficient to discharge the indemnitor, was for the jury.

3. SAME—EVIDENCE.

Where, in an action against an indemnitor to recover a liability of the surety on a forthcoming replevin bond, defendant claimed that the surety's acts in preventing an appeal from the judgment against the surety on the bond were influenced by the fact that the surety's directors were interested in the enforcement of the judgment in replevin, and that such judgment was for their use and benefit, evidence as to who the surety's directors were, and who were the real parties interested in the judgment, was admissible.

Acheson, 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. 201.

Robert H. McCarter, for plaintiff in error.

John F. Harned, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is a writ of error to the Circuit Court of the United States for the District of New Jersey. The Security Trust Company, the defendant in error, brought an action in contract in that court, against Robb, the plaintiff in error. The action was founded on a bond of indemnity given by Robb to the Security Trust Company, to save it harmless, etc., in becoming surety in a property

bond given in a replevin suit, brought in the Supreme Court of the state of New Jersey. The record discloses the following facts:

In the month of June, 1897, the Ft. Wayne Electric Company brought an action of replevin against the Franklin Electric Light Company, at Cape May, to recover goods sold by the plaintiff to the defendant, under a claim of title reserved by the contract in the vendor until full payment was made. Robb, the plaintiff in error, in behalf of the defendant in the replevin suit, procured the Security Trust Company, the defendant in error, to become a surety in a forthcoming property bond to the sheriff, by which the defendant in the replevin suit was allowed to retain possession of the goods replevied, pending the suit. The plaintiff in error, Robb, indemnified the Security Trust Company against loss, by reason of becoming surety, as aforesaid, in and by an indemnifying bond. The action of replevin resulted in a judgment in favor of the plaintiff, based upon the plaintiff's ownership and right to possession of the property. Suit was then commenced against the Security Trust Company, as surety in the replevin bond, by the Ft. Wayne Electric Company. The Security Trust Company duly notified the plaintiff in error, Robb, to appear and defend the suit as its indemnitor. Pursuant to this notice, Robb appeared by his counsel, and conducted the litigation with the assistance of, but without expense to, the trust company. A protracted trial resulted in a verdict in favor of the plaintiff in replevin and against the Security Trust Company, and judgment was entered in the Supreme Court, upon said verdict, against the trust company, on the 22d day of January, 1901, for the sum of \$14,621.88.

Under the law and practice of New Jersey, this judgment was subject to review by a writ of error, at any time within three years from its date. If, however, it was desired to prevent the issuing of an execution and recovery thereon, it was necessary to file, within 10 days from the date of judgment, a bond with surety to prosecute the writ with effect. By the statutes of New Jersey, such bonds could be executed jointly with the surety by the plaintiff in error, or any substantial person for him. The uniform practice appears to have been, that the plaintiff in error executed the bond with the surety. There is testimony tending to show that the secretary, or other executive officer, of the defendant in error—the Security Company, who actively co-operated with the indemnitor at the trial, gave him to understand all through the litigation, as well as expressly promised, that in case of an adverse result in the suit against the Security Company, a writ of error would be sued out, to be prosecuted by and at the expense of the indemnitor in the Court of Errors and Appeals of the state of New Jersey. That pursuant to such understanding, upon the entry of the judgment in the court below, the indemnitor, at his own expense, sued out a writ of error in the Court of Errors and Appeals, in the name of the said Security Company, and proceeded to have drawn up a bail bond with a proper surety, to wit, the City Trust Company of Philadelphia, in order to obtain a supersedeas, as provided by law in that behalf. The testimony also tends to show that the president of the trust company designated the said City Trust Company as a surety satisfactory to him, and promised to

complete the bail bond with that company as surety, so that it might be filed within the 10 days necessary to obtain a supersedeas. The testimony also tends to show that, in the interval between the entry of the judgment, on the 22d day of January and the 31st of that month, communications were had between the president of the Security Trust Company, the defendant in error, and the representative of the plaintiff in error, in which the information was given that arrangements had been made with the said City Trust Company to go on the bail bond as surety, and that this information was acquiesced in as in accordance with the general understanding between the parties. It is not disputed that \$144 was paid by the plaintiff in error, Mr. Robb, to the said City Trust Company, as its charge for becoming surety in the supersedeas bond, and that Mr. Robb arranged also to indemnify the said company against loss. There is testimony tending to show that the counsel for the plaintiff in error, relying upon such an understanding with the defendant in error, presented a properly drawn bond, executed by the said City Trust Company, as surety, to the Security Trust Company, the defendant in error, on January 31st, and that not until that day was any notice received by the plaintiff in error, or his representatives or counsel, that there was any objection on the part of the Security Company to executing such a bond. It is in testimony that on that day, the secretary of the Security Company telegraphed from Camden, N. J., to the counsel of the plaintiff in error in Newark, in that state:—"We don't care to continue bond;" and that afterwards, when another representative of the plaintiff in error called at the office of the Security Company in Camden, the secretary of the company said:—"Our board of directors do not care to continue this litigation any further. It is doing us no good;" and that afterwards, a proposition for the deposit of \$15,000, or additional collateral security, was made by the Security Company to the representative of the plaintiff in error. As this was in the afternoon of the last day when a bond could be executed for the obtaining of a supersedeas, it is contended by plaintiff in error that it was then too late to comply with such a request, even if it had been a reasonable or proper one, as it was necessary to file the bond the next day in Trenton, while the parties who were then transacting the business were in Philadelphia and Camden, N. J. Within two weeks, thereafter, the plaintiff in error was notified by the Security Trust Company that execution had been issued upon the judgment in the replevin suit, and that upon the demand of the sheriff, in whose hands the execution was, it had paid the same, and that it would look to him to be indemnified, according to the obligation of his bond. It appears also that the judgment at the suit of the Ft. Wayne Electric Company against the said Security Trust Company, was for the use of John J. Burleigh, a director of the Security Trust Company, and an offer by the plaintiff in error in the suit below, to show that other of the directors of the Security Trust Company were interested in the said judgment against that Company, was denied.

The writ of error, however, which was sued out by the attorney of the plaintiff in error, pursuant to the general authority given by the Security Trust Company, on the 23d of January, 1901, continued

pending in the Court of Errors and Appeals of the state of New Jersey, and capable of prosecution, notwithstanding the failure to file the supersedeas bond within the ten days prescribed by law. If the said writ of error had been prosecuted with effect, the judgment below of the said court would have been reversed and the Security Company would have been entitled to a writ of restitution.

On the 6th of April, however, the Security Company, by its attorney, notified the attorney of the plaintiff in error, that the said writ of error in the Court of Errors and Appeals of New Jersey was being prosecuted without authority from the Security Company, and that unless the amount of the judgment below was paid, or security sufficient to reimburse said Security Company were deposited, he, the said attorney for the Security Company, would move the said Court of Errors and Appeals for the dismissal of the writ, on the ground that the same was being prosecuted without authority. Thereupon, the attorney for the plaintiff in error here, who had sued out the writ in pursuance of his alleged understanding with the Security Company, and who had appeared in the litigation in the lower court at the request and with the co-operation of the said company, discontinued the said writ of error. In this, we think he was justified.

In the suit in the court below, the plaintiff, the defendant in error here, having proved the judgment against it as surety in the replevin bond, and the issuing of execution thereon, and payment of the same by it, and the undertaking of the plaintiff in error, Mr. Robb, in his bond of indemnity to it, to indemnify and hold it harmless by reason of its said suretyship, demanded peremptory instructions from the court for a verdict in its favor, notwithstanding the testimony adduced by the defendant, the substance of which has been above recited. The plaintiff in error, the defendant below, also asked for peremptory instructions for a verdict in his favor. The learned judge of the court below granted the request of the plaintiff, the defendant in error here, and directed a verdict in its favor, for the sum of \$14,621.88. The assignments of error relate to the propriety of the action by the court below in granting the request for a peremptory instruction to find for the plaintiff.

A careful consideration of the testimony sent up to us in this record, has brought us to the conclusion that the learned judge of the court below erred in thus directing a verdict for the plaintiff. In the reasons given by him for his action, the learned judge says:

"There are some things that are clear in my mind with regard to this, and I confess that there are some things which are not. I am clear, for instance, that the Security Trust Company was not bound to prosecute the writ of error themselves. On the other hand, I am also clear that Mr. Robb, as surety on the replevin bond, was entitled to have the case, as it had been tried before Justice Garrison in the Supreme Court, reviewed by a writ of error, and that, if the Security Trust Company did anything to impair that right, it would, under the decisions which have been cited to me, have released Mr. Robb, the surety."

We think the principles of law governing this case are here clearly stated. An indemnitor, who has been vouched to defend in a suit brought against a surety whom he has agreed to indemnify, is entitled, at his own expense and charges, to fully defend such suit, and to con-

duct in good faith the whole litigation from beginning to end. Such litigation, in our opinion, includes the right to prosecute under the laws and practice of the jurisdiction in which the suit is brought, an appeal from or writ of error to, an adverse decree or judgment of the court of first instance. If there is manifest error in the judgment against the surety and indemnitee, by which the indemnitor's liability would be fixed, if unreversed, it would be clearly a denial of justice to such indemnitor and an impairment of his right under his contract to take from him the opportunity, provided he proceed in good faith and with reasonable promptness, to demonstrate such manifest error to the proper court of review. *Stark v. Fuller*, 42 Pa. 320; *American Surety Co. v. Ballman* (C. C.) 104 Fed. 634.

We only differ from the learned judge of the court below, in that we think there was testimony in this case tending to show that the Security Company did do something to impair the right of Mr. Robb to have the judgment against the said Security Company reviewed in the appellate court by a writ of error, and we think that it should, therefore, have been submitted to the jury to say whether the testimony so tending was sufficient to establish the fact of an improper and unjustifiable interference by the Security Company with that right of the plaintiff in error. The contract of indemnity is in some respects *sui generis*, but, as in the case of other contractual obligations, the law of the contract depends upon and is found in the terms of the particular contract itself, and in the legal implications arising from those terms. The bond of indemnity in this case stipulated that Thomas Robb, the plaintiff in error, should save and keep harmless the Security Trust Company from and against all loss, damage, etc., which the company shall or may at any time sustain, incur or be put to by reason or in consequence of its having become surety in the replevin bond already mentioned, or in or about defending any action, suit, or other proceeding which may be commenced or prosecuted against the said company upon its said bond. The well-settled interpretation of such undertaking is that the liability of the indemnitor is not fixed, except by definitive judgment against him on the replevin bond referred to. In any such suit, the indemnitee must, under the contract of indemnity, either in good faith defend himself, or vouch the indemnitor to defend the suit at his (the indemnitor's) own costs and charges; rendering such assistance as he may be called upon by the indemnitor to render in facilitating and furthering such defense. Whether the indemnitee be bound to notify the indemnitor, or not, it is not necessary here to decide, but where, as in this case, the indemnitor has been vouched to defend the suit, we consider the law to be that full and ample scope to make such defense should be afforded to the indemnitor by the indemnitee, including all necessary assistance in permitting and facilitating the review in an appellate court of an adverse judgment in a court of first instance. That is, the indemnitor is entitled, under such circumstances, to all the rights of defense to such a suit, including the right of review, which belonged to the indemnitee as the real party thereto. Under the law of New Jersey, the right to a writ of error is absolute. It was as much the right of the plaintiff in error as indemnitor, under the circumstances disclosed by this record, to have taken the case to a re-

viewing court, as it was to defend the suit against the Security Company in the lower court, provided he exercised that right in good faith and with reasonable promptness, and it was as much the duty of the Security Company, as indemnitee, to refrain from obstructing or interfering with that right, as it was to offer every opportunity for the proper defense of the suit in the court below. These reciprocal rights and duties arise from the law of this particular contract. The testimony disclosed by the record in this case, above briefly summarized, in our opinion, tends to show that this right of the indemnitor (Robb) to fairly and fully exercise and enjoy his right to prosecute a writ of error to the judgment against the Security Company, was interfered with and impaired by the indemnitee, the defendant in error, contrary to the reciprocal obligation resting upon it as party to the bond of indemnity.

The second assignment of error raises another and different question, to which it is necessary to advert. When Henry D. Robb, nephew of the plaintiff in error, was upon the stand, he had testified, as already stated, that the Secretary of the Security Company, Mr. Polhemus, had told him on the 31st day of January, the last day when it was possible to perfect the supersedeas bond:—"Our Board of Directors do not care to continue this litigation any further," and he (Robb) said:—"The Directors" (meaning the directors of the Security Trust Company, defendant in error) "are fighting us, and you lie down at the eleventh hour and refuse to execute the bond." He was then asked by counsel for the plaintiff in error, as follows:

"Q. You said you said that their directors were fighting. Do you know who were the real parties in interest beside Mr. Bell, in this suit against Thomas Robb? A. I do. (Objected to by Mr. Pancoast as immaterial, the real question being what was actually done.) Mr. McCarter—We think it is material by showing the animus of the Security Trust Company in suddenly changing its base of operations. The Court: I think your position is correct. Judge Pancoast, that we are only concerned in the facts; but it is a question as to how far the fact may be explained by the relation existing to those facts by other parties. I will allow you to show who Mr. Burleigh was. (Exception for plaintiff prayed and allowed.) Q. Mr. Robb, were you in court, in the case at Camden, when Judge Pancoast, representing the plaintiff in this suit, announced who beside Mr. Burleigh were the real owners of the Burleigh claim? A. I was. Q. Who did he so declare? (Objected to as immaterial, irrelevant, and incompetent.) Q. What relation, if any, does Burleigh hold, and did he hold, at the time of which you are speaking, to the Security Trust & Safe Deposit Company or the Security Trust Company? (Same objection. Objection overruled. Exception prayed and allowed.) A. He was a director; at that time he was a director; I don't know that he was any other officer; he was a director. Q. (By the Court) A director in what? A. In the Security Trust Company of Camden. Q. (By Mr. McCarter) Do you know who were the other, and who are the other real plaintiffs interested in this judgment? (Same objection. Objection sustained. Mr. McCarter, in behalf of defendant, prays an exception to this ruling of the court.)"

It appears by the pleadings that the suit of the Ft. Wayne Electric Company against the Security Trust Company, and the judgment in the same, which the latter was compelled to pay, was for the use of John J. Burleigh. It also appears from the testimony above quoted, that Burleigh was a director in the Security Trust Company, and from the testimony of Mr. Bullitt, that Mr. Polhemus, secretary of the com-

pany, said to him, (speaking of the directors of the Security Trust Company) "A good many of them were interested in this claim," and that Judge Pancoast announced during the trial of the case in Camden, that others beside Burleigh, who was a director, were the real owners of the Ft. Wayne claim. We think the testimony objected to and ruled out, should have been admitted. Taken in connection with the testimony bearing upon the conduct of the defendant in error, showing or tending to show interference with and obstruction of the exercise by Robb of his right to prosecute a writ of error to the judgment against the Security Trust Company, and the promptness with which execution was issued upon that judgment, and paid by the defendant in error, the excluded testimony might have had some bearing upon the contention of the plaintiff in error, that the action of the trust company was prompted by the direct personal interest which several of its directors, including Mr. Burleigh, had in the collection of the Ft. Wayne judgment.

Let the judgment be reversed, and a venire de novo awarded.

ACHESON, Circuit Judge (dissenting). I dissent from this reversing judgment. The plaintiff below (the Security Trust Company) made out a clear, prima facie case. The defense set up was that the defendant (Robb) was released from liability on his indemnity bond because the plaintiff had declined to execute the supersedeas bail bond tendered by the defendant, and had interfered with the prosecution of the writ of error which the defendant had sued out. Now, the plaintiff did decline to execute a supersedeas bond, as principal therein, and in connection therewith a judgment bond of indemnity to the proposed bail in error, the City Trust, Safe Deposit & Surety Company of Philadelphia. In its explanatory letter of January 31, 1901, the plaintiff declared its willingness to sign a bond which would "afford Mr. Robb an opportunity to litigate the question to the utmost," but declined to assume additional responsibility unless indemnified; and later, on the same day, in an interview with the representative of Mr. Robb, the plaintiff offered to execute the bail bond as prepared if indemnified, but this offer Mr. Robb rejected. It is plain to me that until the presentation of the prepared papers on January 31st the plaintiff did not understand the nature of the proposed obligation it was asked to assume. The plaintiff's request for indemnity, I think, was entirely reasonable. But, assuming that the plaintiff previously had agreed to execute the appeal bond as tendered, how was the defendant damnified by its refusal to sign? That refusal did not prevent Mr. Robb's taking a writ of error with supersedeas of execution. The signature of the Security Trust Company to the appeal was not at all necessary. Upon no just principle, then, could its refusal to sign operate to release the defendant Robb. It is idle to say that there was no time to prepare and perfect a new appeal bond. The bond was not due until February 1st, and Trenton is within an hour's ride of Philadelphia. In fact, Mr. Robb did sue out a writ of error, which, if prosecuted with success, would have secured to him a writ of restitution. Did the plaintiff (the Security Trust Company) so interfere with the prosecution of the writ of error as to release the defendant (Robb)?

Here resort must be had to the correspondence between the attorneys of the respective parties. Mr. Harned's letter to Mr. McCarter was as follows:

Camden, N. J., Apr. 6, 1901.

Robert H. McCarter, Esq., Counsellor at Law, Newark, N. J.—Dear Sir: It has just come to my attention that you are prosecuting a writ of error in the name of the Security Trust Company in a suit of the Fort Wayne Electric Company against that Company. You are probably aware that in this matter execution was issued, and the defendant Company compelled to pay the judgment, amounting in all to some \$15,000. Your use of the Trust Company's name, as you well know, is without authority, and I am directed by the Company to notify you that, unless you, at once, secure them by the payment of the money already advanced by them, or by a deposit of securities amply sufficient to reimburse them, they will move before the Court of Errors for a dismissal of your writ upon the ground that you are using the name of the Security Trust Company without their authority or consent. Failing to hear from you, I shall, at once, take steps as above indicated.

Yours truly,

John F. Harned.

To this letter Mr. McCarter made the following reply:

Newark, N. J., April 13, 1901.

John F. Harned, Esq., Camden, N. J.—Dear Sir: In reply to your favor of April 6th I beg to say that you are mistaken in the statement that my use of the Trust Company's name was without authority, but inasmuch as that authority now appears revoked by your letter, I am of course compelled, against my judgment, and contrary to my views of what is proper, to announce that I will not further prosecute the writ of error to which you refer.

Yours very truly,

Robert H. McCarter.

The purpose of Mr. Harned's letter undoubtedly was to secure his client from loss arising from the delays of litigation. To his reasonable call for security there was no direct response. Mr. McCarter's answer ignored the subject. Mr. Harned's letter was by no means a peremptory order to dismiss the writ of error. Mr. McCarter did not then regard it as an absolute order to dismiss, for he wrote merely that he would not "further prosecute the writ of error." The utmost that can be said fairly is that Mr. Harned's letter was a notification to Mr. McCarter not to further prosecute the writ of error unless the trust company was reimbursed the money it had been compelled to pay, or was secured against loss. Mr. McCarter was not directed by that letter to take any affirmative action in the pending suit in error. Mr. Harned reserved to himself positive action. This, it seems to me, is the reasonable interpretation of the correspondence; and, evidently it was so understood by the parties themselves. Both sides avoided immediate action. The matter was allowed to rest for a period of six months. Then, on October 11, 1901, Mr. Robb's attorney, without communicating with, or giving any warning to, the Security Trust Company or its attorney, went into the Court of Errors and Appeals, and procured an order dismissing the writ of error. The order, it is true, was made as of April 13, 1901, but it was procured on the 11th of October. The indorsement upon the order of dismissal is, "Filed October 11, 1901, as of April 13, 1901." In the circumstances, the procurement of that order must be regarded, I think, as the voluntary and deliberate act of Mr. Robb. He can-

not, in my judgment, justly claim that this order of dismissal, made upon the motion of his own attorneys, released him from the obligation of his bond here sued on.

As there was no conflict of evidence in respect to the material facts, the court, I think, rightly directed a verdict for the plaintiff.

FEE et al. v. DURHAM.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1903.)

No. 1,617.

1. MINING CLAIMS—RIGHT OF RELOCATION—FAILURE TO COMPLETE ASSESSMENT WORK.

Rev. St. § 2324, as amended by Act Jan. 22, 1880, 21 Stat. c. 9, p. 61 [U. S. Comp. St. 1901, p. 1426], requires \$100 worth of labor to be performed on each mining claim in each calendar year, commencing on the 1st of January succeeding the date of location, and provides that "upon a failure to comply with these conditions the claim or mine on which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators * * * have not resumed work upon the claim after failure and before such location." A locator commenced his annual assessment work on December 26th, and his employes worked until the night of December 30th, which was Saturday, when they quit until Monday morning, January 1st, and then resumed work, in the meantime leaving their tools on the claim. They continued the work until \$500 worth had been done, but less than \$100 worth had been done on Saturday night. Sunday night, between 12 and 1 o'clock, plaintiffs went upon the claim and relocated the same. *Held* that, in contemplation of law, the original locator continued in actual possession from Saturday night until Monday morning, and his work was continuous, and that plaintiffs were trespassers, and acquired no rights by their relocation.

Sanborn, Circuit Judge, dissenting.

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

The High Peak placer mining claim was duly located January 1, 1898, by the grantors of the defendant in error. On the 26th of December, 1899, the original locators of the claim commenced to do the assessment work for that year. Laborers, provided with suitable tools for the purpose, worked continuously during the usual working hours of each day from the 26th of December up to Saturday evening, December 30th, when they left off work, leaving their tools on the ground intending to resume work Monday morning, which they did, and thereafter prosecuted it diligently until largely more than the assessment work required by law had been done. Acting on the assumption that the original location of the claim was forfeited, and that it was open to relocation, because the full amount of the assessment work for the year 1899 had not been done before the expiration of the year, the plaintiffs in error, a few minutes past midnight on the last day of December, 1899, entered upon and relocated the claim, and afterwards brought this action of ejectment to recover possession thereof from the defendant in error. A jury trial resulted in a verdict and judgment for the defendant, and the plaintiffs sued out this writ of error.

The only question in the case which it is material to consider arises on the court's charge to the jury, which was as follows: "In determining this

¶ 1. See Mines and Minerals, vol. 34, Cent. Dig. § 59.

case you will start out with the assumption that the defendant's location on the first day of January, 1898, was valid. That gave him until midnight of the thirty-first day of December, 1899, to do such work as was necessary to hold the claim; and it is undisputed in this case that the defendant did not do the work during the year 1899 necessary to hold the claim; therefore at midnight on the 31st day of December, 1899, his claim forfeited, and the land became subject to relocation and entry, unless it appears from the proof that the plaintiffs relocated the land before the defendant resumed work upon the claim after his failure and before such relocation; but if you find from the evidence that the defendant commenced work on the 26th day of December, 1899, and prosecuted said work until the 30th day of December, that day being Saturday, and that on that day his laborers engaged in such work left their tools upon the ground at the place where they were engaged in work, intending to return on Monday morning, January 1, 1900, and that they did return at the usual hour on that day, and continued said work with reasonable diligence until the amount required by law had been performed, and that all of said work was done by defendant in good faith, intending thereby to perfect his title to the land, and that plaintiffs or any of them had knowledge that the defendant was thus engaged in such work on said land, and in order to defeat his claim entered upon said land between the hours of twelve o'clock at midnight and one o'clock on the morning of January 1st, and posted notice on said land, then the plaintiffs were trespassers upon the land in the possession of defendant, and such attempted location, under such circumstances, was void, and they acquired no right thereunder as against the defendant; but, on the other hand, if the defendant did not resume work on said land until the 4th day of January, 1900, and in the meantime the plaintiffs had filed for record the location of said lands, then the plaintiffs would be entitled to recover." The giving of this instruction, to which due exception was taken, is now assigned for error.

The act of Congress requires that \$100 worth of labor shall be performed or improvements made on every located mining claim during each year until the patent issues, and the act of Congress approved January 22, 1880, 21 Stat. c. 9, p. 61 [U. S. Comp. St. 1901, p. 1426], provides that "the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim."

J. W. Black, S. W. Massey, J. C. Floyd, and Robert Neill, for plaintiffs in error.

S. W. Woods and John B. Jones, 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 defendant's grantors were in the actual possession of the claim, actively engaged in doing the annual assessment work thereon, when the plaintiffs entered upon the claim and made their location. The entry and location, under these circumstances, was a trespass, and no rights were acquired thereby. The Lebanon Mining Co. of New York v. The Consolidated Republican Mining Co., 6 Colo. 371; Weese v. Barker, 7 Colo. 178, 2 Pac. 919; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735. Inchoate rights to the public lands cannot in any case be acquired by trespass or by violence. An entry upon the prior possession of another is a trespass, and tends to provoke violence, homicides, and other crimes, and one making such an entry gains nothing by it. Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732.

The original locators must be held to have been in the actual possession of the claim at the time the plaintiffs made their location. The suspension of work Saturday night, intending to resume it Monday morning, and leaving their tools on the ground for that purpose, was not, in any sense, an abandonment of their possession for the time between Saturday night and Monday morning. In contemplation of law, their possession was as complete and actual during that time as if they had remained at work during the night and on the Lord's Day. They were not required to work during the night or on the Lord's Day in order to maintain their possession and make their assessment work continuous. Their possession was attested and protected by their work and the presence of their tools. They could not lawfully work on the Lord's Day if they had desired to do so, for the law of the state forbids labor on that day under a penalty. Sand. & H. Dig. § 1887. Resting from their work from Saturday night until Monday morning was no more an abandonment of their work or possession than the cessation of work to eat their midday meal would be.

Under the act of Congress the failure to do the required assessment work within the year does not absolutely and irrevocably render the claim subject to relocation. It has this qualification: "Provided that the original locators * * * have not resumed work after failure and before such location." Referring to this statute the Supreme Court of the United States in *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, said:

"Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. * * * Mining claims are not open to relocation until the rights of the former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up."

The original locators in this case had not abandoned their claim, but were actually and continuously at work from the 26th of December until an early day in January, when they had done \$500 worth of work. There was no suspension of the work during this time, and there was no period of time during which the plaintiffs could enter and make a valid location. The continuity of the work and possession was not broken by the cessation of labor at night and on the Lord's Day. It must be conceded that if the original locators had "resumed work" after the clock struck 12 on Saturday night, December 31st, that the plaintiffs' location would have been invalid. We think upon the facts in this case, for all legal purposes, the original locators must be held to have been prosecuting the work for the whole of that night, and that the plaintiffs could not rightfully enter upon the claim and make a valid location between midnight and the usual hour of resuming work on Monday morning. *Pharis v. Muldoon* (Cal.) 17 Pac. 70; *Belcher Consolidated Gold Mining Co. v. Deferrari*, 62 Cal. 160.

The instructions of the court are in harmony with the views we have expressed. The judgment of the Circuit Court is affirmed.

SANBORN, Circuit Judge (dissenting). The portion of the act of Congress which conditions the decision of this case reads:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." U. S. Comp. St. 1901, § 2324.

The practical effect of the opinion of the majority of the court is to amend the portion of this statute preceding the stars, which is quoted above, so that it shall read:

"On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, or the locator shall during the year commence to do this work or make these improvements, shall leave some idle tools upon the ground, and shall during the year form an intention to complete the work or improvements after the expiration of the year, and shall subsequently effectuate that intention."

This change of the statute by judicial interpretation seems to me to be unwarranted, because it has the effect to annul the condition precedent prescribed by the act of Congress for the validity of a mining claim, that not less than \$100 worth of labor shall be performed during the year, and to substitute for it a requirement of an indefinite and an infinitesimal amount of labor in the teeth of the rule that statutes should be so construed as to effectuate rather than to destroy the enactments they contain (Potter's Dwaris on Statutes and Constitutions, p. 128, § 16), because the language of the statute is plain and its meaning is clear, so that it is not fairly open to a construction which so emasculates it (*Lake Co. v. Rollins*, 130 U. S. 662, 670, 9 Sup. Ct. 651, 32 L. Ed. 1060; *U. S. v. Hartwell*, 6 Wall. 396, 18 L. Ed. 830; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Knox Co. v. Morton*, 68 Fed. 787, 789, 15 C. C. A. 671, 673; *Railroad Co. v. Sage*, 71 Fed. 40, 47, 17 C. C. A. 558, 565); and because this interpretation really makes an exception to the provision of the statute when its terms are plain, and contain no exception, so that the legal presumption is that Congress intended to make none (*Shreve v. Cheesman*, 69 Fed. 785, 786, 16 C. C. A. 413, 414; *Madden v. Lancaster Co.*, 12 C. C. A. 566, 573, 65 Fed. 188, 195; *Morgan v. City of Des Moines*, 60 Fed. 208, 8 C. C. A. 569). The opposite construction, the interpretation that the statute means what it expresses, that it means as it reads, that if the \$100 worth of work is not performed within the year the locator's right to the mining claim ceases, and that claim becomes subject to relocation at any time before he resumes his work, has been adopted by the Supreme Court in many cases, notably in *Jackson v. Roby*, 109 U. S. 442, 3 Sup. Ct. 301, 27 L. Ed. 990, where that court says of this section:

"The act of 1872—and its provisions are re-enacted in the Revised Statutes—declares that on each claim subsequently located, until a patent for it is issued, there shall be annually expended for labor or improvements \$100, and on claims previously located an annual expenditure of \$10 for each one

hundred feet in length along the vein, and provides that when such claims are held in common the expenditure may be upon any one of them. And it declares that upon a failure to comply with these conditions the claim shall be opened for relocation in the same manner as if no location of the same had ever been made, provided the original locators, their assigns or representatives, have not resumed work upon it after failure and before relocation."

Turning now to the facts of this case in the light of the act of Congress and its interpretation by the Supreme Court, we find that in order to sustain the validity of the mining claim of the original locators they were required to perform work of the value of \$100 on or before midnight of December 31, 1899; that they performed work of the value of only \$15 prior to that time; that they were not at work upon the claim when that day expired; that the statute declared that it then became "open to relocation in the same manner as if no location had ever been made"; that between that time and 1 a. m. of January 1, 1900, the plaintiffs relocated the claim in strict conformity to the provisions of this statute; and that the original locators had not then resumed and did not resume work upon it until 7 o'clock on that morning. These facts seem to me to establish in the plaintiffs a perfect right to this mining claim under the statute which has been quoted.

It is said in the opinion of the majority that this relocation was ineffectual and void because the mining claim was in the possession of the original locators, because its relocation was a trespass, and therefore no rights in favor of the plaintiffs could be founded thereon; and *Lebanon Min. Co. v. Consolidated Rep. Min. Co.*, 6 Colo. 371, *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919, *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732, and *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, are cited in support of this position. These authorities, with the exception of *Belk v. Meagher*, which will be subsequently discussed, are not applicable to the question at issue in this case. They go no farther than to establish these two propositions: (1) That a location cannot lawfully be made upon public land in the possession of another who holds it under color of title to a prior and superior inchoate right to it (*Lebanon Min. Co. v. Consolidated Rep. Min. Co.*, 6 Colo. 371, 379; *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919); and (2) that a right to a mining claim or to any other title cannot be lawfully initiated by a forcible, as distinguished from a peaceable, entry (*Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732). The case at bar does not fall under either of these propositions. In the first place the original locators had no title or color of title to a superior or to any inchoate right to this claim when the plaintiffs relocated it. They, therefore, had no right which drew to them the lawful possession as against the plaintiffs, and they were not in the actual possession of it. The inchoate right of the original locators had ceased at midnight of December 31, 1899. Their possession, as against qualified locators, had also ceased, because the statute declared that the moment they had failed to do the work within the year the land was open to relocation, notwithstanding their possession, in the same manner as if no location of the same had ever been made. The only right remaining in the original locators was the right to resume be-

fore the plaintiffs relocated the land, and this was a mere floating right, subject to the earlier exercise of the right of the plaintiffs. The plaintiffs first exercised their right, and thereby secured the superior claim. In the second place, the entry of the plaintiffs was peaceable, not forcible, so that it does not fall under the rule in *Atherton v. Fowler*, which was made for the express purpose of avoiding violence and personal injury in the assertion of conflicting claims.

Nor does the fact that the plaintiffs relocated this claim between 12 o'clock and 1 o'clock at night militate in any way against its validity. Congress in its wisdom provided that the man who first after midnight of December 31st in each year relocated a forfeited claim should have the prior right to it when they enacted that the year within which the work should be done should commence on the 1st day of January succeeding the date of location. U. S. Comp. St. 1901, § 2324. They might have provided that this year should commence at the hour when courts generally open, at 10 o'clock in the forenoon, and then the relocations would have been made between 10 and 11 in the morning. Under the act as Congress saw fit to enact it, the custom and practice of miners has been, is, and naturally will be, to make most of their relocations between 12 and 1 at night (*Lindley on Mines*, § 652, p. 823), because only in this way can they be sure that the exercise of their rights will precede the exercise of similar rights by others. In this state of the law and the practice of miners it is not perceived that later relocations would be either more righteous or more secure than those made immediately after the expiration of the year fixed by the act of Congress.

It is believed that under the provisions of the act of Congress under consideration the original locators of this claim had no inchoate right to it and no possession of it when the plaintiffs relocated it; that the plaintiffs' peaceable entry for that purpose was not a trespass; that their relocation established in them a perfect right to this mine superior to that of the original locators; and that these propositions are sustained by the act of Congress itself, and by the decisions of the courts, which have considered and decided the questions here presented. U. S. Comp. St. 1901, §§ 2322, 2324; *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. Ed. 735; *Du Prat v. James*, 65 Cal. 555, 557, 4 Pac. 562; *Russell v. Brosseau*, 65 Cal. 605, 608, 609, 4 Pac. 643; *Kramer v. Settle*, 1 Idaho, 485, 491, 492; *Renshaw v. Switzer* (Mont.) 13 Pac. 127; *Morgan v. Tillottson*, 73 Cal. 520, 15 Pac. 88.

Section 2322, U. S. Comp. St. 1901, under which the original locators held this claim, provided that "the locators of all mining locations * * * so long as they comply with the laws of the United States * * * shall have the exclusive right of possession and enjoyment" of their respective claims, and this provision was equivalent to a declaration that they shall not have the right to the possession and enjoyment of the claims when they cease to comply with the laws of the United States. When the plaintiffs made their relocation the original locators had ceased to comply with these laws, they had not performed the work which those laws required them to do during the year 1899 as a condition precedent to the continuance of their right, and they had no right either to the claim or to the possession of it.

Section 2324 makes this conclusion clear, for it provides that upon a failure to perform this work within the year the claim shall be "open to relocation in the same manner as if no location of the same had ever been made," unless the original locators resume work before relocation is made. When the plaintiffs relocated the claim the original locators had completely failed to do the required work of the year 1899, and they had not resumed work upon this claim. They were not in the actual occupation of it. The entry of the plaintiffs upon it was peaceable, necessary to the exercise of the right given them by the statute, and it was made for the express purpose of enforcing that right. This entry, this relocation, could not have been a trespass, for a trespass is an unlawful interference with the right of another, and this relocation did not impinge upon any of the rights of the original locators or of any other parties. The only right they had was the right to resume work before the plaintiffs relocated the claim. The right to resume and the right to relocate vested in the respective parties the instant the 31st day of December passed. Congress granted the right to the land to the parties who first exercised their right. The plaintiffs exercised their right to relocate before the original locators exercised their right to resume and they thereby acquired the better right to the property. Their acts of entry and relocation did not constitute a trespass, because they violated none of the rights of the original locators, but simply asserted and exercised a right Congress had expressly granted to them. These views are not without support in repeated decisions of the courts.

In *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. Ed. 735, Belk had made a location of a mining claim, had performed work upon it, but had failed, like the original locators here, to fully comply with the statutes. No one had entered upon or interfered with his possession, and he was working upon the claim from time to time. He was at least as completely in possession as were the original locators in the case at bar. Thereupon, the defendants in that case, as the plaintiffs did in this case, peaceably entered upon and relocated the mining claim, and Belk insisted, as do the original locators in this case, that the property was covered by his location and was in his possession, so that the entry of the relocators was a trespass, and could not be the basis of any lawful claim, under the rule in *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732. But the Supreme Court said:

"Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in he was in law out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732, to the contrary of this. In that

case it was held a right of pre-emption could not be established by a forcible intrusion upon the possession of one who had already settled upon, improved, and inclosed the property. Upon that proposition the court was unanimous. We also agree that, if a peaceable entry had been made on lands which had not been enclosed or improved, a good right might have been secured. * * * His (Elk's) possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry peaceably and in good faith for the purpose of securing a right under the act of Congress to the exclusive possession and enjoyment of the property. The defendants, having got into possession and perfected a relocation, have secured the better right."

In *Du Prat v. James*, 65 Cal. 555, 556, 557, 4 Pac. 562, the plaintiffs had located a mining claim, had performed the necessary work for the years 1876, 1877, 1878, and 1879, and had done work of the value of \$9 in the year 1880. Thereupon, on January 1, 1881, the defendants entered upon the possession of the plaintiffs, and relocated the claim, and the latter insisted that their relocation was a trespass and ineffectual. The Supreme Court of California said:

"It has been held by the Supreme Court of the United States, and by this court, that a person cannot enter upon the actual possession of another for the purpose of laying foundation for a pre-emption claim to public lands of the United States; and it is claimed by the appellant that the same principle operated upon the parties to this controversy, and the defendants could not lawfully enter upon the possession of the plaintiff and make a valid location, nor acquire any rights as against the plaintiff; that the defendants could not, by a trespass, lay a foundation for obtaining the benefit of the act of Congress for the location of mining claims. The cases of *Eilers v. Boatman*, 3 Utah, 159, 2 Pac. 66, and *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919, are cited to support this view; but we think a close examination of the act of Congress (Rev. St. §§ 2322, 2324) shows the reverse to be the better view. After declaring in section 2322 that the locators of all mining locations, so long as they comply with the laws of the United States, and with the state, territorial, and local regulations, not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, etc.; and, after declaring in section 2324 that a certain amount of labor shall be performed in each year, it is provided in section 2324 that 'upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made.' It seems from the foregoing that plaintiffs' only right to the possession depended upon the performance, annually, of the specified labor, and, the labor being unperformed, the ground, was open to relocation. The act of Congress does not say the ground shall be open to relocation if the labor be unperformed 'and' if it be unoccupied; on the contrary, as above said, it is open to relocation if the labor be unperformed. It is urged that the clause of section 2324, giving to the original locator the right to perform the labor after the failure and before the relocation, gave him the right (as against the relocater) to remain in possession and exclude all others. The logical result of that proposition would be to annul the requirement for the performance of the labor; for, if he may remain and prevent relocation for one day, he may for a year—he may for an indefinite period. Congress had the power to impose such conditions on the right to the possession of the public lands as it saw fit, and we think such conditions must be complied with. It will be observed that the entry of the defendant was peaceable and in good faith. The right of the original locator to perform the labor after a failure, and have the benefit of his location, is dependent upon his having performed the labor before the relocation."

To the same effect are *Russell v. Brosseau*, 65 Cal. 608, 609, 4 Pac. 643; *Kramer v. Settle*, 1 Idaho, 491, 492; *Renshaw v. Switzer*

(Mont.) 13 Pac. 127; *Morgan v. Tillottson*, 73 Cal. 520, 15 Pac. 88. Any other rule, as the Supreme Court of California well says, practically repeals the statute, for if a locator, by depositing idle tools and forming an intention, may hold the possession and the title to a mine against all comers for one hour, he may for two hours, two days, for an indefinite time. No case in which this question has been considered has come under my observation in which there is a decision which either conflicts with or modifies the rule established by these authorities. There is nothing of that character in the cases of *Pharis v. Muldoon* (Cal.) 17 Pac. 70, and *Belcher Consol. G. M. Co. v. Deferrari*, 62 Cal. 160, cited in the opinion of the majority. In each of these cases the original locators had resumed work upon the mining claim before the relocation was perfected. In the case at bar there was no resumption or attempted resumption until after the relocation had been made. The act of Congress and the authorities under it seem to me to be clear and conclusive that where the work is not done within the year the right of the locator ceases. Nothing but the required work will preserve it. Neither idle tools lying upon the ground nor good intentions can, in my opinion, be substituted for the work required, because the statute excludes them when it expressly limits the condition precedent to the performance of the work within the year. When the failure to do that work has occurred, nothing but a resumption of the work before a relocation will, in my opinion, sustain the original location. Tools upon the ground, intention to resume, resumption after relocation, are each and all alike ineffectual to re-establish the original location, because the act of Congress expressly excludes them when it declares that resumption of the work before the relocation, and that alone, can re-establish the original location.

For these reasons, in my opinion the judgment below ought to be reversed, and a new trial of this case ought to be granted.

NORTHERN PAC. RY. CO. v. MIX.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1903.)

No. 854.

1. MASTER AND SERVANT—RAILROADS—COLLISIONS—INJURIES TO BRAKEMAN.

Plaintiff, who was head brakeman on a train known as "162 East," was injured by a head-end collision with another train known as "159 West." Train 162 East was started under an order which made no reference to train 159 West, and no effort was made by defendant's train dispatcher to inform the operatives of train 162 East of the other train until some time after the train had left B., and until after the lapse of time within which train 162 East should have been expected to pass the only station at which it could have received such information, when the dispatcher called the operator, who erroneously reported that the train had not yet arrived, he having been asleep when the train passed. The dispatcher then issued orders which resulted in the collision. *Held*, that whether the train dispatcher was guilty of negligence in failing to timely send notice to train 162 East where to meet and pass 159 West was for the jury.

2. SAME—COMPLAINT—NEGLIGENCE.

A complaint charging that defendant sent plaintiff, as brakeman on one of its trains, along a single track, and negligently omitted to give plaintiff, or any of the crew operating with him, notice that it was at the same time sending another train in the opposite direction on the same track, which must necessarily meet in a very short time, without making any provision for either train to take a siding, contained a sufficient averment of negligence.

3. SAME—INSTRUCTIONS.

In an action for injuries to a brakeman, an instruction that it was defendant's duty to all operatives to prevent passing trains from colliding, and to exercise ordinary and reasonable care to cause to be notified the operatives on one train of the approach of a train in the opposite direction, and to give such orders as will insure the safe passage of the one by the other was not error.

4. SAME—TRAIN DISPATCHER—REPRESENTATION OF RAILROAD COMPANY.

A railroad train dispatcher issuing orders for the movement of trains in the name of the superintendent represents the railroad company, which is liable for such dispatcher's negligence.

5. SAME—RAILROAD RULES—DUE CARE.

The rules of a railroad directing the action of the train dispatcher are prima facie evidence of what is due care on his part, and a violation thereof is prima facie evidence of negligence.

6. SAME—APPEAL—RIGHT TO ALLEGE ERROR.

Where a railroad collision in which plaintiff, a brakeman, was injured, was caused by a train dispatcher's negligence in failing to obtain seasonable information of the movement of a train and in issuing a train order on erroneous information received from a local telegraph operator that a train, which had passed his station while he was asleep, had not passed, defendant was not entitled to complain of an instruction that the local telegraph operator was a fellow servant of plaintiff, and, if the accident happened solely through his negligence, defendant would not be liable.

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

Wm. Wallace, Jr., for plaintiff in error.

T. J. Walsh, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The collision which gave rise to this action for damages occurred on the Rocky Mountain Division of the Northern Pacific Railroad, about $1\frac{1}{4}$ miles east of Hellgate station, between a train known as "162 East," consisting of 39 cars loaded with freight, and one known as "159 West," consisting of a car of horses and a caboose. Both trains were extras, and were, therefore, operated not according to the regularly prescribed schedule, but under special orders of the train dispatcher, acting for and in the name of the superintendent of the road. Missoula, Mont., was the division headquarters, at which was located the chief dispatcher for the division, although it seems that for convenience in train dispatching the division was divided into different dispatching districts; that part of the main line between Helena and Missoula being called the "First District," that part west of Missoula the "Second District," and the branch leaving the main line at Garrison and running to

Silver Bow and Butte, Montana, being called the "Montana Union Branch." In the early part of the night of December 24, 1899, train 162 East, on which the plaintiff below (defendant in error here) was head brakeman, was at Missoula, east-bound, and train 159 West was at Silver Bow, west-bound. 162 East was, therefore, the superior, and 159 West the inferior, train. Eastward of Missoula, to and including Garrison, the stations, sidings, and distances are as follows: Bonner, 7.4 miles east of Missoula; Bonita, 18.1 miles east of Bonner; Carlan, 7.6 miles east of Bonita; Bearmouth, 7.8 miles east of Carlan; Hellgate, 5.3 miles east of Bearmouth; Drummond, 6.9 miles east of Hellgate; Garrison, 20.9 miles east of Drummond. Silver Bow is on the branch line 44.4 miles from Garrison. At the time in question the only night telegraph offices between Missoula and Garrison were at Bonita and Drummond, and there were none on the branch line between Garrison and Silver Bow.

The evidence shows without conflict that train 162 East was started from Missoula under "Train Order No. 91," to "run extra Missoula to Helena, and meet 2nd No. 53 and extra 153 West at Missoula, and meet extra 155 West at Bonner." That order was made "complete"—that is to say, it had been correctly repeated by the local operator to the dispatcher, and by him signed and entered of record, at 9:38 p. m.—and about 10:40 p. m. of December 24th train 162 East left Missoula, east-bound. Order No. 91 was the only order the conductor or engineer or any other of the crew of train 162 East received prior to the collision. It made no mention, as will have been seen, of train 159 West. Shortly after train 162 East left Missoula, to wit, at 11:21 p. m. of December 24th, the train dispatcher at that place sent "Order No. 98" to the conductor and engineer of train 159 West at Silver Bow to run 159 West extra from Silver Bow to Garrison. Shortly after 1 a. m. of the 25th of December, and just before train 159 West arrived at Garrison, the dispatcher called the local operator at Bonita, and asked him about train 162 East. The response was, "Not here yet." At 1:05 a. m. of December 25th, train 159 West arrived at Garrison, and at 1:10 a. m. the local operator there reported to the dispatcher at Missoula that it would be ready in 10 minutes to start west. About 1:10 a. m. the dispatcher again called the local operator at Bonita, and asked if there was any sign of 162 East, to which inquiry he replied, "No sign." Thereupon, and at 1:19 a. m., the dispatcher sent to Bonita "Train Order No. 3" to 162 East to meet 159 West at Carlan. This order was also given, at 1:20 a. m., to train 159 West at Garrison. Shortly after train 159 West left Garrison, the dispatcher instructed the operator at Drummond to put out the "red signal," so that he could reach that train in the event he wished to change the place of its meeting with train 162 East. On receiving notice of the arrival of 159 West at Drummond about 1:57 a. m., the dispatcher called the operator at Bonita again, asking for train 162 East, the latter replying, "Not here yet." The dispatcher then asked if he was sure they had not gone by, and the local operator replied, "Yes." The dispatcher asked, "Yes what?" and the operator replied, "Yes, I am certain that 162 East has not passed." Thereupon the dis-

patcher issued "Train Order No. 4," to the effect that train 162 East and train 159 West should meet at Bonita instead of Carlan, which latter order became complete to train 162 East at Bonita at 2 a. m., and to train 159 West at Drummond at 2:02 a. m. of December 25th. Neither order No. 3 nor order No. 4 was ever delivered to train 162 East, the evidence being that prior to the issuance of either of those orders train 162 East had passed Bonita station. Having passed extra 155 West at Bonner, as directed in the order under which it was running, train 162 East reached Bonita about 12:35 a. m. of December 25th, found the white signal out, indicating its right to continue its journey, and, after stopping at the water tank at that station for about 15 minutes, proceeded eastward without any knowledge on the part of its conductor, engineer, or any other member of its crew that train 159 West was coming westward on the same track, until the collision occurred. Such is the undisputed evidence in the case.

The evidence further shows without conflict that the local operator at Bonita was asleep when train 162 East passed that station, which accounts for his answers to the two inquiries made of him by the dispatcher concerning that train. But according to the evidence the dispatcher did not even attempt to notify train 162 East of the fact that train 159 West was traveling westward, nor did he make any inquiry concerning train 162 East until after the latter had not only actually passed, but until after the lapse of time within which it should have been expected to pass, the only station at which it could, by any possibility, have received such information, namely, Bonita; for, as has been seen, train order No. 3, sent by the dispatcher from Missoula, was not sent to the operator at Bonita until 1:19 a. m., nor was any inquiry made of him until after 1 a. m. of the 25th, prior to both of which times train 162 East had passed Bonita, having arrived there at 12:35 a. m. and left at 12:50 a. m. of the 25th. Of course, if the operator at Bonita had been awake, as he should have been, and had informed the dispatcher, in answer to his inquiries concerning train 162 East, that it had already passed Bonita, the dispatcher might have held train 159 West at Drummond, or perhaps have put it on some other siding, and thus have avoided the collision. But even if, in giving his untrue answers to the dispatcher's inquiries, the operator at Bonita could properly be regarded as a fellow servant of the crew of train 162 East, that would not relieve the defendant company of the charge of negligence committed by its representative, the train dispatcher, in failing to send timely notice where to meet train 159 West. He knew that train 162 East was at Bonner about 11:35 or 11:40 p. m. of the 24th, for train 155 West passed it there, and reported that fact to him on its arrival at Missoula at 12:10 a. m. of the 25th. The distance from Bonner to Bonita is but 18.1 miles, and the chief dispatcher himself testified that, according to his figures, train 162 East must have left Bonner about 11:35 or 11:40 p. m., and that according to his experience it would take it about 1 hour and 15 minutes to run to Bonita, although freight trains of that class, said the witness, "have made the run in much less than that time—an

hour or less." The plaintiff's testimony is to the effect that the average running time of such trains between those stations is 1 hour and 5 minutes, and that on the occasion in question it was about 1 hour. There was no error in permitting the usual running time between Bonner and Bonita to be shown, for it bore directly upon the question of what was timely notice by the dispatcher to train 162 East where to meet train 159 West. Taking the running time as 1 hour and 15 minutes, and the time of departure of train 162 East from Bonner as 11:35 or 11:40 p. m. of the 24th, it should have been expected to reach Bonita at 12:50 or 12:55 a. m. of the 25th. That station, it is well to repeat, was the only station at which it was possible for the dispatcher to notify train 162 East that it must necessarily meet train 159 West going in the opposite direction. Yet it was after 1 a. m. of the 25th before the dispatcher made any effort to get into communication with train 162 East.

In respect to these matters there is, as has been said, no conflict in the evidence. The court below was not only justified in submitting the question of negligence to the jury, but we are of opinion that the evidence is amply sufficient to sustain the verdict against the defendant company on the ground of the negligence of the company's representative, the train dispatcher. Moreover, because we held, in *Oregon Short Line & U. N. Ry. Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965, as have other courts, that a local operator, in delivering orders from the train dispatcher to the trainmen, is a fellow servant of the latter, it by no means follows that in answering the inquiries of the train dispatcher, upon which he may or may not issue orders, the local operator is to be regarded as a fellow servant of the trainmen. That question, however, we find unnecessary to decide in this case, for the reason already suggested.

It will be observed that every order issued to either of the trains in question was issued by the dispatcher in the Missoula office, so that the circumstance urged by counsel for plaintiff in error that the Rocky Mountain Division was divided into different dispatching districts is without significance. So far as these particular trains are concerned, at least, their movements were directed entirely by the dispatcher at Missoula.

In the view we take of the case, it is unnecessary to consider the ruling of the trial court in excluding the letter of the local operator at Bonita, written the day after the collision, confessing that he was asleep when train 162 East passed his station, and endeavoring to explain his action in running away immediately after hearing of the accident.

The objection that the complaint does not charge the defendant company with any negligence is without merit. It charges that the defendant sent the plaintiff, as brakeman on one of its trains, along its single track, and negligently omitted to give the plaintiff, or any of the crew operating with him, notice that it was at the same time sending another train in the opposite direction on the same track, which trains must necessarily meet within a very short time, and without making any provision for either train to take a siding. That is a sufficient averment of negligence.

It is contended on behalf of the plaintiff in error that the trial court erred in instructing the jury that it was the duty of the defendant company "to give such orders as will insure the safe passage of the one [train] by the other." The court, after stating that the plaintiff alleged, in effect, that the defendant company negligently omitted to inform him, or any of the operatives on his train, that the other train was approaching, and that the collision occurred by reason of the negligence of the defendant in that regard, instructed the jury as follows:

"It is the duty of the defendant company to all operatives upon its road to take all reasonable care and precaution to prevent opposing trains on its line of railway from colliding, and to exercise ordinary and reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of a train in the opposite direction, and to give such orders as will insure the safe passage of the one by the other.

"With regard to the movement of trains, the train dispatcher stands in the place of the defendant. His orders are issued in the name of the superintendent, representing the defendant, and for any negligence on the part of the train dispatcher the defendant is liable. If, accordingly, you find from the evidence that the failure of the operatives on train 162 East to receive notice of the approach of 159 West was due wholly or in part to any negligence on the part of the train dispatcher, then the defendant company was negligent, and your verdict should be for the plaintiff. It is not necessary, in order that the plaintiff may recover, that the negligence of the train dispatcher should be the sole cause of the collision; if his negligence contributed to—that is to say, had a share in producing—the injury, the company was liable, even though the negligence of the telegraph operator at Bonita also contributed to the collision.

"It was the duty of the defendant railway company, when it put the two trains in motion in opposing directions on the same track, if it did so, to make suitable provision and to exercise ordinary and reasonable care for their safe management, guarding against danger of accidents. This was a positive duty upon the part of defendant, which it owed to its employés; and if this duty was delegated to any particular agent, such as a train dispatcher, and such agent was negligent in the performance of that duty, his negligence in that respect is the negligence of the defendant.

"It was the duty of the defendant company to regulate the time and manner of running its trains so as to avoid collisions, and to exercise reasonable care to enable all its servants engaged in operating any particular train upon its line of railway, and who would be imperiled by a collision, to know when a train might be expected, which would be likely to collide with the other train. As to what is ordinary and reasonable care depends upon the circumstances and upon the danger to be apprehended. The greater the danger to be apprehended, the greater should be the care exercised.

"In considering the question as to what is due care on the part of the train dispatcher, you are advised that the rules of the defendant company, so far as they purport to direct the action of the train dispatcher, are prima facie evidence of what is due care on his part; and a violation of these rules by the train dispatcher would be prima facie evidence of negligence on his part. The position of train dispatcher of a railway company is one calling for the exercise of a high degree of care and caution. * * * One [who] enters into the service of another and engages in a particular employment is presumed to do so with a knowledge of and a taking of the risks of its ordinary hazards and dangers, in which the negligence or carelessness of a fellow servant or fellow servants is included.

"The duty alleged as owing by defendant to plaintiff in paragraph 4 of the complaint was to advise the servants operating any particular train as to where it would be met or overtaken by any other train; and, second, to give train crews orders where they should await other trains to pass them. The law does not demand that the railway company shall see to it, under all circumstances, that such directions actually reach the train crew.

"The standard system of train movements, as in force upon the Northern Pacific Railway, is a reasonably safe system for the movements of trains, and in this respect, as to the adoption of the system, the defendant has complied with its duty. Under this system the dispatcher gains his information of the whereabouts and of the arrival and departure of trains from the local telegraph operator. The local telegraph operator is a fellow servant of the plaintiff, and, if an accident happens solely through the carelessness or fault of the local operator, the defendant would not be responsible to the plaintiff in damages therefor. If the collision in the present instance was due solely to the local operator Laird's failure to report the passage of extra 162 East to the dispatcher, then the defendant is entitled to a verdict in this action."

Whether the instruction last quoted concerning the local telegraph operator was entirely correct, in view of the facts of this case, we need not decide, for the reason already stated; but certainly the plaintiff in error has no cause to complain of it. The other instructions above quoted embody, we think, a full and correct statement of the law applicable to the evidence in the case. There was no error in refusing the instructions requested by the plaintiff in error; nor do we find any error prejudicial to the rights of the plaintiff in error in any of the rulings of the court below.

The judgment is affirmed.

GODCHAUX et al. v. MORRIS et al.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1903.)

No. 1,189.

1. JUDICIAL SALE—PROPERTY OF CORPORATION—NECESSARY PARTIES TO RULE FOR CONFIRMATION.

Neither stockholders nor general creditors of a corporation, without liens, are necessary parties to a suit to enforce liens on its property; nor need they be served with a rule for confirmation of a sale of such property.

2. SAME—VALIDITY—IRREGULARITY

The failure of a commissioner appointed to make a sale of property under a decree of court, through inadvertence, to offer separately one parcel of land, of small value, as required by the terms of the decree, before offering all as a totality, is a mere irregularity, which will not defeat confirmation where no loss or injury resulted.

3. SAME—FEDERAL COURTS—PLACE OF SALE.

Where a federal court had jurisdiction to order a sale of real estate, the fact that its decree directed that the sale be made at a place other than "the courthouse of the county, parish or city, in which the property, or the greater part thereof, is located, or upon the premises," as required by Act March 3, 1893 (27 Stat. 751 [U. S. Comp. St. 1901, p. 710]), does not render the sale void, nor is it a ground for refusing confirmation, since the decree, although erroneous, is binding unless reversed on appeal.

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

Emile Godchaux, Alexis Brian, and R. E. Milling, for appellants.
James Legendre and Guy M. Hornor, for appellees.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The decree from which this appeal is taken is as follows:

"*Alfred H. Morris v. Caffery Central Sugar Refinery & R. R. Co., Ltd. In Equity.* (No. 12,992.)

"This cause came on to be further heard at this term on the oppositions of Charles Godchaux, agent, Moses Alexander, and Mrs. F. E. Marks, to the confirmation of the sale of the real estate of defendant reported to the court by A. G. Brice, Esquire, special commissioner, and upon the report of William Grant, Esquire, special master, upon said oppositions, and the objections to his report, and was argued by counsel. Whereupon, in consideration thereof, it is now ordered, adjudged, and decreed as follows:

"First. That all the objections to the report of said special master be overruled, and that his report be in all respects confirmed; the court being fully satisfied with the correctness of the special master's conclusion, both of law and of fact.

"Second. It is further ordered that the opposition of Charles Godchaux, agent, of Moses Alexander, and of Mrs. F. E. Marks, filed to the rule for the confirmation of the sale made by the said A. G. Brice, special commissioner, be overruled, and that the sale of the property of the defendant corporation to Charles Godchaux, agent, made on the 29th day of March, 1902, for the price and sum of one hundred and fifty thousand dollars, as reported to the court by said special commissioner, be now in all respects approved.

"Third. It is further ordered that upon the tender by the special commissioner to him of a deed executed before notary public of the city of New Orleans, in which the notes and bonds secured by mortgage on the said property shall be surrendered and canceled, the purchaser shall forthwith pay into the hands of the special commissioner the sum of \$150,000, the purchase price at which the property was adjudicated to him, less the sum of \$15,000, already deposited on account thereof with said special commissioner.

"Fourth. It is further ordered that all the costs incurred on the oppositions to said sale, including a fee of \$500 to Wm. Grant, the special master, as an allowance for his services herein, to be taxed as part of the costs, be paid by the said opponents, Charles Godchaux, Moses Alexander, and Mrs. F. E. Marks, for which they are condemned jointly and severally."

The report of the special master, referred to in the foregoing decree, is substantially as follows:

"First. It appears from the record that a decree was entered upon the bill and answer in this case on the 18th day of February, 1902, ordering sale of the plantations of the defendant to be made by the commissioner at the front door of the customhouse in the city of New Orleans, for cash, upon thirty days' notice. By the terms of the decree the commissioner was directed to offer the properties for sale in lots as follows: First, the Caffery Central Refinery, with the three lots of ground connected therewith; second, the Stirling plantation; third, the Peebles plantation; fourth, the tract of land fourthly described in the decree. It is further ordered that, after the properties were so offered, they should be offered as one parcel, and, if the bid for them as a totality should exceed the aggregate of the bids for the several lots, then the bid for the properties as a whole should be accepted. It appears from the commissioner's report that he first offered the first three properties separately, but that, through an oversight, he omitted to offer the several parcel of land fourthly described. He then offered all the properties as one parcel, and struck them off to Charles Godchaux, agent, upon his bid of \$150,000, which was in excess of the aggregate amount bid for the properties separately. All these facts were reported to the court by the commissioner on the 11th day of April, 1902.

"On a rule taken by the complainant against the purchaser, Charles Godchaux, agent, to show cause why the sale should not be approved, objections were filed by the purchaser, by Moses Alexander, a creditor who has a privilege on the proceeds of cane sold to the defendant, and by Mrs. F. E. Marks, a stockholder in the defendant corporation. These objections may be stated and summarized as follows: (a) That all the stockholders and cred-

itors of the defendant corporation who have an interest in the sale were not made parties to the rule. (b) That sufficient time has not been allowed the parties in interest to file objections to the sale. (c) That the commissioner did not offer each of the four properties separately, nor afterwards offer them as one parcel, as required by the decree of sale. (d) That said sale was not made in the parish of St. Mary, where the greater portion of the lands are situated, as required by the act of Congress approved March 3, 1893 (27 Stat. 751 [U. S. Comp. St. 1901, p. 710]). (e) That said property, owing to the present temporary financial depression, brought a grossly inadequate price, and that if reoffered it will bring its real value.

"I shall consider these objections separately, in the order here stated:

"(a) The objection that all parties in interest, including stockholders, mortgage and ordinary creditors of the defendant corporation, have not been served with a copy of the rule to confirm the sale, it seems to me, is without merit. It appears from the indorsements on the original rule filed April 21, 1902, that all the parties to the record, except Moses Alexander, a creditor for the price of cane sold to the refinery, have accepted service of the rule, and consented to the confirmation of the sale. I do not think that the stockholders are entitled to notice of the rule, as none of them, except Mrs. Marks, who was permitted to file objection, have come into the case. They are represented by and through the corporation in all matters in litigation, and are not, as a general rule, permitted to appear in a suit and make a defense for the corporation in which they are shareholders, except where it is alleged that the corporation is fraudulently neglecting to defend its interest, etc. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827. Nor do I think that general creditors who have not come into the cause, and whose rights are not directly affected, are entitled to notice of the rule, or to be made parties to the cause. The general charge is made in the oppositions that all the parties in interest have not been served with the rule; but the supposed parties are not named, as they ought to be, under the rules of practice, to give the plaintiff a better writ. It appears from the evidence, however, that there are several suits pending against the defendant corporation in the district court of St. Mary Parish, a list of which is given in the transcript of evidence, and substantiated by copies of the records of the cases filed herewith. Judgments have been recovered against the Caffery Company in these cases, but they have not been signed, owing to the pendency of rules for a new trial, nor have they been registered in the mortgage office as liens on the lands sold by the commissioner, nor can they become operative liens if signed and registered in the future, pending the rule to confirm the sale, for it is an elementary rule that liens cannot be acquired on property in custody of the law to the prejudice of the *lis pendens*. My conclusion on this point is that neither stockholders nor general creditors without liens are necessary parties to a suit of this character in the first instance, under the rule that no one need be a complainant in whom there exists no interest, and none a defendant against whom nothing is demanded. *Kerr v. Watts*, 6 Wheat. 550, 5 L. Ed. 328. While the general rule is that all parties in interest must be made parties, it should be restricted to parties whose interests are directly in issue. *Mechanics' Bank v. Seaton*, 1 Pet. 299, 7 L. Ed. 152; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200. If all the unsecured creditors of a corporation in cases of this character, and its stockholders, are to be considered necessary parties, the court could never proceed to decree at all, for there will always be some who are unknown and neglect to come in. It follows that, if it is not necessary to make general unsecured creditors and stockholders parties in the first instance, they need not until they come in be made parties to a rule to confirm a sale.

"(b) The complaint that the rule to confirm the sale is premature, and does not allow sufficient time to file objections, is equally untenable. Equity rule 83, which gives parties 30 days in which to file objection to a master's report after it is filed in the clerk's office, does not apply to reports of sales made under a decree of court. *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

"(c) The objection that the commissioner did not first offer the four parcels of property separately, and that he did not afterwards offer them all as an

entirety, is only partially sustained by the proofs. The commissioner admits in his report that he did omit to offer the fourth parcel separately, but also reports that he secondly offered them all as a totality, as directed by the decree. The failure of the commissioner to offer one of the parcels separately, which was worth only about \$75, is, at most, merely an irregularity, which the court, in its undoubted discretion, may overlook, as it has injured no one, and did not affect the bidding. 2 Freeman on Executions, § 286. It forms no just ground for refusing to approve the sale. Moreover, the purchaser does not allege or show that he was ignorant of the irregularity complained of, or that he has been injured thereby, and it therefore may be assumed that he intended to waive it. While the stockholder and the general creditor who oppose the confirmation of the sale may have had no knowledge of the irregularity, they do not allege or show that the bidding was affected by it, or that they have been injured or prejudiced thereby. My opinion, therefore, is that, even if a stockholder or general creditor has any right at all to oppose a sale in cases of this character, the present opponents have not made a case by their averments or proofs which entitles them to relief in a court of equity.

"(d) The objection that the sale was not made at the courthouse in the parish where the principal part of the property is situated, as directed by the act of Congress approved March 3, 1893 (27 Stat. 751 [U. S. Comp. St. 1901, p. 710]), is a substantial one, and requires serious consideration. Section 1 of that act is as follows: 'That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the country [county], parish or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree may direct.' The third section directs that the notice of sale shall be published for at least four consecutive weeks in a newspaper published in the county and state where the property is located. But the act does not declare that a failure to comply with these directions shall render the sale null, nor is any penalty denounced for their violation. In this case the decree, by consent of the defendant, directed the sale to be made and the notice to be published in the city of New Orleans, both of which requirements were complied with by the commissioner; and the question, therefore, is whether the sale is void because the court did not require it to be made as directed by the strict letter of the statute. A clear distinction must be drawn between an error made by a court having jurisdiction of the cause of action in which the decree is entered, and the error of a ministerial officer, whose duties were prescribed by law, such as a sheriff, in the execution of a writ of fieri facias, or other similar process. The decree is valid until reversed for error, whereas the error of a merely ministerial officer renders his act void ab initio. Says the Supreme Court in *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283: 'A purchaser is not bound to look beyond the decree. If there is error in it of the most palpable kind—if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the cause before them—the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error. * * * These principles are settled as to all courts of record which had an original jurisdiction over any particular subject matter.' Says Chief Justice Marshall in *Ex parte Tobias Watkins*, 3 Pet. 193, 206, 7 L. Ed. 650: 'It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown by the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on writ of error.' Again: 'If an erroneous judgment binds the property on which it acts, it will not bind the property the less, because the error is apparent. Of that error, advantage can be taken only in a court which is capable of correcting it.' This doctrine has been affirmed in the following cases, and in many others not necessary to cite: *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. Ed. 531; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054. I do not understand that it makes any difference whether the error of the court consists of a departure from a mandatory or a directory statute. In either case it is neither more nor less than an error which can only be corrected by an appellate court. I considered, however,

that the statute is directory merely. This is the opinion of Judge Hawley, as expressed in his decision in the case of Nevada Nick: Syndicate v. National Nickel Company (C. C.) 103 Fed. 391. Commenting on the act, this learned judge says the provisions of the act of Congress in question are intended for the benefit and protection of the judgment debtor, which he may insist upon or waive as he sees fit. The case of Wilson v. Insurance Co., 12 C. C. A. 505, 65 Fed. 38, cited as an authority to the contrary, does not, in my opinion, have any application to the question here involved. In that case it appears that the master, in carrying out the decree of the court, which decree seems to have been correct, failed to publish the notice of sale for four consecutive weeks, as required by the statute, and it was for this reason that the confirmation of sale was refused. Here the master followed the decree of the court which prescribed the terms of sale, both as to the publication of notice, and the place where the property was to be offered. The errors of the court which renders the decree of sale, as I have shown, can only be corrected by a court of review, but the errors of the officer in making a sale renders his acts void. It is a settled rule that where a master, on reference, has followed the order of the decree, and followed its directions, no objection can be taken on appeal to what he has done, when the appeal arises on exceptions to his report, and not on objections to the original decree under which the reference to him was made. 'It is only where the master or the judge, in acting on his report, has departed from the order of the judgment, or has omitted to enforce its provisions, that a just objection can arise.' *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215. It follows that, if the court should now refuse to affirm the sale made by the commissioner pursuant to the decree of sale, its action would be erroneous, for the original decree, no matter what its errors are, must be followed until set aside in the manner provided by law. But whatever errors there may be in the decree, or in the manner in which the commissioner has acted under it, they have been released and waived by the resolution of the Caffery Company ratifying the sale, dated April 16, and filed in this cause April 24, 1902.

"(e) A large amount of evidence has been taken before me on the objection that the property was sold for less than its true value; but I find that this objection has not been sustained. The contention seems to be that the fact that the property was sold in New Orleans, instead of in the parish of St. Mary, ought to be considered as persuasive, if not conclusive, proof that the property sold for less than it would have brought if it had been offered in the parish of St. Mary, as directed by the act of Congress. The evidence has been directed, in the main, to show the actual value of the property, and whether it would have been advantageous to offer in the parish of St. Mary instead of in the city of New Orleans, rather than to show that the bidding was affected by the fact that the directions of the acts of Congress were not followed."

The special master embodies in his report a clear and full summary of the testimony of the various witnesses, and of the substance of the written instruments of evidence admitted by him on the hearing. From all of which he concludes that the properties sold by the commissioner brought a fair price, and that they would not have brought more if they had been offered for sale in the parish of St. Mary; that it is shown by the proper evidence which he files that the taxes due on the property have all been paid; and that, for the protection of all the parties in interest, the defendant corporation, the Caffery Company, has, under an order of court, conveyed the legal title to the properties sold to A. G. Brice, the receiver, who now holds the same subject to the orders of the court. He further shows that all the notes and bonds secured by the mortgage on the property have been delivered to A. G. Brice, the receiver, with authority to cancel the same upon the approval of the sale; that this will give the purchaser a clear title. In conclusion, the master reports that he finds no reason in law

or in fact why the sale of the property to Charles Godchaux, agent, should not be approved, and he so recommends.

The evidence summarized in the master's report, and fully embodied in the transcript of the record, amply sustains the master's finding of fact. His finding of law is likewise fully supported by the sound reasoning of the report, and by the persuasive and controlling precedents which he cites in support of his reasoning. We, therefore, being fully satisfied with the correctness of his conclusions, both of law and fact, concur in the action of the Circuit Court, adjudging and decreeing that all the objections to the report of the special master be overruled, and that his report be in all respects confirmed. The other portions of the decree appealed from follow, as a matter of course, or as the result of a reasonable and righteous discretion.

The decree appealed from is in all respects confirmed.

MACKAY v. FOX et al.

(Circuit Court of Appeals, Ninth Circuit. February 16, 1903.)

No. 867.

1. APPEAL—JUDGMENT—RECORD.

Where a copy of the judgment was contained in the transcript, the beginning of which recited, "On the 8th day of March, 1892, the court rendered judgment herein, which is in words and figures as follows, to wit," and the petition for a writ of error referred to the judgment as "heretofore rendered," and the writ referred to the "rendition of judgment," and the clerk certified that the transcript which contained the judgment entry was a "full, true, and correct copy of the records and proceedings," as the same remains of record on file in the office of the clerk, the appeal was not subject to dismissal on the ground that it did not appear from the transcript that the judgment was entered of record.

2. SAME—FILING JUDGMENT.

There is no provision in the Alaska Code (Act June 6, 1900, c. 786, 31 Stat. 379) requiring that a judgment shall be filed as a prerequisite to the perfecting of an appeal therefrom.

3. MINES AND MINING—ADVERSE CLAIMS—DEATH OF PARTIES—SURVIVAL OF ACTION.

Rev. St. § 956 [U. S. Comp. St. 1901, p. 697], provides that if there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the action shall not be thereby abated, but, such death being suggested on the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant. *Held*, that since, under Hills' Ann. Laws Or. §§ 369, 370, in force in Alaska at the time an action to determine an adverse claim to mining property was brought, such action survived the death of a party thereto, the fact that during the pendency of the action one of the two defendants died did not abate the action, but it was properly continued as against the surviving defendant.

4. SAME—NONJOINDER OF PARTIES.

An action to determine an adverse claim to a mining property was not subject to dismissal for nonjoinder as a party plaintiff of a person acquiring an interest in the property after the commencement of the action.

5. SAME—MISJOINDER OF PARTIES.

In an action to determine an adverse claim to mining property, the fact that parties were joined as plaintiffs who had parted with their interest in the subject-matter was no ground for dismissal.

6. SAME—OBJECTIONS—TIME.

An objection for nonjoinder or misjoinder of parties is too late when made for the first time at the trial of the cause.

7. SAME — ADVERSE CLAIM — FILING — APPLICATION—AMENDMENT—PROCURING PATENT—EFFECT.

Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], provides that, after the filing of an adverse claim to mining property, "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." *Held*, that where, after the filing of an adverse claim to a mining property, and during the pendency of the action to establish the same, the adverse claimant filed an amended application with the Interior Department, and obtained a patent for adjoining land under such amended application, not including any of the land in suit, the obtaining of such patent did not operate as a waiver of his adverse claim.

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

This action was begun by the defendants in error on April 27, 1896, under section 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1430], to determine their adverse claim and their right of possession to a mining claim on Douglas Island, Alaska, known as "the Ready Bullion, No. 2, Lode Mining Claim," for a portion of which the plaintiff in error and another had applied for patent. The claim was located on February 4, 1886, by Frank Mahoney. On May 19, 1887, Mahoney conveyed a one-half interest to Geo. Beaumont. On May 31, 1887, Mahoney and Beaumont conveyed a one-half interest to W. A. Sanders and Geo. W. Garside. On April 17, 1893, Sanders conveyed a one-eighth interest to W. A. Thompson. On October 5, 1893, Sanders and Thompson conveyed a one-third interest to Minnie Ross Holman. In the year 1896 Sanders and Thompson obtained the interest of Mahoney and Beaumont by forfeiture. It thus appears that the conveyance to Minnie Ross Holman was made after the commencement of the action, and that at the time of the trial the estates of Mahoney and Beaumont had no interest in the claim.

Malony & Cobb, John Flournoy, and L. S. B. Sawyer, for plaintiff in error.

John G. Heid and Alfred Sutro, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges

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

A motion is made to dismiss the writ because it does not appear from the transcript that the judgment was ever filed or entered of record. We find no ground to sustain the motion. In the transcript appears a copy of the judgment, at the beginning of which it is recited that "on the 8th day of March, 1892, the court rendered judgment herein, which is in words and figures as follows, to wit." The petition for the writ of error refers to the judgment as "heretofore rendered." The writ refers to the "rendition of the judgment." The clerk's certificate certifies that the transcript which contains the judgment entry is a "full, true, and correct copy of the records and proceedings as the same remains of record and on file in the office of the clerk." It is thus made sufficiently clear that the judgment, a copy of which is found in the transcript, was the judgment of the court, and that it was rendered on March 8, 1902, and entered upon the journal; otherwise it could not be among the records in the

case. The Code of Alaska does not require that the judgment shall be filed. Act June 6, 1900, c. 786, § 31 Stat. 379.

The action, as it was begun, was brought by the defendants in error against the plaintiff in error and Robert Duncan, Jr. Some two years later Robert Duncan, Jr., died. On December 2, 1901, more than two years after the death of Duncan, the defendants in error obtained leave to have the action continued as against J. P. Corbus, the administrator of Duncan's estate; but when the attention of the court was directed to section 35, part 4, of Carter's Annotated Code of Alaska, which provides that, in case of the death or disability of a party, the court may only within two years thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest, the court on December 9, 1901, set aside the order which it had made reviving the case against the administrator, and thereupon, under authority of section 956 of the Revised Statutes [U. S. Comp. St. 1901, p. 697], held that the action should be continued, tried, and determined without the revival thereof, both as against the surviving defendant and others interested with him. This ruling, and the denial of his motion to dismiss the action on the ground that it had abated by Duncan's death, the plaintiff in error assigns as error.

Section 956 provides as follows:

"If there are two or more plaintiffs or defendants in a suit, where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant."

There is no doubt that under this provision of the statutes the court properly denied the motion of the plaintiff in error. The cause of action was one which, not only at common law, but both by the Oregon law, which prevailed in Alaska at the time when the action was commenced, and by the Alaskan Code, which was in force when the court ruled upon the motion, survived the death of a party thereto. Hill's Ann. Laws Or. §§ 369, 370; Act June 6, 1900, c. 786, § 31 Stat. 391.

Equally without merit is the contention that the court should have allowed the motion to dismiss on the ground of the misjoinder of Garside and the representatives of the estates of Mahoney and Beaumont with the plaintiffs in the action, and the nonjoinder of Minnie Ross Holman as a party plaintiff. The interest of the latter was acquired two years after the commencement of the action. Her right therefore became subject to the final determination of the action as it was then pending, and, while she might have been brought in by supplemental pleadings, it was no ground to dismiss the action that she was not. Nor can the plaintiff in error complain that parties were joined in the action against him who had parted with their interest in the subject-matter thereof. The misjoinder of the plaintiffs, if misjoinder there were, affected no substantial right of the plaintiff in error. An objection for either nonjoinder or misjoinder comes too late when made for the first time at the trial of the cause. *Burbank v. Bigelow*, 154 U. S. 558, 14 Sup. Ct. 1163, 19 L. Ed. 51.

The important question in the case is whether the court erred in ruling that the defendants in error had not waived their right to the land in controversy by applying for and obtaining during the pendency of this action a patent for all of their lode claim except that portion which is embraced in the dispute between the parties hereto. The defendants in error in their complaint alleged that they were in possession of the Ready Bullion, No. 2, lode mining claim, with the right to occupy and possess the same; that the plaintiff in error and Duncan had ousted them from a portion thereof, consisting of eight acres, described by metes and bounds, and had applied for a patent for the Drumlummon lode claim, including therein the eight acres in controversy; that the defendants in error had in apt time filed their adverse claim, and had brought the action in support thereof. The opposite parties answered, denying the right of the defendants in error to the possession of the land in controversy, and alleging their right thereto by virtue of the location on May 14, 1895, of the Drumlummon claim. On the trial the defendants in error produced evidence to prove that their location was made on February 4, 1886, and evidence to show their present interest, and then offered in evidence the patent which was issued them on May 18, 1901, for all that portion of their claim save and except the ground in controversy. It does not appear from the record for what purpose the patent was offered. It had been issued during the pendency of the action, and was not referred to in any supplemental pleading. It was offered and received in evidence without objection. It is not pertinent to the present discussion unless it is to be deemed an admission on the part of the defendants in error that they relinquished their claim to all the ground not included in the patent.

It is argued that where two conflicting applications overlap, and, upon application of the owner of either for a patent, adverse proceedings under the statute are instituted by the owner of the other, and proceedings in the land office are thereby stayed, if either party thereafter relinquish the ground in dispute by filing an amended application for patent, it is a waiver of his claim to the ground in controversy, and that if, upon such amended application, a patent be issued from the land office, it can only be regarded as a recognition of the waiver by the officers of the land office. The trial court entertained this view, and intimated that he would have held that by amending their application, and obtaining a patent for all their claim except the disputed ground, the defendants in error waived all right to the latter, but for the decision of the Supreme Court in *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859. In that case the court, in dealing with the question of the effect of an amendment of the application of the original applicant pending adverse proceedings, said:

"But further, it is contended that the action of the owners of the Tyler claim in amending their application, coupled with the withdrawal of their answer, took them entirely out of the case in the District Court. It is said that they had abandoned all claim to the property theretofore in controversy, that they were really no longer parties to the action, and that it remained simply a case pending between the owners of the Last Chance and the United

States. Such seems to have been the view taken by the Court of Appeals when it held that the judgment was improperly admitted in evidence. We are unable to concur in this view. It may well be doubted whether the amendment filed in the land office has any force or effect during the pendency of the action in the District Court. Section 2326 provides that after the filing of the adverse claim 'all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. [U. S. Comp. St. 1901, p. 1430.] As said by this court in *Richmond Mining Company v. Rose*, 114 U. S. 576, 585, 5 Sup. Ct. 1055, 1059, 29 L. Ed. 273, referring to the action of the officers of the department pending proceedings in court: 'After the decision they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended'. It is suggested by counsel that the abandonment by the owners of the Tyler location of any claim to the disputed territory was, in effect, a waiver of the adverse claim, within the language of the statute, on the happening of which the right of the land office to proceed was restored. But that is not within the letter, even if within the spirit, of the statute. The adverse claim is the claim made by the party opposing the application, and the party to waive the claim is the one who makes it. The obvious meaning is that when an adverse claim is filed—that is, a claim filed by some one opposing the application in whole or in part—the proceedings in the land office shall be stayed until the determination of the dispute by the court in which the action is brought, or the party who has presented such adverse claim shall have in some way waived his opposition to the application. There was no waiver on the part of the parties who filed this adverse claim, and the only way in which any waiver is claimed to have been made was by a proceeding on the part of the applicants in the land office, and every proceeding there was, as we have seen, directed to be stayed. It is doubtless true that if, notwithstanding the pendency of such an action, the land office accepts a reduced application for ground, no part of which is covered by the adverse claim, and in respect to which there is no opposition, and proceeds subsequently, upon such amended application, to grant a patent, there is no one who can object, for the matter is one wholly of procedure between the United States and the applicant, and the former, by granting the patent, waive any irregularity in the procedure."

The difference between that case and the present case is that in the former it was the original application for patent that was amended, whereas in this case the amended application was made by, and the patent was issued to, the adverse claimant. It is in that difference that the difficulty is found in applying the doctrine of that case to this.

The statute (section 2326, Rev. St. [U. S. Comp. St. 1901, p. 1430]) provides in plain terms that the adverse proceedings may be brought to an end in one of three ways: First, by a settlement had between the parties; second, by a judgment of the court; and, third, by a waiver of the adverse claim. In *Richmond Mining Co. v. Rose*, 114 U. S. 576, 585, 5 Sup. Ct. 1055, 29 L. Ed. 273, Mr. Justice Miller said:

"We can imagine several ways in which it can be shown that the adverse claim is waived, without invading the jurisdiction of the court while the case is still pending. One of these would be the production of an instrument, signed by the contestant and duly authenticated, that he had sold his interest to the other party, or had abandoned his claim and his contest. Or, since the act says that all proceedings shall be stayed in the land office from the filing of the adverse claim, and not from the commencement of the action in the court, within 30 days, such delay of 30 days is made by the statute conclusive of a waiver. A filing in the records of the court by the plaintiff of a plea that he abandons his case or waives his claim might authorize the land office to proceed."

The first of these suggestions of the court contemplates that a waiver may be made by means of an instrument, executed by the contestant, acknowledging that he has "abandoned his claim and his contest," presented, not to the court, but to the land office, for the learned justice refers to it as a method of waiving the adverse claim "without invading the jurisdiction of the court"; and he proceeds thereupon to suggest, as another way in which the waiver may be shown, the production of such an instrument to be filed in the records of the court where the contest is pending. This is in harmony with the ruling of Secretary Lamar, who held that the adverse claim might, pending the action, be voluntarily dismissed in the land office without entering a discontinuance in the court. *St. Lawrence Min. Co. v. Albion Consol. Min. Co.*, 4 Land Dec. Dept. Int. 117. Indeed, it is apparent that the officers of the Land Department regarded the amended applications as waivers of the contested ground both in the Last Chance Case and in the present case, for otherwise it is not to be supposed that they would have issued the patents, in violation of the law, while the actions were pending in the courts. In the Last Chance Case the court gave as one of the reasons for not regarding the amended application as a waiver the fact that it was made, not by the adverse claimant, but by the original applicant, so that, while it might be within the spirit of the law, it was not within its letter. But the court elsewhere in the opinion gave expression to general views which would seem to sustain the doctrine that such an amendment of an application for patent pending adverse proceedings, whether made by the original applicant or by the adverse claimant, is absolutely void, and that, if not void, it still is not necessarily a waiver of the matter in dispute or determinative of the contest, but that, if patent be issued thereon, it is a matter which rests purely between the government and the applicant, and affects no right of the adverse party, and that the waiver contemplated by the statute must be one which in express terms acknowledges a relinquishment of all claim to the ground in dispute. It is suggested on the argument that the defendants in error made their amendment in this instance in reliance upon the doctrine of the Last Chance Case. Whatever may have been their purpose, it is very clear that they did not intend to waive their claim, and that they did not suppose that by amending their application and obtaining the patent they had done so; otherwise it is not conceivable that they would have proceeded with the litigation, or have voluntarily offered their patent in evidence. It is equally clear that the plaintiff in error had not been, so far as the record shows, injured or affected by the action of the defendants in error in obtaining their patent, and had not acted thereon to his disadvantage. Upon a careful review of the question, we are not convinced that the trial court erred in its ruling thereon.

The judgment will be affirmed.

MACGREGOR v. UNION LIFE INS. CO. OF OMAHA, NEB.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1903.)

No. 1,663.

1. AGENCY—BREACH OF CONTRACT CREATING.

A life insurance company which abandons its business by transferring it to another company, and thus disables itself from carrying out a contract by which it appointed a general agent or manager, and refuses to permit him to continue to act in such capacity, is liable for damages for breach of such contract, where, either by its terms or by implication, the agency was to continue for a certain term.

2. SAME—CONSTRUCTION OF CONTRACT CREATING—IMPLIED TERM OF CONTINUANCE.

By a written contract, plaintiff was appointed manager for defendant, a life insurance company, for a city and surrounding territory. The contract contained no specific statement of the term during which the agency should continue, but it required plaintiff to provide and maintain a suitable office at his own expense, and provided that he should be compensated by commissions on the business secured, according to a schedule therein, "during the term provided for in this contract," which commissions should be "subject to revision at the end of five years." It required plaintiff to solicit only good business, which would be a credit to both agent and the company, and which, in his judgment, would continue in force and pay premiums after the first year, and he was to receive a commission on such premiums. It provided that defendant might terminate the contract in case plaintiff should procure no applications during a period of two consecutive months, except in case of temporary sickness or accident, or for neglect of business on his part. There was also a provision with respect to the rights of the parties when the contract should be terminated "as herein otherwise provided," which gave plaintiff the right to a commission during his lifetime on renewal premiums if he should retire from the service at any time after three years' continuous service, unless he entered the service of another company. *Held*, that it was evidently the intention of the parties that the agency should be of a permanent character, and to fix a term for its continuance, and that there was an implied agreement, arising from the express provisions of the contract, that it should continue in force for a term of five years, which rendered it mutually obligatory during such term, unless sooner terminated by mutual consent, or in one of the ways provided for therein.

Sanborn, Circuit Judge, dissenting.

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

Charles F. Macgregor, the plaintiff in error, brought an action against the Union Life Insurance Company of Omaha, Neb., the defendant in error, to recover damages for the breach of a contract, which was as follows:

"This agreement, made and entered into, by and between the Union Life Insurance Company, of Omaha, Nebraska, party of the first part, and C. F. Macgregor, of the city of Kansas City, and the state of Missouri, as party of the second part, witnesseth:

"The said party of the first part, for and in consideration of the covenants and agreements hereinafter contained, which are to be kept and performed on the part of the said party of the second part, has this day appointed, and does hereby appoint, the said party of the second part its manager, within and for the city of Kansas City, and the counties of Jackson, Cass, Lafayette, Ray, Clay, Platte, Buchanan, Clinton, Caldwell and such other counties as may be hereafter assigned to this agency, with the authority to solicit, procure and forward to the said party of the first part, for its approval and ac-

ceptance, applications for insurance upon the lives of persons under the rules, regulations and terms prescribed by the said party of the first part.

"And the said party of the first part, agrees to allow and to pay to the said party of the second part, for the services to be rendered under this agreement, subject to revision at the end of five years, and to conditions stated in paragraph number three, of the following page of this contract, a commission to be computed upon each premium paid for the first year's risk, which shall be paid to and received by the said party of the first part, in cash, upon all policies of insurance issued by the said party of the first part, during the term provided for in this contract, upon applications obtained by the said party of the second part, at the rates printed in the company's current rate book, according to the following:

"Schedule of Commissions.

"Tables No. one and seven, ten per cent.

"Tables numbers two, three, four, eight, nine, and thirteen, eighty per cent.

"Tables numbers five, six (te), eleven, twelve, sixteen and seventeen, one hundred per cent.

"Table number fourteen, all of the first twenty-five dollars and five per cent. on the balance.

"Table number fifteen, the same rate of commissions as allowed on participating policies of the same character, less ten per cent.

"The said party of the second part, shall have a collection interest of seven and one-half per cent. of the second and each subsequent premium paid to and received by said party of the first part, in cash, on business written by him, and agents appointed by him, under this agreement, and the same shall apply to interest payments paid to the said party of the first part on single premium business. The said second party shall also have a commission of five per cent. on all sums paid in cash to said first party to reduce single premium loans. Commissions on all premiums collected and paid over as aforesaid upon policies issued upon applications other than as above described, and shall be determined by said company.

"The party of the first part shall supply its usual printed matter and stationery for the conduct of the business.

"In consideration of the covenants and agreements herein contained on the part of the party of the first part, the said party of the second part further covenants and agrees:

"I. That the payment of the commissions herein enumerated shall be full compensation for his services and during the continuance of this agreement he will send to the company only such business as in his best judgment will continue in force and pay premiums after the first year, it being the intent of this agreement to place on the books of the company only good business and that shall be a credit to both agent and company after the first year.

"II. That he will immediately enter upon the performance of the duties herein described, and continuously use his best endeavors to organize his field, secure good agents, and procure applications for insurance for said company. That if he shall procure no applications for insurance for said company during a period of two consecutive months, except in case of temporary sickness or accident, this contract may be declared void by said company without notice to said second party.

"III. That he will maintain a suitable office in Kansas City, and shall pay all the expenses of his agency, including office rent, clerk hire, telephone charges, office fixtures or furniture, his own expense of travel, and all expenses of his subordinates. He will also remit to the company with each monthly report, three dollars for each application forwarded to the company by him or his subordinates, during the month covered by his report, whether the applications are approved by the company or rejected.

"IV. That he will not create or assume to create any debt or obligation in the name of or purporting to be the debt of or obligation of said company, or otherwise impair the credit, standing and good name of said company.

"V. That on or before the tenth day of each month, he will make and send to the home office of the company a report containing a true account of all collections made, and all business entrusted to his care, also a statement of

expenses incurred and all other items called for in the report blank furnished by the company; he shall send with his monthly report vouchers for rent paid, and all office and field expenses, also for commissions, less amount covered by expense vouchers. He shall remit all cash collected less commissions provided for in this contract.

"VI. That he will send to the company with his monthly report one-half of the five year term premium, as now given in table No. seventeen of the company's current rate book, for each one thousand dollars of insurance written in excess of any five thousand dollars of insurance carried by the company on any one life.

"VII. That he will send to the home office on or before the tenth day of each month or with his monthly report all policies, premium receipts or collections of any kind, that are thirty days' past due and have not been delivered or settled for.

"VIII. That in case of his neglect or refusal to send said account or to make the remittance aforesaid, or when called upon or demanded by the company to make good any deficiencies, or whenever, in consequence of his neglect to attend to the collection of renewals, or of conduct prejudicial to the best interests of the company, it shall appear to be necessary to do so, the company shall have the right to immediately terminate this agreement.

"IX. That all books, records, papers, vouchers, and other documents in his hands pertaining to the business of said company, are the property of said company, and at all times subject to the inspection of said company, or its authorized representative, and he will immediately return to said company or its legally authorized agents any and all books and supplies above described, at the termination of this contract, or whenever requested to do so by said company.

"X. That he will furnish and maintain with said company a sufficient and satisfactory bond for the faithful performance of all agreements of this contract, and the duties pertaining to this agency, whenever requested to do so. And it is hereby mutually agreed by the parties hereto that when this contract shall be terminated as herein otherwise provided, therefrom all further rights and obligations hereunder shall cease excepting that if the said second party shall retire from the service of the said first part—, at any time, after three years continuous service under this contract, he shall, providing he does not enter the service of another life insurance company, be paid, during his lifetime, a renewal interest of five per cent. of cash premium receipts from all business written under this agreement.

"This contract shall date from March first, 1898.

"Signed this twentieth day of May, A. D. 1898.

"[Signed]

Union Life Ins. Co. of Omaha,

"By Euclid Martin, President.

"Attest. A. L. Wigton, Secretary.

"C. F. Macgregor."

After setting out the aforesaid contract in his complaint, the plaintiff alleged, in substance, that, acting under the contract, he had procured insurance on 108 lives, to the aggregate amount of \$421,000, which insurance yielded in annual premiums the sum of \$13,974.64; that on May 8, 1899, the defendant company entered into a contract with the Royal Union Mutual Life Insurance Company of Des Moines, Iowa, whereby it engaged to cease to solicit new insurance, and to transfer its good will and agency force to the last-named company, the latter company agreeing to reinsure all of the risks of the defendant company in consideration of its being paid "the full net four per cent. actuarial term rate for the age attained upon all policies hereby reinsured," and that the reinsuring company should proceed to issue supplemental policies by which it should assume all the liabilities of the defendant company on the outstanding risks thus reinsured. Plaintiff alleged that in accordance with this agreement the defendant company had discontinued its business as a life insurance company, and failed and refused to permit plaintiff further to prosecute his duties as defendant's manager according to the terms of his contract; that the defendant by the last-mentioned contract had divested itself of the power to keep and perform its part of the contract entered into with the plaintiff; that, by reason of the defendant's failure and refusal to

permit the plaintiff to further prosecute his duties under his contract, he had lost and would lose his earnings under the same, and had lost and would lose his collection interest upon premiums paid and thereafter to be paid as provided for in his contract, and had lost and would lose his collection interest in interest payments as provided for in said contract, and had been damaged in the sum of \$20,000, for which he prayed judgment.

The defendant below demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained, whereupon the plaintiff below declined to plead further, and a judgment was entered that the plaintiff take nothing by reason of his action, and that the defendant go hence discharged. To reverse the judgment, a writ of error has been prosecuted to this court.

Theo. L. Carns, for plaintiff in error.

O. H. Dean (W. D. McLeod, Hale Holden, and N. M. Hubbard, Jr., on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The complaint to which the demurrer was addressed contains allegations that are sufficient to show that the contract in suit had been broken by the defendant company when this action was commenced, unless the agency contract was of such a nature that the agency could be terminated at the pleasure of the company. The doctrine is elementary that when one of two contracting parties disables himself from performing the stipulations by him to be performed, or refuses to permit the opposite party to execute the agreement according to its tenor, he is guilty of a breach of contract, and may be sued therefor. *Wolf v. Marsh*, 54 Cal. 228; *Smith v. Jordan*, 13 Minn. 264 (Gil. 246), 97 Am. Dec. 232; *Webster v. Coffin*, 14 Mass. 196; *Bishop on Contracts*, §§ 826, 1426. In this instance the complaint not only alleged that the defendant company, by abandoning its business and transferring it to another, had disabled itself from keeping its engagements with the plaintiff, but it was also averred that it had refused to permit the plaintiff to further act as its solicitor and manager. The important question in the case, therefore, would seem to be whether the defendant company, acting within its rights under the contract, could terminate it without cause, at its mere pleasure, without incurring any liability to the plaintiff, who had agreed to act as its agent and manager.

A contract should always be so construed as to effectuate the intentions of the parties thereto; and, in determining what was their intention, everything within the four corners of the instrument is to be considered, as well as the situation and relations of the parties, and the subject-matter to which the contract relates. A mere glance at the agreement before us, as well as a consideration of the business to which it related, convinces us that it was not the intention of the parties to create an agency of a mere temporary character. One of the contracting parties was an insurance company which desired to build up a permanent and lucrative business in a large city and in a populous district adjacent thereto. To that end, it appointed the plaintiff, who was presumptively an experienced insurance agent, as its

manager at the place in question; agreeing to pay him as compensation for his services not only a commission on initial premiums, but also a commission of $7\frac{1}{2}$ per centum on all subsequent premiums on business solicited by him or any of the agents whom he might appoint, and binding him to send to the company only such business as, in his judgment, would "continue in force and pay premiums after the first year," and to solicit only good business, that would "be a credit to both agent and the company." These circumstances create a strong presumption that, in the contemplation of the parties to the agreement, the agency was to continue for a considerable period, and might last for years. Indeed, it can hardly be supposed that two persons entering into such a business arrangement, and having such objects in view, would intentionally leave either party at liberty to terminate it without cause at his mere pleasure.

Turning to the contract which is quoted above, it will be observed that in one of the opening paragraphs it was provided that the compensation agreed to be paid to the plaintiff should be "subject to revision at the end of five years," while in the same clause it was declared that the compensation specified should be paid "during the term provided for in this contract." In view of this language, it is manifest that the parties to the agreement supposed that they had fixed a period or "term" for the continuance of the agency. It will also be observed that in paragraph 2 of the agreement the defendant company reserved the right to declare the contract at an end if the plaintiff "shall procure no applications for insurance for said company during a period of two consecutive months, except in case of temporary sickness or accident"; also that by paragraph 8 it reserved the right to terminate it for any dereliction of duty, such as a neglect on the part of the plaintiff to attend to the collection of renewals, or if he was guilty of any conduct prejudicial to the interests of the company. These provisions reserving the right to declare the contract void and to terminate it for the reasons last specified were clearly unnecessary if it be true, as now claimed, that the defendant company had the right to put an end to the contract at any time at its mere pleasure. Moreover, provision 10 of the contract, on which some stress was laid in argument, as giving the plaintiff the right to abandon the agency at any time, did not, in our opinion, confer that right, but was only intended to secure to the plaintiff his right to commissions on renewal premiums, provided that the contract was terminated, after the plaintiff had been in service for as much as three years, for any of the causes therein specified.

It is a well-known rule for the construction of contracts that a contract should be interpreted, if possible, so as to give effect to all of its provisions, and not render any of them nugatory or useless; for, when parties insert independent stipulations in an agreement, they are supposed to have some object in view, and to have formulated them for the purpose of securing some right or guarding against some liability which otherwise would not be adequately secured or guarded against. It is also well settled that whatever may be fairly implied from the express provisions of an agreement is as binding and obligatory upon the parties thereto as that which is in terms expressed.

Williams Cooperage Co. v. Scofield, 115 Fed. 119, 123, 53 C. C. A. 23. Applying these rules to the contract in suit, and considering all of its provisions, we are of opinion that the contract created an agency for the term of five years, and that such was the intention of the parties: After the lapse of that period the plaintiff's compensation was to be readjusted, and if the parties failed to agree on that point the agency would necessarily end; there being no agreement for compensation after that time. If they did reach an agreement, a new contract would necessarily result therefrom; the old one becoming *functus officio*. It is true that the contract contained other provisions, to which reference has already been made, in virtue of which the agency might be terminated at an earlier day—as, for example, if the plaintiff failed for as much as two months to secure applications for insurance, or was guilty of any of the specified derelictions of duty; but, barring the termination of the contract in these ways, it was to continue, we think, for a period of five years, and in this respect was mutually obligatory upon the contracting parties.

The views heretofore expressed find support, we think, in the following cases: Thus in *Norton v. Cowell*, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331, an accepted offer tendering one wages at \$100 per month, and containing the further clause, "and if you give me satisfaction at the end of the first year I will increase your salary accordingly," was held to imply an engagement for a year's service. So, also, in *Gundlach v. Fischer*, 59 Ill. 172, where an agent was employed to sell certain machines, and the principal agreed that, if the agent faithfully performed his duties, he would furnish him such a number of machines as he might be able to sell prior to October 1, 1867, it was held that this imported a definite agreement that the agency should continue until October 1, 1867. And in the case of *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394, the court concluded that one who had been employed to come from a neighboring city, where he was manager of a hotel, and assume control of a hotel at Hot Springs, Ark., at a salary of \$125 per month and board for himself and family, in view of all of the circumstances, was engaged for a year, although there was no express promise to that effect. See, also, *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Danby v. Coutts*, L. R. 29 Ch. 500, 515. The general doctrine which is invoked by counsel for the defendant company, that a principal is entitled to revoke the authority of an agent at any time, when there is no express or implied agreement between them that the agent shall be retained for a definite period, is not denied; but in the case in hand we are of opinion, for the reasons already stated, that there was an implied agreement between the contracting parties that the agency here involved should continue for the period of five years unless it was terminated by mutual consent, or in one of the ways provided for in the contract. We conclude, therefore, that the petition stated a cause of action, and that the demurrer thereto ought not to have been sustained.

No question arises upon this record concerning the appropriate measure of damages for the breach complained of, and no opinion need be expressed on that point. Even though the damages for the breach shall prove to be nominal, the petition states a cause of action, and

whether it does state a cause of action is the sole question presented on the present occasion.

The judgment below is reversed, and the case is remanded for a new trial.

SANBORN, Circuit Judge, dissents.

GILBERT, Sheriff, v. AMERICAN SURETY CO. OF NEW YORK et al.

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

No. 886.

1. RES JUDICATA—JUDGMENT OF DISMISSAL—QUESTIONS RULED BY APPELLATE COURT.

Questions ruled by an appellate court are not thereby rendered res judicata as between the parties, where the judgment under review is reversed, and the cause remanded for a new trial, and is afterward dismissed by the trial court for the want of prosecution.

2. FEDERAL COURTS—FOLLOWING STATE DECISION—QUESTIONS OF GENERAL LAW.

A decision of the Supreme Court of a state on a matter of general law, such as the effect of the invalidity of a contract on the rights of the parties to a suit, is not binding upon a federal court.

3. SALE—TRANSFER OF PROPERTY TO ILLEGAL COMBINATION—RECOVERY AFTER EXECUTION OF CONTRACT.

Where a contract for the sale of personal property was fully executed by the payment of the consideration and the delivery of the property, which was then turned over to the seller as agent and employé of the purchaser, and held by him for three years in such capacity, he cannot thereafter claim such property as his own against the purchaser on the ground that the sale was made in furtherance of a combination in restraint of trade, and was therefore void as against public policy, since he is estopped to deny the title of his employer for whom he holds the property in trust.

4. REPLEVIN—LIABILITY ON BOND—ATTORNEY'S FEES.

Attorney's fees and stenographer's fees expended by defendant are not recoverable on a replevin bond.

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

The American Preservers Company, a corporation of the state of West Virginia, on May 11, 1891, brought suit in replevin against Andrew D. Bishop in a court of the state of Illinois, and caused a writ to be therein issued, directing the sheriff to take certain described property from the possession of Bishop and to deliver the same to the plaintiff in the writ, upon receiving proper bond in double the value of the property, stated to be of the value of \$9,000. The property mentioned was taken from Bishop and delivered to the American Preservers Company, the plaintiff in the writ, the sheriff taking from the plaintiff the bond in suit executed by the Preservers Company as principal and by the American Surety Company as surety, conditioned as follows: "Now, therefore, if the American Preservers Company, plaintiff, shall prosecute its said suit to effect and without delay, and make

¶ 2. State laws as rules of decision in federal courts, see notes to *Griffin v. Overman Wheel Co.*, 1 C. C. A. 518; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

See Courts, vol. 13, Cent. Dig. § 979.

return of the property recovered and taken under and by virtue of said writ of replevin issued in said cause, if return thereof shall be awarded, and shall save and keep harmless the said sheriff for having replevied the said property, and shall pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then this obligation to be void; otherwise to remain in full force and effect."

The issues in the replevin suit are stated at length in *Bishop v. American Preservers Company*, 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317. The trial of that suit resulted in a judgment for the plaintiff, which upon appeal was affirmed by the Appellate Court, and, upon further appeal to the Supreme Court, was reversed, and a new trial awarded upon the ground of the improper exclusion of evidence. The cause was thereupon redocketed in the trial court, and by an order therein entered on December 15, 1898, amending an order of May 5, 1898, the replevin suit was dismissed without a trial upon the merits, and a return of the property taken under the writ, together with the costs of suit, was adjudged. From the judgment awarding a writ of retorno the Preservers Company, plaintiff in the suit, appealed to the Appellate Court, and the judgment of dismissal with retorno habendo was there affirmed, and subsequently, upon further appeal, affirmed by the Supreme Court of the state.

This suit is brought against the principal and surety upon the replevin bond to recover, failing a return of the goods, the value of them, and damages by way of attorney's fees and expenses incurred in the defense of the replevin suit.

To the declaration the defendants in error inter alia pleaded that the property in the replevin suit sought to be recovered was the property of the American Preservers Company. To this it was replied that the property mentioned was not the property of the Preservers Company, but was the property of Bishop, because Bishop, being engaged in the business of manufacturing fruit butters and like products, was induced, by threats that otherwise his business would be ruined, to enter into a trust combination to prevent competition and to secure a monopoly in the manufacture of like articles of food throughout the United States (this agreement is set forth at large in the opinion of the court in 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 371); that his goods then on hand, inventoried at \$9,063.03, were transferred by bill of sale under seal executed by him in July, 1888, to the American Preservers Company, for which he received 331 shares of stock of that company, of the par value of \$33,100, which he assigned to the trustee of the trust, and received in lieu thereof 662 certificates of trust, of the par value of \$66,200; that said bill of sale was executed to aid the trust in controlling the entire manufacture of fruit butters and like products throughout the United States, and to create a monopoly in such manufacture and sale and to stifle competition; that such bill of sale constitutes the title of the American Preservers Company to the goods in question, and was held by the Supreme Court of Illinois in the case mentioned to be void, and that such ruling is conclusive and binding upon the parties to the suit; that in December, 1888, and in March, 1889, Bishop tendered his trust certificates to the general manager of the trust, and demanded a return of the property covered by its bill of sale, which being refused, he was induced to continue the management of the business and to render to the trust reports thereof until March, 1891, when he was advised that the trust agreement was illegal; that at the making of the bill of sale he was in possession of the property therein mentioned, and ever since that time has been in such possession, except so far as articles have been changed through sales and purchases.

At the trial it was shown that upon delivery of the bill of sale in July, 1888, Bishop was employed by the American Preservers Company at a salary of \$50 per week, to conduct the business sold by him to it, was placed in possession of the property as its agent for the purpose, opened a new set of books, insured the property in the name of the American Preservers Company, and made reports periodically to the company of the business, and continued so to do and to receive his stipulated salary, until just prior to the 11th of May, 1891, the date of the commencement of the replevin suit. The court refused to allow proof of the facts stated in the replication; directed

the jury to return a verdict for the plaintiff, and to assess "the plaintiff's damages at debt \$22,000, and damages at the sum of one cent, said debt to be satisfied upon payment of said damages of one cent and costs of suit," which was done. To review the judgment entered upon such verdict this writ of error is brought.

L. Evans, for plaintiff in error.

Alfred S. Austrian, for defendants in error.

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

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

It is provided by statute of the state of Illinois that in an action upon a bond given upon replevin the obligors in the bond may plead, in mitigation of damages, title to the property in dispute in the replevin suit, when the merits of the case have not been determined in that suit. 3 Starr & C. Ann. St. Ill. c. 119, par. 26, p. 3388; *Stevenson v. Earnest*, 80 Ill. 513. It was therefore open to the defendants in error to show in this suit that the title to the property involved in the replevin suit was in the American Preservers Company. This was shown by the bill of sale executed by Bishop to that company. That title, however, was sought to be rendered nugatory by evidence that the bill of sale was given in pursuance of an illegal trust agreement in restraint of trade; in other words, that Bishop, who had sold his plant and had received the stipulated consideration, and for nearly three years thereafter had been in the service of the vendee at a stipulated salary, could defeat his vendee's title, and hold as his own the plant sold by him of which he was in possession only as agent of his vendee, and including goods subsequently purchased by the vendee, because the agreement under which the bill of sale was executed was in restraint of trade.

It is primarily urged in support of this contention that the Supreme Court of Illinois had so ruled in the replevin suit between Bishop and the American Preservers Company (157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317), and that its decision is *res judicata* between the parties to that suit, and therefore conclusive in this suit. The vice of this contention is not difficult to be ascertained. It is not doubted that a decree of a court of competent jurisdiction is conclusive, in a second suit between the same parties or their privies, of every matter that was decided therein and that was essential to the decision made, and we have so held. *David Bradley Manufacturing Company v. Eagle Manufacturing Company*, 18 U. S. App. 349, 6 C. C. A. 661, 57 Fed. 980. In the replevin suit, however, there was no judgment determining the merits of the cause. The case was dismissed for want of prosecution, with the ordinary judgment for the return of the property taken in replevin. The decision of the Supreme Court merely ruled that certain evidence tending to show the illegality of the transaction, and which was excluded at the trial of the replevin suit, should have been allowed, and the judgment was therefore reversed, with a direction for a new trial. There was no new trial. The dismissal of the suit for want of prosecution is no bar to a

subsequent action—certainly not so persuasive as a judgment of nonsuit when the plaintiff's evidence has been heard; and the latter is not a bar to a second suit. *Manhattan Life Ins. Company v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; *Bucher v. Cheshire Railroad Company*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Gardner v. Michigan Central Railroad Company*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. The case of *Mitchell v. First National Bank of Chicago*, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. Ed. 627, does not, as was urged at the bar, hold otherwise. In that case there was final judgment of a state court, which was properly held conclusive under the general rule above stated.

Nor, while we read with great respect the decisions of the highest appellate court of the state of Illinois, can we recognize its ruling in the *replevin* case as binding upon us. The question upon which it passed was one of general law, and was not founded upon the construction of a statute of the state. In respect of such questions of general law, the federal courts cannot avoid the responsibility of deciding them for themselves as they may arise. In *Delmas v. Insurance Company*, 14 Wall. 661, 668, 20 L. Ed. 757, the Supreme Court said:

"But, as we have already said, this is not the class of questions in which we are bound to follow the state courts. It is not based on a statute of the state, or on a construction of such a statute, nor on any rule of law affecting the title to lands, nor any principle which has become a settled rule of property; but on those principles of public policy designed for the protection of the state or the public, of which we must judge for ourselves, as they do when the question is fairly presented."

See, also, *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Carpenter v. Providence Washington Insurance Company*, 16 Pet. 495, 10 L. Ed. 1044; *Railroad Company v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Boyce v. Tabb*, 18 Wall. 546, 21 L. Ed. 757; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Liverpool & Great Western Steam Company v. Phenix Insurance Company*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Gardner v. Michigan Central Railroad Company*, 150 U. S. 349, 358, 14 Sup. Ct. 140, 37 L. Ed. 1107.

Assuming that the agreement pursuant to which Bishop executed his bill of sale was, as held by the Supreme Court of Illinois in *Bishop v. American Preservers Company*, and within the principle laid down in *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, void as against public policy and in restraint of trade, and that therefore a court will not lend its aid to either party to such unlawful agreement, it is to be remarked that the supposed unlawful agreement had in fact been executed by the parties thereto. Bishop had made his bill of sale and given possession of his property to the Preservers Company in execution of the unlawful agreement. Such possession as he afterward had of that property was not in his own right as owner, but as agent of the Preservers Company. A trust character was assumed by him. We doubt if such illegal transaction can be made the subject of defense in an action at law, unless the suit be brought upon the illegal contract itself. We doubt if it can be thus attacked collaterally. It is

true that contracts which in themselves are directly in restraint of trade may in a suit based thereon be declared void and unenforceable by the court, but certainly one dealing with the principal of the illegal combination cannot defend against his contract made with such principal, although it was collateral to the arrangement for the combination, the action not being one to enforce the terms of the arrangement. *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732; *Smith v. Sheeley*, 12 Wall. 358, 20 L. Ed. 430; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473; *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Strait v. National Harrow Company (C. C.)* 51 Fed. 819; *Dennehy v. McNulta*, 30 C. C. A. 422, 86 Fed. 825, 41 L. R. A. 609; *The Charles E. Wiswall*, 30 C. C. A. 339, 86 Fed. 671, 42 L. R. A. 85; *National Folding-Box & Paper Company v. Robertson (C. C.)* 99 Fed. 985; *Harrison v. Glucose Sugar Refining Company*, 53 C. C. A. 484, 116 Fed. 304, 58 L. R. A. 915.

In the case at bar Bishop had sold his property to the American Preservers Company and parted with his title to it. He had delivered possession to that company. The illegal agreement between him and the promoter of the trust was executed. He thereafter was in possession of the property by virtue of his employment as agent of the company. He occupied a position of trust, holding the property and dealing with it for the company for a stipulated compensation, which he promptly received. He may not, after years of service under that arrangement, hold as his own the property which he had sold and for which he had received the agreed price. "An obligation will be enforced though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case." *Armstrong v. American Exchange Bank*, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747. We are not asked to enforce an agreement in restraint of trade. We are asked to declare that a trustee, receiving property from his principal and holding it in trust for the principal, shall not be permitted to convert it to himself. He is estopped to deny the title of his principal. There is no public policy which would warrant us to hold otherwise. We concur with the remark of the court in *Manchester Railroad Company v. Concord Railroad Company*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582:

"And, however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and common honesty, and which in conscience the benefited party cannot retain."

And we approve the observation of Lord McNaghten in *Nordenfelt v. Ammunition Co.* [1894] App. Cas. 535:

"There is a homely proverb in my part of the country which says you may not 'sell the cow and sup the milk.' * * * It seems almost absurd to

talk of public policy in such a case. It is a public scandal when the law is forced to uphold a dishonest act."

It is said that the court erred in not permitting the plaintiff below to prove the value of stenographer's fees and costs, including therein attorney's fees necessary and incidental to the conduct of a replevin suit. In this ruling we think the court was entirely right. *Conard v. Pacific Insurance Company*, 6 Pet. 262, 8 L. Ed. 392; *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181.

The judgment is affirmed.

UNITED STATES v. BASIO CO.

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

No. 871.

PUBLIC MINERAL LANDS—CUTTING TIMBER—STATUTES—CONSTRUCTION.

Act June 3, 1878, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528] section 1, provides that all citizens of the United States, bona fide residents of specified states and all other mineral districts of the United States, are authorized to remove timber on public mineral lands not subject to entry except for mineral entry, for building, agricultural, mining, and other domestic purposes. *Held*, that such act authorized the removal of timber not only from land on which mining claims had been located, or in which mineral has actually been discovered, but also on other lands lying in close proximity, or in the neighborhood of such mining claims, having the general character of mineral lands.

2. SAME—RULES OF INTERIOR DEPARTMENT—COMPLIANCE—BURDEN OF PROOF.

Act June 3, 1878, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528] section 1, authorizes the cutting of timber from public mineral lands, subject to such rules and regulations as the Secretary of the Interior may prescribe; and section 3 [U. S. Comp. St. 1901, p. 1529] provides that any person violating the act or any rules or regulations of the Interior Department shall be punished, etc. *Held*, that the burden was on the defendant in an action by the United States to recover for the value of timber cut from the public domain, in which it claimed that the cutting was justified by such statute, to show that it had complied with the rules and regulations established by the Interior Department in that behalf, and, where there was no evidence of a compliance with such rules and regulations, a verdict in favor of defendant could not be sustained.

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

R. V. Cozier, U. S. Atty.

W. B. Heyburn, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was an action brought by the United States in the United States Circuit Court for the District of Idaho to recover the sum of \$10,745.67 from the defendant in error, a New Jersey corporation doing business in Idaho, the alleged value of certain logs and lumber which the United States claimed were unlawfully cut from the public domain during the year 1898, and con-

verted by the defendant in error to its own use. The jury returned a verdict in favor of the defendant in error, and judgment was entered accordingly. The United States brings the case to this court upon writ of error.

It appears from the evidence that the defendant in error bought the logs and lumber in question from certain contractors, who cut the timber mainly from unappropriated public lands, and that the timber so cut was used by the defendant in error for mining purposes. The defendant in error justifies the cutting and use of the timber under the act of June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the territories to fell and remove timber on the public domain for mining and domestic purposes." 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528]. Section 1 of this act provides that:

"All citizens of the United States and other persons, bona fide residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such land, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations."

Section 3 [U. S. Comp. St. 1901, p. 1529], provides:

"Any person or persons who shall violate the provisions of this act, or any rules or regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months."

Under the authority of this statute, the Secretary of the Interior prescribed rules and regulations requiring, among other things, that every owner or manager of a sawmill, or other person felling or removing timber under the provisions of the act, should keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land whence cut by legal subdivisions, if surveyed, and as near as practicable when not surveyed, with a statement of the evidence upon which it is claimed that the land was mineral in character, and stating also the kind and quality of lumber manufactured therefrom, together with the names of the parties to whom such timber or lumber was sold, dates of sale, and the purpose for which sold. It was further provided that every such owner or manager of a sawmill, or other person felling or removing timber under the act, should not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same should not be used except for building, agriculture, mining, or other domestic purposes within the state or territory. It was also provided that every such purchaser should further be required to file with said owner or manager a certificate under oath that he purchased such

timber or lumber exclusively for his own use, and for the purpose aforesaid. It was required that the books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, should at all times be subject to the inspection of the officers and agents of the Land Department. It was further provided that timber felled or removed should be strictly limited to building, agriculture, mining, and other domestic purposes within the state or territory where it grew, and that all cutting of such timber for use outside of the state or territory where the same was cut, and all removals thereof outside of the state or territory where it was cut, were forbidden. It was also provided that no person be permitted to fell or remove any growing trees of any kind whatsoever less than eight inches in diameter. This last prohibition was not made applicable to black or "lodge pole" pine growing in separate bodies upon mineral lands. Persons felling or removing timber from public mineral lands of the United States were required to utilize all of each tree cut that could profitably be used, and were required to cut and remove the top and brush, and dispose of the same in such manner as to prevent the spread of forest fires.

The United States assigns as error the construction given by the court to this act in its charge to the jury. The instruction excepted to was as follows:

"The contention of the government, through the Department of the Interior, by its agents, is that the cutting of timber under this act must be limited to such portions of the land in a mineral district as is shown to actually contain mineral; that is, the mineral must be actually discovered in the ground. This, in fact, would be to limit it to that ground located as mining ground or mining claims, for it is a well-known fact that as fast as mineral is discovered the ground in which it is found is so located as a mining claim. Such a construction is, in my opinion, open to two serious objections: First. It would leave such an insignificant amount of land available to timber—for only a comparatively small portion of the land is covered by mining claims—that the supply would be totally inadequate to the necessities of the communities. There would not be sufficient timber on any one mining claim to supply even the wants of that claim in its development and operations. But the act provides not only for the use of the timber for the miner, but also every other citizen, and for every domestic purpose. Keep that in view—for all citizens and bona fide residents of the mining district, and for all domestic purposes. It was contemplated that by the discovery and development of a mining camp all other industries, including the building of mills, towns, etc., would follow. The act expressly provides that for all such wants the citizens could be supplied with the timber on mining lands. Even a slight knowledge of the operations and the necessities of a mining camp, with all its varied interests, will convince any one that these necessities cannot be supplied from the timber growing on the located mining claims or the equivalent—that ground actually shown to contain mineral. The second objection to this construction is this: That all the timber in the mining claims belongs not to the citizens generally, but to the owners of those claims, and other citizens cannot take or use it. So you will see that, if the cutting of timber is limited simply to that which grows on mining claims, nobody but the owners of the mining claims can use timber, although the law provides for its use by other citizens. These two conditions make the construction asked absolutely untenable. It would make the law a futile one. It would be almost worthless, and we cannot for a moment imagine that Congress contemplated it should be limited to the narrow lines now asked. I say distinctly, in my own opinion, that the law didn't intend the cutting of timber

to be confined to those grounds located as mining claims, or in which mineral had actually been discovered. If that is not the law, the question then is, what is the law? To what lands does this act of Congress refer? My answer to that is this: That the only reasonable construction to be given to it is that it includes as mineral lands not only those which have been located as mining claims, or in which mineral has actually been discovered, but also the other lands lying in close proximity to, or in the neighborhood of, such mining claims, or those having the general character of mineral lands.

"In this connection you must bear in mind that, as a rule, the land in a mineral district and in the neighborhood of mines is of such a hilly, broken character that it is utterly useless for agricultural or other purposes than mining, and for the timber growing upon it, and, as Congress is presumed to have known this fact, it is presumable that it intended to include all such lands under the designation of mineral lands, and with the view of granting the use of the timber thereon, as stated.

"As a further aid in reaching your conclusion upon this question, I instruct you that lands of this broken character lying reasonably near lands in which mineral has actually been discovered, and which is so like it in general appearance that miners would be justified in prospecting it in the expectation of discovering mineral, should be classed as part of the mineral lands of the mining district, and come within the purview of this law. * * * It is for you to determine, first, from the evidence in this case, whether these lands on which this timber was cut are of the character which I have described, and which I have instructed you should come under the head of mineral lands. If you find they are of that character, then the defendant was justified in cutting the timber from the land, and your judgment would have to be for the defendant. If, on the contrary, you find they are not of that character, do not come under the head of mineral lands, within the definition I have given you, then your judgment must be for the government for such damages as you may find, depending on the two rules I gave you in the beginning as to whether it was a willful or unintentional trespass."

In the case of *Frank P. Hardin et al.*, 1 Land Dec. Dept. Int. 607, the Secretary of the Interior discussed the scope and purpose of the act of June 3, 1878, and referred to the fact that prior to 1878 it was the custom in all the mining regions of the United States for the inhabitants to appropriate the timber on government lands for domestic purposes; that cities and towns, with churches and school-houses, had been built with the timber so taken from the public lands; and that the act of June 3, 1878, was passed to establish by positive enactment a right claimed and exercised without interference on the part of the government for a period of about 30 years. This broad construction of the act was given as instruction for the guidance of the officers of the Land Department in the enforcement of the provisions of the act, and in justification of this broad construction the Secretary said, "If the timber is cut having reference to the rules established by the department as to size, etc., no complaint ought to be made." We agree with the Secretary that this construction of the act is in harmony with its evident purpose, and is not open to serious objection, if the rules and regulations of the Land Department are observed and enforced. It has been the policy of Congress to develop the mineral resources of the country, and provide practical legislation to that end, placing only such restraint upon the settler and mineral explorer as would provide against waste and destruction. The act under consideration is part of this legislation, and, in our opinion, should be construed with reference to the conditions prevailing in the mining regions requiring that the taking of

timber for mining and domestic purposes should not be restricted to lands known to contain minerals in paying quantities, but should include such adjacent lands as, under all the conditions, would not be deemed to be subject to entry under any of the laws of the United States except as mineral lands; this right or privilege being exercised under such regulations as will preserve the timber for the benefit of the inhabitants engaged in or connected with the mining industry. The District Court for the District of Colorado in *United States v. Edwards*, 38 Fed. 812, and the Circuit Court for the District of Nevada in *United States v. Richmond Mining Co.*, 40 Fed. 415, have similarly construed the act in question. No adverse construction of the act appears to have been given by any of the federal courts. Nor has the Secretary of the Interior changed his ruling with respect to this feature of the act. The evidence in this case shows that most, if not all, of the land from which the timber was cut was classed as mineral by the miners in that vicinity and in the return of the Surveyor General. The instruction of the trial court with regard to the character of the land and the meaning of the act was not, therefore, in our opinion, open to objection.

It is further assigned as error that the court refused to instruct the jury that, even though the lands might have been mineral lands within the meaning of the act of Congress, if the cutting and removal of the timber therefrom was not done in compliance with the rules and regulations of the Secretary of the Interior governing such cutting and removal, such acts would be unlawful; and that it was necessary for the defendant in error, in order to justify the cutting and removal of the timber from the land in question, to show by a preponderance of evidence that it was done in full compliance with said rules and regulations. The act is specific in making the privilege of taking timber from the public domain for mining purposes subject to "such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth upon such land." The Secretary of the Interior has prescribed rules governing such taking of timber, and it is necessary, under the act, to show that timber was taken in accordance with the requirements of such rules as to show that it was taken from land of the character described in the act. It was, therefore, necessary for the defendant in error, the United States having established their title to the land in question, and the fact that the timber was taken therefrom, to show that the timber was taken for the purposes prescribed by the act, and in the manner directed in the rules and regulations of the Secretary of the Interior. There is no evidence in the record upon that subject. An instruction that such evidence was necessary was a proper one to give to the jury, and the United States was entitled to an instruction of that character. The court, in this connection, gave the following instruction:

"The law provides especially that the Secretary of the Interior may establish rules for the regulation of the cutting of timber, and especially as to the undergrowth. It is not always that rules established by the department under the law are valid rules. Rules established by the department must be in harmony with the law itself. There is one rule here which provides for the cutting of the undergrowth and the preserving of the undergrowth. This

comes clearly within the law, and there are some other rules there which I think are within the purview of the act. Some may not be. Now, there is no evidence here to show whether any of these rules were complied with or not, as I recollect; but you must be the judges of that. If there is no evidence whatever that those rules were complied with, then it results that they have not followed this law of Congress strictly. Those rules should have been complied with; but if you find that they have not complied with the rules, that does not authorize you, in my opinion, to assess the damages as in willful trespass. The most that can be done, if you find they acted in good faith in all other respects, would simply be to find the value as innocent trespassers. It would not go beyond that."

If it be contended that this instruction covered, in effect, that requested by the United States, then the verdict was against the instruction, and should have been set aside by the court.

The judgment of the Circuit Court is reversed, with instructions to grant a new trial.

FOLEY et al. v. GRAND HOTEL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1903.)

No. 1,781.

1. EQUITY—RELIEF AGAINST FORFEITURE—OPPRESSIVE CONDUCT IN PROCURING APPOINTMENT OF RECEIVER.

A hotel company which had leased its hotel, acting in concert with a company which had made a conditional sale of the furniture therein to the lessee, to be paid for in installments, instituted a suit in equity against the lessee, alleging his failure to pay two monthly installments of rent, and obtained the appointment of a receiver, without notice, who took possession of the hotel and its contents, including the furniture and the funds on hand. At that time the lessee was not in default on the furniture, and had paid a large part of the purchase money. An installment which came due the next day, however, was not paid, and the seller declared a forfeiture of the contract under its terms, and filed an intervening petition in the suit, claiming to be the absolute owner of the furniture, and asking that its rights as such be protected. The lessee assigned his interest in the furniture contract to appellants, who held a mortgage thereon; and they offered to pay the installment due the seller, which was refused. They then filed an intervening petition, tendering payment of the installments remaining due, and asking protection of their rights as assignees of the contract. The remedy at law of the plaintiff in the suit was adequate under the lease, and no sufficient showing was made to justify the appointment of the receiver. *Held*, that the parties concerned in instituting the suit having taken the property into a court of equity by an unusual and unauthorized proceeding, which itself apparently caused the default in the furniture payment, upon which the forfeiture was declared, the court should exercise its powers to protect the equitable rights of all other parties in interest, and that, on the facts shown, appellants were entitled to a decree permitting them to pay into court the remainder due on the furniture contract, and to become the owners thereof.

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

J. J. Shea (John P. Organ, on the brief), for appellants.
Charles M. Harl, for appellee Penn Mutual Life Ins. Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. From the record on file in this case, it appears that the Grand Hotel Company, one of the appellees, which owned a hotel in the city of Council Bluffs, Iowa, filed a bill of complaint against its tenant, D. C. Smith, wherein it prayed for the appointment of a receiver for the hotel property. The bill so filed contained no allegations, we think, which entitled the complainant to the appointment of a receiver, or to other equitable relief. It simply alleged that its tenant had leased the hotel for a period of five years from and after April 1, 1899; that he had failed to pay two installments of rent, in the sum of \$300 each, which were due, respectively, on June 1, 1901, and on July 1, 1901; and that he had suffered the hotel to run down, and had been careless in the management of the same. The bill of complaint showed on its face that by the terms of the lease the hotel company had the right to declare a forfeiture of the lease for the nonpayment of these installments of rent. Nevertheless, without declaring such a forfeiture, and bringing an action at law for an unlawful detainer if its tenant refused to surrender possession of the hotel property, it applied to a court of equity for equitable relief in the form of an order appointing a receiver; and the lower court, as we think, erroneously granted such relief, and assumed charge of the property through the hands of its receiver. The present appeal, however, does not challenge the order so made, and the action of the lower court in making it is not before us for review.

The bill of complaint was filed on July 31, 1901, and a receiver was appointed on that day by an order made without notice to the defendant. On September 23, 1901, the Penn Mutual Life Insurance Company, one of the appellees, which held a mortgage on the hotel, and also an assignment of the rents under the lease in favor of Smith, and which had also made a conditional sale of all the furniture in the hotel to D. C. Smith, the lessee thereof, filed what it termed an intervening complaint in the action that had been brought by the hotel company against Smith, the lessee. In its intervening petition the insurance company, after setting out the terms of the agreement under which it had sold the hotel furniture to Smith, alleged, in substance, that Smith had failed to pay one installment of the purchase money that was due on the furniture, amounting to \$150, which matured August 1, 1901; that by virtue of his failure to make this payment it had declared a forfeiture of all of his rights under the conditional contract of sale, as it had a right to do under the provisions of that instrument; and that the furniture in question was in the custody and under the management and control of the receiver theretofore appointed by the court for the hotel property. It accordingly prayed that the receiver might be adjudged to hold the furniture for the intervener's benefit, and that the court would protect its interest therein and its rights and title thereto. A few days later the hotel company made a merely formal answer, practically admitting all of the allegations of the intervening petition. Afterwards, on November 1, 1901, T. J. Foley, as surviving partner of the firm of Fenlon & Foley, and Peregoy & Moore, filed an intervening complaint in the equity cause. This intervening complaint stated, in

substance, that on April 9, 1901, D. C. Smith had executed and delivered a chattel mortgage, covering the furniture in the hotel, to secure the payment of an indebtedness which he owed to the interveners, and that on August 1, 1901, said Smith had executed in favor of the intervener J. M. Fenlon a written assignment of all his interest in the contract whereby he had purchased the hotel furniture from the Penn Mutual Life Insurance Company; that the interveners had offered to pay the Penn Mutual Life Insurance Company the installments of purchase money that were due to it under the conditional contract of sale, and were ready and willing to pay the same, but that the insurance company had refused to accept the money, and was insisting upon its right to retain the furniture and all of the purchase money theretofore paid by Smith, amounting in the aggregate to the sum of \$5,450. The interveners alleged that the hotel furniture was then of the reasonable value of \$7,500; that the insurance company was not entitled to hold the furniture as forfeited, together with all of the purchase money which had been paid thereon, but, at most, was only entitled to fair compensation for the use of the property while it had been in the custody of Smith, and to reasonable compensation for any depreciation in the value of the property during that period; and that such fair compensation for the use of the property and for any depreciation in value did not exceed the sum of \$1,500. The interveners accordingly prayed that the insurance company be required to receive from the interveners the sums of money due to it under the contract with Smith for the purchase of the furniture, or, if it declined to receive the same, that it be directed to pay into court, for the benefit of the interveners, the amount of money which it had received on account of the purchase, to wit, \$5,450; first deducting therefrom reasonable compensation for the use of the furniture, and for any depreciation in the value thereof. They further prayed the court to fully protect the interveners' interest in the hotel furniture, which they had acquired by virtue of the chattel mortgage and by virtue of the assignment aforesaid.

To this intervening petition the insurance company filed a reply in which it reasserted its right to hold the furniture and all of the purchase money which had been paid by the vendee. It also prayed that it be adjudged and decreed that it was the sole and absolute owner of the furniture in controversy, and that all of the rights of D. C. Smith, the purchaser thereof, and all of the rights of the interveners claiming under Smith, be adjudged forfeited.

Many other persons who had claims against Smith, the lessee of the hotel, on account of wages, etc., subsequently intervened in the cause; but the proceedings had thereon are unimportant, and need not be stated. By its final decree, which was entered on December 3, 1901, the lower court decreed that the claims of the interveners T. J. Foley, Perego & Moore, and J. J. Shea, as executor of the estate of James Fenlon, deceased, the latter of whom had been made a party to the proceeding, be fully barred and dismissed, and that the Penn Mutual Life Insurance Company was the full and absolute owner of the hotel furniture. From this latter order an appeal was taken by T. J. Foley and J. J. Shea, as executor of the estate of J. M. Fenlon,

deceased. Peregoy & Moore, as it seems, declined to join in the appeal, and they were accordingly named as appellees. The question to be determined, therefore, is one which arises solely between the Penn Mutual Life Insurance Company and Foley and Shea, the latter of whom claim to have succeeded to all the rights of D. C. Smith, the original purchaser of the hotel furniture. Some time after the litigation was inaugurated, Smith surrendered to the hotel company his lease of the hotel, and assigned to it all of his interest in the furniture now in controversy, subject, however, to the rights of the interveners, and is no longer interested in the litigation.

The principal error which the interveners assign is that the lower court erred in enforcing or declaring a forfeiture of their interest in the hotel furniture. It is said, and said truly, that a court of equity never lends its aid to enforce forfeitures, but leaves the parties concerned to assert their rights in a court of law. Courts of equity will grant relief against a forfeiture which has been incurred through accident or mistake, or by reason of any fraudulent, oppressive, or unfair conduct on the part of one who is asserting a right of forfeiture; but a chancellor will not lift his hand to aid a litigant in enforcing a forfeiture. *Marshall v. Vicksburg*, 15 Wall. 146, 149, 21 L. Ed. 121; *Livingston v. Tompkins*, 4 Johns. Ch. 415, 8 Am. Dec. 598; *Insurance Co. v. Norton*, 96 U. S. 234, 242, 24 L. Ed. 689; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 33, 11 Sup. Ct. 691, 35 L. Ed. 332. It is hardly accurate, however, to characterize the intervening petition of the insurance company as a bill to enforce a forfeiture, or the intervention by Foley and Shea as a bill to obtain relief against a forfeiture. After the lower court had appointed a receiver for the hotel property, including the furniture, both the appellants and the insurance company intervened in the case, as they were then obliged to do for the protection of their respective interests. The lower court, having the custody of the res, was asked by the insurance company to declare that it was the sole owner of the property, and had lawfully exercised its right of forfeiture, and to protect its interest, while the appellants asked permission to preserve their interest in the furniture by paying the installments of the purchase money which were due thereon pursuant to the conditional contract of sale. Both interveners were compelled to seek the forum in question after the receiver was appointed, and the court had assumed possession of the property in controversy.

The question of most importance in the case, as we view it, and the one upon which the decision principally depends, is whether the hotel company and the insurance company acted in concert in filing the original bill and procuring the appointment of a receiver. This is a question of fact, and we have considered it with some care, with the result that we have been constrained to believe that the bill was filed by the hotel company with the full knowledge and consent of the insurance company; the purpose of both parties being to force the lessee out of the hotel, and recover the possession of the same, as well as the possession of the furniture, with as little delay as possible. The question to be determined being, as above stated, one of fact, it would subserve no useful purpose to discuss the same at length.

It will suffice to say that the conclusion last announced has been formed after a perusal of all the testimony, and upon a consideration of the relations existing between the hotel company and the insurance company, and the circumstances under which the appointment of a receiver and the summary ouster of the tenant from the hotel was accomplished. These facts and circumstances leave little room for doubt that the two companies, acting in concert, and desiring to obtain the possession of the hotel and its furniture as expeditiously as possible, without resorting to a court of law, invoked the aid of a court of equity, and succeeded in obtaining it, although the remedy at law for the accomplishment of the object which they had in view was fully adequate.

The proceeding that the hotel company and the insurance company, acting in concert, saw fit to adopt for the attainment of their purpose, namely, the immediate ouster of the lessee, was certainly novel and without precedent. Moreover, when the proceeding had been chosen as the one most likely to lead to speedy results, the reasons that were assigned for the appointment of a receiver were clearly inadequate; and as the proceeding was unusual and based on insufficient grounds, and as the order appointing a receiver was made without notice, it doubtless took the defendant Smith, as well as the present appellants, who were then interested in the hotel furniture, by surprise. They were suddenly dispossessed of the property in controversy without an opportunity to be heard. Furthermore, as the receiver took possession of all the property in the hotel, including the furniture and the funds then on hand, and did so on July 31, 1903, the very day the bill was filed, it is fair to conclude that the action so taken at the instance of the hotel company, and with the knowledge and concurrence of the insurance company, occasioned the very default of which the insurance company now complains, namely, that Smith, the purchaser of the furniture, did not pay the sum of \$150 on account of the purchase price which was payable on August 1, 1901. It was on account of that default, and on account of Smith's alleged failure to pay certain taxes, that the insurance company claims to have declared a forfeiture of all of his rights under the conditional contract of sale. Up to that time Smith had paid to the insurance company the sum of \$5,450 on account of the furniture. No payment was due on July 31, 1901, but the appointment of a receiver on that day appears to have disabled the purchaser from paying the installment of the purchase money that was due on the following day, which result was doubtless foreseen and intended by those who were instrumental in obtaining the appointment and ousting the lessee from the possession of the hotel.

In view of the premises, we are of opinion that the trial court erred in declaring that the appellants' claims were barred, and that their intervention be dismissed, and in adjudging that the Penn Mutual Life Insurance Company was the absolute owner of the furniture in the hotel; thereby setting the seal of approval upon what had been done, and aiding the insurance company to obtain an absolute title to the furniture, as well as aiding it to appropriate to its own use the large sum of money that had already been paid thereon by the pur-

chaser. Inasmuch as the proceeding by which Smith had been dispossessed of the property in controversy was most unusual and operated as a surprise, and was in its nature oppressive, and had probably occasioned the very default on which the insurance company predicated its right of forfeiture, a court of equity, instead of declaring that the right had been lawfully exercised, and that the insurance company had become the absolute owner of the property, should have strained its powers to the utmost to prevent such a result, and the sacrifice of valuable rights by such means. Having possession of the res, it was within its power to have permitted the appellants to pay into court, for the use of the insurance company, the installments of the purchase price due on the furniture as they accrued, which payments the appellants offered to make. Under the provisions of the conditional contract of sale, the appellants had no right to pay at once all that was due on the furniture, and forthwith remove it from the hotel, because the contract in question contained a provision, in substance, that the furniture should remain in the hotel where it was located until the purchase money was fully paid, and that it should not be removed from the hotel without the consent of the insurance company. It was within the power of the lower court, however, to have permitted the appellants to make the payments on the furniture as they matured, by depositing the money in court for the benefit of the insurance company, if it declined to accept the money itself, and to have adjudged that when the property was paid for, and all other acts to be done by Smith had been faithfully performed by him or his assigns, the appellants be permitted to remove the property from the hotel, or make such other disposition of it as they thought proper. We think that the lower court, sitting as a court of chancery, should have exercised the power in question, and should have entered a decree, such as is above outlined, for the purpose of preserving the appellants' rights, and that it erred in refusing to grant such relief, and in decreeing, as it did, that the insurance company was the absolute owner of the property.

It is accordingly ordered that so much of the decree as adjudged that the appellants' claims be fully barred and their interventions dismissed, and that so much of the decree as adjudged that the insurance company was the absolute owner of the furniture, be reversed, and that the cause be remanded to the lower court, with directions to modify its decree by inserting therein such a provision or provisions as are above described.

SIMS et al. v. UNITED STATES.

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

No. 874.

1. ALIENS—EXCLUSION—CHINESE—STATUTES—EXPIRATION—PENALTIES.

Act July 5, 1884 (23 Stat. 117, c. 220 [U. S. Comp. St. 1901, p. 1305]), prohibited any person from aiding or abetting the landing of any Chinese person not lawfully entitled to enter the United States, and declared that the act should be in force for 10 years. On May 5, 1892, before the prior act had expired, the laws relating to the exclusion of Chinese were re-enacted for a further period of 10 years. Rev. St. § 13 (Act Feb. 25, 1871, c. 71, 16 Stat. 432 [U. S. Comp. St. 1901, p. 6]), declares that the repeal of any statute shall not release or extinguish any penalty incurred thereunder, unless the repealing act shall expressly so provide, but such statute shall be treated as remaining in force to sustain any action or prosecution for the enforcement of such penalty. *Held*, that where an offense against the exclusion act was alleged to have been committed on February 15, 1902, an indictment therefor not brought until after the expiration of the time limited by the act of May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319]) was not demurrable, since the exclusion act was continued in force as to such offense by section 13.

2. SAME.

Act May 5, 1902, expressly continuing in force all laws prohibiting and regulating the coming into the country of Chinese persons, did not create a new law nor repeal any of the laws then in existence, but continued in force, without interruption, the Chinese exclusion act of May 6, 1882 (22 Stat. 58, c. 126), as amended by act July 5, 1884 (23 Stat. 117, c. 220 [U. S. Comp. St. 1901, p. 1305]), and extended for 10 years by act May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319]).

3. SAME—INDICTMENT—SUFFICIENCY.

In a prosecution for aiding and abetting the landing of certain Chinese, prohibited by act July 5, 1884, an indictment charging that defendants did unlawfully and knowingly land, and aid and abet in landing, in the United States, from a certain foreign steamship specified, then lying at the port of T., three certain male Chinese laborers, named, each of whom was not lawfully entitled to enter the United States, which had previously been brought on such steamship from the empire of China, was not demurrable for failure to set out the facts constituting the alleged unlawful landing.

4. SAME.

Where, in a prosecution for aiding and abetting the illegal landing of Chinese laborers, the indictment alleged that the landing was effected from a foreign steamship lying in the port of T., and that such laborers had been brought into the United States at such port on such steamship from the empire of China, it was not objectionable in that it showed that the Chinese alleged to have been landed had already entered the United States.

5. SAME—REPUGNANCY.

Under act July 5, 1884, prohibiting any person from aiding or abetting the landing of any Chinese person brought into the United States from any vessel, an indictment charging defendants with "aiding and abetting," and immediately thereafter charging them with "landing" Chinese, was not objectionable for repugnancy, since, as defendants were liable as principals for aiding and abetting the commission of the offense, the further charge of "landing the Chinese" was surplusage, and not repugnant to the other charge.

¶ 1. Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

6. SAME—KNOWLEDGE.

Act July 5, 1884, provides that any person who shall "knowingly" bring into or cause to be brought into the United States, or aid or abet the landing in the United States, from any vessel, any Chinese person, etc., shall on conviction be punished. *Held*, that the word "knowingly," as so used, referred to knowledge of the fact of landing and not knowledge that the Chinese landed were not legally entitled to enter the United States.

7. SAME—APPEAL—REVIEW—OBJECTION IN TRIAL COURT.

An objection to an indictment on the ground of repugnancy cannot be reviewed on appeal when it was not raised in the Circuit Court.

8. SAME—NEGATIVING EXCEPTIONS.

An indictment for violation of Chinese exclusion act 1882, as re-enacted by act April 29, 1902 (32 Stat. 176, c. 641), declaring that all laws now in force prohibiting and regulating the coming of Chinese persons be, and the same are, re-enacted, extended, and continued, so far as the same are not inconsistent with treaty obligations, was not objectionable for failure to charge that the Chinese alleged to have been landed in violation of the act were not entitled to land by virtue of treaty obligations.

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

A. W. Buddress, for plaintiffs in error.

Jesse A. Frye and Edward E. Cushman, for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were jointly indicted on June 7, 1902, for the offense of unlawfully landing, and aiding and abetting in landing, three male Chinese laborers, at Seattle, Wash., on February 15, 1902, from a foreign vessel at Port Townsend, Wash. The indictment contained two counts for the illegal landing of the same Chinamen. The plaintiffs in error demurred to each count on the ground that in neither of them are facts stated sufficient to constitute an offense against the laws of the United States. The demurrer was overruled. Upon a plea of not guilty, the plaintiffs in error were tried and convicted. They moved in arrest of judgment upon the ground which was stated in their demurrer. The motion was overruled, whereupon the plaintiffs in error were sentenced to imprisonment and fine.

It is contended that the prosecution of the plaintiffs in error in this case is an attempt to punish them after the expiration of a temporary statute for its violation. The indictment charges them with the violation of section 11 of the act of July 5, 1884 (23 Stat. 117, c. 220), which reads as follows:

"That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year."

This act amends the corresponding section of the original Chinese exclusion act of May 6, 1882 (22 Stat. 61, c. 126 [U. S. Comp. St.

¶ 7. See Criminal Law, vol. 15, Cent. Dig. § 2627.

1901, p. 1310]). Both the original and the amendatory act were by their terms to be and remain in force for a period of 10 years. On May 5, 1892, before the 10-year limit of the amendatory act had been reached, Congress re-enacted all Chinese exclusion laws for another period of 10 years by the following section (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319]):

"That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act."

It is argued that all Chinese exclusion laws which were in force on February 15, 1902, the date of the alleged commission of the offense with which the plaintiffs in error are charged, were only temporary statutes, and by their express terms expired on May 4, 1902, more than a month before the plaintiffs in error were indicted, and that the court had no power to try and sentence the plaintiffs in error for violation of a temporary act after its expiration. In support of this contention reference is made to *Yeaton v. United States*, 5 Cranch, 281, 3 L. Ed. 101; *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520; *Moore v. United States*, 29 C. C. A. 269, 85 Fed. 465; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153. It is true that these cases sustain the general doctrine as stated by Chief Justice Marshall in the case first cited, that "it has long been settled on general principles that, after the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." The statute under discussion in that case had been repealed, and a special provision had been made in the repealing act as follows:

"Provided nevertheless that persons having offended against any of the acts aforesaid may be prosecuted, convicted and punished, as if the same were not repealed, and no forfeiture heretofore incurred by a violation of any of the acts aforesaid shall be affected by such repeal."

It was held that this was not a sufficient provision for the punishment of the violation of an act which had itself been repealed. After that decision was made, Congress by section 13 of the Revised Statutes, which was enacted in 1871 (Act Feb. 25, 1871, c. 71, 16 Stat. 432 [U. S. Comp. St. 1901, p. 6]), provided as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

This statute is clearly sufficient to sustain the ruling of the Circuit Court upon the demurrer to the indictment in this case, even if it were a case in which the doctrine of *Yeaton v. United States* was applicable. But we do not regard it as such a case. The act of May 5, 1902, expressly continues in force all the laws prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent. It is a particular provision continuing such laws in force for all purposes. It went into effect while those laws were still in existence. There was no break, no hiatus, in the existing

legislation providing for the exclusion of Chinese and for the punishment of infractions of the act. The act of May 5, 1902, did not create a new law or repeal the old. It simply extended the life of the existing statutes.

It is contended that the indictment is insufficient for the reason that the facts which constitute the alleged unlawful landing of the Chinese laborers are not therein set forth. The indictment charges that the plaintiffs in error "did unlawfully and knowingly land and aid and abet in landing in the United States from a certain foreign steamship and vessel known and called the *Wilhelmina*, then lying at the port of Port Townsend, county of Jefferson, and state of Washington, three certain male Chinese laborers, each of whom was not lawfully entitled to enter the United States, to wit, Chin John, Tom Dip, and Wong Hing, * * * each and all of said Chinese laborers above named having immediately theretofore been brought into the United States at the port of Port Townsend on said steamship and vessel from the empire of China." This indictment follows the language of the statute in which the statutory offense is defined. We know of no reason why such an indictment is not sufficient, or why there should be in this case a departure from the general rule that the offense is sufficiently charged if the indictment follow the words of the statute in setting forth the facts which constitute it. We discover nothing in the statute to indicate that it was the obvious intention of the Legislature to require more particularity, nor is the offense charged one that is analogous to any common-law offense, so as to require greater nicety and particularity in its description. *United States v. Gooding*, 12 Wheat. 460, 474, 6 L. Ed. 693; *Heard*, *Criminal Pleading*, 173; 10 *Enc. Pleading & Practice*, 483; *Peters v. United States*, 36 C. C. A. 105, 94 Fed. 127.

Nor is there ground for holding that the indictment is insufficient for the reason that it shows that the three Chinamen so alleged to have been landed by the plaintiffs in error had already entered the United States. They were alleged to have been brought upon a foreign vessel which had arrived from the empire of China and was lying at the port of Port Townsend. It was the act of aiding and abetting in landing them from the vessel with which the plaintiffs in error were charged, and the nature of their act was not affected by the fact that the landing was not had at the port where the foreign vessel lay, but was completed at another port on Puget Sound, the port of Seattle.

It is said that there is such repugnancy between different parts of each count as to render the indictment fatally defective. The repugnancy is said to consist in the fact that each count charges the plaintiffs in error as principals and immediately thereafter charges them as accessories in the commission of the same offense. We cannot say that it was error to sustain such an indictment. The statute made unlawful the act of aiding and abetting the landing of the prohibited Chinese. Those who aid and abet in the commission of such an offense are principals. To add to the charge of "aiding and abetting" the further charge of "landing" the Chinese was, at most, surplusage. It was not repugnant to the other charge. This question,

however, is not properly before us. It was not raised in the Circuit Court. There was no motion or demurrer directed against the indictment on the ground of repugnancy.

It is contended that the indictment is fatally defective for the reason that it does not charge that the plaintiffs in error knew that the Chinamen were not legally entitled to enter the United States. The act which is rendered unlawful is the act of "knowingly" aiding and abetting in landing Chinese not lawfully entitled to enter the United States. The act contemplates that all persons who shall aid and abet Chinese in landing from a foreign vessel must first know that such Chinese are lawfully entitled to enter the United States, and that without such knowledge they assume the risk of incurring the penalty of the act. The word "knowingly" so used in the statute refers to knowledge of the fact of landing, and was intended to recognize a distinction between a landing knowingly aided or abetted in and one unwittingly or unconsciously aided; such, for instance, as where a Chinaman might effect a landing from a vessel as a stowaway in another vessel.

It is contended that the indictment is defective for the reason that it fails to negative the exception contained in the penal section of the Chinese exclusion act of 1882 and in the enacting clause of the act of April 29, 1902 (32 Stat. 176, c. 641), which declares that "all laws now in force prohibiting and regulating the coming of Chinese persons * * * be and the same are re-enacted, extended and continued so far as the same are not inconsistent with treaty obligations." It is urged that the indictment should have proceeded further, and negated this exception, and should have charged that none of the said Chinese persons were lawfully entitled to enter the United States under treaty stipulations. The rule is that only such exceptions and provisos need be negated as are found in the enacting clause of the statute, and that, in any event, no exception or proviso need be negated that is not descriptive of the offense. *United States v. Nelson* (D. C.) 29 Fed. 202. If the three Chinese referred to in the indictment were entitled to land in the United States by virtue of treaty obligations, that fact was one that should have been pleaded in defense. We find no error in the record.

The judgment of the District Court is affirmed.

PULITZER PUB. CO. v. RUMFORD FALLS PAPER CO.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1903.)

No. 1,705.

1. SALE—CONSTRUCTION OF CONTRACT—WARRANTY.

A contract to furnish paper for use in the publication of a daily newspaper, to be paid for by weight, which, after specifying the sizes, provided that settlements should be made on the basis of 108 pounds producing 1,000 sheets, "average to be computed on car-load lots," and also that when the paper furnished was overweight it should be paid for on the basis of the weight specified, and when under weight on the basis

of its actual weight, cannot be construed as containing a warranty that each roll of paper should be of the exact weight of 108 pounds to the 1,000 sheets, but recognized the fact that there would necessarily be some variance by providing that the purchaser should have the benefit of such variance, and bound the seller only to act in good faith, and to supply paper which was approximately of the specified weight.

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

This action was brought by the Rumford Falls Paper Company, the defendant in error, against the Pulitzer Publishing Company, the plaintiff in error, to recover a balance of \$4,312.36, which was alleged to be due to the paper company from the publishing company for paper supplied to the latter company during the months of September, October, November, and December, 1897. The value of all the paper delivered during that period was \$37,269.59, but between November 20, 1897, and February 7, 1898, payments had been made on account, which left a balance due, as the paper company claimed, amounting to the sum above stated, \$4,312.36.

The paper in question was supplied under a contract between the paper company and the publishing company of date August 4, 1896, which was as follows:

"St. Louis, August 4, 1896.

"Rumford Falls Paper Co., Rumford Falls, Maine—Gentlemen: We hereby contract with you for the entire supply of paper to be used by the Pulitzer Publishing Co., in this city, for a period of twelve (12) months, beginning January 1st, 1897, and ending December 31st, 1897.

"Paper to be of same quality, sizes and weight as that you are furnishing under our present contract.

"For which we agree to pay you Two Dollars and Twelve Cents (\$2.12) per hundred pounds, delivered on board wagons at our press room entrance, free of all other expense to us.

"All other terms and conditions not covered by the above, to be the same that governed our contracts dated Sept. 21st, 1894 and July 31st, 1895.

* * * * *
 "[Signed] C. H. Jones,

"Editor & Manager St. Louis Post Dispatch.

"Accepted."

The contract of July 31, 1895, to which reference was made in the foregoing contract, was one whereby the paper company agreed to supply the publishing company with the paper necessary for the publication of the St. Louis Post Dispatch for the term of about one year ending December 31, 1896. The only provisions found in that contract which it is deemed necessary to quote in full are the following:

"Paper to be of same quality as that you are now furnishing us, sample herewith attached, and to be of same sizes and weight.

* * * * *
 "All white waste taken from the rolls and charged back to you, will be delivered to you or your agent weekly upon demand."

The contract of date September 21, 1894, to which reference is made in the foregoing contract (and which seems to have been the first contract that was entered into by the parties), was a contract whereby the publishing company contracted with the paper company for a full supply of paper to be used by the publishing company in the publication of the St. Louis Post Dispatch for the term of one year beginning not later than October 20, 1894. This initial contract was more elaborate than either of the succeeding contracts. The provisions thereof which are deemed material to the present controversy are the following:

"Paper to be made on rolls in widths of 70¼ in., 53 in., 35½ in., 17½ in., and in such proportions of each as we may require, and of quality, color, finish, strength, winding and general characteristics, equal to that which shall be accepted by us as satisfactory after one week's continuous run of first

shipments made at your Mill, and to equal the samples you have submitted and which are made a part of this contract.

"For which we agree to pay Two Dollars and Eight Cents (\$2.08) per 100 pounds delivered at our press room entrance, free of all other expense.

* * * * *

"Settlements shall be made upon the basis of 108 pounds producing 1,000 (8-page) sheets 35 $\frac{1}{2}$ x43. Average to be computed on full car lots.

"When paper is of standard weight or over, then payment shall be made on basis of production by press of 1,000 8-page sheets computed at 108 pounds to 1,000 sheets.

"When paper is less than standard weight, then payment shall be made upon basis of weight of paper actually printed upon our presses.

"The net weight of paper actually printed upon will be computed by deducting tare and white waste. The Post Dispatch will keep an accurate record of the tare and white waste and production of each roll, and will furnish a statement showing the weight of each roll per 1,000, 8-page sheets, and the production per 108 pounds.

* * * * *

"It is further agreed, that if the paper furnished under this contract, shall not in all respects equal that to be furnished by you, and accepted as aforesaid, then we shall be free to go into the open market and purchase paper of equal quality to that herein provided for, and it is understood that any difference between price so paid and price set forth in this agreement, and any and all other damage caused by your default in any of the stipulations of this contract shall be paid to us by you, so that we shall be saved harmless from any default on your part."

The publishing company, the defendant below, did not deny on the trial that it had received and used the quantity of paper alleged in the complaint during the four months in question. Nor did it claim that it had not received proper credit for all payments made on account, or that the sum unpaid, \$4,312.36, was incorrectly stated. Its defense was, and it filed a plea to that effect, that by the contract in suit the paper company "expressly agreed" to furnish paper each 1,000 eight-page sheets whereof should weigh 108 pounds. It averred that the paper supplied during the four months in question was inferior in weight to that agreed to be furnished, and that it was forced to use some paper of inferior weight so supplied during that period. It also averred generally that by the use of such paper of inferior weight it incurred "additional expense in the operation of its presses," that delay was occasioned "in the publication of its successive daily editions," and that it had paid the full worth of the paper. The trial resulted in a verdict in favor of the plaintiff below for the sum demanded.

F. N. Judson (John F. Green, on the brief), for plaintiff in error.

William E. Garvin and Leonard Wilcox (James P. Dawson, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The defense in this case is grounded upon the assumption that the Rumford Falls Paper Company, the plaintiff below, expressly warranted that all the paper to be supplied under its contract with the publishing company should be of such a kind that each 1,000 eight-page sheets at any time produced by the press would weigh 108 pounds; and the first question to be determined is whether this assumption is well founded.

The contract contains no such warranty in terms. It does contain an express agreement that the paper to be supplied shall be "of same

quality, sizes, and weight as that you are furnishing us under our present contract"; but no effort was made by the defendant on the trial to show what was the actual weight or usual run of the paper that was furnished under the contract in force when the last contract was made. Nor does the defendant count upon the last-mentioned provision of the agreement in its answer, or place any reliance thereon, so far as we can ascertain. To sustain its allegation concerning an express warranty, it refers to a provision contained in the first contract with the paper company, of date September 21, 1894, which is as follows: "Settlements shall be made upon the basis of 108 pounds producing 1,000 8-page sheets 35¹/₈x43. Average to be computed on full car lots"; and it contends, apparently, that this stipulation bound the plaintiff at its peril to deliver only such paper as would weigh 108 pounds per 1,000 sheets, no more and no less. This provision, however, does not seem to have been inserted in the contract with a view of binding the paper company not to furnish any paper or rolls of paper weighing less than 108 pounds per 1,000 eight-page sheets, since the provision was followed immediately by the further stipulation that, when the paper supplied happened to overrun the last-mentioned weight, it should be paid for at that weight, thus giving the publishing company the benefit of any overweight, and that when it happened to fall below the weight mentioned it should be paid for according to its actual weight. Impliedly, at least, this latter clause bound the defendant to accept and pay for paper which weighed somewhat more or less than 108 pounds per 1,000 sheets. These provisions were inserted, we think, with a view to convenience in making settlements, and not for the purpose of prescribing an absolute standard of weight for each roll, from which there could be no departure without incurring a liability in damages as for a breach of a warranty. The weight of the paper, so far as there was an express agreement on that point, had been specified previously in the clause to which reference has already been made; and while, as above remarked, the defendant made no effort to show what was the weight or quality of the paper that was being supplied when the contract in suit was entered into, yet the plaintiff did offer considerable testimony, which was not controverted, that the quality and weight of its paper improved continuously from 1894 to 1898; that the paper as it was produced was compared constantly with samples that were used when the first contracts were made; and that the paper produced and delivered during the year 1897 was fully up to sample, and as good as the paper which had been delivered to the publishing company previously and by it accepted. The provisions concerning the method of making settlements clearly show that the contracting parties well understood, what the testimony discloses to have been the fact, namely, that the process of manufacturing paper in large quantities for newspaper use, such as that involved in the present instance, could not be so conducted that the paper in each of a large number of rolls would have a perfectly uniform run, being at all places of the same thickness, so as to attain precisely the same weight per 1,000 sheets. The parties to the agreement assumed that the rolls would probably vary somewhat in weight, and they made a very reasonable provision for such a variance, in the manner above

shown, by agreeing that the publishing company should never pay for more than the actual weight of the paper supplied; whereas, if the paper overran at any time the weight named as a basis of settlement, it should not, on that account, be compelled to pay for the surplus weight. It is impossible to read the provisions of the contract in suit relative to the manner of making settlements without being impressed with the conviction that both parties well knew that the paper to be supplied would not run evenly, so as to maintain at all times precisely the same weight. They were doubtless aware that there were difficulties attending the manufacture of paper, which could not be overcome entirely, and, knowing this fact, they prescribed a remedy in the manner of making settlements, which they deemed just, neither party intending to impose on the other an obligation which could not be strictly performed and to hold it accountable in damages for its non-performance.

We are of opinion, therefore, that the defendant below failed to show either an express or an implied warranty, such as was counted upon in its answer, and for the breach of which it sought to recoup damages to the amount of \$4,312.36, thereby absorbing the balance due on the plaintiff's account, for paper actually delivered. It may be conceded that the parties to the agreement assumed that the paper to be supplied would weigh approximately 108 pounds per 1,000 eight-page sheets, and that the paper company would endeavor in good faith to produce paper of about that weight by giving proper attention to the process of manufacture. They realized, however, that, notwithstanding the care which might be exercised, some of the paper produced would, to some extent, exceed or fall below that weight, and they accordingly provided for that contingency by adopting a mode for estimating the weight for the purpose of making settlements that would afford the defendant full protection against losses resulting from the delivery of paper which was heavier than was deemed necessary. The method of making settlements so prescribed by the parties themselves also had the effect, we think, of excluding claims for damages incident to such small and seemingly unimportant variations in the weight of paper as the testimony in this case discloses—the same being variations which do not appear to have been occasioned by any want of good faith, or by any design on the part of the plaintiff company to avoid a full compliance with the terms of its contract. None of the paper that was supplied during the months of September, October, November, and December, 1897, was rejected by the defendant company as unsuitable for its use, but all of it was in fact consumed; and such complaints as were made in the meantime seem to have been made with a view of inducing the paper company to consent to a reduction of the contract price, the value of paper having declined to some extent after the execution of the contract. Moreover, the testimony that was offered at the trial with a view of showing that the publishing company had sustained special damage by the use of some light-weight paper during the months in question was general and unsatisfactory, and we very much doubt whether it would have warranted a jury in finding that any damage had been sustained on that account. It is unnecessary, however, to express a definite opinion on that point,

since we conclude, as heretofore stated, that the defendant did not succeed in establishing such a warranty as it pleaded and relied upon in its answer. For the same reason all the errors specified in the assignment of errors relating to rulings upon testimony and the refusal of instructions become, in our judgment, immaterial, and any discussion thereof is unnecessary.

We are satisfied that the judgment below was for the right party, and it is accordingly affirmed.

BUTTE & B. CONSOL. MIN. CO. v. MONTANA ORE PURCHASING CO.

(Circuit Court of Appeals, Ninth Circuit. February 9, 1903.)

No. 846.

1. RIGHT TO REVIEW FAVORABLE JUDGMENT—WAIVER—MOTION FOR ENTRY—EFFECT.

The right to review a judgment granting insufficient relief is not waived by moving for the entry of the judgment after being denied a new trial.

2. WRITTEN INSTRUMENT—CONSTRUCTION—SITUATION OF PARTIES AND SUBJECT-MATTER—ADMISSIBILITY OF EVIDENCE.

Under Code Civ. Proc. Mont. § 3137, providing that the terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is admissible to show use in a local, technical, or other peculiar signification; and section 3136, providing that the circumstances under which a contract was made, including the situation of the subject-matter and parties, may be shown—testimony is admissible that a prospective lessee told the lessor that he was about to build a smelter, and that the premises were desired for dumping purposes, and also that the word "tailings," in the lease, was selected as the broadest term descriptive of the material to be dumped, and was intended to cover slag.

3. PURCHASE OF LEASED PREMISES—USE OF PREMISES—PURPOSE OF LEASE—NOTICE.

The purchaser of premises leased to the operator of a smelter for dumping purposes is put on notice of the technical and comprehensive sense in which the word "tailings" is used in the lease by the practical construction given the instrument in the dumping of slag.

4. EXCEPTION TO INSTRUCTION—SUFFICIENCY.

An exception to the court's charge on the burden of proof as a whole is insufficient to raise the objection on review that the court should have singled out a particular issue, and instructed otherwise as to that.

5. HARMLESS ERROR—SUCCESS OF PARTY—EFFECT.

A party in whose favor the jury has found an issue cannot allege error in the court's charge as to the burden of proof on that issue.

6. NONEXPERT WITNESSES—TECHNICAL MEANING OF WORD—ADMISSIBILITY OF TESTIMONY.

Where the ordinary meaning of a word used in a written instrument is not in dispute, but the issue is as to its technical meaning, the evidence of a nonexpert witness is properly excluded.

7. WRITTEN INSTRUMENT—USE OF TERM IN TECHNICAL SENSE—QUESTION OF FACT.

The question whether a word used in a written instrument has a technical meaning, more comprehensive than its ordinary meaning, in which the parties understood it, is an issue of fact for the jury.

¶ 7. See Contracts, vol. 11, Cent. Dig. § 768.

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

The plaintiff in error brought an action against the defendant in error in ejectment, and to recover damages upon three causes of action: First, for damages for trespass while the property was owned by the Butte & Boston Mining Company and its receivers, who were the predecessors in interest of the plaintiff in error; second, for damages for trespass while the property was owned by E. Rollins Morse, the successor in interest of the Butte & Boston Mining Company; and, third, for damages for trespass since May 3, 1897, the time during which the plaintiff in error was owner. The prayer of the complaint was for possession of the premises and for \$12,000 damages. The defendant in error pleaded permission on the part of the owners of the premises to store water, debris, tailings, etc., on the premises, and also pleaded the statute of limitations; setting up therein that from April, 1892, until the commencement of the action, the defendant in error and its predecessors in interest had been dumping wastes from its concentrator and smelter upon the premises. It also claimed the right so to do under a written agreement with the Butte & Boston Company, and it alleged that during all of that time said corporation and its successors in interest had full knowledge and notice of such possession and use, and consented thereto, and acknowledged the right of the defendant in error so to do. The agreement under which the defendant in error justified its acts was made between the Butte & Boston Mining Company and F. Augustus Heinze, the predecessor in interest of the defendant in error. It contained the following clause: "It is also agreed that the said lessee shall have the right to flood and to store water upon any of the ground of the party of the first part lying east of the embankment of the north leg of the Y of the Northern Pacific Railway as now constructed, also the right to dump tailings from any and all works erected on the leased premises by the second party onto any ground of the party of the first part east of the Montana Union Railway Company's tracks and north of the embankment of the Northern Pacific Company, above mentioned, to wit, about the place where the tailings from the concentrator of the Boston & Montana Company's lower works are now being deposited. It being the intention of the parties hereto that the rights of storing water and dumping tailings and all rights of any kind mentioned in this indenture are to and shall belong to said second party under an extension of this lease." It was shown that upon the premises so mentioned, and at or about the time when the agreement was made, the predecessors of the defendant in error erected a smelter, and that, independently of the agreement, it purchased the liquidator concentrating plant, and the ground whereon the same was constructed; the same lying adjacent to the premises so obtained from the Butte & Boston Mining Company. Upon the trial of the cause the jury found a verdict for the plaintiff in error for the ownership of the ground in controversy subject to the easement granted by the instrument of November 16, 1892, and assessed damages to the plaintiff in error in the sum of \$1.

Forbis & Evans, for plaintiff in error.

McHatton & Cotter, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

A motion is made to dismiss the writ upon the ground that the plaintiff in error attempts thereby to review a judgment which was rendered in its favor, and in which it acquiesced. The motion is based upon the fact that the judgment gives to the plaintiff in error the possession of the leased premises, subject to the lease, and damages in the sum of \$1, and that the judgment was entered upon the motion of the plaintiff in error. It is argued that a party who accepts the benefits of a judgment

is estopped from prosecuting a proceeding to review the same. It is true that such an estoppel applies to one who accepts the benefits of a judgment, but this is not such a case. The judgment was in favor of the plaintiff in error, it is true; but it does not award it all that it sued for, and it had the right, therefore, to sue out its writ of error. That right was in no way affected by the fact that the judgment was entered at its instance. The court had denied its motion for a new trial. The entry of the judgment was a mere matter of form. If it were true that the plaintiff in an action, by moving the court to put in proper form and in the shape of a judgment its conclusion already reached, must thereby lose his right to review the judgment, the defendant in the case might eventually deprive him of that right by refusing to move for the entry of a judgment. All the cases cited by the defendant in error in support of its motion are cases in which the plaintiff in error or the party appealing has in some way acquiesced in the judgment, or accepted the fruits thereof, or consented thereto. None of these features occur in the present case. The plaintiff in error has not acquiesced in the judgment. It has not taken possession thereunder, nor collected damages or costs thereunder, nor has it in any way consented thereto. The motion for the entry of a judgment when the jury had returned their verdict, and the court had already announced its conclusion upon the motion for a new trial, was no consent. Counsel for the defendant in error, in this connection, and as ground for dismissing the writ, advert to the fact that the plaintiff in error has assigned no particulars in which the judgment is claimed to be erroneous. The answer to this is that error is not charged in the judgment itself or the entry thereof, but in the proceedings upon the trial upon which the verdict of a jury was reached. It is on account of those alleged errors that the judgment is sought to be reviewed.

It is contended that the court erred in admitting evidence to explain or define the meaning of the word "tailings," as it was used in the written agreement. Upon the trial it was contended by the defendant in error that it had the right to deposit slag upon the leased premises, and that the term "tailings" included slag, such as was the molten refuse from its smelter. The court, in ruling upon the objection to this evidence, said, "If it can be proven here that if, by any technical meaning, slag is embraced in tailings, you can prove it." Testimony was accordingly given by expert witnesses for the defendant in error tending to prove that the term "tailings" had a technical meaning, and, as such, included the refuse product from any practical process after the extraction of the valuable components of the rock, and that the term was sufficiently comprehensive to include slag. The testimony so offered is criticised, and it is contended that it was not sufficiently explicit or positive to prove that the term "tailings" had such a technical meaning as was claimed for it by the defendant in error. With the weight of the evidence, however, we are not concerned. We think there was sufficient evidence in the record to justify the submission of the question to the jury. The court, under proper instruction, permitted the jury to determine whether or not the term "tailings" had the technical signification which the defendant in error imputed to it. The jury, upon this question, and under the instruction of the court, re-

turned a special verdict, and found that the term "tailings" had a scientific meaning, and that it included "slag."

It is contended that the court erred in permitting the defendant in error to introduce evidence of the negotiations and conversations between the parties to the written contract which preceded its execution. If there was no error in the admission of evidence tending to prove that the word "tailings," as used in the contract, had a technical meaning such as to include slag, it follows that there was no error in admitting evidence to show that the parties to the contract, in adopting it, therein understood it in that technical sense.

Section 3137, Code Civ. Proc. Mont., provides:

"The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical or otherwise peculiar signification, and were so used in the particular instance, in which case the agreement must be construed accordingly."

Section 3136 provides that, for the proper construction of an instrument, "the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown."

The testimony so admitted was to the effect that the lessee under the written contract made known to the lessor the fact that he intended to build a smelter, and that the premises in question were desired for dumping purposes, and that that matter was discussed and understood when the contract was made; that it was agreed that "tailings" was the broadest word that could be used, and that it would cover slag. It is suggested that there was error in admitting the evidence for the additional reason that the contract was made, not with the plaintiff in error, but with its predecessor in interest, and that the former stands in the attitude of an innocent purchaser, and is not chargeable with notice that the word "tailings," in the contract, was used otherwise than in its ordinary sense, or that it was understood between the parties in a more narrow and technical sense. To this it may be said that it does not appear that the plaintiff in error is an innocent purchaser from the Butte & Boston Mining Company. But it is immaterial whether or not it was a purchaser in good faith for value, and without actual notice. It was bound to take notice of the practical construction that had been placed upon the agreement by the original parties thereto. At the time when it became the owner of the property, the premises in question were, and for several years had been, used by the defendant in error as dumping ground for slag. According to the testimony, the evidence of that fact was plainly visible upon the ground. This was sufficient to put any purchaser upon notice to ascertain by what right the slag was so deposited, and whether the term "tailings" had been used in the contract in its ordinary meaning, or in the more technical sense in which the jury found that it was used. There is no denial in the testimony which appears in the record before us that the word was in fact used in that sense.

It is contended that the court erred in instructing the jury with reference to the burden of proof. The court, after instructing the jury

that the burden of proof was upon the plaintiff in error to prove every material allegation of its complaint, said :

"If you find from the evidence that it has failed to prove any material matter or issue by such preponderance of the evidence, you must find against it as to such matter or issue, and in favor of the defendant; and, if you find that the evidence is evenly balanced or preponderates in favor of the defendant as to any material matter in dispute in this case, you must find against the plaintiff and in favor of the defendant as to such matter."

It is conceded that this instruction was correct as to all the issues in the case, except the issue raised in the answer by the plea of the statute of limitations. It is contended as to that issue the charge was erroneous, and that the court should have instructed the jury that the burden of proof as to that was upon the defendant in error. The exception of the plaintiff in error, however, was to the whole charge to the jury on the subject of the burden of proof. No notice was thereby given to the court of the nature of the objection which is now relied upon. If the attention of the court had been specifically directed to the point of the objection, undoubtedly the instruction would have been corrected, and the jury would have been instructed as to the burden of proof upon that particular issue, if that was one of the material issues of the case. The plea of the statute of limitations which was set forth in the answer was that the defendant in error and its predecessor in interest had been in the open, continuous, and adverse possession of the premises, and had used the same for storing water and dumping débris thereon, since July, 1892, with the knowledge and consent of the plaintiff in error and its grantors, and that thereby the causes of action had become barred by the laws of Montana. The issue so raised was found by the jury in favor of the plaintiff in error. Its title to the property was sustained by the court and jury. It cannot complain, therefore, that the charge of the court upon that point was erroneous. The court, moreover, in charging the jury, instructed them as to the statute of limitations applicable to actions to recover damages for waste or trespass on real property, and informed them that no recovery could be had except for débris deposited on the premises within two years prior to the commencement of the action. No exception was taken to the charge.

It is contended that the court erred in excluding the evidence of one Matthews, who was called as a witness for the plaintiff in error to testify as to the meaning of the word "tailings." He did not claim to be an expert witness, nor was he offered as such, nor was it proposed to show by his testimony that the term "tailings" had or had not a technical meaning such as to include slag. The court ruled that he was not a qualified witness. We think the court ruled properly. There was no occasion to offer testimony to prove the ordinary meaning of the word "tailings." That was not in dispute. The court, in charging the jury, instructed them that the word, in its ordinary meaning, did not include slag.

It is said that the court erred in refusing to instruct the jury as requested by the plaintiff in error, and in its instructions given to the jury as to the meaning of the word "tailings," and in submitting its meaning as a question of fact to the jury. The court instructed the

jury, in substance, that the word "tailings," in its ordinary use and meaning, did not include slag, but that the jury might determine whether the term "tailings" had a scientific meaning, and whether the parties so understood it in writing the contract. The merit of this contention has already been discussed. If the court was right, as we have found that it was, in admitting the evidence above adverted to, there was no error in giving or refusing instructions to the jury.

We find no error in the record. The judgment is affirmed.

BUNKER HILL & S. MINING & CONCENTRATING CO. v. KETTLESON.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1903.)

No. 855.

1. INJURIES TO MINER—ASSUMPTION OF RISK.

Where a miner was directed down an inclined chute for the purpose of putting in lagging, and requested that a rope be furnished to prevent falling, and at the direction of the superintendent the miner himself placed a rope in the chute, which was subsequently removed by a fellow servant, and the miner continued to work with knowledge of such removal, and was injured by falling, he assumed the risk, and was not entitled to recovery therefor.

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

This action was brought by Gunder Kettleison, a citizen and resident of the state of Washington, against the Bunker Hill & Sullivan Mining & Concentrating Company, a corporation organized and existing under the laws of the state of Oregon. The defendant's mine is located in the state of Idaho. The plaintiff was engaged in this mine, and while so employed was injured. The present action is to recover damages for the injuries resulting from the alleged negligence of the defendant in not providing a safe place for the plaintiff to do the work in which he was employed. The workings of the mine were being extended to an ore chamber that had been formerly opened, but not used for 18 months or more. The chute and manway leading up from one of the levels of the mine to this chamber were to be cleaned out, and the plaintiff had been directed by the shift boss to put in some lagging in the bottom of the chamber. It was alleged in the complaint "that the chute where this plaintiff was ordered and directed by the defendant to work sloped to the bottom thereof, a distance of 90 and more feet, at an angle of about 90 deg., and was dangerous and unsafe for this plaintiff and other workmen to work at said point and place; that this plaintiff then and there refused to work at said place, and notified the foreman of said mine in charge of this plaintiff (one Bishop) that the said place was unsafe and dangerous, and that plaintiff could not work at said point and place as aforesaid unless the defendant would provide suitable ropes, ladders, and support at said point and place, whereupon the said Bishop did then and there provide a certain rope, and caused the same to be attached to the timbers along the said chute, and did then and there promise and agree with this plaintiff, on behalf of said defendant mining company, that the said rope should be then and there maintained, and that a ladder should be placed in said chute, so as to render the place where the plaintiff worked safe and secure, and to provide proper and adequate means for this plaintiff to save himself in case that the rock, ore, debris, or earth in any manner gave way, and this plaintiff as aforesaid, at all the times herein mentioned, went to the said place, being assured that the same was safe, and that the said defendant would cause said rope to be and remain in place, and would forthwith place a ladder in said chute at the point where this plaintiff was working, and did then and there rely

and believe and was assured by the said defendant that each and all of said precautions as aforesaid would be taken to render said place safe; and this plaintiff continued to work at said point and place solely on account of said assurances and promises on the part of the said defendant company, which plaintiff fully believed and relied upon." The plaintiff further alleged that while he was working at said point and place "the rock, ore, and débris there, negligently and carelessly suffered to be and remain by the said defendant company, gave way under the feet of this plaintiff; that this plaintiff thereupon attempted to catch the said rope and the said ladder, and plaintiff would have been able to have so caught the same, had the same been at the point agreed upon between the plaintiff and defendant, and at which place the plaintiff then and there believed and relied upon its promise that the same would be, but that the said defendant mining company negligently and carelessly removed, or caused to be removed, or permitted to be removed, the said rope theretofore placed, and carelessly and negligently omitted to place said ladder at said place, or to take any precaution to preserve the safety of this plaintiff; that there was no other means or method whereby plaintiff could save himself, and at the time said ore, débris, and rock, carelessly and negligently permitted to be there and remain by the said defendant company, gave way under the feet of this plaintiff, without any fault or want of care and caution on his part; that plaintiff fell and rolled over and along said chute a distance of ninety and more feet." The answer of the defendant specifically denied these allegations in plaintiff's complaint, and alleged "that with full, complete, and perfect knowledge of the chutes, manways, and stopes in defendant's mine, and of the construction and condition thereof, and of the business of placing lagging in stopes, and of the danger attending such work in defendant's said mine, voluntarily undertook to place some lagging in a stope in said mine at a point reached by a chute about sixty feet in length, the first or lower thirty feet of which is constructed at an angle of about fifty-five degrees, and the remaining thirty feet at an angle of about forty-two degrees; that said lagging was to be placed in a stope at the top of said chute; that said plaintiff, with knowledge of the said mine and of the business he undertook, and the dangers attending the same, voluntarily undertook said work, and assumed all the risks and dangers ordinarily incident thereto, among which the danger of falling down said chute was included; that before commencing work in said chute, said plaintiff, at the suggestion and upon the recommendation of the defendant's foreman, under whose immediate direction said plaintiff was at work, placed a rope furnished by defendant along the side of said chute as a safeguard in case of accident, which said rope was afterwards used by plaintiff; that a short time prior to the happening of the accident to the plaintiff hereinafter mentioned, without the orders, knowledge, or consent of the defendant, but with the consent and concurrence of plaintiff, carelessly and negligently given, said rope was removed and delivered to plaintiff's fellow servants, and was not returned for the reason that plaintiff informed his said fellow servants that he had no need of the same; that while at work alone, placing said lagging, for some cause to the defendant wholly unknown, plaintiff fell, and, by reason of his neglect in permitting said rope to be removed and to remain away, slid from the top of the chute, a distance of about sixty feet, to the bottom thereof, and by said fall and sliding received whatever injury was sustained by him." Plaintiff's reply denied the new matter set forth in the defendant's answer.

The plaintiff testified in his own behalf that he was 44 years of age, and had been a miner for 27 years. He had been a foreman, and had worked at all kinds of work about a mine. He had been working in defendant's mine about five or six days. It appears from the evidence that, with respect to the place where plaintiff was at work, the first 30 feet of the chute from the level below passed up through solid rock, requiring no timbering, and a ladder was used in the manway adjoining the chute. Above this to the ore chamber in which plaintiff had been set to work, some 31 feet or more, a log crib had been constructed, with two compartments—one for an ore chute as an extension of the chute below, and the other as a manway, corresponding to the manway below; but the upper manway had been closed, and access to the

ore chamber through the upper section was by way of the log-cribbed chute. The log cribbing had interstices between the logs, in which the foot could rest when the miner or other workman was ascending or descending the chute. The testimony is conflicting as to the angle of the chute. The plaintiff claims that the angle of the chute was about 90 deg., or nearly perpendicular. The defendant claims to have ascertained by actual measurements that the lower section of the chute was 30 feet in length, and had an angle of 44 deg., and the upper section was 31 feet in length, and had an angle of 41 deg. The plaintiff's testimony concerning the accident is as follows: "I was working there about five days in the other place, and Mr. Bishop, he came one morning to me and says, 'Mr. Kettleison, we want you over there on a new job—over in the chute.' For 35 feet from the bottom of the chute, it had to be picked down and shoveled, and take it down to the mill. He says, 'I will go up and show you another place there,' 35 or 40 feet further up. 'You go up there, and there has rotten timbers been lying there, and that is like this, about forty-five degrees' [indicating]. You had to go up on this rotten timber, and then into a hole that had been caving down—old rock—and you had to crawl in this hole, and I had to put in new lagging to protect the ground. I went up there, and Mr. Bishop went up, and he showed me this thing, and he asked me if I could do that kind of work. I said, 'I can do it if I take time.' Me and Mr. Bishop walked down again—down there about 35 feet. We were in the manway, then, you know, and Mr. Bishop slipped down and fell 15 or 20 feet. I says, 'Have you hurt yourself?' 'No.' He got up and went on, and I says, 'Mr. Bishop, I can't work here unless you get a rope and a ladder for me to put in for a few days until I get through this job.' 'All right, Mr. Kettleison,' he says, 'you go over there and get that rope and put that up, and I will help you.' I went over and got the rope and put the rope in, and so the ladder didn't go in. I went down and got some lagging and went up there, and I put in three lagging that day. I asked Bishop if he wouldn't put in a rope for me, and he says, 'Yes.' I had to have a rope and a ladder in there. If I had fell down or slipped on anything on this rotten ground, so I wouldn't fall down and be killed. He says, 'All right. Put that rope in.' So I had to take up another lagging, and I drove my candlestick into the wall, and took another candle and went down to get the lagging. And these timbers was lying down there in this place, and I slipped on that, and I went down about fifteen or twenty feet, and tried to get hold of this rope, and the ladder wasn't there, and the first thing I knew I knew I got senseless, and the ladder and rope wasn't there, and I went down about seventy feet to the bottom of that chute." He subsequently testified that he went down 35 or 40 feet. He testified further that with a rope and ladder the place where the accident occurred was safe, but without them he would not have worked there. It appears from the evidence that, after the plaintiff had placed the rope in the chute for his own safety, a fellow workman took it away, and the testimony on the part of the defendant was that the rope was taken away by plaintiff's permission. The plaintiff, on the other hand, denied that he gave any such permission, and testified that Bishop admitted to him after the accident that he had taken the rope away; that it was needed over in another place to take up some lumber. The witnesses for the defendant contradict the plaintiff as to all the material facts of the case. Bishop, the shift boss, testifies that the rope was placed in the chute at his suggestion, so that the plaintiff would have something to take hold of; that the plaintiff got the rope and placed it in the chute; that on the following morning the witness saw plaintiff in the manway, and asked him where the rope was; he replied that it had been taken the night before to pull up some timbers; that witness advised plaintiff that he had better go and get the rope, so that he would have something to take hold of; and that plaintiff replied that he did not need it. Plaintiff testified that in the conversation he had with Bishop on the morning after he had placed the rope in the chute, and about half an hour before the accident, he said to Bishop: "You are going down now. Will you please look out for that ladder, and get that solid there if I need it, and the rope there, too?" and Bishop said, "I will attend to it right away." Bishop testified that a ladder was never mentioned, that there was no necessity for

a ladder, and that he did not admit to plaintiff that he took the rope away. The defendant introduced a number of other witnesses in support of the claim that the rope was removed with the knowledge and consent of plaintiff. Upon this conflicting testimony the case was submitted to the jury, under the instructions of the court. The jury returned a verdict in favor of the plaintiff in the sum of \$10,000.

The case is brought here upon assignments of error relating to instructions to the jury, but the error mainly insisted upon in this court is the refusal of the trial court, upon the conclusion of the evidence in the case, to instruct the jury that the evidence was not sufficient to sustain a verdict in favor of the plaintiff, and the refusal of the court to direct the jury to return a verdict in favor of the defendant.

Dolph, Mallory, Simon & Gearin, for plaintiff in error.

Thomas O'Day and F. C. Robertson, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). The evidence was not sufficient to sustain the verdict in favor of the plaintiff, and the jury should have been so instructed. Plaintiff had himself placed the rope in the chute on the day before the accident for his own safety, and he testified that the chute was not safe without it. He nevertheless ascended the chute on the morning of the accident without it, and claims that he did not notice the absence of the rope. Clearly, these two situations are inconsistent. If the chute was unsafe without the rope for persons ascending or descending, plaintiff must have observed the absence of the rope when he climbed up the chute in going to his work, and assumed the risk. Again, after ascending the chute on the morning of the accident, he had a talk with Bishop, and claims to have told him to look out for the ladder and the rope. Why did he refer to the rope, unless he knew that it had been removed? He knew there was no ladder there, and he must have known that the rope was gone. His testimony indicates that he had this knowledge, but, whatever view may be taken of his testimony, the actual situation was open to his observation, and he must be held to have assumed the risk when he undertook to descend without the rope. He was a miner of 27 years' experience, and was familiar with the place where he was at work; and whether the chute was nearly perpendicular, as he claims, or had an angle of 41 deg., as determined by defendant's measurements, he knew or must have known that the rope he had placed in the chute had been removed; and the fact that he requested Bishop to look out for it seems to be conclusive as to plaintiff's knowledge of the situation. It is a well-established rule that where a servant enters upon or continues in a dangerous employment with either knowledge of the danger, or full opportunity to observe the conditions making the employment dangerous, he assumes the risk of such employment. *Kansas City Ry. Co. v. Billingslea* (C. C. A.) 116 Fed. 335; *Terry v. Schmidt* (C. C. A.) 116 Fed. 627.

Is there anything in the testimony tending to relieve plaintiff from this position? There is certainly nothing, unless it be assumed that he knew of the absence of the rope, and that just before the accident he requested Bishop to look out for it, and that Bishop promised he would do so. But with respect to this aspect of the evidence, it is

sufficient to say that it does not follow that the defendant was bound by this promise, if made, since the evidence does not show that Bishop had any authority to make such a promise; and the allegation in defendant's answer that Bishop suggested to plaintiff the use of the rope as a means of safety cannot be construed as an admission that Bishop was acting for the defendant in that behalf. If, on the other hand, it be assumed that plaintiff was not informed of the removal of the rope, the same result follows. The evidence does not show that Bishop had authority to bind the defendant to the maintenance of the rope as plaintiff had placed it, or to restore it if removed. In the absence of such evidence, the conclusion is unavoidable that, in procuring and using the rope in the manner and under the circumstances described by plaintiff, Bishop and he were acting in the relation of fellow servants; and, as a result, the failure of Bishop to restore the rope before the accident, as claimed by plaintiff, cannot be held to be the negligence of the defendant. From what has been stated, it is apparent that the plaintiff was not entitled to recover, upon the most favorable consideration of the testimony on his behalf.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to grant a new trial.

GILBERT and ROSS, Circuit Judges, concur in the judgment on the ground that it appeared from the evidence, without conflict, that the rope that the defendant in error himself placed in the chute for protection—and, having which, he willingly undertook the work in which he was engaged when injured—was subsequently, and while he was so engaged, removed by a fellow servant, for which act, whether with or without the consent of the defendant in error, the master was not responsible.

FRYE-BRUHN CO. v. MEYER.

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

No. 842.

1. FOREIGN JUDGMENTS—OPERATION.

A judgment recovered in the state of Washington and assigned to plaintiff has not the force and operation of a domestic judgment in Alaska, and cannot be made a lien on defendant's property in that territory without suit brought and judgment recovered thereon.

2. SAME—SET OFF OF JUDGMENTS—COLLECTIONS—INJUNCTION.

Where plaintiff alleged that it was an assignee of a judgment recovered against defendant in the state of Washington; that defendant had recovered a judgment against plaintiff in Alaska, for the payment of which money had been deposited with the clerk of the Alaska district court; and that defendant was either insolvent, or had no property out of which to satisfy the judgment, or had his property secreted so as to defeat the enforcement of plaintiff's judgment, and unless restrained he would satisfy his judgment against plaintiff from the money deposited, whereupon plaintiff would be unable to satisfy or set off its judgment—the court had equitable jurisdiction to restrain defendant from collecting the judgment against plaintiff until plaintiff's rights had been

established, and its judgment made an offset against the judgment held by defendant.

2. SAME—RIGHTS OF THIRD PERSONS—MOTIONS.

Where an injunction was granted restraining defendant from collecting a judgment against plaintiff for money deposited in the hands of the clerk of the court until a judgment against defendant had been established as a set-off, persons claiming an alleged lien on the deposit, who had not intervened and were not parties to the suit, could not have their right to a lien on the fund adjudicated on motion supported by affidavits in advance of the trial.

Appeal from the District Court of the United States for the District of Alaska, Division No. 1.

S. H. Piles, George Donworth, and James B. Howe (Wynn & Shackleford, of counsel), for appellant.
Malony & Cobb, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is a suit in equity commenced by the Frye-Bruhn Company, a corporation, against Herman Meyer in the United States District Court for the District of Alaska, Division No. 1, on the 21st day of March, 1902. The bill of complaint alleged the recovery of a judgment by Charles H. Frye against the defendant, Herman Meyer, in the superior court of Kings county, in the state of Washington, on the 28th day of June, 1889, for \$3,140.10, and costs; the issuance of an execution on this judgment against the property of Herman Meyer, directed to the sheriff of Kings county, state of Washington, and the return of the execution by the sheriff unsatisfied; and, further, that no property of the defendant had been found. The bill further alleged the assignment of the judgment to plaintiff on the 27th day of January, 1900; the commencement of an action in the District Court of Alaska by Herman Meyer against the Frye-Bruhn Company in 1899; and the recovery of a judgment against the defendant in that action on the 21st day of March, 1902, for the sum of 45 per cent. of \$6,295, after the payment of the costs of the action. The bill alleged that there was money in the hands of the clerk of the court in which the last-named judgment was obtained, that this money was paid to the clerk of the court by the Frye-Bruhn Company, that the same was sufficient to pay the judgment in that court in favor of Meyer, and that the court had ordered that this money be applied on said judgment. The bill alleged that the plaintiff would be unable to collect the judgment secured in the superior court of Kings county in the state of Washington against Meyer; that Meyer was either insolvent, and had no property out of which to satisfy said judgment, or had his property secreted and in the name of other persons in order to defeat the rights of the plaintiff; that Meyer had threatened to, and would, unless restrained by the court, have an execution issued in the case in which he had recovered the aforesaid judgment, and have the property of plaintiff levied upon to satisfy that judgment and costs, to the great and irreparable damage of plaintiff; that Meyer had also threatened to assign his judgment to other persons in order to defeat the plaintiff's claim; that such action would leave the plaintiff without

any remedy for the collection of its judgment secured in the state of Washington unless the defendant, Meyer, be restrained by an order of the court until the plaintiff's rights were established, and its judgment in the state of Washington made an offset to defendant's judgment against plaintiff in the Alaska court. The bill was supported by the affidavit of counsel for plaintiff setting forth the same facts alleged in the bill. The court thereupon issued an order directed to the defendant to show cause why an injunction should not issue as prayed for in the bill. The order also provided that in the meantime the defendant should be restrained from assigning, selling, or negotiating the said judgment recovered against plaintiff, and from collecting any money thereon from the clerk of the court; that all proceedings under said judgment should be stayed, and the clerk of the court ordered not to pay out any money upon said judgment in said cause, but to hold and retain the same in his possession until the further order of the court. On motion of counsel for the defendant the temporary restraining order was subsequently modified by the court to the extent of permitting them to withdraw the sum of \$1,000 from the fund in the registry of the court. This action of the court was had upon an affidavit filed by counsel for defendant alleging that they were entitled to that amount as compensation for their services as attorneys for the defendant, Meyer, in the case wherein the judgment was recovered in his favor, and upon the claim that this amount was payable out of the fund in the registry of the court recovered upon the judgment, and was a prior lien to the judgment claimed by plaintiff as a set-off. From this order modifying the restraining order and injunction, and permitting defendant's counsel to withdraw the sum of \$1,000 from the registry of the court, the complainant has appealed to this court, and assigned the order of the court in this behalf as error.

This appeal is, in effect, an appeal from an order of the District Court dissolving an injunction, to the extent to which the order modified the previous order of the court granting the injunction. Counsel for appellee, in support of this modifying order, admit that, if the bill of complaint had stated facts that entitled the appellant to any relief, they would have been compelled to resort to a bill of intervention to protect their rights in the fund in court; but they contend that the original order granting the injunction was erroneous, and, upon the facts stated in the bill, the injunction should have been dissolved and the entire order vacated and set aside. The appeal therefore brings the case before the court upon the merits. *Smith v. Vulcan Iron-works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810.

The judgment obtained by Charles H. Frye against the defendant in the state of Washington, and assigned to plaintiff, did not, in Alaska, have the force and operation of a domestic judgment, except for the purpose of evidence. *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177; *Claffin v. McDermott* (C. C.) 12 Fed. 375. In any jurisdiction other than that of the state of Washington, the plaintiff, as the owner of this judgment, was simply a creditor at large. *Buchanan v. Marsh*, 17 Iowa, 494; *National Tubeworks v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070. To make the claim of the foreign judgment a lien upon defendant's property in Alaska, it was necessary to sue at

law and recover upon the judgment in that territory. But the bill alleges that the defendant is either insolvent, and has no property out of which to satisfy said judgment, or has his property secreted and in the name of other persons in order to defeat the rights of plaintiff. A creditor at large, under such circumstances, may obtain the assistance of a court of equity to protect his rights against the insolvent debtor. *Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565.

The court had equitable jurisdiction, upon the facts stated in the bill, to restrain the defendant from collecting the judgment against the plaintiff until the rights of the plaintiff had been established, and the judgment in its favor in the state of Washington made an offset against the judgment in favor of the defendant. This conclusion determines the only question involved in this appeal, since it is not contended that counsel for the appellee, who were not parties to the suit and had not intervened therein, could, upon an affidavit and motion, have their right to a lien upon the fund in court adjudicated in advance of the trial.

The interlocutory order modifying the injunction is therefore reversed, with costs.

HAYS v. RICHARDSON et al.

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

No. 865.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—QUESTION OF JURISDICTION OF CIRCUIT COURT.

Where a Circuit Court found that an attachment was fraudulently sued out by plaintiff and levied on property of defendants, who were nonresidents of the state, without a substantial bond being given as required by law, for the purpose of compelling defendants to come within the jurisdiction, and dismissed the action for want of jurisdiction, without determining any other question, the judgment is not reviewable by the Circuit Court of Appeals, but only by the Supreme Court.

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

On motion to dismiss writ of error for want of jurisdiction.

Sachs & Hale, W. F. Hays, and R. B. Albertson, for plaintiff in error.

Peters & Powell, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The defendants in error have moved this court to dismiss the appeal herein for want of jurisdiction. It appears that the action was brought in the superior court of Skagit county, Wash., for the recovery of \$139,000, upon an alleged agreement between the plaintiff and defendants, wherein the plaintiff was to assist the defendants in the purchase of timber lands. Service

¶ 1. Orders, decrees, and judgments reviewable in Circuit Court of Appeals, see note to *Salmon v. Mills*, 13 C. C. A. 374.

was had by publication of summons, the defendants being nonresidents and beyond the jurisdiction. Prior to the publication of summons a writ of attachment was sued out upon certain real property of the defendants, and the statutory bond thereon was filed. The case was thereafter removed to the Circuit Court of the United States for the District of Washington on the ground of the diverse citizenship of the parties. No pleading or other appearance having been filed by the defendants at the expiration of 60 days from the date of the first publication of summons, other than the petition for removal, the plaintiff filed a motion for a default judgment against the defendants. The defendants then appeared especially for the purpose of moving the court to quash the attempted service of summons, on the ground that there was no honest intent to furnish a bond as a basis for the attachment of property, but a fraudulent attempt on the part of the plaintiff to entrap the defendants into the jurisdiction of the court by an attachment based upon a bond with sureties of no financial responsibility whatever. The court denied both the motion for default judgment and the motion to quash service of summons. A bill of particulars was filed by the plaintiff, and the defendants then filed an answer to the complaint, setting up, as matter of affirmative defense, that the sureties named in plaintiff's bond on attachment were not financially responsible; that this fact was well known to the plaintiff, but that the plaintiff procured and induced the said sureties to go upon the bond as a trick and device to force the defendants to enter general appearance in the cause, thus fraudulently obtaining jurisdiction of them. It was further alleged that the statute of Washington governing such procedure required a defendant to enter a general appearance before attacking the regularity of any attachment, or the bonds upon which the same was based. The plaintiff replied, denying any fraudulent intent. The cause proceeded to trial before the judge and a jury, and evidence was taken, over the objection of the plaintiff, as to the value of the property held by the sureties at the time of their justification. At the conclusion of this evidence, upon motion of the defendants the court directed the jury to return a verdict for the defendants; finding as a fact that the writ of attachment was issued fraudulently, without a substantial bond being given as required by law, and that therefore neither the state court nor the Circuit Court had acquired jurisdiction of the defendants, they being nonresidents of the state. Judgment of dismissal was accordingly entered, from which the plaintiff has appealed to this court.

It is readily seen from the foregoing statement that no question other than that of jurisdiction was determined by the court below. It has been heretofore held by this court that under the construction of the act of March 3, 1891, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547] by the Supreme Court of the United States in *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893, and in *United States v. Jahn*, 155 U. S. 114, 15 Sup. Ct. 39, 39 L. Ed. 87, where a Circuit Court dismisses a case on the ground that it has no jurisdiction, leaving other questions undetermined, the only issue reviewable is that of jurisdiction, and that such review must be obtained in the

Supreme Court; it cannot be had in the Circuit Court of Appeals. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co. et al.*, 48 C. C. A. 349, 109 Fed. 497. And in the case of *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, where the District Court adjudged that it had not acquired jurisdiction over a defendant, by reason of there having been no valid service of process, it was contended that the question was reviewable by the Circuit Court of Appeals. The Supreme Court, however, held that the proper procedure in such a case, under section 5 of the act of March 3, 1891, was to sue out a writ of error directly to the Supreme Court.

The present case comes fully within the rulings in the cases above cited. Other questions than that of jurisdiction were left undetermined by the trial court, and are not involved in this appeal. The question of jurisdiction was decided in favor of the defendants, and the case was thereby disposed of, so far as the trial court was concerned. Under the act of Congress governing appeals in such cases, as it has been construed by the highest court in the land, the Supreme Court alone has the power to review the case. The writ of error is therefore dismissed.

In re LEWENSOHN.*

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 53.

1. BANKRUPTCY—CLAIMS—PETITION FOR REVIEW.

A proceeding may not be instituted by a creditor, without the concurrence of the trustee in bankruptcy, to re-examine the allowed claims of other creditors; Bankr. Act 1898, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], covering the subject of proof, allowance, and re-examination of claims, being silent as to the party who may move for the re-examination; and general order 21, cl. 6 (32 C. C. A. xxiii, 89 Fed. x), providing that, when the trustee or any creditor shall desire the re-examination of any claim, he may apply by petition to the referee for an order for the re-examination, and thereon the referee shall make an order fixing a time for the petition, merely intending to permit a proceeding by a creditor prior to qualification of a trustee.

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

Max J. Kohler, for petitioners.

Jesse Epstein, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The petition of review presents a question of practice of considerable importance. The order of the court below has sanctioned a proceeding by one of the creditors of the bankrupt, instituted without the concurrence of the trustee, to re-examine the claims of various other creditors which have been proved and allowed. Such a practice, when the estate and the in-

*Application for writ of certiorari denied by the Supreme Court of the United States April 27, 1903.

terests of all the creditors are represented by a trustee, does not subserve any necessary purpose, and opens the door to grave abuse. It enables one creditor at his own pleasure to subject any one of the other creditors, or all the other creditors, to the inconvenience and expense of unnecessary litigation, and to unduly protract the settlement of the estate. It is not allowed, in terms, by any provision of the bankrupt act. The whole subject of the proof and allowance of claims and their re-examination is covered by section 57, c. 541, Act July 1, 1898, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]. The provisions of this section which relate more particularly to the present question are these:

"(d) Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

"(f) Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estate and claimants will permit."

"(k) Claims which have been allowed may be reconsidered for cause, and re-allowed or rejected, in whole or in part, according to the equities of the case, before but not after the estate has been closed."

"(l) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part."

None of these provisions touch the question directly, and the act is silent as to the party by whom a re-examination may be moved.

The trustee represents every creditor. The orderly conduct of the administration requires that a proceeding for the re-examination of the claim should be taken in the interests of all the creditors, and not be permitted at the instance of any one creditor unless demanded by the interests of all. If the trustee should, without sufficient reason, refuse to proceed, the court, by its order, could compel him to do so, or remove him for disobedience. It has been held under the present act that a creditor cannot prosecute an appeal from the judgment of a court of bankruptcy allowing the claim of another creditor, and that the trustee is the only party who can do so. *Chatfield v. O'Dwyer*, 42 C. C. A. 30, 101 Fed. 797; *Foreman v. Burleigh*, 48 C. C. A. 376, 109 Fed. 313. The provision allowing such appeals does not designate the party by whom they may be prosecuted, and these decisions proceeded upon the ground that the trustee is the proper party, and the only proper party, because he represents the interests of all creditors in the estate. There is such a close analogy between the two proceedings of a re-examination and a review that these decisions are apposite.

The court below was of the opinion that the proceeding was authorized by general order 21, cl. 6 (32 C. C. A. xxiii, 89 Fed. x). That part of order 21 which is pertinent reads as follows:

"When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for the re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor."

This regulates the procedure for re-examination, without regard to the party by whom or the time when it may be pursued, and does not purport to confer any right or privilege beyond those expressed or impliedly given by the act. The court below seems to have construed the language as though it were intended to permit the trustee or any creditor to apply by petition "whenever he may desire to do so." Thus read, it would permit a re-examination after the estate had been closed; and this, clearly, could not have been intended, because it is forbidden by clause "k" of section 57. It may be given due effect by reading it as authorizing a petition by a creditor at the appropriate stage of the proceeding when it may be desirable for the creditor to intervene. The word "desire" is used in the sense of "intend." It may become desirable and necessary to re-examine a proved claim prior to the qualification of the trustee, as delays frequently ensue in the election and qualification of this officer, and it might be that evidence would be lost in the meantime. This probably was within the contemplation of the general order, but we cannot believe it was within its intention to permit the trustee and creditors concurrently to pursue a re-examination of a claim, or to permit a creditor to do so when the trustee, for sufficient reason, does not approve, or when, in the interests of all, it is desirable that the trustee should conduct the proceeding.

The order is reversed.

GILBRAITH et al. v. STEWART TRANSP. CO.

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

No. 881.

1. SEAMEN—SERVICES FOR RELIEF OF STRANDED VESSEL—SPECIAL SALVAGE.

Services rendered by the crew of a stranded steamer in throwing overboard the cargo of coal to save the vessel, which was not abandoned, were within the duties of their employment; and, although arduous, perilous, and meritorious, the crew cannot recover therefor on the theory that they constituted special salvage services.

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

The Steamer, "C. F. Bielman" on a voyage from Buffalo to Milwaukee, carrying a cargo of three thousand tons of soft coal, struck and lodged September 17th, 1900, on Fisherman's Shoals, two and one-half miles from shore, and fifteen miles from Milwaukee, the nearest port.

The crew—sixteen in number—including appellants, were under articles as hired seamen, to make the round trip from Buffalo to Milwaukee, and return to some Lake Erie port, at the wage of twenty-five dollars per month and board.

The steamer struck at about 11:30 P. M. September 17th. Notice having been sent to the underwriters at Milwaukee, the crew, under the direction of the captain, about ten o'clock in the forenoon, September 18th, began to shovel the coal overboard. This however, was stopped at six o'clock in the evening of that day, when a schooner in tow of a tug, with forty longshoremen aboard, arrived to relieve the steamer of its cargo. About one o'clock on the morning of the 19th, the schooner having taken on board about one thousand tons of coal, of the steamer's cargo left for Milwaukee, and after

eight o'clock of the same day, the crew and longshoremen continued to shovel coal from the steamer into the lake.

About twelve o'clock the longshoremen, in company with the captain, went ashore, the crew remaining on the steamer shoveling coal, until eight o'clock in the evening, when they were taken ashore by a United States Life Saving boat which had been lying off for that purpose.

On the 20th, the weather cleared. The crew returned to the steamer and continued to throw coal overboard until noon of the 23rd, when the steamer thus lightered, floated off, and was brought into the port of Milwaukee. There is no question, that during the period of the ship's peril, just described, the crew worked with unremitting industry, and that the relief of the vessel was due largely to the lightering thus accomplished. The claim urged below and here is, that they are special salvors. The District Court dismissed the libel, and from that order the appeal was taken.

Francis Bloodgood, for appellants.

Tallmadge Hamilton, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion of the court:

The crew of a vessel, under articles for wages, can become general salvors, only after the vessel has become a shipwreck, without hope of recovery, and the crew discharged from further service. This general doctrine is not disputed. But it is insisted that, under certain circumstances, the crew though under articles for wages may become special salvors. Such relation arises, it is said, when the service rendered is arduous, perilous and meritorious, and under circumstances extraordinary in character. The argument is based for authority chiefly upon a dictum of Justice Story, in *Hobart v. Drogan*, 10 Pet. 122, 9 L. Ed. 363.

None of the cases actually decided exemplify the application of any such rule. It is needless to restate their facts in detail. In none of them was there given to the claimants more than their transportation from the place of accident to their homes, and their sustenance, or such sums as would equal their sustenance, during that interval.

But even this, meagre as it appears, is said by counsel to be a species of special salvage, and to illustrate the principle, if not the measure, of compensation that ought to be applied to the case under consideration. The argument has not won our concurrence. We do not doubt, that under the law, preexisting the recent legislation of Congress, freight was regarded as the mother of wages, and upon the loss of freight, wages ceased. But though in that state of maritime law, transportation home, and sustenance during that interval, were not, in strict logic, the payment of wages, they need not, by that fact alone, be attributed to the enforcement of any doctrine recognizing special salvage. The feeling underlying these early decrees was the dictate of humanity that shrinks from leaving a shipwrecked sailor on a distant shore, and, in cases of such catastrophe, added to the obligation of the master to pay wages, the further obligation to bring his crew home. To reach such a result there existed no need to build up a doctrine of special salvage, or in other ways than the

one object to be attained, break into the settled law of ship and crew.

But though the argument be accepted, the element upon which it is based is wanting in the case under consideration. There was no abandonment of the steamer "Bielman." The seamen lost nothing by the loss of freight; for, under existing law, the running of their contract for wages continued. The service rendered, in lightering the vessel, was different, in degree only, from the usual service in boisterous weather. What appellants did, plainly was within their duty as seamen, and was therefore paid for by the wages stipulated in the articles of employment.

The decree of the District Court is affirmed.

TORREY v. KELLY.

(Circuit Court of Appeals, Ninth Circuit. February 9, 1903.)

No. 827.

1. SHIPPING—CARRIAGE OF PASSENGER—POINT OF DESTINATION—CONSTRUCTION OF CONTRACT.

Evidence in a libel by a passenger against a vessel for an alleged breach of contract in not landing him at the mouth of a certain river examined, and *held* to show the making of a contract to land libelant merely as near to the mouth as could be done with safety.

2. SAME—DISCRETION OF MASTER.

Where the master of a vessel agrees to transport a passenger to a point as near the mouth of a certain river as will admit of a safe landing, it is for the master to determine, in good faith, where the landing shall be made.

3. SAME—ATTEMPTED LANDING—EXERCISE OF GOOD FAITH.

Evidence in a libel by a passenger against a vessel for breach of contract in not landing him as near to the mouth of a river as could be done with safety examined, and *held* to show that the contract was complied with by the master.

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

D. C. Conover and R. F. Jones, for appellant.

Greene & Griffith and Austin E. Griffiths, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee, Kelly, libeled the schooner Thomas Bayard, her tackle, apparel, and furniture, for an alleged breach of a contract alleged to have been made between the libelant and the master of the schooner, one Torrey, by which the master agreed to carry the libelant and his mining outfit on board the schooner to, and land them at the mouth of, a river designated in the libel as Kowack river, in Norton Bay, Alaska, and for certain alleged damage to the libelant's provisions, growing out of their being landed in a leaky boat at another place, and for certain alleged loss claimed to have been suffered by the libelant by reason of his being compelled to use for the building of a boat a certain portion of his outfit, consisting

of lumber, and intended by him for sluice boxes. For a second cause of action the libelant alleged that he advanced to the master of the schooner \$50 in cash, which was used by the latter, and was necessary to be used by him, in procuring and paying for provisions for the master and crew of the schooner on the voyage then about to be undertaken. The answer of the claimant denied, among other things, the making of the contract as alleged, but set up that he contracted with one Carroll to transport the libelant, not to the mouth of Kowack river, but to Norton Bay, and that that contract he duly performed.

The evidence in the case, which we have examined with care, shows that Carroll and Kelly had entered into an arrangement by which Carroll should furnish Kelly with the necessary provisions and pay his expenses on a mining prospecting trip to Alaska, and that Kelly should contribute his time, labor, and skill to the undertaking, for the joint and equal benefit of both parties thereto. Carroll's clerk and representative, Abernethy, and Kelly, negotiated with Torrey for the transportation of Kelly to his destination. The evidence shows that Torrey knew that Kelly wished to go to the mouth of and up the river in question, the true name of which seems to be Qwik or Quik river, and that Torrey, Kelly, and Abernethy, on behalf of Carroll, discussed the question as to how close to the mouth of the river the master of the schooner could take Kelly; the latter stating that there was sufficient channel to enable the vessel to approach near enough the mouth of the river to land passengers, and the master stating that he did not know the channel there, but that he would take the schooner as far up the bay and as close to the mouth of the river as could be done with safety to the vessel. The latter, we think, was the contract that the master made to transport Kelly and his outfit, and for which Abernethy on behalf of Kelly paid him. It is conceded that at the time of the making of the contract of carriage, as well as at the time when the voyage was made, there was no chart of Norton Bay, into which the river in question entered. Therefore the probabilities all corroborate Abernethy's testimony to the effect that the agreement was that the master should take and land Kelly as near the mouth of the river as could be done with safety.

The evidence shows that the master carried Kelly and his outfit, together with a few other miners and their outfits, to Alaska, and up Norton Bay to within a few miles of the mouth of the river in question, where he anchored about eleven hours, and finding the water breaking so badly around his boat, and deeming it unsafe to remain there, sought another point in the bay from which to land the passengers with their belongings, variously estimated by the witnesses at from 15 to 27 miles from the mouth of the river, and from which point all of the passengers, including Kelly with his outfit, were sent ashore in small boats.

As the master's contract, as we think the evidence shows it to have been, was not to carry the libelant and his outfit to, and land them at the mouth of, the river, but only so near thereto as he could with safety to his vessel, it must, we think, be admitted that, in the absence of any showing of bad faith, it was for the master to determine how near to the mouth of the river he could approach and make a landing. Not

only do we fail to discover anywhere in the testimony any evidence of bad faith on the part of the master, but we think it quite clearly appears therefrom that he endeavored to make the landing at the mouth of the river, and only gave up the attempt after becoming convinced that the safety of the schooner and his passengers and crew required him to do so. The evidence shows that he remained in close proximity to the mouth of the river for about eleven hours, and that when the condition of the water indicated to him that safety required him to seek another landing place he sounded continuously until he found the place from which the landing was effected.

Being of the opinion that the evidence shows that the contract as made was performed, and agreeing with the court below that while there was probably some slight damage to the libelant's provisions in landing them, yet the evidence furnishes no basis for estimating the actual loss, and being of opinion, further, that the alleged advance by the libelant is not sustained by the evidence, the judgment must be reversed, and cause remanded, with directions to the court below to dismiss the libel at the libelant's cost.

It is so ordered.

In re HERZIKOPF.

COHN, GOLDWATER & CO. et al. v. GORCHAKOFF et al.

(Circuit Court of Appeals, Ninth Circuit. February 16, 1903.)

No. 892.

1. **BANKRUPTCY—ADJUDICATION—JURY TRIAL—RIGHTS OF CREDITORS.**

Rev. St. §§ 648, 649, 566 [U. S. Comp. St. 1901, pp. 525, 461], provide that except where a jury is waived in a civil action a jury trial may be had, except in cases in equity, and except as otherwise provided in proceedings in bankruptcy. Bankr. Act § 19, subd. "a," Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], entitles a person against whom an involuntary petition has been filed to a jury trial of the question of his insolvency and any act of bankruptcy alleged to have been committed. Subdivision "c" declares that the right to submit matters in controversy to a jury shall be determined according to the laws of the United States in relation to trials by jury; and section 18, subd. "d," gives the bankrupt or any of his creditors the right to appear and "controvert the facts alleged in the petition." Held, that the right to a jury trial of the question of an involuntary bankrupt's insolvency and of alleged acts of bankruptcy was limited to the bankrupt, and could not be extended to intervening creditors contesting such issues.

Appeal from the District Court of the United States for the Southern District of California.

Oscar Lawler and Carroll Allen, for appellants.

Dunning & Craig, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. On the 14th day of October, 1901, an involuntary petition in bankruptcy was filed by the appellees against one Jacob Herzikopf. The subpoena issued thereon was served on the same day, and made returnable October 9th. The appellants, inter-

vening creditors of the bankrupt, filed a demurrer to the petition on the 17th day of October, and on the 19th day of the same month filed a motion to dismiss the proceedings. On the 20th day of October the demurrer and motion were, after argument, overruled by the court, and an order was thereupon entered allowing the interveners 10 days from that time within which to answer, which they did on the 7th day of November, 1901, in which answer they raised "an issue in respect to both the insolvency of said Jacob Herzikopf and also of the several acts of bankruptcy alleged in said petition," and also "demanding that the issues therein raised should be inquired of by a jury." The court below denied them a jury trial, which action constitutes the sole ground of the present appeal.

It is declared by sections 648, 649, and 566 of the Revised Statutes [U. S. Comp. St. 1901, pp. 525, 461] that, except where a jury is waived by written stipulation of the parties in a civil action, the trial of issues of fact in the Circuit and District Courts shall be by jury, except in cases in equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy. By section 19, subd. "a," of the present bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), it is provided that "a person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived." Subdivision "c" of the same section declares that "the right to submit matters in controversy, or an alleged offense under this act, to a jury, shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury." Subdivision "d" of section 18 gives to the bankrupt or any of his creditors the right to appear and "controvert the facts alleged in the petition."

The argument for the appellants is that any defense which would be open to the bankrupt is open to all of his creditors, including the method of making it. The difficulty in the way of the appellants is that, except in certain specified particulars, within which the present case does not come, proceedings in bankruptcy are of an equitable nature (*Bardes v. Hawarden Bank*, 178 U. S. 524, 534, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175), in respect to which, it must be conceded, the right to a jury trial does not exist. Of course, in the exercise of the jurisdiction at law conferred on the bankruptcy courts, as, for instance, the power to "arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted regulating trials for the alleged violation of laws of the United States," there goes the concomitant right to trial by jury. But in proceedings not at law, but relating, as does the case at bar, to the question of the in-

solvency of the alleged bankrupt, and to acts of bankruptcy alleged to have been committed by him, it is quite clear, we think, that no right to a jury trial exists unless the bankruptcy act expressly or by necessary implication gives it. It is not claimed that it is expressly given to any creditor. It is given, with certain limitations, to the "person against whom an involuntary petition has been filed" by the clause above quoted. But even the bankrupt is by the statute restricted in his right to a jury trial to the issues specifically mentioned, to wit, his insolvency and any act of bankruptcy committed by him. These express limitations of the right to a jury trial clearly manifest, under the familiar maxims, "*Expressio unius est exclusio alterius*," and "*Expressum facit cessare tacitum*," the intention of Congress to withhold it from all others, and in all cases, in such of the proceedings in bankruptcy as are of an equitable nature.

These views render it unnecessary to consider the point made in respect to the time within which the demand for a jury trial must be made. The judgment is affirmed.

ROGERS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 4, 1903.)

No. 2,858.

1. CUSTOMS DUTIES—GAUGE GLASSES.

Gauge glasses, consisting of sections of glass tubes ready for mounting, made by a workman inserting a hollow iron rod into a pot of molten glass, and blowing a bulb from the glass adhering to the rod, and again dipping the bulb into the pot to secure the adherence of enough more glass to draw out the tube to the required length, is "blown glassware," within Tariff Act 1897, par. 100 (Act July 24, 1897, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633]), and taxable thereunder, and not under paragraph 112, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1634], as manufactures of glass not specially provided for.

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

For opinion below, see 115 Fed. 233.

This cause comes here on appeal from a decision of the Circuit Court, Southern District of New York, affirming a decision of the board of general appraisers which affirmed a decision of the collector of the port of New York.

Albert Comstock, for appellant.

J. Frank Lloyd, for the United States.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The merchandise in issue is gauge glasses. They are sections of glass tubes, entirely finished so far as any further work of the glassmaker is concerned, and ready to be mounted into a construction of which they form a factor, permanently connected with metallic and rubber portions, for the gauging of liquids in closed vessels, to which the constructions are attached. The collector classi-

fied them under paragraph 100 of the tariff act of 1897, Act July 24, 1897, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], which reads:

"Par. 100. Glass bottles, decanters, or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all the foregoing, filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem."

The importer contends that they are dutiable under paragraph 112, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1634], which reads:

"Par. 112. Stained or painted glass windows, or parts thereof, and all mirrors, not exceeding in size one hundred and forty-four square inches, with or without frames or cases, and all glass or manufactures of glass or paste, or of which glass or paste is the component material of chief value, not specially provided for in this act, forty-five per centum ad valorem."

The Circuit Court held that they are complete glass tubes, and as such are a commercial article of glassware. We are entirely satisfied with the reasoning and conclusion of the opinion below, and would not find it necessary to write anything, were it not that such opinion contains the statement, "The contention that the articles were not blown was not pressed at the hearing." That contention is pressed here.

The process of manufacture is as follows: A workman inserts a hollow iron rod into a pot of molten glass. The glass adheres to the rod when he withdraws it. He then puts the mouthpiece of the rod to his mouth, and gives a puff through it, which makes a bubble in the center of the bulb of glass, giving the required diameter. The bulb is again dipped in the pot to secure the adherence of enough more glass to draw out the tube to the required length. It is then drawn, and the air which has been blown in keeps the core hollow and of the original diameter until the process of drawing is completed. The importer's own witness testified that the hollow is created by blowing; otherwise when drawn out the glass would be a solid rod, not a hollow tube. Upon this evidence, we are of the opinion that the article produced is "blown glassware."

The decision of the Circuit Court is affirmed.

FARIES MFG. CO. v. GEORGE W. BROWN & CO.

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

No. 852.

1. PATENTS—INVENTION—CHECK-ROW WIRES.

The Barlow patent, No. 328,452, for an improved knot for check-row wires, discloses patentable invention in view of its utility and the length of time during which unavailing efforts were made to overcome the defects in the wires previously used, which it was the first to accomplish successfully.

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

The bill is to restrain infringement of letters patent, No. 328,452, issued October 20th, 1885, to Joseph C. Barlow, for improvements in wire for check-row corn planters. The substantial part of the patent, with its drawings, is as follows:

"This invention pertains to certain improvements in the construction or form of what are technically known as 'knots,' attached to or forming part of the check-row wire, and serving to actuate the planting mechanism; and it consists in the novel method or manner of twisting or laying the wire composing the knot, whereby a firm and durable knot is formed, and the cutting or wearing of the fork or other portion of the planting mechanism with which the wire co-operates is prevented, thereby diminishing the wear upon the machine, and at the same time increasing the life of the knots, all as herein-after more fully described, and pointed out in the claims.

In the accompanying drawings, wherein one mode of carrying into execution my said invention is illustrated, Figure 1, represents a section of a check-row wire, showing how the knots have heretofore been formed and applied. Fig. 2 illustrates my improved form of knot as applied to the joint or coupling between the ends of adjacent wires or sections.

Similar letters of reference in the several figures denote the same parts.

Check-row wires as heretofore generally constructed have been made from sections of wire A, Fig. 1, united by bending the wires to form interlocking eyes or loops A', and coiling the ends back from the eyes or loops and around the body of the wire, as shown at A². When so constructed the extreme ends a of the wires stand out more or less from the body of the wire, forming salient points or projections, which, striking against the fork of the actuating devices on the planter, are not only worn themselves or are caught and bent or deflected, so as to injure the connection at that point, but they also produce an excessive wear of the fork or equivalent actuating device.

To overcome these defects in the construction of the knot, as shown in Fig. 1, instead of carrying the end of the wire forward and leaving the point lying upon and projecting from the body of the wire, as in Fig. 1, I carry the end back or in the opposite direction, and wind it upon the first coil, as shown at A⁴, Fig. 2, and press the extreme end or point a down in rear of the preceding coil a', whereby the knot is not only enlarged and the connection strengthened, but the end or point a of the wire is shielded by the preceding coil of wire, which makes contact with and actuates the fork. In this manner not only am I enabled to construct a more firm and durable knot, but one less subject to be injured by or inflict injury upon the fork or equivalent device for operating the planting mechanism."

Fig. 1



Fig. 2.



The claims relied upon are as follows:—

- 1: An improved knot for check-row wires, formed by coiling the wire composing the knot, back upon itself, substantially as described.
- 2: The improved knot for check-row wires, composed of a primary coil and a reversely wound external coil, substantially as described.

The patents introduced into the record as relating to the state of the art, are the following:

- No. 132,792, Nov. 5, 1872, A. Barnes.
- No. 157,885, Dec. 15, 1874, M. J. Stevens.
- Reissue** No. 7,522, Feb. 20, 1877, A. Barnes.
- No. 197,271, Nov. 20, 1877, L. L. Haworth.
- No. 202,552, April 16, 1878, J. Knipscheer.
- No. 208,814, Oct. 8, 1878, G. D. Haworth.
- No. 219,176, Sep. 2, 1879, W. A. Root.
- No. 227,787, May 18, 1880, J. W. Hudson.
- No. 232,472, Sep. 21, 1880, J. C. Dupee.
- No. 242,602, June 7, 1881, W. R. Clough.
- No. 274,123, March 20, 1883, J. Kaylor.
- No. 295,252, March 18, 1884, T. H. Hutchins.
- No. 296,661, April 8, 1884, W. B. Woodman.
- No. 299,064, May 20, 1884, L. E. Evans.
- No. 307,755, Nov. 11, 1884, A. C. Evans.
- No. 315,773, April 14, 1885, E. P. Haff.
- No. 315,821, April 14, 1885, G. Nicholson.
- No. 333,121, Dec. 29, 1885, R. Faries.

The appellee was shown to have used the knot embodied in the appellant's patent; but the validity of the patent is disputed. The cause was here before upon demurrer, 42 C. C. A. 483, 102 Fed. 508, and we held the patent not demurrable upon its face. The Circuit Court dismissed the bill for want of equity and from that decree this appeal is prosecuted. The further facts are stated in the opinion of the court.

C. E. Pickard and L. L. Bond, for appellant.
Thomas A. Banning, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

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

In the planting and cultivation of corn, it is desirable that the hills be spaced equally apart, in order that the corn may be cultivated between the rows in both directions. This spacing was formerly accomplished by running furrows across the field in both directions from three to four feet apart, the intersections of the furrows being the places where the corn was dropped. In the earlier planters, the seed dropping device was operated by a lever, rocked by a man or boy riding upon the planter, who operated the lever so as to drop the corn as nearly as possible at the intersections. This method, however, did not produce accuracy, and the rows of corn were frequently found to be out of alignment.

Then came the device which employed ropes or wires, stretched across the field at regular intervals, along which were carried by the planter a forked lever, the rope or wire being provided with knots or tappets at prescribed distances. The fork was dipped by coming in contact with such knots, thereby causing a certain number of seeds to be dropped at uniform distances.

It was found however, that as a constant quantity, the rope could not be relied upon. It would lengthen or shorten according to the weather. Wire was substituted, consisting of links of the required length, the several links being flexibly united by interlocking eyes. The short free ends of the wires were then coiled backward upon

the joints upon the body of the wire, to form a knot or tappet, designed to throw the fork lever. This was known as the Barnes patent.

The shortcomings of the Barnes patent, need not be stated at length. The knot was too small. After a little use of the fork, the knot would sometimes slip through without tipping the fork, thereby leaving the corn unplanted, but conveying no knowledge of the failure to the driver of the planter. Then too, the end of the coiled wire, coming in contact with the fork first, tended to wear the fork by cutting grooves into it. On account of this and other faults, there arose a demand that the difficulty be remedied, the successful reply to which was the patent in suit, taken out twelve years later.

In the meantime, however, other devices were employed to avoid the difficulty. Some took the form of bulbs, buttons or balls, attached to the wire, but extraneous thereto. So far as an increase of dimensions went, these devices answered their purpose, but they lacked endurance. The continual blows delivered to the bulb required resistance of a more robust character than was contained in a bulb thus artificially attached.

In the patent under consideration, the knot is made from the wire itself, and its dimensions over the Barnes knot increased by employing longer free ends at the interlocking eyes, and after coiling these, as in the Barnes device, coiling them back again upon the first coil, toward the interlocking eyes. This method at once increases the size of the Barnes knot, and leaves the end of the wire when the knot is completed, not toward the front, where it will receive the blow, but behind the knot and protected thereby. Its superiority over its predecessors was soon proven, and it is now in general use. Undoubtedly its usefulness is in the fact that it overcomes the tendency to cut the fork, and, without losing the resistance of the Barnes knot, obtains the necessary increase of dimension.

The single inquiry is: Does this constitute patentable invention? The advance seems simple enough. One wonders why, pending its adoption, twelve years went by. But the same wonder accompanies every step forward in the useful arts. The eye that sees a thing already embodied in mechanical form gives little credit to the eye that first saw it in imagination. But the difference is just the difference between what is common observation and what constitutes an act of creation. The one is the eye of inventive genius; the other of a looker on after the fact.

Considering the utility of the new knot, and the unavailing efforts, prior to the patent in suit, to reach some correction of the existing defects, and the length of time those efforts went on, we are convinced that the patent under consideration evinces something more than mere mechanical skill. The decree below will be reversed, with instructions to enter a decree sustaining the patent, and restraining appellee from its infringement.

FARREL et al. v. UNITED VERDE COPPER CO.

(Circuit Court, S. D. New York. January 16, 1903.)

1. PATENTS—INVENTION—CONVERTER FOR COPPER ORES.

The Manhes patent, No. 470,644, for a converter for copper ores, covering a process for reducing copper matte and a converter for carrying out such process, which consists in forcing radial jets of air into the matte while in a molten state to burn out the foreign substances, the chief or only feature of novelty claimed being the method of removing the chilled copper which forms around and obstructs the inner ends of the blast holes or tuyeres by means of holes through the outer wall, having removable plugs, through which an iron bar may be passed, is void for lack of novelty in view of the prior art, both as to the process and the converter.

In Equity. Suit for infringement of letters patent No. 470,644, for a converter for copper ores, granted to Pierre Manhes March 8, 1892. On final hearing.

H. A. Seymour, for complainants.
Henry G. Atwater, for defendant.

WALLACE, Circuit Judge. This is an action in equity to restrain infringement of two patents to Pierre Manhes, of Lyons, France, for improvements in the art of smelting copper—No. 456,516, dated July 21, 1891, for "process of smelting copper," and No. 470,644, dated March 8, 1892, for "converter for copper ores." At the hearing of the cause the first patent was abandoned and withdrawn from the consideration of the court by the complainants. It is to be regretted that this had not been done at an earlier stage in the suit, before the introduction of the voluminous proofs in regard to its validity and its infringement. Indeed, it is a matter of surprise that it was ever brought forward as the basis of an infringement suit in equity. Its term had expired before the commencement of the suit, and the court therefore had no jurisdiction, and the remedy for infringement was cognizable only in a court of law. The subject-matter had been patented in nearly every country of the civilized world, and the terms of several of the foreign patents had expired, thus ending the term of the United States patent some considerable time before the suit was brought.

The second patent contains two claims, each of which is in controversy, the validity and infringement of each being contested by the defendant. The application for this patent was filed December 2, 1885. In its preamble the patent recites that the improvements to which it relates had been patented in Great Britain October 13, 1883. The claim of the British patent reads as follows:

"A Bessemer converter, or similar furnace, provided with tuyeres or air passages arranged above the space to be occupied by the metal, and in combination with an air-belt provided with orifices opposite the tuyeres, substantially as and for the purpose specified."

The specification of this patent states:

"The arrangement of these parts as described permits the ready removal of any obstruction from any of the tuyeres by means of a rod or bar passed through the side orifices provided in the air-belt."

In the application for the patent in suit, as appears by the file wrapper, the invention first claimed was this:

"The method herein specified of insuring uniformity in the blast in converters for treating copper matte, consisting in driving into and through the tuyere holes successively a bar for removing the chilled copper around the inner end of the tuyere, substantially as specified."

That claim was rejected by the Patent Office upon the statement that it was "universally practiced in the art of smelting ores to clear the tuyeres by inserting bars or rods in the manner described by applicant." Thereupon the application was amended as follows:

"I am aware that provision has been made for clearing blast holes in blast furnaces, but this apparatus is not adapted to the conversion of copper matte, and my process renders the operation of converting copper matte practical and efficient, whereas the efforts to reduce copper matte in blast furnaces have heretofore failed in consequence of the blast holes becoming obstructed."

Thereupon the application was reconsidered, and rejected again by the Patent Office, upon the statement as follows:

"It being common practice to free the tuyere openings of blast and cupola furnaces by inserting bars or rods, it must be held that the application is without patentable novelty."

By an amendment to the application, filed June 16, 1887, a new claim was added as follows:

"(2) The converter having an air-belt around it, and tuyere holes opening inwardly from the same, and corresponding openings through the outer wall of the air belt, in combination with removable plugs introduced into the latter openings, whereby drift bars can be passed rapidly through the tuyere holes for removing the chilled copper or matte at the tuyere holes, without interfering with the blast, substantially as set forth."

The examiner of the Patent Office refused to allow the claim, principally upon the ground that the apparatus sought to be covered by the proposed amendment was a different invention from the original process claimed. He also suggested to the applicant that the construction sought to be covered was very old and common, and cited a number of patents as references. September 9, 1891, the applicant applied for special permission to introduce further amendments to the claims. That permission was granted, and the claims were amended to read as they now appear in the patent. The examiner again rejected the claims, citing a number of references against their novelty, and thereupon the Commissioner of Patents seems to have intervened in the proceeding without a formal appeal having been taken to him, and November 14, 1891, the application was allowed.

A brief reference to the prior art is desirable before entering upon a detailed consideration of the patent. In the treatment of sulphurate copper ores, the regulus, or the matte in its liquid state, is placed in a converting furnace, which has been heated to a sufficient temperature, and then subjected to a process of combustion and oxidation of the sulphur and iron by the forced passage of a blast of air under sufficient pressure to traverse the mass.

In 1866 Raht obtained a patent in this country for a process of treating ores, among them copper, by forcing the air through the liquid matte, in contradistinction to the process described in Besse-

mer's patent for treating iron ores by forcing air through the ore. His process obviously contemplated the employment of a Bessemer converter, and the manipulation of the converter and the regulation of the air blast according to the Bessemer method. In such converters, as in some other converters of the prior art, the air-blast is introduced from a wind-box (commonly spoken of as a "wind-belt") encircling the outer walls of the furnace, from which channels, known as "tuyeres," running through the walls, communicate with the interior of the furnace. In some instances these tuyeres projected horizontally through the walls of the furnace, in others they projected vertically. These furnaces were generally provided with peepholes, having stoppers, for the purpose of viewing the interior of the furnace through the tuyeres, and to facilitate the introduction of a rod for cleaning out the tuyeres and removing obstructions therein. One form of Bessemer converter had a vertical axis, and was designed to be blown in a position vertical, or nearly so. Another form of Bessemer converter had a horizontal axis, in position for blowing when the tuyeres were beneath the bath. The Swedish patent to Manhes of April 15, 1884, describes a cylindrical converter having a horizontal axis designed for the smelting of various metals, among others for the smelting of copper. It is supplied lengthwise on one side with a line of tuyeres, each of which at one end reaches the inside of the furnace, and at the other communicates with the wind-box. In the wall of the wind-box opposite the tuyeres is a line of holes "through which one can clean the former tuyeres when necessary, otherwise the holes are closed with plugs."

The patent in suit, after the preamble reciting that the improvements to which it relates had been patented in Great Britain, contains this recital:

"Converters have heretofore been made in which the blast enters through one of the trunnions and passes by a pipe to an air-belt around the lower part of the converter, and from the air-belt tuyeres or orifices pass through the lining of the converter, and in some instances openings have been provided in the outer wall of the air-belt, into which pieces of glass have been inserted, and sometimes movable screw-cap pieces have been applied. In the conversion of iron into steel the air acting upon the carbon increases the heat of the mass in the converter; but when the copper matte is introduced into the converter the action of the air upon the same is to burn out the impurities and separate the copper; but this copper speedily becomes chilled by the action of the air, and the tuyeres or blast holes become obstructed, and the operation of the converter is thereby delayed on account of an insufficient supply of air."

The specification then continues:

"My invention relates to the method or process pursued in treating copper matte for its conversion into metallic copper; and it consists in driving into the melted mass within the converter from time to time the copper which becomes chilled at the end of the tuyeres, so that the blast is maintained in full force and the rapidity of the operation greatly promoted."

"In carrying out my invention I provide a converter substantially as shown in the accompanying drawings, in which—

"Figure 1 is a vertical section of the converter, and Fig. 2 is a horizontal plan through the air-belt at the line. * * *"

The specification then describes the converter, which is illustrated by the drawings, as follows:

"The converter A is of ordinary size and shape, and it is supported by the trunnions B in suitable frames, and the air is supplied through one of the trunnions and the pipe E to the air-belt E, that surrounds the lower part of the converter, and there are tuyere-holes or openings C from the air-belt through the case and lining of the converter. In the outer wall of the air-belt there are openings with removable plugs F, which openings are opposite to and in line with the tuyere-holes C. These tuyere-holes C may be all around the converter or only one side, according to the shape or character of the converter. After the copper matte in a melted condition has been supplied into the converter the blast is applied and the converter rotated in such a manner that the blast will pass into the matte for the purpose of burning out the foreign substances and reducing the matte to copper, and the attendant from time to time removes the plugs F in succession to ascertain whether the tuyere-holes C are open and the blast passing freely into the matte. If there is an obstruction an iron bar about the size of the tuyere-hole is entered and driven through the tuyeres to break away and carry into the mass of matte and copper the chilled metal that has accumulated around the inner end of the tuyeres, thereby opening up the tuyeres whenever necessary for securing the full action of the blast."

The patent then contains the following disclaimer:

"I am aware that provision has been made for cleaning the blast-holes in blast-furnaces; but this apparatus is not adapted to the conversion of copper matte, and my process renders the operation of converting copper matte practicable and efficient, whereas the efforts to reduce copper matte in converters have heretofore failed in consequence of the blast-holes becoming obstructed."

The claims are as follows:

"(1) The process of reducing commercial or pig copper from copper matte, consisting in charging the matte in a molten state into a converter, forcing radial jets of air uniformly and continuously through the charge of molten matte and causing the heat produced by the combustion of the sulphur and iron in the matte to separate the foreign substance from the metallic copper contained therein, allowing the metallic copper as it is separated from the matte to settle below the action of the air-jets and removing the chilled metallic copper as it forms around and obstructs the inner ends of the tuyeres, and thereby insure the maintenance of a continuous and practically uniform distribution of air throughout the molten matte, and continuing the operation until the metallic copper contained in the charge has been separated therefrom and then removing the copper from the converter, substantially as set forth.

"(2) A converter for reducing commercial or pig copper from copper matte, having a wind-belt encircling the converter above its bottom, a series of tuyeres extending through the lining of the converter and communicating at their outer ends with the wind-belt, and removable stoppers located in the outer wall of the wind-belt and in alignment with each one of said tuyeres, whereby a drift-bar may be inserted successively through said tuyeres to remove obstructions from their inner ends, substantially as set forth."

Inasmuch as no description is given of the process claimed, except that part of it which consists "in removing the chilled metallic copper as it forms around and obstructs the inner ends of the tuyeres," it must be presumed that all else was well known to those skilled in the art, and therefore did not require description to that part of the public to whom the specification of a patent is addressed. It follows that the novelty of the first claim depends upon the fact whether that part of the process was new. If it had been customary to remove the obstructing matter from the inner ends of the tuyeres, the claim covers nothing more than the use or function of the particular arrangement of tuyeres and holes with stoppers described in the second claim.

It will be observed that the claim in the original application for the patent specifying this feature of novelty was rejected by the Patent Office. The patentee acquiesced in this rejection by amending the claim. He thereby admitted that this feature of novelty was not of itself sufficient to sanction a patent. If all the other steps of the process were old and well known, it is not readily conceivable how the use of another, which was not new, and, as the examiner of the Patent Office said, "had been universally practiced in the art of smelting ores," can be the basis of a valid claim.

It is not necessary, however, to rest the conclusion that the claim is invalid upon any technical ground. The fact that the metallic copper, when separated from foreign substances in the matte during the later stages of such a process as is described in the claim, will congeal, thereby necessitating to a greater or less extent the freeing of the tuyeres, is self-evident. If evidence to establish the fact were necessary, it is supplied by the English patent to Lake of March 26, 1884, in which it is pointed out as "obvious" that, when the smelting operation has exhausted the combustible matter in the charge "the copper is cooled and solidified by contact with the air"; and, again, "that there is a tendency, especially towards the close of the operation, for masses of congealed matte to form around the tuyeres."

It remains to consider the second claim. If it is true that the wind-belt is usually interposed between the tuyeres and the furnace, that in operating the converter it is necessary at times to clean out the tuyeres by inserting a rod or bar therein, and that it was old in the prior art to have holes in the outer wall of the wind-belt in alignment with the tuyeres for the purpose of doing this, the patentable novelty of the claim can only reside in the removable stopper of the claim. The disclaimer in the patent admits that "in some instances openings have been provided in the outer wall of the air-belt, into which pieces of glass have been inserted, and sometimes movable screw-cap pieces have been applied."

The British patent to Clark of May 9, 1877, describes a furnace surrounded by a blast-chamber, whence the blast is distributed in the furnace tuyeres, the number and dimensions of which vary according to the quantity of metal to be melted. The blast-chamber (wind-belt) "is provided with sight holes, H, opposite the several tuyeres, each closed by a sliding door fitted with blue glass, through which when closed the progress of the operation may be watched, and when opened the tuyeres cleared." This is probably the reference first contemplated by the disclaimer.

The United States patent to Bessemer of July 25, 1865, shows a converter surrounded by a wind-belt communicating with horizontal tuyeres. Opposite the tuyere is a screw-plug "for the purpose of admitting a plug or rod for the purpose of clearing out the tuyere should it become obstructed when in use."

The United States patent to Stribling of April 11, 1877, shows a furnace surrounded by an annular air space communicating with horizontal tuyeres in which there is a hole in the outer wall of the air-belt opposite each tuyere, "usually kept plugged up when the furnace is in operation. This hole, when opened, allows the operator

to view the interior of the furnace, and also permits the insertion of a clearing bar or rod to remove obstructions from the mouth of the tuyere should it become stopped."

All these prior patents show the movable stoppers of the claim. Whether they are removable as readily as those contemplated by the patent is merely a matter of conjecture, as the specification is silent as to the means or mode by which the stopper is removed. The Patent Office was abundantly justified in its first rejection of the claim for want of novelty.

In conclusion it is proper to say that, however much the patentee may have contributed by his other inventions to the improvement of the art of smelting copper, those things which are the subject of the present patent seem so destitute of merit as to excite surprise at the action of the Patent Office in finally allowing his application.

The bill is dismissed, with costs.

PITTSBURGH REDUCTION CO. v. COWLES ELECTRIC SMELTING & ALUMINUM CO.

(Circuit Court, N. D. Ohio, Eastern Division.)

No. 4,869.

1. PATENTS—SUIT FOR INFRINGEMENT—REHEARING.

What laches will defeat an application for a rehearing after an interlocutory decree finding infringement depends entirely on the facts in each case, and the effect which the granting or refusal of the application will have on the rights of the parties respectively.

2. SAME.

An interlocutory decree finding infringement of the Hall patent, No. 400,766, for a process for reducing aluminum by electrolysis, set aside, and a rehearing granted on a showing of newly discovered evidence.

In Equity. Suit for infringement of letters patent No. 400,766, for a process for reducing aluminum, granted to Charles M. Hall, April 2, 1889. On motion for rehearing.

For former opinions, see 55 Fed. 301, and 64 Fed. 125.

T. W. Bakewell and G. H. Christy, for complainant.
Thurston & Bates, for defendant.

WING, District Judge. The issues arising on the hearing of this petition have been very fully discussed. I have become familiar with the opinions of his honor Judge Taft ([C. C.] 55 Fed. 301; [C. C.] 64 Fed. 125) filed upon the entry of the interlocutory decree and the refusal of a former petition for rehearing.

It is represented in the petition that certain new testimony, the existence of which was unknown at the time of the prior hearing, can be adduced. An examination of the proposed new testimony in connection with the testimony upon which the interlocutory decree was based, and the reasons stated in these opinions for the conclusions reached, raises grave doubt in my mind as to the justice of entering a final decree without a consideration of the proposed new testimony. Some new light has been thrown upon the case by the decision of the Circuit

Court of Appeals in the case of Cowles Electric Smelting & Aluminum Company et al. v. Lowrey, 24 C. C. A. 616, 79 Fed. 331.

In view of Judge Taft's opinion, it is most important to a correct decision of this cause that full information should be had upon the question as to whether commercial success resulted from the practice of the process described in the complainant's patent, or some important modification of, or addition to, such process. Judge Taft was much influenced in his decision by the fact, as it then appeared to him from the proofs, that Hall, by his process, had reduced the cost of production of aluminum in a most marked degree. Important testimony is proposed to be offered on the question as to whether or not internal heating sufficient to fuse is necessarily incident to the use of the electric current in electrolysis. There are other important questions raised by a consideration of the proposed new testimony, the solution of which seems essential to a correct final decree. I am fully appreciative of the weight and importance which should be given to the decision of so able a jurist as Judge Taft, and am of the opinion that, had he the cause before him as now presented upon this petition, unless restrained by the consideration of some imperative rule of practice in equity, he would give the defendant the opportunity of supplementing its proof in the manner prayed for.

It is urged by the complainant that there has been such lapse of time since the existence of the proposed evidence was known to the defendant that it should be barred of the relief sought. What should or should not be considered laches depends entirely upon the facts in each case. The complainant has not been injured by any delays of the defendant, except, perhaps, in the time expended in the inquisition of damages before the master. The injury inflicted upon the defendant by an erroneous decree, made such by an omission to consider all of the testimony possible to be adduced, would be far greater than that which might result to the complainant from disappointment with respect to the stability of an interlocutory decree in its favor. In the latter case the actual damage to a complainant who has acted upon the supposition that the interlocutory decree was final, so far as the court of first instance was concerned, would be reparable; but that inflicted in the former instance would be irreparable.

As a condition of the granting of the prayer of this petition, and of the defendant being allowed to reopen the cause and adduce new proofs, all costs taxed in connection with the hearing before the master in the ascertainment of damages and profits should be first paid by the defendants. Upon the payment of such costs an order may be drawn providing that the interlocutory decree herein be set aside, and the cause reopened, and a rehearing thereof had, and allowing the defendant to adduce such additional proof as is set forth in its petition for rehearing, and with special order that the defendant be allowed to introduce in its additional proof in this cause such parts of the proof in the cause of The Electric Smelting & Aluminum Company v. The Pittsburgh Reduction Company, begun in the Circuit Court of the United States for the Northern District of New York, as was offered in said cause by the defendant therein and is set forth in the petition for rehearing of the defendant herein.

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court, S. D. New York. January 21, 1903.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the article made by defendant prior to the filing of a bill for infringement of a patent did not infringe, and no intention then to infringe is shown, a subsequent change in structure, which transforms the noninfringing into an infringing device, will not warrant the granting of a preliminary injunction.

In Equity. Suit for infringement of letters patent No. 360,070 for a fluid pressure automatic brake mechanism granted to George Westinghouse, Jr., March 29, 1887. On motion for preliminary injunction.

Frederick H. Betts, for complainant.

William A. Jenner, for defendant.

LACOMBE, Circuit Judge. This suit was brought to enjoin an alleged infringement. Upon proofs showing the type of valve which defendant had manufactured and sold before suit brought, it was held that such type did not infringe the patent under the restricted construction given to it by the Supreme Court (*Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136), and that defendant's device was similar to the Boyden valve, possessing a structural feature which that court held differentiated the Boyden valve from the valve of 360,070. Since then defendant has so modified its valve as to eliminate the feature which differentiated it, and it is thought that as now constructed it infringes 360,070, as construed by the Supreme Court.

When an infringing device is shown to have been made before suit brought, the charges of the bill will be held broad enough to cover subsequent changes of structure which also infringe, and successive preliminary injunctions may issue to cover each and all of such modified forms. But no authority is called to the attention of the court which holds that where no infringement is shown before filing of the bill, and no threat to infringe is proved by evidence of an intention then to manufacture a particular structure, which the court can see will infringe if it be made, a subsequent change of structure, which transforms a noninfringing into an infringing device, will warrant the issuing of a preliminary injunction. There are several cases which hold the other way. *Humane Bit Co. v. Barnet* (C. C.) 117 Fed. 316; *Slessinger v. Buckingham* (C. C.) 17 Fed. 454; *Judson Mfg. Co. v. Burge-Donahue Co.* (C. C.) 47 Fed. 463.

The motion is denied, with leave to renew after defendant shall have applied for and obtained leave to file a supplemental bill.

ARMAT MOVING PICTURE CO. v. EDISON MFG. CO.

(Circuit Court, S. D. New York. December 16, 1902.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a patent has been sustained at final hearing after strong opposition, a preliminary injunction against another infringer will not ordinarily be refused upon affidavits to a prior public use.

2. SAME—DEFENSE OF LICENSE—MEASURE OF PROOF REQUIRED.

The defense of license from some one who is claimed to have had an interest in the patent sued on is one to be made out by the defendant by a fair preponderance of proof.

In Equity. Suit for infringement of patent. On motion for preliminary injunction and motion for rehearing.

Church & Church, for the motion.

Richard N. Dyer, opposed.

LACOMBE, Circuit Judge. The patent in suit was before Judge Hazel at final hearing on a voluminous record, and he discussed it in a long and careful opinion (118 Fed. 840), in which he appears to have considered all of the various defenses now urged in opposition to this motion. No new prior patent or publication is produced. The only new evidence is as to experiments conducted by Thomas A. Edison, terminating, as the affiants aver, on some date prior to the application for patent in suit, in a completed machine, which, if it then existed, would probably be an anticipation. But, where a patent has been sustained at final hearing after strong opposition, it is not usual to refuse preliminary injunctive relief against another infringer upon affidavits to a prior public use.

There seems to be no suggestion of noninfringement of the patent, when construed as it has been in the earlier case.

The motion for preliminary injunction is granted.

On Motion for Rehearing.

(January 3, 1903.)

LACOMBE, Circuit Judge. The defense of license from some one who it is claimed has some interest in a patent sued upon is one to be made out by defendant by a fair preponderance of proof. In this case there seems not to be sufficient identification of the invention of the patent in suit to Armat & Jenkins with the invention of Jenkins himself, which was the subject of his contract with the Graphophone Company. It is thought, therefore, that the moving papers do not present sufficient reasons for modifying the injunction already granted, and the motion for rehearing is denied.

The order of denial should itself contain a clause continuing the injunction, so that, if defendant decides to appeal, all the papers used on original hearing and on application for rehearing may be brought before the appellate court.

WESTINGHOUSE ELECTRIC & MFG. CO. v. AMERICAN TRANS-
FORMER CO.

(Circuit Court, D. New Jersey. February 9, 1903.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A prior adjudication sustaining the validity of a claim of a patent, and finding infringement, is not sufficient to justify the granting of a preliminary injunction against another defendant, whose structure is different, and does not appear to be within the claim as construed in the former suit.

In Equity. Suit for infringement of letters patent No. 366,362, for cooling transformers, granted to George Westinghouse, Jr., July 12, 1887. On motion for preliminary injunction.

Thomas B. Kerr and Drury W. Cooper, for the motion.

Clifton V. Edwards, M. B. Philipp, and Geo. Whitfield Betts, Jr., opposed.

KIRKPATRICK, District Judge. This is an application for a preliminary injunction. The moving papers show that claim 4 of the patent in suit has been adjudged valid in the case of Westinghouse Electric & Manufacturing Company v. Union Carbide Company (C. C.) 112 Fed. 417, which decree was affirmed in the Circuit Court of Appeals for the Second Circuit. 117 Fed. 495. It appears from an inspection of that case that the only question involved was that of anticipation and want of novelty, infringement being admitted if that defense failed. The court held the claim valid, and its decree was sustained on appeal by the Circuit Court of Appeals. I do not consider the case authority for more than the validity of the claim. The structure of the defendant in the case at bar differs from that of the carbide company there in suit. The affidavits of the defendant now presented, together with an inspection of defendant's apparatus, convince the court that the merits of the controversy ought to await the final hearing.

The claim of the complainant's patent has been sustained, but it does not appear that the construction there given it was such as is now claimed, or that it would be applicable to the defendant's apparatus. Under these circumstances, a preliminary injunction should be refused. Whippany Manufacturing Co. v. Indurated Fibre Co., 30 C. C. A. 615, 87 Fed 215.

Let the rule to show cause be discharged, and a decree entered denying the motion for a preliminary injunction.

YOUNG v. CLIPPER MFG. CO.

(Circuit Court, S. D. New York. January 19, 1903.)

1. PATENTS—DESIGNS—PRIOR PUBLIC USE.

Since a design is patentable only for its appearance, the exhibition of the subject of a design patent by the inventor to others after its completion, and more than two years before the filing of the application for a patent, constitutes a prior public use which invalidates the patent.

2. SAME—DESIGN FOR PAPER FASTENER.

The McIntosh design patent, No. 27,514, for a design for a clip or fastener for holding sheets of paper together, is void for prior public use.

In Equity. Suit for infringement of letters patent No. 27,514, for a design for a clip or fastener, granted August 10, 1897, to William R. McIntosh. On final hearing.

S. L. Moody and Harold Binney, for plaintiff.
Edmund Wetmore, for defendant.

WHEELER, District Judge. This suit depends upon design patent No. 27,514, dated August 10, 1897, and granted to William R. McIntosh, assignor to the plaintiff, "for a clip or fastener," of resilient wire, to hold together sheets of paper, documents, and other articles, by slipping over and clamping their edges. One defense set up is that the design was in public use more than two years before the application, which was filed June 24, 1897.

The inventor made some of the clips in May, 1895, and gave one to a printer, who got an engraving company to make an electrotype of it for printing letter heads, setting forth its qualities, and envelopes calling attention to it, which were done June 5th; and some were placed upon the edges of letters and tags sent by the inventor, in correspondence concerning them, before June 24, 1895. A design is patentable for its appearance, and the use of it consists in exhibition and contemplation of it. Any such use, involving others than the inventor, would seem to be a public use, as the use of a mechanical device, at the request of the inventor, by another, is well adjudged to be. *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755. The use of this design by the engraver for the printer, and by the inventor in his correspondence with others, neither of which had anything to do with producing or completing the invention, would each seem to be such a public use, according to the principles of that case, as will defeat a patent. The time of these uses is well established, and they seem to compel the overthrow of this patent upon this defense.

Bill dismissed.

CIMIOTTI UNHAIRING CO. v. FROLLOEHR et al.

(Circuit Court, S. D. New York. January 20, 1903.)

1. PATENTS—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT—SUFFICIENCY OF PROOF.

Circumstantial evidence, although of such a character as to create a strong impression that defendant has violated an injunction against infringement by making a merely colorable change in his machine, is not sufficient to warrant the court in adjudging him guilty of contempt, which involves imprisonment, against his sworn denial.

On Motion to Punish for Contempt.

Louis C. Raegener, for the motion.
Wm. H. Von Steenberg, opposed.

LACOMBE, Circuit Judge. The impression produced by repeated study of the affidavits is that the change made by defendants in

their original infringing machines was colorable; being so arranged that the brushes could readily be adjusted in practice so as to brush the fur down, as well as across. Moreover, the court is strongly inclined to believe that they have been so adjusted in practice. Nevertheless, strong impressions are not sufficient warrant for holding a person in contempt, when such holding would involve his imprisonment. Against the sworn denials of the defendants, uncontradicted by any testimony from the room in which the machines have been actually used, the circumstantial evidence secured upon the inspection of November 21st is not sufficient to support a finding that defendants have disobeyed the order of the court.

Motion denied.

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court, S. D. New York. January 21, 1903.)

1. PATENTS—VIOLATION OF INJUNCTION BY EMPLOYÉS.

It is the duty of a defendant corporation, enjoined from making or selling a patented article, to take such steps as will insure obedience to the injunction by its employés, and a fine will be imposed for contempt where, through carelessness of its officers, although without intention on their part, the injunction is violated by its employés.

Motion to punish for contempt in disobeying an injunction against the making, using, or vending of any air brakes, valves for air brakes, apparatus or devices containing, embodying or employing the invention of claim 2 of the Boyden patent, No. 481,134.

Frederick H. Betts, for complainant.

William A. Jenner, for defendant.

LACOMBE, Circuit Judge. Four "quick action triple valves" of the type which was found to be an infringement are shown to have been sold subsequent to service of the injunction. The defendant upon the record here presented must be acquitted of any deliberate violation of the order of the court, its officers having given instructions not to make or sell such structures. Nevertheless, it is thought that an enjoined defendant should take such steps as will enforce obedience to these instructions on the part of its employés. For deliberate violation a heavy penalty would be imposed; for mere carelessness, however, it should be sufficient to exact one which will induce greater carefulness in the future. This motion might have been avoided had proper attention been given to the notification given to the defendant last summer that infringing valves had been found, which had been sold by its employés since injunction. It is thought that a proper disposition of the motion will be to impose a fine of \$250 for each of the four infringing valves, one-half to the United States, one-half to the complainant.

It is so ordered.

¶ 1. See Patents, vol. 38, Cent. Dig. § 613.

WABASH R. CO. v. HANNAHAN et al.

(Circuit Court, E. D. Missouri, E. D. April 1, 1903.)

1. INJUNCTION—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—TEMPORARY RESTRAINING ORDER.

A bill filed by a railroad company against the officers of certain labor organizations alleged a malicious conspiracy on the part of defendants to interfere with the carrying of the mails by complainant, and to restrain interstate commerce, by inducing and compelling complainants' employes engaged in operating its trains, some of whom were members of such organizations, to strike in violation of their contracts, although they had no grievance and were entirely satisfied with their wages and conditions of service, and to prevent connecting carriers from interchanging traffic with complainant, the purpose being to compel complainant to recognize the organizations represented by defendants, and to employ no men who were not members thereof. *Held*, that such bill was sufficient to authorize and require a federal court to grant a temporary restraining order enjoining defendants from ordering or causing a strike of complainant's employes, or in any manner interfering with complainant in the discharge of its duties as a common carrier of interstate traffic and the mails, until a hearing could be had on a motion for a preliminary injunction.

2. LABOR STRIKES—RIGHT OF COMBINATION.

An employé has an unquestionable right to place a price and impose conditions upon his labor at the outset of his employment, or, unless restrained by contract obligations, upon the continuance of his labor at any time thereafter, and, if the terms and conditions are not complied with by the employer, he has a clear right not to engage, or having engaged in the service to cease from work, and what one may do all may lawfully combine to do for the purpose of rendering their action more effective. But this right of combination and to strike or quit the employment must be exercised in a peaceable and lawful manner, without violence or destruction of property or other coercive measures intended to prevent the employer from securing other employes, or otherwise carrying on his business according to his own judgment.

3. SAME—LABOR ORGANIZATIONS—DELEGATION OF POWERS TO OFFICERS OR COMMITTEES.

It is the right of labor to organize for lawful purposes, and by organic agreement to subject the individual members to rules, regulations, and conduct prescribed by the majority; and the courts cannot enjoin the officers or committees of such an organization from counseling or ordering a strike in the exercise of authority given them by the laws and sanctioned by a majority of its members, nor can such action be made the basis of a charge of malicious conspiracy.

4. SAME—LEGALITY OF ACTION—EVIDENCE CONSIDERED.

Evidence considered on a motion for a preliminary injunction, and *held* insufficient to sustain the charge of conspiracy to interfere with interstate commerce or prevent the carrying of the mails by complainant, in violation of the laws of the United States, or to support the allegations of the bill that defendants, as officers of the Brotherhood of Railroad Trainmen and of the Brotherhood of Locomotive Firemen, respectively, in declaring their purpose to order a strike of the members of such orders in complainant's employ, acted without due authority from the employes affected, or with any purpose other than to enforce, by peaceable and lawful methods, demands previously made relating to wages and rules of work.

In Equity. On motion for preliminary injunction.

Wells H. Blodgett, C. N. Travous, and Boyle, Priest & Lehmann, for complainant.

F. A. Judson, E. J. Pinney, J. H. Murphy, and W. T. Irwin, for defendants.

ADAMS, District Judge. This is a suit commenced by the railroad company against John J. Hannahan, grand master of the Brotherhood of Locomotive Firemen, W. G. Lee, vice grand master of the Brotherhood of Railroad Trainmen, and officers and members of the joint protective board of the first-mentioned and of the general grievance committee of the second-named order.

The bill of complaint charges that the labor organizations above named, and the defendants, as officers, representatives, and agents of such organizations, "have unlawfully and maliciously conspired, combined, and confederated together for the purpose of forcing your orator to recognize said organizations as representing and controlling said employés in all their relations with your orator, and compelling its said lines of railroad within the United States to become and be operated as exclusively union or brotherhood roads, and thus prevent your orator, through its officers and agents, from dealing with its employés in respect to any difference or controversy between it and such employés, and from adjusting any such difference or controversy directly with its employés, as heretofore, and compelling your orator to discharge and discriminate against and keep out of its employ all persons not members of such organizations, and retain and employ in its service only such persons as are members of said organizations." Such is the purpose of the alleged conspiracy.

The means which the defendants are alleged in the bill of complaint to have devised and adopted to accomplish their purpose are as follows: (1) To maliciously induce and compel complainant's employés engaged in the operation of its trains as brakemen, switchmen, and locomotive engineers, who the bill alleges "are entirely satisfied as to all matters concerning their service and compensation," to quit the service of complainant, and that, too, in violation of their different contracts of employment; (2) to maliciously interfere with and prevent complainant from operating its trains and performing its contracts with shippers for the transportation of property; (3) to maliciously prevent complainant "from affording reasonable, proper, and equal facilities for the interchange of traffic between its lines of railroad and other lines of railroad connecting therewith, and from receiving, forwarding, and delivery of passengers and property to and from its lines of railroad with other railroads connecting with such lines, and making a continuous carriage of freight from the place of shipment to place of destination"; (4) to maliciously prevent connecting lines and their employés "from interchanging traffic with and affording like facilities to your orator, as required by the interstate commerce act"; (5) to maliciously prevent complainant from carrying the United States mail in accordance with its contracts in that regard, and as required by the statutes of the United States; (6) to maliciously obstruct complainant in the discharge of its duties as common carrier of interstate commerce, and to restrain and interfere with the commerce of the country, in violation both of the interstate commerce act (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]),

and the act of July 2, 1890 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), "to protect trade and commerce against unlawful restraints and monopolies."

The bill of complaint further shows that the defendants, in order to accomplish their purpose, had threatened and were about to exercise the power and authority conferred upon them as officers, agents, and representatives of their brotherhoods to order and cause complainant's employés to forthwith strike and quit its service, and to incite and induce the employés of connecting lines to refuse to interchange traffic with complainant or to afford facilities therefor, and it is averred that unless an immediate restraining order be issued the threats and purpose aforesaid would be speedily executed, and irreparable injury done to complainant.

From the foregoing analysis of the bill of complaint it is observed that the jurisdiction of this court is invoked to prevent the execution of a conspiracy to accomplish the purpose of the defendants to secure recognition of their labor organizations, by violating and inducing others to violate the laws of the United States, in relation to interstate commerce, the mail service, and unlawful restraints and combinations. The threats of the defendants to subserve their own purposes by precipitating a strike on the part of complainant's employés, who, as already stated, are alleged to have been entirely satisfied with their present wages and conditions of service, is averred in the bill of complaint to be the initial act leading up to the culmination of the gist of the complaint, namely, preventing complainant from performing its duties and obligations, and thereby subjecting it to the pains and penalties of the interstate commerce and other acts of congress.

Upon the filing of this bill, duly verified, and upon motion of the complainant, a restraining order was forthwith made and served on the defendants, commanding them to refrain from ordering or causing a strike of complainant's employés, and from in any other way or manner interfering with complainant in the discharge of its duties as common carrier of interstate traffic and the mails of the United States, until the further order of this court, and the defendants were given 15 days within which to appear and show cause why the restraining order should be dissolved or modified.

Such an order, on the showing made by the bill of complaint, was not only warranted, but imperatively required, by well-recognized principles of equitable jurisprudence, as well as by controlling, satisfactory, and abundant authority in cases of similar character in this country and in England. On this point it will suffice to refer to the leading cases in this country of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414, in which Mr. Justice Harlan of the Supreme Court of the United States, sitting in the Court of Appeals for the Seventh Circuit, delivered the opinion of the court; and *Toledo Railway Co. v. Pennsylvania Company* (C. C.) 54 Fed. 730, 19 L. R. A. 387, and *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 62 Fed. 803, in both of which Circuit Judge Taft delivered the opinion, and to the numerous cases therein referred to. See, also, *Vegeahn*

v. Guntner. (Mass.) 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722.

Reference is also made to the recent case in England, decided by the House of Lords on appeal from the decision of the Court of Appeal, wherein it was held not only that an injunction was an available remedy against the agents of a trades union and against the union itself for preventing interference with the workmen and business of complainant, but that an action at law was also maintainable against the union itself, although unincorporated, for damages sustained by the conduct of its agents. *The Taff Vale Railway Company v. The Amalgamated Society of Railway Servants*, App. Cas. Law Reports 1901, p. 426. Subsequently it is currently reported (*North American Review*, March, 1903, p. 413) that a civil suit for damages was instituted by the same plaintiff, which resulted December last in a recovery of \$135,000 against the society and its officers for damages for a conspiracy to produce a strike by terrorizing plaintiff's employes.

Pursuant to the leave given in the restraining order, the defendants appeared and filed their answer under oath, denying the alleged conspiracy in all its alleged phases, and denying each and all the threats and purposes alleged in the bill to interfere with or prevent the complainant from performing its duties as common carrier, or to interfere with or prevent connecting lines from interchanging traffic, and fully disavowing any such intention or purpose. The answer further explicitly denies that complainant's employes were satisfied with the condition and compensation of their present service, but avers, in substance and effect, that they (the defendants) were officers and agents of the brotherhoods already referred to, of which many of complainant's employes were members, and that they at the time the restraining order was made were engaged in the performance of the functions and duties imposed upon them by their constitution, rules, and regulations, and at the request and by authority of a large majority of complainant's employes, who were members of their brotherhoods, were in good faith making an effort to better the conditions of their service, and to secure a higher rate of wages therefor, and that any strike which they were about to sanction was intended only for the purpose of peaceably asserting the rights which they demanded. At the same time the defendants filed numerous affidavits in support of their answer, and with this answer and accompanying affidavits the defendants filed a motion to set aside the restraining order. Whereupon both sides, by leave of court, filed further affidavits in support of and against the right to a preliminary injunction, and have now been fully heard in argument on the question.

The ad interim restraining order was made conformably to the provisions of section 718, Rev. St. 1878 [U. S. Comp. St. 1901, p. 580], without notice to the defendants, because it appeared from the averments of the bill that there was immediate danger of irreparable injury unless it was so made. The same statute, however, clearly contemplates that such restraining order is to have no other effect than to preserve in statu quo the rights and property of the parties until a hearing, after notice to defendants, can be had in due form on the motion for a preliminary injunction.

It results from the foregoing that the present status of this case is as follows: The complainant has moved the court for a preliminary injunction, restraining the defendants until the final hearing of this case as prayed for in its bill. The defendants have had due time to appear and have appeared, and both sides have been heard on the motion.

I may here properly remark that counsel have not by proof or argument drawn the federal anti-trust act of July 2, 1890, into consideration in this case. The same will, therefore, not be specially considered, notwithstanding the fact that defendants, by the bill of complaint, are alleged to have threatened its violation.

The question now to be answered is whether on the whole showing, irrespective of the provisional order already made, the complainant is entitled to a preliminary injunction.

Attention has already been called to the law applicable to a situation as disclosed by complainant's bill, and before proceeding to a consideration of the facts it will probably be beneficial to briefly state the law applicable to the situation disclosed by defendants' answer. It is held by the Supreme Court in the case of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, in substance and effect, that the agreements among employ  s of a railroad company which are condemned as in restraint of interstate commerce are such as have some direct and immediate effect upon such commerce, and do not include agreements not to work for less than a certain sum, or not to work except under certain conditions, even though the cost of interstate traffic would be thereby enhanced.

In the case of *Hopkins v. Oxley Stave Co.*, 28 C. C. A. 99, 83 Fed. 912, 917, Judge Thayer, speaking for the Court of Appeals of this circuit, makes use of the following language:

"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 very 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 judgment."

In the case of *Arthur v. Oakes*, *supra*, page 219, 11 C. C. A., pages 320-321, 63 Fed., and 25 L. R. A. 414, Mr. Justice Harlan expresses the rule thus:

"It is the right of the employ  s, without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages, and to withdraw in a body from the service of the receivers, because of the proposed change. * * * If in good faith and peacefully they exercise that right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they are willing to remain in the service."

As said by Judge Caldwell in *Ames v. Union Pacific Ry. Co.* (C. C.) 62 Fed. 714:

"Organized labor is organized capital. It is capital consisting of brains and muscle. * * * If it is lawful for the stockholders and officers of a corporation to associate and confer together for the purpose of reducing the wages of its employes, or of devising other means for making their investments more profitable, it is equally lawful for organized labor to associate, consult, and confer with a view to maintain or increase wages."

On this subject of organization of labor no one has spoken more clearly or acceptably than did Judge Taft in the case of *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 62 Fed. 803. He there says (page 817), in dealing with a subject very much like that now under consideration, that the employes of the railroad—

"Had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employe may compel him to accept any terms offered him. * * * They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint or any other person to whom they choose to listen may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, he may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory."

To the same effect is the case of *Vegelahn v. Guntner*, supra, where in Judge now Mr. Justice Holmes says:

"If it be true that workmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control."

Allen, J., in delivering the opinion of the majority in that case, speaks on this point with equal emphasis. He says:

"A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby."

I might continue at length in the citation of cases stating or illustrating the foregoing propositions, but enough has been said to clearly indicate the general rule, which may be briefly summarized as follows: An employe has an unquestionable right to place a price and impose conditions upon his labor at the outset of his employment, or, unless restrained by contract obligations, upon the continuance of his labor at any time thereafter; and, if the terms and conditions are not complied with by the employer, he has a clear right either not to engage or having engaged in his service to cease from work. What one may do all may do.

They may seek and obtain counsel and advice concerning their rights, duties, and obligations in relation to their employer, and persons interested in their welfare may advise, aid, and assist them in

securing such terms and conditions of service as will best subserve their interests, and what they may lawfully do singly or together they may organize and combine to accomplish.

In like manner, as capital is combined for legitimate purposes, so labor may combine for legitimate purposes, but this right of combination, and the resulting right to strike or quit their employment, is a weapon for the defense and protection of employés, and not a weapon of attack. They may, by peaceful and lawful combination and concert of action, be able to so control the supply of labor as to compel the employer to come to their terms, but they are not at liberty to make use of this weapon to otherwise interfere with or injure the employer or co-employé. The clear line of demarkation, recognized by all the authorities, is that the lawful and permissible strike must not be attended by violence to or destruction of property or by other coercive measures intended to prevent the employer from securing other employés or otherwise carrying on his business according to his own judgment.

Guided by the rules of law already laid down, it now becomes my serious and anxious duty to reach a just and righteous conclusion upon the issues already stated, with absolute fidelity to the truth as disclosed by the proof before me. The proof, in my opinion, fails to substantiate the charge made in the bill to the effect that the complainant's employés are entirely satisfied with their wages and conditions of service.

In the summer of 1902 the Western Association of General Committees, etc., was organized at Kansas City, Mo., for the avowed purpose of securing an advance of 20 per cent. in wages of trainmen and other employés on roads west, northwest, and southwest of Chicago. The trainmen of the Wabash did not at first join this association, but later, through their general committee, notified the president of the company that they had become identified with that movement, and would expect an increase of wages accordingly. The firemen also at about the same time, through their committee, notified the president of the company of their desire for a new schedule of wages and rules. At about the same time the firemen's demands were made, to wit, on November 13, 1902, the president of the railroad company issued an address or general circular to employés, stating, in effect, that he had been giving careful attention to the important question of wages, with the object in view of a fair and equitable adjustment of the wages of all classes. He called attention to the conditions of the service, and announced a certain increase of wages for engine and train men, to take effect December 1, 1902, and requested employés to be conservative, fair, and reasonable. Notwithstanding this concession and request, the committees of both trainmen and firemen who were then in session in St. Louis insisted upon greater concessions, either of wages or rules of service. Repeated conferences and much correspondence ensued, until finally the president of the company questioned the authority of the committees to act for any employés. Thereupon a written authority was secured from a large number of such employés authorizing the committees to represent them. Further interviews and correspondence ensued

between the committees and grand masters of the two brotherhoods of firemen and trainmen to which they belonged on the one hand, and the president of the company on the other, resulting in a failure to agree upon wages and rules of service. Thereupon, on February 20, 1903, the grand masters and committees joined in a written communication, addressed to all the members of the brotherhoods of firemen, trainmen, and conductors, detailing their efforts and proceedings in their behalf, and calling upon them to fill out and return their vote on the proposition of a strike to enforce the demands which had been made in their interest. This vote was taken. The conductors voted against a strike, but the firemen and trainmen voted by more than a two-thirds vote in favor of a strike unless the differences could be adjusted satisfactorily to the committees and officers.

From the foregoing general statement, fairly supported, in my opinion, by all the evidence before me, four things appear: First. That at the time in question there was a very general demand for an increase of wages and change in rules and conditions of service by employés of railroads operated in this region. Second. That such demands had come to the attention of complainant's chief executive officer and had been recognized by him. Third. That the committees and officers of the brotherhoods of which many of complainant's employés were members had undertaken to exercise the functions of their office in behalf of their members by making demands for additional wages and different rules of service. Fourth. That upon their authority being questioned the committees secured written authorization from a large number of members of their orders to represent them in securing the concessions requested.

In the light of these facts, it is clear that the employés claimed to have grievances and were engaged in seeking redress therefor at the time this suit was instituted. The argument on this point took a wide range, and an effort was made to show that the grievances complained of arose with or were initiated by the committees or officers of the brotherhoods, and did not have their origin with the employés themselves. It was also argued that the alleged grievances were not presented to the subordinate officers of complainant company, for their initial consideration, as provided by the by-laws and rules of the brotherhoods in question; but such arguments, in my opinion, are of little value, in the light of the conclusive evidence already detailed, showing an existing recognized claim for additional wages and other benefits.

It is not for me to pass or express any opinion upon the reasonableness of the demands made by or in behalf of the employés. It is sufficient, for the purposes of this case, that such demands were in fact made.

As already seen from the authorities cited, it is the privilege and right of employés to impose any conditions upon their service deemed wise or prudent by them, and to demand such compensation therefor as they deem reasonable, and on failure to secure the concessions insisted upon by them to retire from the service of the employer.

It is shown by the proof that no strikes can lawfully occur by employés who are members of either of the brotherhoods in question

without the sanction of the grand master and general grievance committees of the order. To enjoin them, therefore, from ordering or otherwise causing a strike is, in substance and effect, an injunction against resort to a strike by employes who may be members of the orders for the redress of asserted grievances. This, under well-settled law, cannot be done. See cases *supra*.

It is contended that the threatened strike was resorted to by the defendants, not in good faith to redress grievances or secure desired concessions, but as a result of a combination and conspiracy to accomplish the ulterior purpose of securing recognition of their unions or brotherhoods, as authoritative agents or representatives of its members, in all their dealings with the company, and also to unionize the roads of the company, and that the defendants did not honestly and fairly secure the two-thirds vote of the brotherhood employes in favor of the strike, but did secure the same by coercion, misrepresentation, and fraud.

An interesting and able argument in support of this contention is drawn from the provisions of the constitution and general rules of the two brotherhoods involved in this litigation, whereby it is made to appear that a strike may be declared which will have the effect of forcing the minority of the brotherhood members who vote against it and also all nonunion employes in service upon the road of the employer out of work without their consent and even against their wishes. Attention is particularly called to the situation disclosed by the proof in this case, that a large majority of complainant's employes working on roads east of the Mississippi river, for whose special benefit largely the threatened strike was intended, voted against it; and it is argued that these and other like considerations disclose that the necessary operative results of the system and methods of the brotherhoods in question are subversive alike of the fundamental rights of the employer to manage his own business, and of the employes to bestow their labor as they will.

This kind of argument enters deeply into the domain of political science, and might well be addressed to a body of constructive statesmen or men originally contemplating a labor organization. It is an argument that would be pertinent against the organization of society into government. The will of the individual must consent to yield to the will of the majority, or no organization either of society into government, capital into combination, or labor into coalition can ever be effected. The individual must yield in order that the many may receive a greater benefit. The right of labor to organize for lawful purposes and by organic agreement to subject the individual members to rules, regulations, and conduct prescribed by the majority is no longer an open question in the jurisprudence of this country. I entirely agree with the views expressed on this subject by Judge Taft in *Thomas v. Railway Company*, *supra*, hereinbefore quoted.

Other arguments in support of this last contention are drawn from the fact that the defendants, or others representing their brotherhoods, in the years 1894 and 1901, on the occasion of the labor troubles of those years, insisted upon the right of recognition of properly constituted committees by railroad officers in the adjustment of grievances

with their men, and now insist upon the same right. The proof undoubtedly shows that the defendants, who were duly authorized by the members of their orders to appear for them and secure the redress of their grievances if possible, undertook to represent their principals. The members of the general grievance committees were or had recently been in the employment of the complainant. The grand masters of the orders were not, and, so far as I know, had not been, in complainant's employ. Accordingly there was some quibbling in the conferences and negotiations as to the capacity in which the defendants appeared before the complainant's officials, whether that of individual employé, committee, or adviser; but this does not seem to have been a matter of great importance in the negotiations leading up to the present situation. Even if it had been insisted upon by the defendants, the question of the right of the employé or body of employés to appear, by agent or committee, before their employer, for the assertion of rights or redress of wrongs, being a matter more of business policy than anything else, could not, in and of itself, be the basis of a charge of malicious conspiracy.

It is argued that misrepresentations were made by the defendants in their circular addressed to their fellow members, setting forth the negotiations and proceedings leading up to a failure to agree with the complainant, and that as a result the vote for a strike was brought about by false representations and coercion. I think this charge is not sustained by the proof. There may have been, and probably was, a magnifying of the president's indisposition to meet the defendants for a consideration of their claims; but, in my opinion, neither this nor any other statement made in the circular was intentionally false or misrepresenting, and, taken as a whole, it fairly represented, so far as the evidence before me discloses, the situation as it existed at the time it was sent to the employés.

After considering all the evidence bearing upon the issues now under discussion, and carefully weighing the foregoing and all other arguments of counsel, I am not able to find the existence of the conspiracy to secure recognition as charged.

In this I am fully confirmed by the fact that whatever may have been the loose talk between the defendants or either of them and complainant's president, at any of the personal interviews between them, all the correspondence making formal statements of the demands of the employés, and especially the letter of March 3, 1903, written in reply to the president's request for a specific statement of the grievances for the redress of which they proposed to strike, contained demands relating to wages and conditions of service only. Not a word is found in that ultimatum about recognition of the brotherhoods of committees or unionizing the roads, or anything else except the subject of wages, working rules, and the like.

This leads next to a consideration of the alleged conspiracy to interfere with the complainant's railroad in the discharge of its duties prescribed by the statutes of the United States relative to carrying the mails of the United States and relative to interstate commerce. There is no specific proof of any threat to interfere with the mail service, but such interference is claimed in argument to be necessarily involved and

embraced in the proposed assault upon interstate commerce. There being no allegation of diversity of citizenship between complainant and the defendants, the jurisdiction of this court is invoked solely because of the federal question arising under these statutes.

The matters in issue hereinbefore considered are not in and of themselves subject-matter of federal cognizance, and would not have been argued by counsel, or considered by the court, except upon the theory claimed by complainant, that the acts and purposes disclosed by them were steps or links in the chain leading up to the ultimate conspiracy now under discussion, namely, to interfere with interstate commerce.

Section 3 of the act of February 4, 1887, commonly known as the "Interstate Commerce Act" (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), provides that:

"Every common carrier subject to the provisions of this act shall according to their respective powers afford all reasonable facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith," etc.

Section 10 of the same act, as amended (25 Stat. 857 [U. S. Comp. St. 1901, p. 3161]), provides that:

"Any common carrier * * * or any * * * agent or person acting for or employed by such corporation, who alone or with any other corporation, company, person or party * * * shall willfully do or cause to be done * * * or shall willfully omit or fail to do any act, matter or thing in this respect required to be done * * * or shall aid or abet such omission or failure, * * * shall be deemed guilty of a misdemeanor. * * *"

Section 5440, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3676], provides that:

"If two or more persons conspire to commit any offense against the United States, * * * and one or more parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than \$10,000.00, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

The gravamen of the conspiracy coming within the jurisdiction of this court charged against the defendants is that they have maliciously conspired, combined, and confederated to accomplish the object of securing their own recognition as plenary agents and representatives of complainant's employes, by preventing complainant from performing its duties, and by preventing lines of railroads connecting with complainant and their employes from performing their duties, as prescribed by sections 3 and 10 of the interstate commerce act, just quoted.

The charge against the defendants is a criminal conspiracy, within the meaning of section 5440, supra, to violate the laws of the United States, and to induce others to do the same thing; thereby subjecting themselves to civil liability for consequent damages, and particularly to punishment by imprisonment, as prescribed by the last-cited statute. *Toledo Ry. Co. v. Pennsylvania Co.*, supra. It is also now the settled law in this country, as seen in the fore part of this opinion, that any such conspirators as the defendants are charged to be are subject to the injunctive process of this court, and to all the legal and equitable consequences flowing from a violation of the injunctive commands.

The foregoing statutes and principles are adverted to for the purpose of vividly presenting the act or acts alleged to have been threatened by the defendants, with all their attendant consequences. From the foregoing it must appear that only bold, audacious, and reckless men would attempt or intend to engage in the unlawful and criminal acts complained of. These considerations are alluded to as bearing upon the probability or improbability of the truth of the charge made against the defendants. Now, what are the facts?

First, it is argued that the Western Association of Committees formed in the summer of 1902 at Kansas City, with which complainant's employes afterwards became affiliated, was such a combination as would facilitate the alleged conspiracy, and should therefore be regarded as evidence of it. It is true that was an association of the chairman of the grievance committee of certain orders, including the Brotherhood of Railroad Trainmen, and embraced representatives of a large number, if not all, of the railroads operating west, southwest, and northwest of Chicago, and became and was a formidable body. The invitation to membership in the association recites its general purpose to be as follows:

"Changed conditions of work and employment which have come within the last few years have led our membership generally to the conviction that higher rates or standards of pay for conductors and trainmen are fully justified. Voicing that sentiment among the men, members of our general committees for this territory (more or less recently) made efforts to secure the increase desired. They have failed to secure general increases, principally because of inability to successfully answer or controvert the argument that the road in question was paying as much as its neighbors and competitors."

It further appears that the association, after considering other suggestions, finally decided to request an increase of wages of 20 per cent. in freight service, and to make an effort to secure such advance in the wages of passenger conductors, trainmen, and yardmen as would harmonize with the figure so fixed for freight service. It further appears that in urging united action to secure these specific advances the address or invitation stated, among other things, as follows: "It is not expected that these requests will be accompanied by any other complaints or grievances when filed with the officials of any road."

So far as appears in the proof, this association was organized for a lawful and laudable purpose, namely, for the betterment of the condition of employes; and there is nothing before me (except certain affidavits, which will be alluded to later) to indicate that it was intended to accomplish this purpose by any unlawful means.

On December 23, 1902, one of the defendants, as chairman of the general grievance committee of the Brotherhood of Railroad Trainmen, notified the president of complainant's company that the trainmen of his road had become identified with the Kansas City movement, and would expect the increase of wages contemplated by it. So far as disclosed by the proof (except the affidavits just referred to), this general movement in which complainant's employes joined was a combination or union of men engaged in a common pursuit to better their condition by uniting their forces to that end, and was a united effort

recognized as lawful and permissible by the authorities hereinbefore cited, provided and so long as no unlawful means were resorted to for its accomplishment.

As already observed, the record before me shows that the Western Association of Committees is an organization that might facilitate a conspiracy like that charged, if so disposed. This might be said of any organized bodies, like the Masons, Odd Fellows, or the like, but such fact, in and of itself, affords no substantial evidence that the Western Association or the other orders referred to would resort to unlawful and criminal methods to accomplish their purpose.

It is also argued that the union and concert of action of the Brotherhood of Locomotive Firemen and of Railroad Trainmen, as shown by the proof in this case, are evidence of the unlawful conspiracy complained of. As already observed in another connection, this cannot be so. Their purpose being lawful—that is to say, to secure increased wages and better conditions of service—the concert of action is per se lawful and proper, and, in the absence of proof of a purpose to accomplish their object by unlawful means, the usual presumption should rather be indulged that they would not resort to unlawful means to accomplish it.

But it is argued that there is direct evidence tending strongly to show that the defendants were engaged in a conspiracy to interfere with interstate commerce in the way charged in the bill, and that they intended to enforce their demands, whether for recognition or increase of wages, by overt acts, in execution of the conspiracy. This brings me to a consideration of the affidavits alluded to. These are made principally by John W. Schrader, R. J. Robinson, and Clarence A. Hover, and, among other things, detail certain conversations between some of the defendants after March 2, 1903, and certain remarks made by defendant Lee in a speech delivered at a meeting of Terminal Lodge, at Druid's Hall, in St. Louis, about February 3, 1903, which affiants claim to have overheard. These affidavits are very comprehensive, and cover the substance of the charge laid in the bill. One of the affiants swears that he overheard Hannahan and Lee, the grand masters of the two orders of firemen and trainmen, respectively, on several occasions during the week preceding the date of his affidavit, which was March 14, 1903, and particularly on March 2, 1903, talking together in the Laclede and Imperial Hotels of St. Louis in regard (I now use affiant's own language) "to compelling the Wabash Railroad to recognize their organizations, and to deal with them as representatives of the said organizations, in matters affecting the employes of said railroad company, by forcing a strike and tying up and crippling its business and property," and that he heard Hannahan and Lee say, in conversation with others, that "unless the Wabash Railroad Company accede to their demands, and recognize and deal with their unions as such, and with them as representatives of said organizations, they would make it a very serious affair to the Wabash Railroad Company; that arrangements had already been made to tie up all business of the Wabash Railroad and cripple it by preventing the interchange of traffic between it and other railroads; and that no connecting railroad would be allowed to interchange with it," etc.

It cannot but be observed that the language attributed to Hannahan and Lee concerning their arrangements to boycott the complainant's road by preventing the interchange of traffic, etc., is sufficient, of itself, to convict them of a conspiracy to violate the laws of the United States. Section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676]. The public utterance of such well-phrased self-condemnatory language is not usual among commonly prudent persons. It is also to be observed that the language imputed to Hannahan and Lee concerning their purpose to compel the recognition of their organizations as plenary representatives of the employes in all their relations with the company is out of harmony with the situation as it existed on March 2d, and for that matter some time anterior thereto.

It has already been pointed out, and in my opinion satisfactorily demonstrated, that if any such purpose had ever existed on the part of the defendants, or the brotherhoods they represented, it had undoubtedly been abandoned before March 2d. The ultimatum asked for and delivered to the president of the railroad company on that day contained no such requirement. Nothing was then insisted upon but increase of wages and certain changes in working rules, and I may here properly remark that the proof shows that the only substantial matter of difference between complainant and its employes, at least after February 18, 1903, was whether the wages and rules already established, or conceded to be easily agreed upon, for service west of the Mississippi river, should be applicable to service on lines east of that river.

Such being the facts and circumstances of the case, the question of recognition of the brotherhoods and unionizing the roads had been, on and prior to March 2d, eliminated from consideration. Is it probable that the controlling spirits of the movement would have made, not only the self-condemnatory, but the unquestionably false, statements attributed to them by the affidavits in question. I think not. It is not deemed necessary to analyze or specifically refer to any of the other affidavits relied upon by complainant. They differ in detail somewhat from that already considered, but in substance are quite like it, so that the same general observations as have just been made are pertinent to them.

Not only so, but each of the defendants charged with making the damaging admissions alluded to unequivocally deny the same, and present affidavits of others corroborating in material respects their denials. They not only deny the alleged statements, but affirm again that which is found in their sworn answer, that the intention or purpose attributed to them by the affiants never existed in fact, and does not now exist. Such being the case, the affidavits in question are so far discredited as to be unsatisfactory and unreliable as a basis for the temporary relief now sought.

It is argued that the two telegraphic dispatches sent on March 2, 1903, by the defendants Hannahan and Lee, as grand masters of their respective brotherhoods, to O. D. Ashley, as chairman of the board of directors of the Wabash Railroad Company, and to George Gould, as president of the Missouri Pacific Railroad Company, contained subtle threats to boycott at least the Missouri Pacific Railroad, in the event

the demands of the workmen were not complied with. These dispatches (both being the same) are in the following language:

"On account of the refusal of President Ramsey of the Wabash to meet the demands of the members of the Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Firemen in the matter of working rules, and wages; we hereby notify you that unless Mr. Ramsey recede from his position by noon Tuesday March 3, these men will leave the service of the company, in a body. We have only asked exactly the same rules and rates already granted by the other Gould lines. You can reach us at Laclede Hotel, this city."

I fail to discern in the language of these dispatches any evidence of ulterior or sinister purpose. They appear to me to be the usual and ordinary attempt to appeal to all available influence and power to accomplish a desired purpose. In this connection it is observed that, in this last and final appeal to what was probably supposed by the defendants to be powers behind the throne, the defendants submitted no other claims or demands except those relating to "working rules and wages."

Other facts and arguments have been urged upon the attention of the court by able counsel representing both sides of this controversy, all of which have received careful consideration by the court, but the principles already laid down, the observations made and conclusions reached, are not materially affected by them. They will therefore not be specifically adverted to.

It results that this court should not interfere with the exercise of the right on the part of complainant's employes, who are members of the brotherhoods in question, of quitting the service of complainant in a body, by restraining the defendants, who are officers of the brotherhood, from exercising the functions of their office prerequisite thereto, and that at the present time there is no reason shown for an injunction restraining the defendants from interfering with interstate commerce or the mail service of the United States.

The categorical and unevasive denial, both in sworn answer and separate affidavits, by each of the defendants, of any conspiracy, intent, or purpose like that charged in the bill of complaint, and the apparently candid and ingenuous avowal of no such intention or purpose in the future, together with the appeal made to the honorable record of the brotherhoods in question in connection with labor disturbances in the past and to their professed belief in accomplishing their purposes by peaceful and lawful means only, induce this court to believe, and confidently expect, that whatever measure may be adopted in the present emergency no coercive, violent, or other unlawful means will be resorted to by the defendants, or any one acting for them or under their direction, to accomplish their purposes. Nevertheless this court will be in session and retain jurisdiction of this cause, if desired, so that, in the event of any molestation of or interference with interstate commerce or the mail service, all its lawful powers may be invoked to restrain the same, with the confident assurance that they will be fearlessly and effectively exercised.

I cannot conclude this opinion without expressing the sincere wish of the court that, if the parties are unable to adjust their differences by such mutual concessions as are necessary to that end, the offer made

in open court by defendants' counsel to submit the questions in dispute to the board of arbitration provided for by the act of congress of 1898 will be speedily accepted, and another instance of rational and intelligent adjustment of a business difficulty be exhibited to an expectant public.

The motion for a preliminary injunction is denied, and the ad interim restraining order heretofore made is vacated.

In re GOLDBERG.

(District Court, N. D. New York. March 18, 1903.)

1. BANKRUPTCY—PROPERTY OF BANKRUPT—ATTACHMENT IN STATE COURT—SALE UNDER ATTACHMENT—BONA FIDE PURCHASER.

Bankr. Act, § 67, subd. "f" (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), declares that all attachments obtained against an insolvent within four months prior to the filing of a petition in bankruptcy against him shall be deemed void if he is adjudged a bankrupt, and the property affected by the attachment released therefrom, provided that nothing shall impair the title, obtained by such attachment, of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry. After the filing of a petition in bankruptcy, property of the bankrupt of a value exceeding \$500, which had been attached before the petition was filed, was sold to a son of the attachment plaintiff for \$50. *Held*, that the purchaser was not bona fide a purchaser for value, without notice, within the proviso, and obtained no title.

This is a motion on the part of Albert Levi for an order to vacate an injunction heretofore granted by this court, which restrains him and others from interfering with the property of said bankrupt, and especially from interfering with or disposing of certain property of said bankrupt sold by the sheriff of Warren county, N. Y., in certain attachment suits brought against said Goldberg, the bankrupt, by Jonathan Levi and Edward F. Cohn shortly before the bankruptcy proceedings were instituted, but which sale took place thereafter, and which attached goods were sold to said Albert Levi.

Ashley & Williams, for the motion.
Walter A. Chambers, opposed.

RAY, District Judge. On or about July 19, 1902, Jonathan Levi and Edward F. Cohn commenced an action in the Supreme Court of the state of New York against said bankrupt, in which one or more warrants of attachment were issued, and by virtue of which the sheriff of Warren county seized certain property then in Goldberg's possession or under his control, and caused an inventory thereof to be made. The value of the property so attached was fixed by the appraisal at the sum of \$1,548. The claim of the plaintiffs amounted to the sum of \$335.33 and interest from July 10, 1902. August 1, 1902, the county judge of Warren county authorized and directed the sale of a portion of said property, marked "Perishable," which was appraised at more than \$500, and a sale thereof was made August 8, 1902. Au-

gust 7, 1902, a petition in bankruptcy was filed against said Harry Daniel Goldberg, and a subpoena was issued, but he had fled the state; and there was long delay in securing service of the subpoena and procuring an adjudication and the appointment of a trustee of the estate of the bankrupt.

It is claimed, and for the purposes of this motion will not be questioned, that notice of the sale was given as required by law. The fact remains, however, that the sale was attended by Albert Levi, a son of one of the plaintiffs in such attachment suits, by the attorney for the plaintiffs therein, and by the officer making the sale, only, and goods inventoried at more than \$500, and which were worth that sum, were then and there offered for sale and struck off to said Albert Levi for the sum of \$50. Under this alleged sale the purchaser undertook to take possession, and ordered the goods shipped. It is now asserted that prior to the filing of the petition in bankruptcy, but within the four months preceding, however, the bankrupt had made a bill of sale of a portion of these goods to one Mollie White, and that this fact accounts for the small sum bid, and for which the goods sold. This vendee in the bill of sale had not taken possession of the goods, or of any part thereof, nor has she ever asserted any claim or right thereto under such bill of sale, or, if she did, she shortly abandoned such goods and all claim thereto. The evidence shows that it was fraudulent and void both in fact and under the provisions of the bankrupt law. There is some evidence showing collusion, by which the attendance of bidders at the sale was prevented, and some evidence tending to show that much of the property sold to Albert Levi was not perishable or of a perishable nature, and therefore the sale of such part was not authorized by the ex parte order of the county judge.

The Supreme Court, at Special Term, vacated this sale, but the Appellate Division reversed the order and held (see *Levi v. Goldberg*, 76 App. Div. 210, 78 N. Y. Supp. 367):

"A junior attachment creditor is not entitled to have a sale of a portion of the attached property set aside on the ground that the purchase price was inadequate, where it appears that the remainder of the attached property is more than sufficient to satisfy the claims of both the senior and the junior attachment creditors. An order directing a resale of the property in question should not be granted by the Supreme Court of the state of New York after the United States court, in bankruptcy proceedings against the debtor, has assumed jurisdiction over the debtor's property, and has issued an order restraining all parties from taking any further proceeding in the attachment action, and directing that all things should remain in statu quo. The United States court should not be hampered by orders of a state court touching property over which it has assumed jurisdiction in proceedings in bankruptcy."

And in the opinion said:

"That portion of the order of the federal court restraining all parties from taking any further proceedings in the attachment action, as well as the other provisions of the order providing that all things shall remain in statu quo, seems to have been wholly ignored. That the federal court, in the pending proceedings in bankruptcy, has ample power to determine all matters before the court on the motion for a resale, cannot be doubted. The federal court should not be hampered with orders of a state court touching property over which it has assumed jurisdiction in proceedings in bankruptcy. The order appealed from was therefore, we think, improvidently granted, and should be set aside."

It is claimed on this motion that this court never had jurisdiction to grant the restraining order now sought to be vacated. If this be true, Levi should have appealed from the order to the Circuit Court of Appeals, where the order would undoubtedly have been reversed. The cases cited by the attorney for Albert Levi on this motion have no application whatever. It has been decided by the Supreme Court of the United States that the filing of a petition in bankruptcy is notice to all the world of the pendency of the proceeding; that same is, in effect, an attachment and injunction. *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405. Therefore the sheriff making the sale, the plaintiffs in that action, and their attorneys, and the purchaser at the sale, had notice of the pendency of the bankruptcy proceeding. They knew that Goldberg was gone, and they knew that more than \$500 worth of the bankrupt's property was offered for sale upon a judgment of less than \$350, and they knew that this amount of property was struck off to a son of one of the plaintiffs for the sum of \$50, and it now appears that they knew some of the property was not perishable, and that its sale was not authorized. When that transaction comes up in this court in an appropriate manner, it will be the duty of the court to set aside or ignore that pretended sale; and it is the duty of the trustee in bankruptcy to proceed with all diligence and avail himself of all legal measures to obtain possession of that property struck off to Levi, and reduce it to money, and apply it, with other assets, to the payment of all established claims. This court would be derelict in its duty, should it permit the appropriation by these attaching creditors, or by the purchaser at this pretended sale of this portion of the bankrupt's property, in the manner here attempted. To sanction such a transaction in any manner would be to aid in defeating the bankruptcy law.

The petition having been filed before this alleged sale took place, all property of the bankrupt was immediately made subject to the jurisdiction of the court in bankruptcy; and Levi now claims his title under and through the bankrupt, and not under or through the person to whom the bankrupt gave the bill of sale. Again, the lien of attachment was vacated, in point of fact, when the petition in bankruptcy was filed, for, when the adjudication was made and the trustee appointed, the lien of the attachment fell, and the title to the property vested in the trustee, and the vesting of such title related back to the filing of the petition.

Subdivision "f," § 67, of the act of July 1, 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), provides as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary

to carry the purposes of this section into effect: provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Levi is not within the proviso. He is neither a bona fide purchaser for value, nor did he acquire his pretended title "without notice or reasonable cause for inquiry." He had both notice and reasonable cause for inquiry, and, of course, knew he was purchasing a large and valuable amount of property at a grossly inadequate consideration.

It is not necessary to cite the numerous cases holding that a subsequent adjudication in bankruptcy annuls all attachment levies obtained within the four months prior to the filing of the petition. See *In re Kenney* (D. C.) 97 Fed. 557, 558; *In re Reichman* (D. C.) 91 Fed. 624; *In re Fellerath* (D. C.) 95 Fed. 121; *In re Rome Planing Mill* (D. C.) 96 Fed. 812; *In re Vaughan* (D. C.) 97 Fed. 560; *In re Higgins* (D. C.) 97 Fed. 775; *In re Burrus* (D. C.) 97 Fed. 926; *Bear v. Chase*, 40 C. C. A. 182, 99 Fed. 920-925.

In effect, the filing of the petition in bankruptcy, followed by adjudication, which related back to the date of such filing, gave notice of the pendency of the proceeding to the sheriff, the plaintiffs, and their attorney, and to this purchaser, and attached this property in question for the benefit of all the creditors of the bankrupt, and enjoined the sheriff, his deputies, the plaintiffs and their attorney, and all the world, from further proceeding in the state court in the attachment suits. Whoever proceeded thereunder thereafter did so at his peril. *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405. If the bankruptcy law is to be respected and enforced, it must be carefully and honestly administered according to both its letter and its spirit, when in harmony. The main intent and purpose of the law is to prevent preferences, except as specially given by the act itself, and one of the modes of obtaining a preference especially condemned is by means of attachment proceedings in the state court. No course of procedure would more surely defeat the law and bring it into disrepute than would the granting of an order vacating this injunction, and the consequent dissipation of the assets of the estate now particularly in question.

In *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, Abraham made a general assignment October 29, 1898, to one Davidson, who made an inventory of the property, and forthwith took possession thereof. November 7, 1898, a petition in bankruptcy was filed against Abraham, and December 12, 1898, he was duly adjudged a bankrupt. On or about November 17, 1898, about 10 days after the petition in bankruptcy was filed, Davidson sold the goods assigned to him, at public auction, to Bernheimer, who paid \$3,500 therefor, which was less than half the inventoried value. The following is the syllabus of that case:

"A bankrupt, nine days before the filing of a petition in bankruptcy against him, made a general assignment for the benefit of his creditors, which was an act of bankruptcy. After the filing of the petition in bankruptcy, the assignee sold the property. After the adjudication in bankruptcy, and before the appointment of a trustee, the petitioning creditors applied to the District

Court for an order to the marshal to take possession of the property, alleging that this was necessary for the interest of the bankrupt's creditors. The court ordered that the marshal take possession, and that notice be given to the purchaser to appear in ten days and propound his claim to the property, or, failing to do so, be decreed to have no right in it. The purchaser came in, and propounded a claim, stating that he bought the property for cash in good faith of the assignee, submitted his claim to the court, asked for such orders as might be necessary for his protection, and prayed that the creditors be remitted to their claim against the assignee for the price, or the price be ordered to be paid by the assignee into court and paid over to the purchaser, who thereupon offered to rescind the purchase and waive all further claim to the property. *Held*, that the purchaser had no title in the property superior to the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court, bringing in the assignee if necessary."

If the purchaser at that sale failed to gain title to the property superior to the estate of the bankrupt, it is difficult to see how in the case at bar Levi gained any title superior or equal to that of the bankrupt's estate. Indeed, it is easy to see that Levi obtained no title whatever. *Bryan v. Bernheimer*, supra, is not cited as a case exactly in point, but it throws much light on the questions here raised.

The motion to vacate the injunction must be, and is, denied.

In re CANNON.

(District Court, D. South Carolina. March 12, 1903.)

1. BANKRUPTCY—UNRECORDED MORTGAGE—PROCEEDS OF MORTGAGED PROPERTY—DISTRIBUTION—SUBSEQUENT CREDITORS.

The property of a bankrupt was covered by an unrecorded chattel mortgage, and on the sale of the property by the trustee the proceeds were insufficient to pay the claims of creditors of the bankrupt, who became such after the execution of the mortgage. Code S. C. § 2456, provides that mortgages shall be valid, so as to affect the rights of subsequent creditors, only when recorded. *Held*, that as the mortgage was valid as against the creditors of the bankrupt, who were such when the mortgage was given, but was invalid as against all subsequent creditors, the fund arising from the property should be distributed among such subsequent creditors, to the exclusion of both the antecedent creditors and the mortgagee.

In Bankruptcy.

Willcox & Willcox, for mortgagee.

W. F. Clayton and W. H. Wells, for creditors.

BRAWLEY, District Judge. The court is asked to review the decision of the referee in a matter of law, upon the distribution of the fund in the hands of the trustee, arising from the proceeds of sale of the stock of goods of the above named bankrupt.

After the adjudication in bankruptcy, A. H. Douglass, in due course of proceeding for the administration of the bankrupt estate, set up a lien against the fund; claiming to hold a chattel mortgage upon the stock of merchandise. The validity of this mortgage was contested upon grounds not necessary now to be stated, and after due consideration it was held that the mortgage was a valid lien, it having

been duly executed for a valuable consideration, and not being obnoxious to any objections under the bankrupt law, and that the trustee stood in the place of the bankrupt, and was affected with all the claims, liens, and equities which would affect the debtor, and as between the bankrupt and the mortgagee, and as to all claims against the bankrupt arising prior to the execution of the mortgage, it was a valid lien upon the fund; but, inasmuch as the mortgage had not been recorded, the case went back to the referee, to ascertain whether there were any creditors subsequent to the date of the execution of the mortgage, and it is now here upon his report, which found that there were such subsequent creditors, and that the amount of the fund in the hands of the trustee is not sufficient to pay such subsequent creditors in full.

The question of the distribution of the fund was presented to the referee, and in his report he holds "that the entire fund should be divided pro rata among all creditors whose claims have been allowed, and that the dividend set apart to the antecedent creditors should be applied to the payment of the mortgage debt, and the dividend set apart to the subsequent creditors should be applied pro rata to the payment of their claims"; and the appeal challenges the correctness of this conclusion:

No direct authority upon the question at issue has been cited, and I have found none; and inasmuch as, after reflection, I have reached a conclusion differing from that of my first impression, and from the learned referee, whose opinion is always entitled to weight, it may be well to state the reasons which have led to a result which seems to be in contravention of the fundamental principles of the bankrupt law, which is designed to secure an equal distribution of the bankrupt's estate among all the creditors.

The question arises under the recording laws of South Carolina, which are now embodied in section 2456 of the Code, and provide as follows:

"All deeds of conveyance of lands * * * all mortgages or instruments in writing in the nature of a mortgage of any property, real or personal * * * delivered or executed on or after the first day of March in the year of our Lord one thousand eight hundred and ninety-eight, shall be valid so as to affect from the time of such delivery or execution, the rights of subsequent creditors (whether lien creditors or simple contract creditors) * * * only when recorded within forty days from the time of such delivery, in the office of the clerk of court of the county where the property affected thereby is situated."

The fund arises from the property mortgaged, and it has been already decided that creditors antecedent to the mortgage cannot share in it, because as to them the mortgage is valid. It is said that the subsequent creditors are not entitled to take all of this fund, because they have no specific lien upon it; that as to them the mortgage is a mere nullity; and that their right is to share in the fund only to the extent to which they would be entitled if the mortgage had never been executed. And such contention would seem to be reasonable, but that view fails to take account of the true status of the parties, for, the mortgage being valid as to all creditors antecedent to its execution, the only claimants to the fund are the mortgagee and the sub-

sequent creditors. As between these two, then, which has the higher right? My conclusion is that by the terms of section 2456 the mortgage is valid, so far as to affect the rights of subsequent creditors, only when recorded within 40 days from the time of its execution, and, not having been recorded, it is invalid.

The mischief which the recording laws are intended to prevent is the obtaining of credit by reason of the ostensible ownership of property which in reality is covered by a secret lien, and the great object of all such laws is to give notice—notice to purchasers and notice to creditors who give credit on the faith of property. The first act in South Carolina relating to registry was passed October 8, 1698, and is entitled "An act to prevent deceits by double mortgages and conveyances of lands, negroes and chattels" (2 St. at Large, p. 137), and the preamble is as follows:

"Whereas the want or neglect of registering and recording of sales, conveyances and mortgages of lands and other goods and chattels hath encouraged and given opportunity to several knavish and necessitous persons to make two or more sales, conveyances and mortgages of the same plantation, negroes and other chattels, the first sale, conveyance and mortgage being in force and not discharged to several persons or considerable sums of money more than the same is worth, whereby buyers of plantations and lenders of money upon second or after mortgages do often loose their money and are put to great charges in suits of law and otherwise, for remedy whereof" it was provided that the sale or mortgage first recorded should be adjudged the first sale, etc.

The second act was that of March 8, 1785, relating to the recording of marriage deeds and contracts. Its preamble recited:

"Whereas the practice prevailing in this state of keeping marriage contracts and deeds in the hands of those interested therein hath been oftentimes injurious to creditors and others who have been induced to credit and trust persons under the presumption of their being possessed of an estate subject and liable to the payment of their just debts, for remedy whereof and to prevent such deceitful practices," etc. 4 St. at Large, p. 656.

Accordingly we find running all through the decisions in this state allusions to the prime object of the recording laws, as set forth in the quaint words of these old preambles.

In *Steele v. Mansell*, 6 Rich. Law, 453, Judge Wardlaw says:

"The theory of registry acts is not that an unregistered deed is a fraud (for, if it is fraudulent, it is, whether registered or not, void as to the persons defrauded by it), but that publicity is likely to prevent frauds; and therefore a neglect of the mode provided to give publicity is punished by conferring superior rights upon those who are most likely to suffer by concealment."

Chancellor Inglis, in *McKnight v. Gordon*, 13 Rich. Eq. 235, 94 Am. Dec. 164, says:

"The mischief, for the suppression of which recording laws have been contrived, consists in the fraud which 'knavish and necessitous persons' practice, in selling or mortgaging their lands or chattels for money or other valuable consideration, and, after they have thus divested themselves of all lawful power of disposition, availing themselves of the possession, or other apparent ownership, continued or acquired by them, to obtain, by a second sale or mortgage, or other equally unwarrantable use of the same property, money, or other value, from those who deal with them in ignorance of the former transaction, and of their consequent want or defect of title, and take either nothing whatever, or, at least, not what they bargained or were in-

duced to look for by their dealing, but, on the contrary, in the language of the old statutes, 'do often lose their money and are put to great charges in suits of law and otherwise.' The language of the statutes everywhere, and especially in their preambles, sufficiently evince this. * * *

"To the consummation of the knavery in fact or in law, as the case may be, the silent mortgagee, who fails to put his mortgage upon the public records, contributes equally in the two cases. No doubt, the actual harm will be, and often is, the result of mere neglect, without 'knaveish' purpose on the part of any one concerned, as may be well believed to be the case in the present instance. But the law can only frame general rules, having respect to external acts, badges, and results. It would be vain, in administering these, to undertake exploring the secret motives of parties for a test of their application."

In *McCorkle v. Montgomery*, 11 Rich. Eq. 132, Chancellor Dunkin says:

"Upon this subject the language of Chief Justice Marshall in *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393, is instructive. To the world, says he, the vendee appears to hold the property divested of any trust whatever, and credit is given him in confidence that the property is his own in equity as well as law. The vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of the property on which he claims a secret lien. It would seem inconsistent with the principles of equity and with the general spirit of our laws that such a lien should be set up in a court of chancery to the exclusion of bona fide creditors."

Chancellor Carroll, in the circuit decision reported in *Williams v. Beard*, 1 S. C. 313, says:

"The plain purpose of the act of 1843 [which was an act to amend the law in relation to registry] was to guard against loss and injury to subsequent creditors and purchasers from their dealing with the mortgagor under the delusion that he retained the absolute and unincumbered ownership of the property mortgaged."

To the same general effect are the decisions of the Supreme Court of the United States. An excerpt from the opinion of Chief Justice Marshall in *Bayley v. Greenleaf* has been already cited as quoted by Chancellor Dunkin. The concluding words of that opinion are as follows:

"In the United States the claims of creditors stand on high ground. There is not, perhaps, a state in the Union, the laws of which do not make all conveyances not recorded and all secret trusts void as to creditors, as well as subsequent purchasers without notice. To support the secret lien of a vendor against a creditor who is a mortgagee would be to counteract the spirit of these laws."

In *Judson v. Corcoran*, 17 How. 615, 15 L. Ed. 331, the court, referring to the negligence of the appellant in not presenting an assignment of a claim to the state department, as required by law, upheld the claim of a subsequent assignee, saying:

"The assignment was held up and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees; and such would be its effect on Corcoran, were a priority accorded to it by our decree."

In *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816, which was a controversy between the assignee in bankruptcy of the mortgagor, execution creditors, and the mortgagee touching the application of the fund in court, derived from the sale of personal property covered

by a mortgage not filed in accordance with the laws of New York, the court held that a chattel mortgage not filed as required by the provisions of the statute was void as to creditors and subsequent purchasers in good faith, and quotes with approval the Circuit Justice, who said that the statute had "imposed a rigid and unbending condition, to wit, a filing in the place where the mortgagors actually reside, as a preliminary to the validity of the mortgage. Whether this condition is wise or not—whether convenient or difficult of performance—is not for the courts to say. The statute exacts it, and the courts must see that it is performed." In many of the states the retaining of possession of personal chattels by the mortgagor, whether the mortgage is recorded or not, is considered *prima facie* a badge of fraud, but that is not the rule in South Carolina. The mortgage is good between the parties to it, although it does not conform to the requirements of the statute relating to the recording of it, and the omission only renders it void as to subsequent creditors. Certain expressions in the opinion in *King v. Fraser*, 23 S. C. 543, give support to the contrary view. That decision was a surprise to the profession, which generally regarded the dissenting opinion of the late Chief Justice, who agreed with the view of the very able Circuit Judge, who confirmed the learned and elaborate report of the master, as presenting the better view; and the amendment to the recording laws adopted in 1898 makes our registration law conform to the views expressed in the dissenting opinion, and, as the case now before the court arose subsequent to said amendment, it is not considered that the doctrines announced in *King v. Fraser* are of any binding authority.

The possession of property which can be looked to for the payment of debts is a large element of credit, and goods are sold and money loaned to those who apparently have the means of paying, and the registry laws are intended to give to creditors the means of knowing whether there are any incumbrances upon property which is apparently subject to their debts, and persons who fail, purposely or carelessly, to record their liens, and thereby lead others to give credit because of the ostensible means of paying, cannot be heard to complain if they suffer pains and penalties which follow their intentional concealment or negligence.

The error lying at the base of the referee's report is in the view that subsequent creditors not having earned any priority by superior diligence, or having any specific lien upon the fund, the mortgage, as to them, is to be considered as nonexistent, and therefore they are entitled only to such a *pro rata* share of the fund as they would have received if all the creditors had participated in it. But as already stated, the mortgage, in so far as it affects the mortgagor and the antecedent creditors, is a valid mortgage; and it would follow that if there were no subsequent creditors the mortgagee would be entitled to the whole fund, the antecedent creditors not being entitled to share in it at all, and, in holding that the mortgagee is entitled to take such part of the fund as would be distributable among the antecedent creditors, it could only be by virtue of some right of subrogation, but there can be no subrogation to rights which do not

exist; and, as already held, all claims of the antecedent creditors are extinguished by the mortgage, and, as between the mortgagee and the subsequent creditors, the rights of the latter must prevail.

It follows that the report of the referee must be set aside, and the fund distributed in accordance with this opinion, and it is so ordered.

LAND TITLE & TRUST CO. v. ASPHALT CO. OF AMERICA.

(Circuit Court, D. New Jersey: August 26, 1902.)

1. CORPORATIONS—FORECLOSURE SUIT—PARTIES.

In a suit by the trustee therein to foreclose a corporate mortgage, the court is not authorized to permit a bondholder to intervene and be made a party complainant merely for the purpose of litigating questions with a voluntary committee of bondholders formed for the purpose of reorganizing the corporation, since neither such committee nor its members are parties to the suit, nor has the court any power to make them parties for the purpose of controlling their action as a committee or as individuals in respect to such reorganization.

2. SAME—VOLUNTARY SETTLEMENT BY MAJORITY OF BONDHOLDERS—RIGHTS OF MINORITY.

The fact that a majority of the bondholders of a corporation, through a voluntary committee, may compromise and settle their claims pending a suit for the winding up of a corporation or to foreclose the mortgage, does not prejudice the rights of the minority, who do not assent to such settlement, nor prevent the court, through its receivers, from enforcing for their benefit any rights which the corporation may have against delinquent stockholders or its promoters and directors.

3. SAME—RECEIVERS—SUITS TO ENFORCE LIABILITY OF OFFICERS AND PROMOTERS.

A court which has appointed receivers for a corporation as an insolvent will not direct them to bring suits to ascertain and enforce the liability of promoters, officers, and directors of the corporation for the benefit of creditors until its visible assets have been liquidated and the fact and amount of deficiency is ascertained.

In Equity. On petition of William C. Bullitt to be allowed to intervene and become a party complainant.

John Douglass Brown, for the motion.

Charles L. Corbin, Joseph S. Auerbach, and Charles C. Deming, opposed.

KIRKPATRICK, District Judge. This petition was presented to me by Mr. Brown some days ago, and he asked me then to make an ex parte order, which I declined to do. I went over with Mr. Brown, in a hurried way, perhaps, the prayers of the bill, and I stated to him, then, the objections I had to granting the petition. They are the same as those which I entertain to-day; and while I have been very much interested in all that Mr. Brown has said, and I do not at this time want to dissent from any of the propositions which he has advanced with regard to the liability of promoters and stockholders, yet, at the same time, in the consideration of this petition, I am obliged to look to the prayers of the petition to ascertain whether it is possible or proper that the relief he asks should be granted.

His first prayer is that he be allowed to intervene in this cause, and

to become a party complainant therein, and to have separate notice of all motions, proceedings, and orders, etc. And the reason he gives for asking to be permitted to intervene is that the Biddle committee is the real party complainant in this suit. I cannot assent to that proposition. The parties to this suit are the Land Title & Trust Company, complainant, and the Asphalt Company of America, defendant. Nothing that has been done or left undone by the Biddle committee, of whom I have no knowledge whatsoever except as I have gleaned from the newspapers, and the information contained in the paper annexed to this petition, can afford any ground for the intervention of anybody as a party complainant. That Mr. Biddle, individually, or as chairman of some committee which was organized voluntarily, as was stated in a former petition in this cause, to reorganize the affairs of this company, filed an affidavit saying that, in his opinion, representing a majority of the certificate holders, Messrs. Tatnall and Mack would make capable receivers, did not in any way make him a party to the suit; and, while it may be true, and probably is, that, under some agreement—this agreement that has been quoted—a majority of the certificate holders had a right to demand that suit should be brought by the Land Title & Trust Company, it does not appear that they ever made any such demand, or took action in any way, except to recommend to the court the appointment of the receivers, or that they had taken any part in this litigation.

I do not know that this court has any authority to make the Biddle committee a party complainant to this litigation without its consent. If they should lose this suit, or anything should be done contrary to what they might set up, they might be mulcted in costs; and the court has no right to put them in a position where they would be compelled to pay costs without their consent. The Biddle committee certainly cannot be made a party defendant to this suit, because they, or Mr. Biddle, at least, resides in the city of Philadelphia, and the only ground upon which this court acquires jurisdiction in this case is diversity of citizenship; and if it should be that while the defendant, the Asphalt Company of America, is a resident of New Jersey, the complainant being a resident of Pennsylvania, Mr. Biddle, who is a resident of Pennsylvania, should be joined as a party defendant, it would be very questionable whether this court had jurisdiction. At any rate, I am of opinion that the Biddle committee is not connected in any way with this suit; that nothing that they have done or failed to do would justify an order permitting this petitioner to intervene.

Now, the second prayer of the bill is that Mr. Biddle and his committee be required to answer, but not under oath, and show cause, if any they have, why any plan of reorganization of the National Asphalt Company should not be postponed until an opportunity has been given the receivers of this court thoroughly to investigate the affairs of that company, and to ascertain the rights of holders of the collateral certificates of the Asphalt Company of America to take steps to enforce such rights by appropriate proceedings, if such proceedings shall seem proper, against the promoters, directors, officers, trustees, and past and present stockholders of the Asphalt Company of America and the National Asphalt Company.

Now, as I have said before, if the Biddle committee are not parties to this suit, as I have held they are not, I have no right to make an order restraining them from doing anything they please. As I understand it, the Biddle committee is a self-constituted committee; they have called on the certificate holders to deposit their certificates with the committee, and, having a majority of the certificates, they propose to make a settlement of all these claims in behalf of anybody who will file his certificate with them; they propose to make a settlement with all these people. Now, if anybody chooses to deposit his securities with the Biddle committee, and permits the Biddle committee to make a settlement of his claims as against either the promoters or subscribers of the stock of this Asphalt Company of America, the court thinks that it ought not to interfere. A settlement that is made between parties themselves is always more satisfactory than a settlement made by the court, and it is a voluntary matter, and I think that an opportunity ought to be given to all who are willing to compromise their claims against anybody they think they have a claim against—an opportunity ought to be given them to do so.

Of course, Mr. Brown has made a very forcible argument in regard to the liability of subscribers to this stock, and the liability of directors and promoters to these companies, and has endeavored to show—has quoted authorities, very much in point, which tend to show—the liability of these people on the lines which he has laid out. Of course, the court does not want at this time to pass upon the liability of subscribers to the stock, or of promoters of the company. If such liability exists, why, it would seem to me that it is at least doubtful if the parties who are liable in that way would be relieved of their liability by any voluntary settlement which other certificate holders might choose to make.

The third prayer is for a restraining order on the Land Title & Trust Company and the directors of the Asphalt Company of America and of the National Asphalt Company, the majority, or the representatives of the majority, of the certificates, from selling or converting any of the securities of the Asphalt Company of America until the rights of the parties have been ascertained. As I said during the course of the argument, the appointment of receivers was to preserve, for the benefit of the certificate holders, these very assets, and it was considered that those rights would be best preserved by keeping them intact and keeping the concern a going concern, and that was the view that was presented to the court by the Land Title & Trust Company, and also by the defendant, the Asphalt Company of America; and under those circumstances I do not think there is any danger that the parties to this suit, having come into court and asked that receivers be appointed to take charge of this property in order to preserve it for the benefit of the shareholders, would undertake, without the consent of the receivers, and without the consent of the court, to make any disposition of the assets.

The fourth prayer is that the Land Title & Trust Company be ordered to file a list of the names and addresses of the registered holders of the collateral gold certificates of the Asphalt Company of America, issued by it under the agreement of July 15, 1899. I do not

know what advantage that would be to anybody; it has not been touched upon in the argument, and I do not know the object of the prayer. At any rate, it is so immaterial that it need not be discussed.

The fifth prayer asks that the receivers be directed to bring these suits to ascertain the liability of the promoters, directors, officers, trustees, etc., of the Asphalt Company of America and the National Asphalt Company by appropriate litigation. As to that, as I have said several times before, I do not think that this litigation can be closed or these receivers discharged until a settlement has been made of all the assets of the concern. If, as I have intimated, a settlement should be made by the Biddle committee, representing a large portion of these assets, the court will not interfere with it; on the contrary, opportunity will be given them to make such a settlement. If Mr. Bullitt and those who are associated with him are not satisfied with that settlement, and come into court and represent that there are still these uncollected assets, the court would be willing that an opportunity be given them, in the name of the receivers, to prosecute those suits and ascertain those liabilities. A suit for unpaid subscriptions to stock, as I understand the law in New Jersey, could not be successfully maintained against the subscribers until all of the visible assets had been liquidated; and the reason of that, as I recollect, is that the subscribers are only liable for such deficiency as may exist to meet the payment of all of the liabilities of the company, and, until the measure of that liability is ascertained, no suit could be successfully prosecuted and no judgment could be rendered; and therefore it would seem to me that, under those circumstances, it would be useless at this time to direct the receivers to proceed with any suits, looking to the collection of a deficiency, which deficiency is as yet uncertain and unascertained.

I cannot see that the interests of this petitioner will be in any way jeopardized by the refusal of the court to permit him to intervene in this suit. The receivers are perfectly competent to manage the business, and if the efforts of the Biddle committee should be successful, and any large majority of certificate holders are willing to compromise their claims on a basis which they consider entirely satisfactory to themselves, the rights of this petitioner, if he did not assent, would still be preserved.

For these reasons, I decline to entertain the petition to make Mr. Bullitt a party to this suit.

VANDERBILT et al. v. EIDMAN.

(Circuit Court, S. D. New York. January 15, 1903.)

1. INTERNAL REVENUE—WAR REVENUE ACT—LEGACY TAX.

Section 29 of the war revenue act of 1898 (Act June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]) provides that "any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property * * * passing after the passage of this act from any person possessed of such property, either by will or by the intestate laws, * * * to any person or persons * * * in trust or otherwise shall be and hereby

are made subject to a duty or tax. * * * *Held*, that where a testator left his residuary estate to his executors in trust for the benefit of a son, who was to receive the income, and the principal on reaching a certain age, with a proviso that in case of his death before reaching that age the property should go to other lineal descendants of the testator, the tax became fixed on the passing of the property to the executors as trustees, as a single bequest primarily for the benefit of the son, it being immaterial under the terms of the statute, where or to whom it should ultimately pass from their hands, all the beneficiaries named being in the same class, for the purpose of fixing the rate of tax.

At Law. Action to recover legacy taxes paid under the war revenue act of 1898 (Act June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2284]).

Henry B. Anderson, for plaintiffs.

Charles D. Baker, Asst. U. S. Atty., for defendant.

WHEELER, District Judge. The war revenue act of June 13, 1898 (30 Stat. 448), provides (section 29, c. 448, 30 Stat. 464, 2 U. S. Comp. St. p. 2307):

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property, as aforesaid, shall exceed the sum of ten thousand dollars in actual value, passing after the passage of this act from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein transferred by deed, grant, bargain, sale or gift made or intended to take effect, in possession or enjoyment after the death of the grantor or bargainer to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be and hereby are, made subject to a duty or tax to be paid to the United States, as follows that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be: First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, lineal ancestor, brother or sister to the person who died possessed of such property as aforesaid at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property."

—And a successively increasing rate where the beneficiaries are more remote relatives, and the amount or value exceeds the sum of \$25,000, or successively increasing fixed sums.

The plaintiffs' testator, Cornelius Vanderbilt, died September 12, 1899, leaving a will containing this clause:

"Seventeenth. All the rest, residue and remainder of all the property and estate, real, personal and mixed, of every description, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed or from any other source, I give, devise and bequeath to my executors, hereinafter named, and the survivors and survivor of them, in trust, to hold said estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom for the use of my son, Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years, and thereafter to pay the net income of said estate to him as receiver until he arrives

at the age of thirty years, when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose by my executors and the survivors of them. And upon further trust thereafter to pay to my said son, Alfred G., the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years, when he shall be put in possession of the balance of said trust estate, and the said trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my executors into as many equal shares as he may leave children surviving, and one share shall be held by my executors to the use of each child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain majority, then it is my will that my son Reginald C., shall in all respects, as to said residuary estate, stand in the place and stead of his brother Alfred G., and that if Alfred shall die without issue before he attains the age of thirty years, then Reginald C. shall receive the income from said estate until he attains the age of thirty years, when he shall be put in possession of one-half the residuary estate, and thereafter Reginald C. shall receive the net income of the remaining one-half of my estate, and on arriving at the age of thirty-five years he shall be put in possession of the whole of said estate, and my said executors shall hold said estate upon such trust, and I give and devise the same accordingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters, Gertrude and Gladys Moore, share and share alike; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, per stirpes and not per capita; and in default of issue, the survivor shall take the principal,"

—And all the children named in this clause surviving him.

The defendant was and is the collector of internal revenue for this district, and as such exacted from the plaintiffs \$311,681.36 as a tax on account of this legacy. This suit is brought to recover back this assessment, and the complaint alleges:

"(9) That in order to support the said assessment of the tax the government did, as appeared in the proceedings before the United States commissioner and the collector of internal revenue, wrongfully and improperly claim and rule that, although Alfred G. Vanderbilt then had merely a contingent interest in the principal of said residue dependent upon his attaining the age of thirty years as to one-half and thirty-five years as to the other, yet because he is the beneficiary of the income therefrom in the interval, and inasmuch as he had at his then age an expectancy of life as shown by the mortality tables until the time when he would acquire a vested and indefeasible interest in the principal of said residue, it was to be assumed as a matter of fact that he would live until such time and ultimately receive such residue, and that in consequence there was, for the purposes of taxation, a merger of such interests, and he had a present vested interest in the entire residue which was subject to a present tax, under the provisions of the war revenue act."

The defendant has demurred.

The principal ground for claiming back the money seems to be that these are several contingent legacies for the respective beneficiaries which could only be taxed at their actual value when and as they should become absolutely vested. This is, however, one bequest, and one only, of this residue to the executors in trust, primarily for the benefit of the son Alfred G., although by the happening of events it may reach others of the relatives of the testator. If it should they are all

included in the same class with this son, in the clause quoted of section 29 of the act under which the tax was assessed, and the rate would be the same. The capacities of the executors as such and as trustees for the beneficiaries, although vested in the same persons, were as separate and distinct for the purpose of taking and passing the property as executors, and holding it as trustees for the beneficiaries, as if they had been respectively several persons. *Carey v. Roosevelt*, 43 C. C. A. 320, 102 Fed. 569. It would pass absolutely from the executors in their capacity as such to the executors as trustees for the beneficiaries, and no part of it would ever go back to the executors as such or to the estate. The act charges "legacies or distributive shares" "passing" "from any person possessed of such property," "by will," "to any person or persons," "in trust or otherwise." This property passed from the testator, by this clause of this will, through the plaintiffs, as executors, to themselves as trustees, to hold, "in trust," for the beneficiaries. In so passing from the testator by will to the persons who became executors as trustees after the death of the testator as grantor, it precisely fulfilled the words of the statute laying the tax. The assessment is not laid upon the beneficiaries personally, but upon the property; and not upon that as it reaches them, but in cases like this as it goes to the trustees for them. *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969.

The complaint does not show the amount of this bequest, nor how much the tax assessed upon it as a single bequest in this manner would be, and consequently not in figures whether it would be less than the \$311,681.36 collected; but quite obviously, by estimate, it would not be less than that, and so it does not appear from the complaint that any sum too large was assessed and collected by adopting the manner set forth.

In this view the complaint fails to show any cause of action, and cannot be upheld. Demurrer sustained.

THE BEECHDENE.

(District Court, D. Maryland. January 6, 1899.)

1. SHIPPING—LIABILITY OF SHIP—INJURY OF STEVEDORE.

A ship is not liable for an injury to a stevedore's employé while helping to discharge cargo from the hold, caused by the sliding down upon him of bags of sugar piled next to the cargo which was being taken out, where the only negligence shown or charged was that one of the bags of sugar had been laid athwart ships, instead of fore and aft, by the stevedores who had loaded it, which might have caused the pile to fall, which fact was not shown to have been known to any of the ship's officers.

2. SAME—IMPROPER STOWAGE.

The duty of guarding or warning the men engaged in discharging a ship against danger caused by improper stowage, in matters of detail, is that of the contracting stevedores, rather than of the officers of the ship.

In Admiralty. Action by a stevedore for a personal injury.

John A. Toomey and Robert H. Smith, for libellant.

Convers & Kirlin and George Whitefield Betts, Jr., for respondent.

MORRIS, District Judge (orally). The case for the libelant is that he was employed by a firm of stevedores to assist in discharging a shipment of cement which had arrived at Philadelphia from Hamburg on the steamship Beechdene. The cement was stowed under hatch No. 4, and extended across the ship; being placed against the bulkhead forward, and next to a shipment of sugar in bags aft, and separated from the sugar by dunnage of boards. The gang of stevedores started to take out the cement about 2 o'clock, and, working rapidly, had discharged nearly to the bottom tiers by 6 o'clock, when the accident occurred. The removal of the cement left a vacant space across the ship about 20 feet in depth between the bulkhead forward and the perpendicular tiers of bags of sugar aft. Unexpectedly to the stevedores who were working on the bottom of this opening, and without warning, the bags of sugar on the port side suddenly slid forward and down on the libelant, and injured him. The negligence charged against the ship is that the cargo of sugar was not safely stowed, and secured so as to prevent it from falling when the cement was removed.

In this case, as in all like cases in which the libelant seeks to recover for injuries sustained while in the employment of the ship, the burden lies upon him to show the neglect of some positive duty which was owing to him by the shipowners from whom he seeks to recover.

It is to be noticed in this case, in the first place, that the negligence alleged is negligence in stowing the cargo, by reason whereof the libelant, who was employed in discharging the cargo, met with this lamentable injury. Cargo is stowed with reference to its safe carriage, and the necessity to make it safe for that purpose is the controlling consideration, and not the safety of those who may be employed at the end of the voyage to discharge it. Who are the persons most familiar and experienced in the dangers which attend the business of unloading cargoes? Obviously, the stevedores, and not the officers of the ship. It is true that, if the officers of a ship direct a certain thing to be done in a certain way, they are held responsible if they negligently send the person employed by the ship into a place of danger, the danger of which could be obviated by reasonable care on the part of the officers of the ship. But this does not seem to be such a case. The unloading of the cement was delegated to professional stevedores. The officers of the ship did nothing in the way of directing them as to how the cement was to be taken out, or as to what precaution should be observed to protect those doing it from injury. The stevedores are presumed to know how to do it, and what are the reasonable precautions which must be taken to make it safe to pursue their occupation.

I throw out entirely, in the consideration of this case, the testimony of the master with regard to the special warning which he testifies that he gave to the gang of stevedores who were at work where this accident happened; warning them that the cement, while being hoisted out, was striking against the upper tiers of bags of sugar, injuring the bags and loosening them. I throw that out, because, as has been suggested, the testimony of the captain was taken a good while after the occurrence. It is obvious that he had not then very

distinct recollection of these matters, and I would not base a judgment in this case on the accuracy of his recollection; not intending to impute conscious misstatement to him. I rest my conclusion upon the statements of the stevedores themselves. They were discharging the cement in the manner they thought proper. It would seem that the only possible ground upon which any liability could be imputed to the ship is that there was a danger which these men at work there could not see, and which resulted from an improper stowage of the cargo, viz., in this: that there was one bag, out of a very great number, which was laid athwart ships, instead of fore and aft.

With regard to this alleged fault in stowage, two things suggest themselves to my mind: One is whether in fact it was this bag stowed athwart ships which caused this accident. I think that matter is left in great uncertainty by the testimony for the plaintiff. If that is to be the ground of judgment against the ship, it ought to be proved to the satisfaction of the court; and, at most, it seems to me it was only a suspicion which is raised that it may possibly have been the cause of this falling down of the tiers. Nobody saw this bag moved, and the upper tiers thereupon slide down and overwhelm this man. Upon rescuing him from under the falling bags, it is testified by some of these witnesses that they discovered there a bag which was placed athwart ships, and not fore and aft; and some of them say they have concluded—not from anything definite with regard to its position, but from the idea that there is danger in piling up a tier with one bag so placed—that it may have been this bag which caused the accident. But at most, the result, to my mind, is that it is not proved, but that there is suggested a mere possibility that it may have been the placing of that bag which caused the upper tiers of bags to come down.

The other point on which I am not clear is whether, in the stowage of a cargo of that kind, the placing of a bag of sugar athwart ships would be such an act of negligence that the shipowners could be held liable for the consequences of it. It might possibly be said to be an act of unskillfulness in the stevedore who placed the cargo aboard in Hamburg, but it is not reasonable to exact that the officers of the ship shall superintend the lading to the extent that they could be able to guaranty to any one that comes to work on board in discharging the cargo that there is not a single bag of sugar which was placed a-burton, as it is called. That is a matter of detail in loading which is left to the stevedore, and it seems to me to be carrying the doctrine of the answerability of owners to those who come aboard the ship to an extreme to say that because of an act done in Hamburg by stevedores, such as the misplacing of a single bag in the bottom of the ship, therefore the owners of the ship are liable to persons who come aboard to work in getting out the cargo for injury resulting from that misplaced bag. It seems to me that, in all the reported cases in which the ship has been held liable to stevedores and others who have been injured while in the employ of the ship, it has been where some part of the business of the officers or crew has been done in an improper manner—where some duty which devolved upon the owners or the officers or crew has been neglected—and not where the injury resulted from acts done by others, of a distinct and separate employment, which it would

be almost impossible could come to the knowledge of the owners of the ship or the officers of the ship.

If the misplacing of the bag is not the ground of recovery, then it must be that the officers of the ship owed it as a duty to the stevedores to be present during the discharging of the cargo, watching to see how the stevedores worked, and so as to warn them of any danger that might be impending; to see if these bags had worked forward and were overhanging; and personally to superintend the operations of the stevedores, and be there to protect them against anything that might happen in the course of their work from the result of their own method of working. That has not been contended for, and I do not think there is any ground for such contention. It would seem, on the contrary, that where work of this kind is going on—where stevedores are taking out cement, and leaving high tiers of bags of sugar exposed, and where, as they took out the cement, they took away the dunnage which was keeping the tiers of bags in place—there should be a foreman of the stevedores overlooking the work, to give warning of danger, such as the overhanging of upper tiers, or, as is contended in this case, danger from improper piling of the bags. If there appeared to be danger arising from either of these causes, it would seem proper that somebody representing the head stevedore should be there to give warning of it. It is true, as the stevedores themselves said, they are too busy preparing the draughts to be hoisted up to give much attention to such dangers; but it seems to me that duty did not devolve upon the officers of the ship, they having given over the discharging to men who make it a distinct business to discharge vessels.

Upon the whole, I am unable to see that any duty that was owing to this stevedore by the owners of the ship, or to be performed by officers or crew of the ship, was neglected. Libel dismissed.

UNITED STATES v. ORENE PARKER CO.

(District Court, E. D. Kentucky. October 20, 1902.)

1. INTERNAL REVENUE—SALE OF LIQUOR—PLACE OF MAKING—DELIVERY TO CARRIER.

Where a seller accepts an order for goods at its place of business, by delivering the goods to a carrier to be transported and delivered to the purchaser, at another place, on payment of the price, in accordance with the terms of the order, the sale is made and the title passes at the time and place of such delivery to the carrier; and the seller is not liable to indictment for carrying on the business of retail liquor dealer in the county where the purchaser lives without having paid the special tax required by the revenue act.

Indictment for Violation of Internal Revenue Laws.

James H. Tinsley, U. S. Atty.

W. H. Hough, for defendant.

COCHRAN, District Judge. This is an indictment against the defendant for carrying on the business of a retail liquor dealer without having paid the special tax required by law. It appears from the agreed statement of facts that on divers occasions, before the finding of the indictment, one W. H. Welsh, of Johnson county, Ky.,

gave to the defendant's salesman in said county an order on defendant to ship to him at Whitehouse, in said county, by express, C. O. D., one gallon of whisky, which orders were solicited by said salesman, and which were not contracts, but simply orders for the amount of whisky called for; that said salesman sent said orders to defendant at its place of business in Covington, Ky.; that defendant filled said orders by delivering to the express company the whisky called for, to be delivered by it to said Welsh upon his paying the price; that thereafter the express company delivered the whisky to Welsh, at Whitehouse, Johnson county, upon his paying the price thereof; and that defendant had a United States license to sell at Covington, and not in Johnson county.

The question presented by these facts is whether what defendant did amounted to a carrying on of the business of a retail liquor dealer in Johnson county; and this depends, to a certain extent, upon the subquestion as to where the sales of the whisky sold by defendant to said Welsh were made,—in Johnson county or at Covington. Certainly, if they were made at Covington, defendant did not carry on the business of a retail liquor dealer in Johnson county. But though made in Johnson county, it is possible that it can be said that it did not carry on the business in said county. In my opinion, the sales were made at Covington. That is the place where the title to the whisky passed from defendant to Welsh. The general rule as to when and where title to goods shipped by the seller to the purchaser by means of a common carrier passes is thus stated by Judge Devens in the case of *Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787:

"When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser, or, when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected—the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage in transition."

As to this being the law, there is no difference of opinion. What, then, is the effect of the fact that the goods so ordered by the purchaser are delivered by the seller to the carrier with directions to deliver to the purchaser upon payment of the purchase price, particularly where, as here, the order of the purchaser directs their being sent in that way? Does it have the effect of preventing the title passing from seller to purchaser at time of delivery to carrier, as it would pass if it were not for such C. O. D. direction? Or does it have the effect simply of making the carrier the agent of the seller to collect the price, with directions to retain possession until same is paid? It seems to me that the latter is the true doctrine. I know of no better presentation of the reasons in support of it than is contained in the opinion of Judge Barbour in the case of *Com. v. Russell*, 11 Ky. Law Rep. 576. He there said:

"When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract

of sale becomes absolute, as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods is in the buyer. He is entitled to the goods on the payment of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or time of payment. The payment or tender of the price is in such cases a condition precedent, implied in the contract of sale; and the buyer cannot take the goods or sue for them without payment; for, though the vendee acquired a right of property by the contract of sale, he does not acquire a right of possession of the goods until he pays or tenders the price. 2 Kent, 492. The rule as thus laid down by Kent is undoubtedly the law in this state, whatever dissent to it may have been expressed by the courts of some of the other states. *Crawford v. Smith*, 7 Dana, 60; *Sweeney v. Owsley*, 14 B. Mon. 413; *Duncan v. Lewis*, 1 Duv. 184. Where goods of a certain character are ordered, and the buyer directs that they be sent by a common carrier, or when, by course of trade, delivery to a common carrier to be sent to the buyer is the evident intent, in such cases the property passes as soon as the goods are put in the carrier's possession. From this rule of law has resulted the general proposition that when the goods are consigned the consignee is presumed to be the owner, in the absence of proof to the contrary. *Benjamin on Sales* (Corbin's Ed.) § 517. It is well settled that the delivery of goods to a common carrier—a fortiori, to one specially designated by the purchaser for conveyance to him, or to a place designated by him—constitutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not the person by whom, the goods are sent; the latter, in employing the carrier, being considered as an agent of the former for that purpose. *Id.* § 181. It seems to us clear, upon the authority cited, that the sale in question was made at Maysville. If, after the whisky had been delivered to the carrier, it had been destroyed by the act of God, the loss would have fallen on Ryan. It had been delivered to the agent whom he had selected to carry it to him, and after that delivery the vendor could not have retaken it, except for the purpose of securing himself in the event of the purchaser's insolvency. Nor could he have sold it to another person. An action for the carrier's failure to deliver it would have been in Ryan. This could only be so upon the hypothesis that he was the owner. If Ryan had requested the appellee to sell him a gallon of whisky and to set it apart and retain it for him until a future day, when he would call and pay for it, upon appellee's acceptance of the proposition, and the setting apart of the whisky, Ryan would become the owner of it; and, if it should be destroyed without appellee's fault before the time when it was to be called and paid for, the loss would be Ryan's. What is the distinction in principle between the supposed case and the one we are considering? We can conceive of none. Ryan becomes the owner when his proposition to buy was accepted and the whisky was delivered to the express company, the agent whom he had selected to bring it to him. If the appellee had sent the whisky to be delivered to Ryan unconditionally, upon learning that he was insolvent the appellee could have arrested the whisky in the hands of the carrier, at any time before it was actually delivered, and could have thus secured his price. The understanding between the parties that it was to be delivered only upon payment of the price was but a more certain mode of securing the vendor. It gave to him the right secured to him by the law in the absence of such agreement. The fact that the price was to be paid to the carrier before he was authorized to deliver to the purchaser no more affects the question as to when and where the sale was made than if the goods had been sent without such directions, and the seller had relied upon some other mode of collecting the price. The sale is in either case absolute. The only difference is that in one case a lien is retained, and in the other it is not. In each case the carrier is the purchaser's agent for the purpose of carrying, and the seller's agent, where the price is to be paid before delivery, for the purpose of collecting the money."

To the same effect are the cases of *Com. v. Fleming*, 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763; *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565; *Pilgreen v. State*, 71 Ala. 368; *Brech-*

wald v. People, 21 Ill. App. 213; Norfolk So. P. Co. v. Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611; State v. Peters, 91 Me. 31, 39 Atl. 342; State v. Flanagan, 38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. Rep. 832; James v. Com., 102 Ky. 108, 42 S. W. 1107. The cases of State v. O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557; U. S. v. Shriver (D. C.) 23 Fed. 134; U. S. v. Cline (D. C.) 26 Fed. 515; State v. Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; Crabb v. State, 88 Ga. 584, 15 S. E. 455—are contra. The case of U. S. v. Chevallier, 46 C. C. A. 402, 107 Fed. 434, so far as point decided is concerned, is not contra. The most that can be said is that a favorable reference is made in the opinion to the doctrine of the last-named cases, though that is not entirely certain. It is true that some of those cases are decisions of federal courts, but they are in no wise binding upon me. I am free to decide the questions according to correct principle and weight of authority.

In view of the holding that the sales complained of were made in Covington, where the defendant had a license to sell, it is unnecessary to determine the other question, as to whether, if they had been made in Johnson county, such sales would have amounted to the carrying on of the business of a retail liquor dealer in Johnson county.

The indictment is dismissed.

IN RE WOODS & MALONE.

(District Court, S. D. Georgia, E. D. March 16, 1903.)

1. BANKRUPTCY—FUNDS—IMPLIED TRUST.

Where cotton was by mistake delivered to factors to whom it was not consigned, and by mistake of a warehouseman it was sold, and the proceeds deposited in bank to the factors' account, and subsequently, on bankruptcy of the factors, a balance greater than the amount of the cotton passed from the bank to the bankrupt estate, the owner of the cotton was entitled to the value thereof.

W. W. Gordon, Jr., for intervener.

Walter G. Charlton, for trustee.

SPEER, District Judge. This is a petition to review the finding of Honorable A. H. MacDonell, referee in bankruptcy, on the intervention of J. L. Oswald in the matter of Woods & Malone, bankrupts. From the evidence it appears that the intervener, J. L. Oswald, in the month of October, 1901, shipped from Johnson's Landing, S. C., to Savannah, Ga., one bale of cotton, marked, "J.L.O./J.A." This was consigned to the firm of W. W. Gordon & Co., Savannah. Upon the arrival of the cotton, by some mistake it was delivered to Woods & Malone, now bankrupt. It is also clear that Woods & Malone, who are cotton factors, had no right, title, or interest in the bale of cotton, and, indeed, placed it on their "suspense account," from which it is understood that its disposition was delayed in order to find the true owner. By the mistake of a warehouseman, the particular bale of cotton was sold to Le Hardy & Co. for \$31.89, and the proceeds were deposited in the Merchants' National Bank to the general account of

Woods & Malone. The intervener prays that the court pass an order directing the trustee to deliver to him his cotton, or to pay its value—the sum of \$31.89. It is also in evidence that, up to the time of their failure, Woods & Malone always had in bank, and in all the banks with which they dealt, a balance greater than the claim of intervener, and a sum greater than this in cash was taken over by the receiver of the bankrupts' estate on his appointment. The balance thus received was accounted for by the receiver, and was transferred by the receiver to his account as trustee. Upon these facts the referee found that the intervener was entitled to be paid the proceeds of his cotton, and this finding has been certified for review.

There are a vast number of precedents which have relation to the question before the court. The case principally relied on by the learned counsel for the trustee is *In re Richard*, 104 Fed. 792. This was a decision by the Honorable District Court of the Eastern District of Tennessee, and is to the effect that:

"Money held by a bankrupt as guardian, which he had mingled with his own funds, thereby lost its identity as a trust fund; and the bankrupt cannot withhold property or its proceeds from his trustee on the ground that it was purchased with money of his wards, but the wards in such case are merely creditors, who must share with the general creditors in the distribution of the estate."

The argument is that, if a fiduciary claim of such dignity as that of a ward against the guardian must be aligned with that of creditors generally, a fortiori must the claim of a shipper whose cotton has been disposed of by a bankrupt factor possess no stronger equity. It is to be observed, however, in the case cited, it was a question between the bankrupt and the trustee. The wards were not before the court, and the ruling as to their rights, therefore, must be regarded as obiter. It has, moreover, been expressly held that the obligation of a factor, while of a fiduciary nature, is not within the meaning of the special trust defined by the bankruptcy law. *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236; *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565.

The question here does not depend upon the priority of a debt due from a special trustee, like a guardian, executor, or administrator, to the cestui que trust. The intervention is an appeal to the equitable powers of the court to trace the values inhering in an implied trust which results from the fact that Woods & Malone by mistake took and disposed of cotton of a shipper who was not their customer—consigned to factors other than themselves. On this subject we are of the opinion that the Supreme Court of the United States has established a principle for the equitable enforcement of implied trusts of this character much more than sufficient to recover for the intervener the proceeds of his cotton bale. The leading case is that of *National Bank v. Insurance Co.*, 104 U. S. 68, 26 L. Ed. 693. That was a case in which the bank itself was held liable for a balance due by one of its depositors—an insurance agent—to the company he represented, and which was entitled to the beneficial ownership in its deposits. In that case, however, the bank was made aware that the chief business of its depositor was his insurance agency. Many cases were cited by

Mr. Justice Mathews, for the court, in the unanimous opinion. From *Knatchbull v. Hallett*, *In re Hallett's Estate*, 13 Ch. D. 696, the principle was deduced—

"That if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys. * * * The master of the rolls, Sir George Jessel, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them; if they cannot be identified by reason of the trust money being mingled with that of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account."

The doctrine of Lord Ellenborough that this principle does not apply when the subject is turned into money and confounded in a general mass of the same description is repudiated, for, said the learned master of the rolls:

"Equity will follow the money, even if put into a bag or undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule."

The Supreme Court cites this and many similar cases with approval, and also qualifies them by observing:

"This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. It has been repeatedly recognized and enforced in this court."

And on page 70, 104 U. S., 26 L. Ed. 693, they cite several of their own cases.

A later case (that of *The Union Stockyard v. Gillespie*, reported in 137 U. S. 413, 11 Sup. Ct. 122, 34 L. Ed. 724) is even more forcible in its clear applicability. This was a case where a factor who dealt in cattle had made deposits with a bank, and, by overdrafts and the like, had imparted knowledge to the bank that he was operating largely on the values intrusted to him by his customers. In conclusion, the Supreme Court declares:

"The circumstances surrounding the deposits, and the relations between the depositor and the bank, were such as to impart notice to the bank that the beneficial ownership was outside of the legal title. With that notice, it had no right to appropriate the deposits to pay the obligations of a depositor to the bank, but it was properly adjudged liable in a suit in equity, and in that alone, to the claims of the beneficial owner."

How much stronger than that case is the case at bar in favor of the beneficial owner! There the factors, the *Rappels*, had the legal title, and the owner—for the cattle had been intrusted to them—had nothing but his beneficial equity. Here the intervener is not only the beneficial owner, but he has never parted in any manner with his legal title. The possession of the property by Woods & Malone was as-

sumed by mistake. Its proceeds were deposited to their general account, and to allow the trustee to appropriate the balance for the benefit of the general creditors in bankruptcy would be quite as unjustifiable as to permit him to utilize for the same purpose the values belonging to any other person in no way connected with the case which might have drifted into his possession by accident or mistake.

For these reasons, the finding of the referee must be affirmed, and an order will be taken that the trustee pay to the intervener the proceeds of his bale of cotton.

In re GOSCH.

(District Court, S. D. Georgia, E. D. March 16, 1903.)

1. CONDITIONAL SALE—FAILURE TO RECORD—EFFECT AS TO SUBSEQUENT CREDITORS.

Under the direct provisions of Code Ga. 1895, §§ 2776, 2777, a conditional sale is absolute as to subsequent creditors, unless it is evidenced by writing, and unless the writing is recorded within 30 days from its date.

2. SAME—DATE OF CONTRACT.

Under Code Ga. 1895, § 2777, requiring conditional bills of sale to be recorded within 30 days from their date, where the contract clearly bears date, it must be recorded within 30 days from that time, and not within 30 days from the actual delivery of the property sold.

Petition of Creditors for Review of Referee's Finding.

Max Isaacs, for claimant.

Kay, Bennett & Conyers, for objecting creditors.

SPEER, District Judge. The bankrupt was the owner of a manufactory of window sashes and doors in Brunswick. For the purposes of his business he had purchased from the Berlin Machine Works a sander. This, it seems, is a sort of sand bellows used for the purpose of polishing wood. The sale of this implement was conditional, the vendor seeking to reserve the title. It is insisted, however, that this effort must fail, for the reason that by the law of Georgia a conditional sale is absolute as to subsequent creditors, unless it is evidenced by writing, and unless that writing is recorded in accordance with the statute. The referee to whom the intervention was submitted sustained the claim of the Berlin Machine Works, and directed that the sander be redelivered, to the exclusion of the rights of other creditors. It is perfectly clear from the state law that, unless such sales as these are recorded, the vendor possesses no advantage over subsequent creditors. In the case of *Steen and Marshall v. Harris*, 81 Ga. 682, 8 S. E. 207, the Supreme Court of the state, by Mr. Justice Bleckley, declares:

"As against Harris the conditional element counts for nothing. No record of the contract having been made as the statute requires, the sale is to be treated as absolute so far as the rights of Harris are concerned"—citing the Code, § 1955a.

The statute has been re-enacted by a subsequent Code, and is now found in section 2776 of the latest codification (1895). This provides:

"Whenever personal property is sold and delivered with the condition affixed to the sale, that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of the title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract made by them shall be valid, and may be enforced whether evidenced in writing or not."

The next paragraph (section 2777) provides:

"Conditional bills of sales must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages."

Now, there could be little difficulty about this question if we were at entire liberty to regard the date of the contract as that appearing on the bill of sale itself. The Supreme Court, however, has seemed to declare in *Wheeler & Wilson Company v. Bank*, 105 Ga. 61, 31 S. E. 49, that the date of the real contract is the time of delivery. This is the only case cited in the brief of learned counsel for the Berlin Machine Works which contains this proposition, and, in view of the manner in which the question was presented to the court, and the cursory way in which it was disposed of, is to be regarded as obiter, rather than a conclusive determination. After stating the law to require, with regard to conditional sales, that they must be recorded within 30 days from the date, the learned chief justice remarks, "Treating the date of the real contract as of the time of delivery, which was March 1st, it should have been recorded within thirty days from that time." Since, however, as we have seen, such contracts must be in writing, and since they must be recorded within 30 days from date, it seems safer to conclude that, where the contract clearly bears date, that record must be made within 30 days thereafter, and not within 30 days from the actual delivery of the property sold.

It is true that generally delivery of personal property is essential to a contract of sale, but this rule is not invariable, and a sale not otherwise forbidden by law may be completed and evidenced by a written contract like that before the court, even though delivery is postponed. The contract here is in the form of an order partly written and partly printed. It was given February 1, 1902, and was accepted three days later. It was this instrument which contains the stipulation:

"It is agreed that the property mentioned above shall remain in the consignor until fully paid for in cash, and that in case of rejection consignee will promptly return it to consignor F. O. B. at Beloit, Wisconsin, and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after 30 days from date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of the Berlin Machine Works."

This contract is not recorded until the 20th day of June, long after the period within which it must have been recorded to have secured the exclusive rights of the vendor. It is very plainly the policy of the state to enforce the restrictions made upon conditional sales, and this

court feels obliged to respect that policy when plainly indicated by its enactments.

We therefore do not feel at liberty to agree with the conclusion of the referee that the contract was recorded immediately after its execution, and for these reasons must hold that the intervention of the Berlin Machine Works should be denied.

In re GOSCH.

(District Court, S. D. Georgia, E. D. March 16, 1903.)

1. SAWMILL LIEN—SASH AND DOOR FACTORY.

A sash and door factory is not a sawmill within the meaning of Civ. Code Ga. 1895, § 2809, providing that persons furnishing sawmills with timber, etc., shall be entitled to liens.

2. SAME—PETITION—DEMURRER.

Where one claiming a lien on the property of a bankrupt on the ground that it was a sawmill alleged in his petition facts showing that the property was not a sawmill, the referee was justified, even on demurrer, in concluding that there was no sawmill, and therefore no lien.

Petition for Review of Referee's Finding.

R. D. Meader, for petitioner.

Kay, Bennett & Conyers, for creditors.

SPEER, District Judge. In this case Leroy Satterthwaite, as administrator of W. N. Satterthwaite, deceased, made claim of lien against certain property of the bankrupt upon the ground that it constituted a sawmill, within the meaning of section 2809 of the Civil Code of 1895. His alleged lien was for lumber furnished and sold. In his proof of claim the petitioner declares the alleged sawmill was engaged in sawing timber or lumber into other pieces of wood of suitable sizes, and manufacturing the same into sashes, doors, blinds, etc., so that the lumber sold was in this manner sawed up in convenient dimensions for use in manufacturing said articles. To this proof of claim certain general creditors demur upon the ground that the statement of the intervener that the bankrupt's enterprise was a sawmill, within the meaning of section 2809 Civil Code of Georgia of 1895, is a legal conclusion of the pleader, and states an incorrect proposition of law. The general creditors also insist that the claim of lien was not recorded within three months, as required by law.

The Code of Georgia above referred to, provides:

"All persons furnishing sawmills with timber, logs, provisions, or any other thing necessary to carry on the work of sawmills, shall have liens on said mills and their product, which shall, as between themselves, rank according to date, and the date of each shall be from the time when the debt was created, and such liens shall be superior to liens but liens for taxes, liens for labor, * * * and to all general liens of which they have actual notice before their debt was created, to which excepted liens they shall be inferior."

It will strain the ordinary powers of judicial construction to regard the business of the bankrupt as a sawmill, if it must be considered ejusdem generis with the terms describing that enterprise in the sec-

tion of the Code just quoted. It is not every vocation or occupation in which the saw is used which is for that reason a sawmill. To so conclude might require a latitudinarian construction which would include everything from those monster mills manufacturing into lumber the sequoia gigantea on the Pacific Slope to the hut of the peasant of the Black Forest engaged in shaping toys wherewith to delight the immature imaginations of children. A sawmill, as defined by the law of Georgia, is not a planing mill, or a sash and door factory. There are sawmills which have such attachments, but they are not sawmills for that reason, but because they saw logs and timber, as they are cut from the forest, into the lumber of commerce. It is a mill which deals with saw logs, and these are logs suitable to be cut in a sawmill. As stated in the Standard Dictionary, "it is an establishment for sawing logs into lumber by power, often including other woodworking machines, as lathe machines and planing machines." We think, therefore, the claimant was mistaken in regarding the establishment of the bankrupt as a sawmill as contemplated in the Georgia statute creating a lien thereon.

It is, however, suggested that this objection should not be presented by demurrer. This objection would be well taken had the claimant contented himself with describing the works of the Brunswick Sash & Door Company as a sawmill. In that event the demurrer would ex necessitate have admitted the averment. He, however, went further, and described the work done in the alleged sawmill, and, construing all of his averments together, the referee was justified, even on demurrer, in concluding that there was no sawmill, and therefore no lien.

Order will be taken affirming the finding of the referee.

In re BROWN, DURRELL & CO.

(Circuit Court, D. Massachusetts. March 28, 1903.)

No. 515.

1. CUSTOMS DUTIES—RELIQUIDATION—PROTEST.

Where part of an importation of merchandise, though not explicitly specified in the original protest against the duty imposed, is a subject of consideration on the reliquidation proceedings, the act of the collector on reliquidation is the act finally imposing the duty, as regards the time for protest.

Petition for Review by the United States, by the Collector of Customs for the Port of Boston and Charlestown, of Decision of Board of General Appraisers.

Henry P. Moulton, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

W. Wickham Smith, for Brown, Durrell & Co.

Findings of Fact, and Opinion of the Court.

ALDRICH, District Judge. The two cases of merchandise in question were imported with other cases of merchandise, and were a part of a single entry. The importers in their original protest, sea-

sonably made, objected to the entire duty imposed upon the importation included in the entry upon the ground that the so-called "Customs Administrative Act" of June 10, 1890, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886], was unconstitutional, but in that part of the original protest which related to the classification of the merchandise and the rate of duty imposed the two cases now in question were not specified with the others. Upon proceedings founded upon such protest, reliquidation was ordered upon the ground that the merchandise was subjected to a too high rate of duty, and, while the two cases in question were not explicitly named in that part of the protest which related to the rate of duty, it is conceded that the merchandise which they contained was in fact subjected to an unlawful rate of duty.

The government, therefore, holds money which it received as the result of subjecting the importers' merchandise to a rate of duty which the statute did not authorize. The red-ink marks upon the entry sheet, which indicate the action of the collector upon reliquidation, show that the two cases of merchandise in question were a subject of consideration in the reliquidation proceedings. Upon the sheet which was before the collector when the entry was being reliquidated a reduction of duty was entered as to certain of the cases of merchandise in the importation, and the cases in question were checked off as not entitled to a reduction.

It was thus determined upon reliquidation that they should stand subject to a rate of duty which it is conceded the statute did not subject them to. I find as a matter of fact that these two cases of merchandise, though not explicitly specified in the original protest, were a subject of reconsideration by the collector under the reliquidation proceedings. The importers filed a protest within 10 days after the reliquidation against the rate of duty thus reimposed upon the two cases now in question. The protest was sustained by the general appraisers.

I am inclined to view the reliquidation as the final and effective imposition of the duty complained of. The last paragraph of the opinion of the Supreme Court in *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269, would indicate that the time to protest did not begin to run until then. It is there observed that the previous liquidation is necessarily abandoned by the corrections subsequently made. If we are to treat the act of the collector upon reliquidation as the act which finally imposed the duty, the protest was, of course, seasonably made. It would seem that the right of the government to hold the duty must depend upon the situation upon which the final act of the collector was based.

I think the petition should be denied, and it is so ordered. The decision of the board of general appraisers is affirmed.

In re E. O. THOMPSON'S SONS.

(District Court, E. D. Pennsylvania. March 26, 1903.)

No. 1,015.

1. BANKRUPTCY—PROVABLE CLAIMS—SURRENDER OF PREFERENCES.

Where two notes were given by a bankrupt at the same time, both of which were held by the same creditor, and the one first maturing was paid within four months prior to the bankruptcy, and during insolvency, the amount so paid must be surrendered, as a preference, to entitle the creditor to prove the other in bankruptcy.

In Bankruptcy. On certificate of referee, Richard S. Hunter, sur claim of Chester National Bank.

The following are the opinions of the referee:

On December 28, 1900, the Chester National Bank purchased two notes—one for \$2,500, dated December 20, 1900, payable at three months, and another for \$2,500, dated December 20, 1900, payable at four months. These notes were made by E. O. Thompson's Sons to the order of Benjamin Thompson, and by Benjamin Thompson indorsed. The note falling due March 20, 1901, was sent by the bank, in the due course of business, to the Central National Bank of Philadelphia for collection. This note was payable at the Independence National Bank, and, upon being presented by the Central National Bank at the Independence, it was paid.

The note of \$2,500 payable April 22, 1901, was not paid at maturity, and was returned by the Central National Bank, to whom it was sent for collection, protested. This second note of \$2,500 is the note upon which the claim of the Chester National Bank is made against the bankrupt estate. The contention of the Chester National Bank is that the two notes represent two separate and distinct debts, and were so carried upon the books of the bankrupt, and that at the time the first note was paid the second note was not payable or collectible.

Counsel cited in support of their contention Abraham Steers Lumber Company, 7 Am. Bankr. Rep. 333, 50 C. C. A. 310, 112 Fed. 406, and the case of Albert Elsasser, 7 Am. Bankr. Rep. 215. These cases are to the point that a full or partial discharge of a debt, made after the debtor is insolvent, does not impair the creditor's right to prove a debt subsequently contracted. Beyond this these cases do not go.

In the case now at hand there was no debt contracted after the discharge of a previous debt. There were two debts contracted at the same time, one of which was paid, and the other not paid. The referee can see no legal distinction between this state of facts and that which arises where upon a debt of \$5,000 the sum of \$2,500 is paid on account.

The prayer of the petition is granted.

On Reargument.

Upon exceptions of the Chester National Bank to the finding of the referee granting the petition of the trustee for the return of payments received by the said bank, the matter was again argued before the referee. No new authorities were adduced, but stress was laid by counsel upon *In re Dickinson*, 7 Am. Bankr. Rep. 679, where the referee stated, as a rule which he had adopted, that "a creditor holding distinct debts may prove and be allowed his claim upon one upon which no preference was received, without surrendering a preference received upon another." It is not clear from the report whether this was a decision of the case in hand, or a general statement of opinion by the referee in the case. In any event, it does not appear to the referee to be of the same authority as *In re Conhaim*, 3 Am. Bankr. Rep. 249, 97 Fed. 923, where, in a case exactly similar to the present, debts being due to a bank upon four promissory notes, and payment made of two of them, the court disallowed the claim of the bank unless it should surrender the payments received.

It seems clear that the purpose of the act was that, among creditors proving their claims, one should not receive a greater proportionate share of the bankrupt estate than another. To make a distinction between a creditor who lends \$5,000 upon one promissory note, and receives \$2,500 in part payment thereof, and another creditor who lends the same sum on two promissory notes, and receives the same payment, is inequitable and unjust.

The referee sees no reason to alter his decision disallowing the claim.

Julius C. Levi, for trustee.

Lindsay & Harvey, for Chester National Bank.

J. B. McPHERSON, District Judge. The reports of the learned referee are adopted as the opinion of the court, to which I may add the citation of *Re Rogers Milling Co.*, 4 Am. Bankr. Rep. 540, 102 Fed. 687.

BOARD OF TRADE OF CITY OF CHICAGO v. CHRISTIE GRAIN
& STOCK CO. et al.

(Circuit Court, W. D. Missouri. March 19, 1903.)

1 EXCHANGES — CONTRACT FOR DISTRIBUTION OF QUOTATIONS — LEGALITY OF RESTRICTIONS.

A contract between a board of trade, having a property right in the quotations made on its exchange, and a telegraph company, relating to the transmission and distribution of such quotations by the latter, is not in violation of the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), as in restraint of trade and commerce, because of a provision that the quotations shall only be furnished to persons who sign an agreement to the effect that they shall not be used in the conduct of a bucket shop.

In Equity. On final hearing.

For former opinion, see 116 Fed. 944.

HOOK, District Judge. The only question of consequence presented at the final hearing which was not fully argued at the preliminary hearing is whether the arrangement between the board of trade and the telegraph companies is violative of the provisions of the Sherman act (Act July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). This proposition may be roughly stated as follows: The board of trade, having a property right in its quotations, contracted with the telegraph companies for their transmission and distribution by the latter; such transmission and distribution to be confined to persons who would sign an application embodying an agreement to the effect that the quotations should not be used in the conduct of an unlawful business, to wit, a bucket shop. Is such an arrangement an unlawful combination in restraint of trade and commerce, within the meaning of the act of July 2, 1890, popularly known as the "Sherman Anti-Trust Act"? I am of the opinion that it is not.

Let a final decree be prepared in conformity with the above, and the conclusions heretofore announced in this case.

PRESSED STEEL CAR CO. v. EASTERN RY. CO. OF MINNESOTA.
EASTERN RY. CO. OF MINNESOTA v. PRESSED STEEL CAR CO.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1903.)

Nos. 1,802, 1,803.

1. CONSTRUCTION OF CONTRACTS—INTENTION OF PARTIES THE DESIDERATUM.

The sole purpose of the construction of a contract is to ascertain and enforce the intention of the parties—the sense and meaning upon which their minds met when they made it—and when this is discovered it prevails over verbal inaccuracies, inapt expressions, and the dry words of the agreement.

2. SAME—INTENTION DEDUCED FROM ENTIRE AGREEMENT.

The intention of the parties must be deduced from the entire agreement, and not from any part or parts of it, because, where a contract has several stipulations, it is plain that the parties agreed that their intention was not expressed by any single part or stipulation of it, but by every part and provision in it, considered together, and so construed as to be consistent with every other part.

3. SAME.

Where the language of a contract is obscure or ambiguous, or its meaning is doubtful, so that it is susceptible of two constructions, that interpretation which evolves the more usual, reasonable, and probable contract should be adopted.

4. SAME—FACTS AND CONSTRUCTION IN THIS CASE.

A car company agreed to make and deliver 400 cars to a railway company on or before April 1, 1900, subject to delays from unavoidable contingencies, but that, if it failed to deliver the cars within "the time specified," it would forfeit and pay to the railway company, as liquidated damages, \$5 per day for every car so delayed.

Held, "the time specified," in the damage clause, meant all the time specified for the delivery of the cars in the earlier part of the contract (that is to say, the time on or before April 1, 1900, plus the time during which the delivery might be delayed by the unavoidable contingencies), and the car company was not liable for the stipulated damages during that time.

5. SAME—LIQUIDATED DAMAGES.

When it is certain that some damages will result from delay in the performance of a contract, when those damages are incapable of exact ascertainment, or are based upon matters that are to a considerable degree uncertain, and when the amount stipulated is not, on the face of the agreement, out of all proportion to the probable loss, a contract to pay a sum certain for each day, week, or other definite period of delay beyond the time fixed by the contract for its fulfillment is a valid and enforceable agreement for the measurement of the damages, and is not a contract for a penalty.

6. TIME—COMPUTATION—SUNDAY EXCLUDED WHEN LAST DAY.

When the last day within which a deed is to be performed falls on Sunday, that day is excluded, and the act may be done on the succeeding day.

7. SAME—INTERVENING SUNDAYS INCLUDED.

In the computation of rents, interest, damages, or any other amounts, where a day, a week, a month, or any other definite period, is the agreed standard of measurement, every intervening Sunday, as well as every secular day, must be included and counted.

(Syllabus by the Court.)

† 5. See Damages, vol. 15, Cent. Dig. §§ 161, 167, 173.

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

These writs of error have been sued out to review the trial of an action brought by the Pressed Steel Car Company, a corporation, against the Eastern Railway Company of Minnesota, another corporation, to recover the unpaid part of the purchase price of 400 steel hopper ore cars, which the car company had made and delivered to the railway company under this contract:

"This agreement, made and entered into this 19th day of December, A. D. 1899, between the Pressed Steel Car Company of Pittsburgh, Pa., party of the first part, and the Eastern Railway Company of Minnesota, party of the second part,

"Witnesseth: that the party of the first part covenants and agrees to and with the party of the second part, to build for the party of the second part four hundred (400) steel hopper ore cars, to be delivered on or before April 1st, 1900, in accordance with the specifications, hereto attached and made a part hereof, and subject to the inspection of a representative of the party of the second part, and to deliver said cars on the tracks of either the P. C. C. & St. L. Ry. or P. & L. E. Railroad, or the P. F., W. & C. Ry. or P. & W. Ry., (our works) without cost to the party of the second part, except the purchase price hereinafter mentioned to be paid by the party of the second part. The delivery of these cars to be subject to delays in delivery of materials to be used in these cars, other than the first party's manufacture, and to strikes, fires, delay of carriers, or other unavoidable contingencies beyond the control of said first party. But it is agreed that in the event of the failure of the party of the first part to make and deliver the cars aforesaid within the time specified, then it shall forfeit and pay to the party of the second part as liquidated damages consequent upon such failure the sum of five dollars per day for each and every car so delayed after the said April 1st, 1900.

"In consideration whereof, the party of the second part covenants and agrees to accept said cars and to pay for the same the sum of eight hundred and seventy-five dollars (\$875.00) each, to the party of the first part, such payments to be made in cash on delivery of each lot of one hundred cars.

"It is mutually understood and agreed, by and between the parties hereto that in case any future change or modification is made in said specifications, increasing or decreasing the cost of said cars, or any of them, the party of the first part will make the proper deduction from the above price for any such decreases, and the party of the second part will pay for any such increases."

The plaintiff alleged that the amount of the purchase price remaining unpaid was \$151,518.66 and interest. The answer of the defendant was that the plaintiff was so dilatory in delivering the cars that the damages for the delay which were stipulated in the contract amounted to more than the unpaid part of the price of the cars. None of the cars were delivered until May 29, 1900, and the delivery of the cars was not completed until June 28, 1900. The plaintiff alleged that this delay was caused by the unavoidable contingencies specified in the agreement. The court held that the plaintiff was liable for the stipulated damages for delays caused by these contingencies, as well as for delays caused by its own default or negligence, and instructed the jury that the defendant was entitled to damages to the amount of \$5 per car for every secular day after April 2, 1900, that the delivery of the cars was delayed. The result was a judgment for the plaintiff for \$29,186.26.

The car company complains of the trial because the court charged it with damages for delays in the delivery of the cars caused by the unavoidable contingencies, and the defendant is dissatisfied with the result because it was not allowed \$5 per car per day for every Sunday as well as for every secular day that the delivery of the cars was delayed after April 1, 1900.

Jared How and Adrian H. Joline (John S. Ferguson, on the brief), for Pressed Steel Car Co.

W. E. Dodge (M. D. Grover, on the brief), for the Eastern Ry. Co. of Minnesota.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The grave question in this case is whether the Pressed Steel Car Company agreed to pay the railway company the liquidated damages stipulated in the contract during the time it was delayed in delivering its cars by the unavoidable contingencies named in the agreement, and that question must be determined by a fair construction of the contract.

The purpose of a written agreement is to evidence the terms upon which the minds of the parties to it meet when they make it. Hence the true end of all contractual interpretation is to ascertain that intention, and when it is found it prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipulations. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then, from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do—upon what sense or meaning of the terms they used their minds actually met. *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 74, 12 C. C. A. 37, 41, 42; *City of Salt Lake v. Smith*, 104 Fed. 457, 462, 43 C. C. A. 637, 643; *Fitzgerald v. First National Bank*, 52 C. C. A. 276, 284, 114 Fed. 474, 482.

The intention of the parties must be deduced from the entire agreement and from all its provisions considered together, because, where a contract has many stipulations, it is plain that the parties understood and agreed that their intention was not expressed by any single part or provision of their agreement, but by every part and stipulation, so construed as to be consistent with every other part and with the entire contract. *Jacobs v. Spalding*, 71 Wis. 177, 189, 36 N. W. 608; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *O'Brien v. Miller*, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469.

Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract. *Coghlan v. Stetson (C. C.)* 19 Fed. 727, 729; *Jacobs v. Spalding*, 71 Wis. 177, 186, 36 N. W. 608; *Russell v. Allerton*, 108 N. Y. 288, 292, 15 N. E. 391.

Let us consider the agreement of these parties in the light of these familiar canons of interpretation. The stipulations of the contract

material to the determination of the question before us are that the car company undertook to deliver 400 cars to the railway company—

"On or before April 1st, 1900, * * * subject to delays in the delivery of materials to be used in these cars, other than the first party's manufacture, and to strikes, fires, delay of carriers, or other unavoidable contingencies beyond the control of said first party. But it is agreed that in the event of the failure of the party of the first part to make and deliver the cars aforesaid within the time specified, then it shall forfeit and pay to the party of the second part as liquidated damages consequent upon such failure the sum of five dollars per day for each and every car so delayed after the said April 1st, 1900."

The parties evidently contemplated and provided in this agreement for two classes of delays, those that might be caused by the unavoidable contingencies described in the contract, and those that might result from the default or negligence of the car company. For the purpose of reducing the agreement to its lowest terms and of facilitating the discussion, the former will be termed excusable, and the latter inexcusable, delays; the liquidated damages of \$5 per day will be termed demurrage; and it will be assumed that there were both excusable and inexcusable delays in the performance of the contract. The agreement then becomes a contract by the car company to deliver the cars on or before April 1, 1900, subject to excusable delays, and to pay the railway company demurrage for a failure to deliver them within "the time specified"; and the question is, when was "the time specified," within which a failure to deliver subjected the car company to the liquidated damages? Was it the time between the date of the agreement and April 2, 1900, or was it the time between the date of the agreement and the expiration of the postponement of the time of delivery caused by the excusable delays? Counsel for the car company insist that it was the latter, because that, as they say, is the obvious meaning of the terms of the agreement, because the word "so," before "delayed," points in that direction, and because that interpretation makes the agreement equitable and reasonable, while the opposite construction renders it unconscionable and improbable. On the other hand, counsel for the railway company as earnestly contend that the former is the true construction, because, as they insist, that is the evident sense of the plain words of the contract, because when the agreement was made the railway company needed the cars for actual use in the transportation of ore as soon as April 1, 1900, when the season for using them opened, because every day's delay in their delivery entailed a great and irreparable loss upon the railway company, and while it was willing to bind itself to accept the cars after April 1, 1900, during the postponement of delivery by the excusable delays on the condition that the car company would contract to pay demurrage during that time, it would never have made the agreement without such a stipulation, because the word "but," which introduces the stipulation for demurrage and expresses antithesis, and the words "after the said April 1st, 1900," at the close of the damage clause, sustain this view, because it cannot be supposed that the parties contemplated a breach of the contract, and stipulated damages for such a breach, and be-

cause the only "time specified" in the writing was the time on or before April 1, 1900.

To the counsel of each of these parties this contract seems plain and unambiguous, and its meaning certain, and yet it has an entirely different signification to the representatives of each of these corporations. This fact, repeated perusals, and a careful study of the writing present very convincing evidence that its terms are not altogether clear, that they were well calculated to raise this controversy, and that they are susceptible of two constructions. It remains to determine which is the more natural, probable, and rational interpretation.

There is no evidence in the record that either of the two interpretations urged upon our consideration would have deterred either of the parties from entering into the agreement. What they intended to stipulate, what they understood the contract to mean, and what they would have done if their interpretation of it had been different, can be deduced only from the contract itself, the situation of the parties, and the circumstances surrounding them when they made it.

It is undoubtedly true that the railway company expected when it entered into the contract that it would sustain serious losses if the cars were not delivered on or before April 1, 1900, and that it did sustain such losses on account of the excusable delays in delivery. This fact, however, is insufficient to prove that "the time specified," within which a failure to deliver the cars would subject the plaintiff to the liquidated damages, was limited to the time prior to April 2, 1900, because it is met by the equally potent consideration that the car company must have known when the agreement was made that it would be liable to great losses for excusable delays if it agreed to pay damages for such delays after April 1, 1900. In other words, the interest of each of the parties was as great when the contract was made as it is now to obtain the agreement which it now claims that it has secured, and the respective interests of the parties are not determinative of the construction that should be given to the agreement.

Nor is the contention of counsel for the railway company that the presumption is that the parties did not contemplate a breach of the contract, and hence that the demurrage must have been provided for the excusable as well as for the inexcusable delays, persuasive, because the demurrage clause is, in essence, a stipulation for the measurement of possible damages; because damages are indemnity for the breach of a contract or of a duty; because stipulations to liquidate possible damages for delays in the fulfillment of contracts for construction and manufacture, for the purpose of securing their prompt performance, are customary, and in such contracts the presumption and the practice are to anticipate and make provision for a possible failure of the contractor or manufacturer in the prompt performance of his work. 1 Sutherland on Damages (2d Ed.) pp. 582, 583, and 584, and cases cited in notes. Moreover, this clause of the contract unquestionably stipulates for demurrage for the inexcusable delays—the delays caused by the acts or omissions of the car

company—and this fact is conclusive proof that the parties did contemplate a possible breach of the agreement when they made it.

While the word “but,” which opens the damage clause, ordinarily expresses antithesis, it is not of such paramount importance or significance as to dominate or seriously influence the decision of the grave question here at issue. Nor have we been able to find anything in the fact that this stipulation closes with the words “after the said April 1st, 1900,” decisive of this question. So far as we are able to discover, the contract would have the same meaning without these words that it has with them. In other words, they are demonstrably tautological, and have no legal effect, whether the construction asserted by the plaintiff or that maintained by the defendant is given to the contract. This fact is demonstrable by assuming that the postponement of the time of delivery by the excusable delays was one month, or until May 1, 1900. Then “the time specified,” according to the railway company’s contention, would be the time between December 19, 1899, and April 2, 1900; and, according to the car company’s contention, it would be the time between December 19, 1899, and May 2, 1900. Insert this time in the stipulation for demurrage in the place of the words “the time specified,” and omit the term “after the said April 1st, 1900,” and it will read:

“But it is agreed that in the event of the failure of the party of the first part to make and deliver the cars aforesaid within the time between December 19, 1899, and April 2, 1900 [as the railway company insists] or within the time between December 19, 1899, and May 2, 1900 [as the car company maintains], then it shall forfeit and pay to the party of the second part as liquidated damages consequent upon such failure the sum of five dollars per day for each car so delayed.”

It is clear that there could not be any liability on the part of the car company for demurrage under this stipulation prior to April 2, 1900, under either construction, because by the preceding part of the contract the railway company agrees that the plaintiff shall have until April 2, 1900, to make its deliveries, and because the clause providing for the demurrage stipulates for none prior to that date, whether the interpretation of the plaintiff or that of the defendant is adopted. Now, add to the clause the words “after the said April 1st, 1900,” and they add nothing and take nothing away from its legal effect or significance under either construction, because, in the absence of these words, damages for demurrage prior to April 2, 1900, are no more recoverable than in their presence. The word “so,” before “delayed,” about which much was said upon the argument, is in the same category. The cars “so delayed” are those delayed in the time and manner stated in the preceding part of the agreement. If “the time specified” is the time prior to April 2, 1900, as the railway company insists, then the cars “so delayed” are those delivered after April 1, 1900. If, on the other hand, “the time specified” is, as the car company contends, the time prior to May 2, 1900, then the cars “so delayed” are those that are not delivered until after May 1, 1900. After all is said, the meaning of the term “the time specified” conditions the determination of the whole question; and

the words "but," "so," and "after the said April 1st, 1900," give no clear indication of its true interpretation.

It is said that "within the time specified" must mean the time anterior to April 2, 1900, because that is the only exact, specific time mentioned in the portion of the agreement preceding the stipulation for damages. But to specify is to mention specifically, to name distinctly, and the fact that the delivery of the cars on or before April 1, 1900, was to be subject to the delays caused by the unavoidable contingencies stated in the contract, and hence that the time of delivery was to be extended thereby, was as specifically mentioned and as distinctly named in the earlier part of the agreement as was the date of April 1, 1900. It was a distinctly stated and clearly specified part of the contract preceding the damage clause that the time within which the car company might lawfully deliver the cars was the time prior to April 2, 1900, plus the time it might be delayed by the unavoidable contingencies. The words "the time specified" refer back to the time during which the cars might be delivered under the preceding paragraph of the agreement, and there is nothing in the word "specified" or in its definition to restrict the signification of the term under consideration to one part, or to exclude another part of the time distinctly named in the earlier paragraph of the contract. On the other hand, when by the foregoing paragraph of the agreement the stipulation had been made that the cars might be delivered within the time prior to April 2, 1900, plus the time the car company might be delayed by the specified acts beyond its control, and the parties went on in their agreement to say that, if the car company failed to make the delivery "within the time specified," it should "forfeit and pay to the party of the second part as liquidated damages consequent upon such failure five dollars per day for each and every car so delayed," the natural and rational inference was that the time specified was all the time within which the parties had agreed that the delivery might be made, and not a part of that time.

It is unquestionably true that the car company had the right to deliver, and that the railway company obligated itself to accept the delivery of, these cars within any time after April 1, 1900, to which the delivery might be postponed by the excusable delays mentioned in the agreement; and there is great force in the argument of the counsel for the railway company that it is unreasonable to suppose, and is improbable, that the defendant would have made this obligation, and would have subjected itself to the certain losses consequent upon these delays, without a corresponding obligation on the part of the company to indemnify it against them. But when the entire contract, the situation of the parties, the surrounding circumstances, and the terms of the agreement are thoughtfully considered, this argument is more than overcome by the following considerations: The car company was certainly unwilling to agree to deliver the cars on or before April 1, 1900. It was unwilling to take the chances of the losses on account of the delays in the manufacture and delivery that might be caused by the unavoidable contingencies named in the agreement. It therefore demanded and secured from the railway company a stipulation that it might deliver, and that the defend-

ant would receive, these cars after April 1, 1900, during the time that their delivery might be delayed on account of the specified contingencies. It demanded and secured this stipulation for the purpose of relieving itself from the liability for damages which it might incur if, without this agreement, it was prevented by matters beyond its control from making its deliveries by April 1, 1900. In the face of this fact, is it reasonable to suppose, is it probable, that at the same time that it insisted upon and obtained this stipulation to relieve itself from possible damages that might accrue from its failure to deliver on account of these possible delays, it also agreed to pay to the railway company \$2,000 per day for every day that the delivery of the cars might be postponed by the happening of these unavoidable contingencies, and a proportionate amount for the like postponement of the delivery of every car? A negative answer seems to be the more rational reply to this question. An agreement by a party to pay damages for events beyond its control, against which it has already stipulated, is certainly an unusual contract, out of the ordinary course of business, and unlikely to be made by a party of ordinary prudence and sagacity. Moreover, the stipulation under consideration is for the forfeiture and payment of damages for the failure of the car company to deliver within the specified time. The words "failure," "damages," and "forfeit" all point, not to a stipulation whereby a new liability is created, but to one in which the indemnity against injury that is likely to result from the failure to perform a stipulation already made is measured. They are words commonly used, and naturally applicable to the treatment of defaults within the control of the party who undertakes to forfeit and pay the damages. The damages one pays or agrees to pay usually consist of indemnity for injuries caused by his own breach of duty or of contract, and not to losses which another sustains from events over which the former has no control. In the ordinary course of business, the failures for which one forfeits and pays, or agrees to forfeit and pay, damages, are generally those resulting from his own fault or negligence, not those caused by unavoidable contingencies against liability, for which he has already stipulated. There were or there might have been inexcusable delays in the delivery of these cars, to which the words under consideration fitly apply; and there is nothing in the agreement, the situation, or the circumstances of the parties to persuade that they used, or intended to use, them in any extraordinary or unusual sense.

While the question is not free from difficulty, the fact that in the first part of this agreement these parties contracted that the car company might deliver, and the railway company would accept, the cars within the time prior to April 2, 1900, plus the time after April 1, 1900, within which the delivery might be delayed by the unavoidable contingencies described in the agreement, the fact that it is unusual for one to agree to pay damages for losses caused by events over which he has no control, and against which he has stipulated, while it is customary for one to promise to pay liquidated damages for losses caused by his own breaches of duty or of contract, and the fact that losses of the latter character, to which the stipulation

for damages in this agreement may well apply, were possible and were probably contemplated by the parties when the contract was made, the fact that the more natural and rational application of the words "failure," "damages," and "forfeit and pay," in the stipulation wherein the car company agrees to forfeit liquidated damages for its failure to deliver the cars, is to a measurement of the damages for a failure to perform the agreement to deliver, already recited in the earlier part of the contract, and not to a stipulation to create a new liability for the excusable delays against which the company had already stipulated; and the fact that the term "the time specified," during which there could be no failure under the damage clause, does not specifically except any, but naturally includes all the time specified for the delivery of the cars in the foregoing paragraph of the contract (that is to say, all the time prior to April 2, 1900, plus the time after April 1, 1900, during which the delivery might be delayed by the unavoidable contingencies)—all these facts, and the considerations and arguments they suggest, converge with compelling force to persuade that the parties to this agreement never intended to contract that the car company should pay the damages stipulated in the agreement for the time during which the deliveries were delayed by the unavoidable contingencies against which it stipulated, but that their intention was that the agreement for liquidated damages should apply only to delays beyond the time within which the car company was bound to deliver the cars under the earlier paragraph of the contract. This construction evolves a more reasonable and probable agreement than that for which the railway company contends, and the subject-matter of the contract, the situation and surroundings of the parties when they made it, the terms of the damage clause, and a consideration of all the stipulations of the agreement together, furnish cogent arguments in support of it. Our conclusion, therefore, is that the car company was not liable, under the contract, to pay the liquidated damages for which it stipulated during the time within which it was permitted to deliver the cars under the first part of the contract, but that its agreement was to pay those damages for all the time during which any of the deliveries were postponed by its own act, neglect, or default.

It is assigned as error that the court rejected testimony offered by the car company to show that the parties themselves construed the contract as we have interpreted it. But it is unnecessary to consider the question raised by this assignment, because the conclusion already reached necessitates a reversal of the judgment, and because by a consideration of the agreement itself we have reached the result which the evidence was offered to attain.

It is contended that the court erred because it refused to instruct the jury that the provision of the contract for the payment of the \$5 per car for every day that the cars were delayed after the time specified was a stipulation for a penalty, and not for liquidated damages, and that, as no actual damages had been proved, the railway company was entitled to no allowance for the delay in the delivery of the cars, whether it was caused by the car company or otherwise. But where it is certain that some damages will result if there is a

delay in the performance of an agreement, where those damages are incapable of exact ascertainment, or are based upon matters that are to a considerable degree uncertain, and where the amount stipulated is not, on the face of the contract, out of all proportion to the probable loss, an agreement to pay a sum certain for each day, week, or other definite period of delay beyond the time fixed by the contract for its fulfillment is a valid and enforceable contract for the measurement of the damages, and not an agreement for a penalty for nonperformance. *Burk v. Dunn*, 55 Ill. App. 25, 29; *Story's Eq. Juris.* § 1318; *Fletcher v. Dyche*, 2 Durnford & East, 32, 36; *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 235, 26 N. E. 256; *Harris v. Miller (C. C.)* 11 Fed. 118, 122. It was reasonably certain that the railway company would sustain losses by the failure to deliver the cars at the opening of the season, when they were desired and could be used. It was uncertain what the amount of those losses would be. They would be conditioned by the contracts of the railway company, the amount of ore that would be offered for transportation, the demand, the supply, the general commercial prosperity, and many other facts and considerations which could not be fully anticipated. The parties to the contract stood on an equal footing, each represented by trained and intelligent men—each better equipped to measure the probable injuries which the railway company would suffer than any court or jury is likely to be. They deliberately agreed that the standard for the measurement of the damages occasioned by the losses of the railway company through these delays should be \$5 per car for every day of inexcusable delay. This amount does not appear from the face of the contract to be greatly out of proportion to the actual damages which the defendant would be likely to sustain, and no reason occurs to us why the courts should interpose to relieve the parties to this contract from the obligations which they have deliberately assumed.

All the evidence offered by the car company for the purpose of proving the fact that the delays in the deliveries of the cars were caused by the unavoidable contingencies named in the agreement was rejected by the court below on the ground that the car company was liable, under its construction of the contract, to the same extent, for the excusable as for the inexcusable delays. This, as we have seen, was, in our opinion, an erroneous view of the signification of the agreement. Counsel for the railway company now contend that, notwithstanding the fact that this testimony was ruled out for this wrong reason, yet this error furnishes no ground for a reversal of the judgment, because it was properly rejected on the ground that it shows upon its face that all the delays were caused by the fault or negligence of the car company. But this objection to this evidence was not made at the trial. The question whether or not it proves that the delays were caused by the unavoidable contingencies or by the negligence of the car company was not considered, tried, or ruled by the court below. Moreover, the car company was not called upon at the trial to present or offer all the evidence which it may have had upon this issue, because the court refused to receive any of this evidence, upon the ground that it was all immaterial un-

der its interpretation of the agreement. The plaintiff may or may not have evidence upon this issue which it did not offer at the trial below. However that may be, it has never had a trial, or an opportunity to try, a ruling, or a decision of the issue whether the delays in the deliveries of the cars were caused by the unavoidable contingencies or by its own fault; and, until it has had such a chance, this court cannot lawfully determine, and ought not to decide, that question. The jurisdiction of this court in an action at law is limited to the correction of the errors of the court below. That court has not yet considered, tried, or ruled upon the issue here presented; and therefore there is nothing in its action regarding it for this court to consider or determine, and its discussion and decision of this issue must be deferred until there has been an opportunity to try it, and a trial of it, in the Circuit Court.

The railway company complains of the trial below because the court instructed the jury (1) that in view of the fact that April 1, 1900, fell on Sunday, the car company was not in default in the delivery of the cars until the end of April 2, 1900; and (2) that, in calculating the damages for the failure of the car company to deliver the cars within the time specified, they were not to count any Sunday as a day, within the meaning of the damage clause of the contract. When the last day within which a deed is to be performed falls on Sunday, that day is excluded, and the act may be done on the succeeding day. *Street v. United States*, 133 U. S. 299, 306, 10 Sup. Ct. 309, 33 L. Ed. 631; *Hammond v. Ins. Co.*, 10 Gray, 306; *Post v. Garrow*, 18 Neb. 682, 26 N. W. 580; *Gen. St. Minn.* 1894, § 5222; *Spencer v. Haug*, 45 Minn. 231, 232, 47 N. W. 794. There was therefore no error in the first of these instructions. As much cannot be said of the second, however. The stipulation for liquidated damages is not, as counsel for the car company argue, an agreement to pay \$5 for the use of each car each day during the delay, and hence void as to Sundays, because there could be no lawful use, and therefore no legal loss of use, upon those days. On the other hand, it is a contract whereby the parties establish and agree to apply a specified standard to the measurement of damages that are uncertain and incapable of accurate determination. They agree that these unliquidated damages for the delay of the delivery of each car shall be measured by multiplying \$5 by the number of days the delivery is delayed beyond the time specified. The agreed standard is \$5 for every day's delay of each car. The contract would not have been essentially different if it had fixed the standard at \$35 for each week's delay, or at 20 cents for each hour's delay, in the delivery of each car. It would be as reasonable to exclude one-seventh of the week, or the hours of Sunday, in a measurement by such standards, as it would be to exclude Sunday where the standard of measurement is 24 hours or a day. In the computation of rents, interest, damages, or any other amounts in which the day, the week, the month, or any other fixed period of time, is the agreed standard of measurement, every intervening Sunday, as well as every secular day, must be included and counted in the reckoning. The contract of these parties was that the car company would pay to the railway company "five

dollars per day" for every car delayed, and this was an agreement that the amount of damages for each car's delay should be the product of \$5 by the number of days, including both Sundays and secular days, that the delivery of the car was delayed beyond the time when it was due by the terms of the agreement.

The judgment below is reversed, and the case is remanded to the Circuit Court for further proceedings not inconsistent with the views expressed in this opinion.

TRICE et al. v. COMSTOCK et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1903.)

No. 1,808.

1. TRUST—FIDUCIARY RELATIONS—ESTOPPEL.

Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.

2. SAME—CONSTRUCTIVE TRUST—ADVERSE INTEREST ACQUIRED.

A violation of this inhibition, and the acquisition by one of the parties, by means of interest or information acquired through the fiduciary relation of any property or interest, which prevents or hinders his correlate in accomplishing the object of the agency, charges the property thus acquired with a constructive trust for the benefit of the latter, which may be enforced or renounced by him, at his option.

3. SAME—TEST OF CONSTRUCTIVE TRUST BETRAYAL OF CONFIDENCE—NOT INTEREST, AUTHORITY, OR DAMAGE.

The test of such a trust is the fiduciary relation, and a betrayal of the confidence imposed under it to acquire the property. Neither a legal nor equitable interest by either party, during the relation, in the property subsequently acquired, nor authority in either to buy or sell it, nor damage to the party betrayed, nor the existence of the fiduciary relation at the time the confidence is abused, is indispensable to the existence and enforcement of the trust. The existence of the relation, and a subsequent abuse of the confidence bestowed under it for the purpose of acquiring the property, are alone sufficient to authorize the enforcement of the trust.

4. SAME—CONSTRUCTIVE TRUST ENFORCED—FACTS.

Real estate dealers who were engaged in procuring from owners options to purchase their property at fixed prices, and in selling it at higher prices, retaining the difference themselves as their profits, employed a resident of another state as their agent to solicit and conduct to their county probable purchasers of lands, and agreed to pay him his traveling expenses and 50 cents an acre on all the lands sold to the customers he brought. The agent conducted a probable purchaser to his principals. He and the possible customer were shown a tract of 1,925 acres by his principals, which was for sale at the rate of \$20 an acre by the owners, but in which the principals had no interest and upon which they had no contract. In this way the agent learned the location and value of the land. He was paid the expenses of his trip by his principals under the contract of agency. Three months later he renounced his agency, and one month thereafter, and while his principals were still endeavoring to sell the land to the possible customer whom he had conducted to them, the agent bought the land of the owners for himself at the price of \$20 an acre. *Held*, the title to the land obtained by the agent was

charged with a constructive trust for the use and benefit of his principals, which a court of equity would enforce.

5. EQUITY—WRONG OF COMPLAINANT BARRING RELIEF.

The principle, "He who comes into equity must do so with clean hands," repels a complainant only when his iniquity consists of wrongful conduct in the acts or transactions which raise the equity he seeks to enforce.

6. BONA FIDE PURCHASER—PAYMENT BEFORE NOTICE INDISPENSABLE.

The actual payment before notice of the purchase price is indispensable to the maintenance of the claim that one is a bona fide purchaser of property for value without notice.

(Syllabus by the Court.)

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

For opinion below, see 115 Fed. 765.

This is an appeal from a decree which dismissed a bill exhibited by Charles Y. Trice and David A. Beamer to charge the title of 1,925 acres of land, held by the defendant James C. Comstock, with a trust for the use and benefit of the complainants. The pleadings contained many allegations and denials, but the evidence disclosed these facts:

Trice and Beamer were engaged in dealing in real estate at Lamar, in Barton county, Mo. They were in the habit of obtaining the right to purchase lands at fixed prices from the owners, of selling them at higher prices, and of making the difference themselves. Sometimes they procured contracts from the owners whereby it was stipulated that they might sell the lands and retain for their compensation the difference between the prices fixed in the agreements and the prices at which they were able to sell them. The land in controversy in this suit was situated in Barton county. It consisted of 1,925 acres, and the title to it was in Alfred P. Reid and Eoline G. Green, the executor and executrix of the will of Henry B. Buckwater, who had died in 1897. George E. Bowling, of Barton county, had been the agent of Buckwater to rent and care for these lands for many years prior to his death, and was the agent of the executors for the same purpose after his decease. Bowling claimed that he had power from the executors to sell the lands, but this claim is not sustained by the evidence. The lands were for sale by the executors at the price of \$20 per acre, and the complainants were aware of this fact. Bowling informed Trice and Beamer that he had the right to sell the lands for that price, and made an agreement with them to the effect that they should have the option or right to purchase them at that rate, and Trice and Beamer supposed that he had the power to make this contract. George H. Reitmeyer was a dealer in real estate at Maquoketa, in the state of Iowa. C. W. Comstock was a banker at Lost Nation, in that state, and James C. Comstock was his brother.

In this state of the case, the complainants, Trice and Beamer, made an agreement with Reitmeyer and C. W. Comstock to the effect that the complainants appointed Reitmeyer and Comstock their agents to procure and conduct to Barton county, Mo., purchasers for lands controlled by Trice and Beamer in that county, and agreed to pay them for their services one-half the railroad fare of the intending purchasers, all the railroad fare and traveling expenses of the agents in conducting the customers from Iowa to Missouri and return, and \$1 per acre for all lands in Barton county, Mo., sold to customers furnished by Reitmeyer and Comstock. In May, 1899, Reitmeyer and Comstock entered upon the discharge of their duties as agents for the complainants under the contract. The complainants wrote a general description of the 1,925 acres of land here in controversy to Comstock, and he conducted to Barton county a Mr. Shirk for the purpose of inducing him to buy this tract of land. The complainants took Comstock and Shirk to the lands, drove them around and over a portion of them, showed the corn-cribs, the products of the property, its character and quality, and the rents it was

¶ 5. See Equity, vol. 19, Cent. Dig. § 186.

likely to produce. They were not successful at that time in inducing Mr. Shirk to purchase, but continued their endeavors to sell the land to him after he returned to Iowa. C. W. Comstock learned the character, quality, and location of this land, its rental value, its occupation, the probable amount of rents it would produce, and essentially all the facts he ever learned concerning its value, under and by virtue of his services as one of the agents of Trice and Beamer to conduct customers to the land for the purpose of enabling them to sell it. The complainants paid Comstock his railroad fare and traveling expenses from Iowa to Barton county, Mo., and return, and a portion or all of the expense of Mr. Shirk. In August, 1899, Comstock conducted a party of land seekers from Iowa to Barton county, and the complainants displayed the lands which they controlled to them, and endeavored to induce them to purchase. At that time Comstock notified the complainants that he would bring no more customers to Barton county, and that all relations between them were closed. But Reitmeyer and Trice and Beamer were still negotiating to persuade Mr. Shirk to buy these lands. While these negotiations were pending, and on September 15, 1899, Comstock bought an option to purchase the land from Reid and Green, the executors of the will of Buckwater, and paid \$75 for it. About October 12, 1899, C. W. Comstock assigned this option to his brother, James C. Comstock. On or about October 16, 1899, C. W. Comstock paid Reid and Green \$1,925 on account of the purchase of this land, and on January 4, 1900, James C. Comstock deposited \$10,000 with C. W. Comstock, out of which, he testifies, the \$2,000 was paid back to C. W. Comstock. About March 1, 1900, James C. Comstock paid, out of this deposit of \$10,000, \$6,000 in part payment of the purchase price of the land, and secured a deed to it from Reid and Green. At the same time he executed his note for the sum of \$30,000, and a trust deed or mortgage of the land to Reid and Green to secure its payment. Before he obtained this deed or paid the \$6,000 he was notified of the claim of Trice and Beamer, which is presented in this suit. James C. Comstock never paid C. W. Comstock anything for the option on the land, although the latter estimated its value at far in excess of its purchase price. C. W. Comstock conducted the negotiations and managed all the business relative to the land after he assigned the option to his brother, as before.

On April 30, 1900, the complainants exhibited their bill against C. W. Comstock and James C. Comstock to the judges of the Circuit Court, in which they prayed that the defendants might be decreed to hold the title to these lands in trust for their use and benefit, and that they might be directed to convey them accordingly. The court below held that the foregoing facts disclosed no equity which entitled the complainants to relief, and dismissed the bill.

B. G. Thurman and R. B. Robinson (H. H. McCluer, on the brief), for appellants.

John C. Tarsney, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the case as above, delivered the opinion of the court). For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former

all commission or compensation for his services. This inexorable principle of the law is not based upon, nor conditioned by, the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that sagacious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed, although he had no legal or equitable interest in the property, and although his correlate who acquired it had no joint interest in or discretionary power over it. The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation.

And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and cestui que trust, principal and agent, client and attorney, employer and an employé, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his cestui que trust, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. 2 Sugden on Vendors (8th Am. Ed.) 406-409; Mechem on Agency, pp. 455, 456; Tisdale v. Tisdale, 2 Sneed, 595, 608, 64 Am. Dec. 775; Ringo v. Binns, 10 Pet. 269, 280, 9 L. Ed. 420; McKinley v. Williams, 74 Fed. 94, 95, 20 C. C. A. 312, 313; Lamb v. Evans [1893] 1 Chan. Div. 218, 226, 236; Connecticut Mutual Life Ins. Co. v. Smith, 117 Mo. 261, 295, 22 S. W. 623, 38 Am. St. Rep. 656; Van Epps v. Van Epps, 9 Paige, 237, 241; 1 Lewin on Trusts, 246, *180; Davis v. Hamlin, 108 Ill. 39, 49, 48 Am. Rep. 541; Winn v. Dillon, 27 Miss. 494, 497; People v. Township Board, 11 Mich. 222, 225; Grumley v. Webb, 44 Mo. 444, 454, 10 Am. Dec. 304; Lockhart v. Rollins, 2 Idaho, 503, 511, 21 Pac. 413; Eoff v. Irvine, 108 Mo. 378, 383, 18 S. W. 907, 32 Am. St. Rep. 609; Robb v. Green, [1895] 2 Q. B. 315, 317, 318, 319, 320; Louis v. Smellie (1895) 73 Law Times (N. S.) 226, 228; Gardner v. Ogden, 22 N. Y. 327, 343, 359, 78 Am. Dec. 192.

Why is not the case at bar governed by these rules of law? The defendant C. W. Comstock was the agent of the complainants to conduct to them in Barton county, Mo., probable buyers of land,

to the end that they might sell land in that county to them, and gain a profit of the difference between the price at which the owners were willing to sell it and the price at which the complainants might be able to dispose of it. Comstock accepted this agency and acted under it. He conducted Mr. Shirk, his acquaintance and a possible customer, from his residence in Iowa to Barton county, Mo., and accepted from Trice and Beamer his traveling expenses for his service under his contract of agency. By means of this agency he learned what he probably never would have known otherwise, the location, quality, value, products, and probable income of the 1,925 acres of land in controversy. One of the objects of the agency which the complainants gave him was to enable them to sell this land. The subsequent purchase of it by Comstock prevented the accomplishment of this end. Could he lawfully take the information and advantages which Trice and Beamer conferred upon him through this agency to the end that they might make a sale of this land by means of his services under it, and then use this information and these advantages to make such a sale impossible, to deprive his principals of all the benefits which they hoped to derive from the payment of his expenses, and the exhibition of this land to the possible customer? Could he lawfully appropriate to himself the land and all the benefits derived and expected from the agency? The answers to these questions do not seem to be difficult or doubtful. The law imposed upon this agent, Comstock, the duty to use all the knowledge and all the benefits he derived from his agency to accomplish the purpose of his principals, and it implied an agreement on his part that he would faithfully discharge this duty. It forbade him to use them for his sole benefit or to prevent his principals from obtaining the object of the agency, and charged everything which he acquired by a violation of this inhibition with a constructive trust for their benefit. Why were not the lands in his hands charged with this trust for the use of the complainants?

It is contended that no trust arose because Trice and Beamer had no interest in or control over the lands. But no interest or control of the property to which the agency relates is essential to the raising of the trust. The fiduciary relation and a breach of the duty it imposes are sufficient in themselves. *Winn v. Dillon*, 27 Miss. 494, 497; *People v. Township Board*, 11 Mich. 222, 225; *Grumley v. Webb*, 44 Mo. 444, 454, 10 Am. Dec. 304; *Lockhart v. Rollins*, 2 Idaho, 503, 511, 21 Pac. 413. If one employs and pays an agent to investigate the title or the character of land for the purpose of purchasing it, and the agent uses the knowledge he acquires in this way to forestall his principal and obtain a title to the property for himself, it is no answer to the suit of the former to recover the land from his agent that the employer never had any title or interest in it, or that he was not injured by the action of the agent. In *Winn v. Dillon*, 27 Miss. 494, 495, the complainant, Winn, employed Dillon for the agreed compensation of \$200 to search out and furnish to him the numbers or descriptions of state lands which he might enter under an act of the Legislature of the state of Mississippi. Dillon furnished the descriptions pursuant to the contract. But before Winn

had completed his entry of the lands Dillon entered them in his own name and for himself. Neither of these parties had any interest in, or control over, this property during the time that the contract of employment or agency was in force, but the court said: "Winn's object was to enter the lands; he had engaged the services of Dillon to that end, and this created the relation of private trust and confidence which disabled Dillon from doing any act or acquiring any interest in the property adverse to the interest of Winn;" and it declared that the title in the hands of Dillon was charged with a trust for the use and benefit of his employer, Winn. Concede that the complainants had no contract for the purchase of this land from its owners, Reid and Green, yet they knew that it could at any time be purchased for the price of \$20 per acre. Their scheme was to buy it at that price and sell it at a higher one. This was a legitimate business enterprise. The object of the agency of Comstock was to carry out this plan. His use of the knowledge he acquired through his agency to prevent his principals from accomplishing this purpose and to appropriate the benefits of the scheme to himself alone was as flagrant a breach of confidence and as fatal to his title to this property as it would have been if Trice and Beamer had held an unassailable agreement for the purchase of the land.

Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term. *Eoff v. Irvine*, 108 Mo. 378, 383, 18 S. W. 907, 32 Am. St. Rep. 609; *Robb v. Green* [1895] 2 Q. B. 315, 317-320; *Louis v. Smellie* (1895) 73 Law Times (N. S.) 226, 228. In *Eoff v. Irvine*, after an attorney had examined an abstract of title for a client and after the relation had ceased, he, by the use of the knowledge he had acquired in the examination, secured the title to the property for himself and his friends, but the court decreed that they held it in trust for his former client. In *Robb v. Green*, a manager of a business copied the names of the customers from the order book of his master, the proprietor. After the manager's term of service had ended, he established a business in competition with that of his master, and proceeded to use the names of customers he had copied to divert business to himself, but the court decided that he held this information in trust for his former master, and enjoined him from using it against him.

Another objection earnestly urged against the equity of the complainants is that Comstock had no discretionary power, no authority to sell the land; that his only agency was to solicit and conduct probable customers to his principals; and that, if he was disabled from purchasing this Buckwater tract, he was disabled from buying any land in Barton county. It does not follow that Comstock was forbidden to purchase any land in Barton county because he was disabled from buying the Buckwater tract. He was prohibited from using the information and advantages he had secured by means of

his agency to prevent or hinder his principals from accomplishing the purpose of the agency. His disability extended to all land by the purchase of which through the information and benefits he had derived from the agency he would hinder or obstruct his principal's business of buying and selling lands in Missouri. But it extended no farther. He was at liberty to deal in any lands in Barton county concerning which he had learned nothing by the means of his agency. But he could not lawfully use any information or interest acquired thereby to destroy or to injure the business of his principals.

Nor was discretion or authority to sell these 1,925 acres of land requisite to disable this agent from buying and holding them adversely to his principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purpose for which the agency was established. In *Gardner v. Ogden*, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192, the clerk of the brokers of the plaintiffs, was held to be disabled from buying the plaintiffs' property, although he never had any discretion or authority relative to the sale of it. In *Winn v. Dillon*, 27 Miss. 494, 497, Dillon was declared to be disabled from purchasing the lands he acquired, although the only authority he ever had was to search out and report their descriptions. In *Davis v. Hamlin*, 108 Ill. 39, 49, 48 Am. Rep. 541, an agent of a lessee to procure amusements for his theater, who never had any authority to deal with the leasehold estate, was held to be disabled from taking a renewal of the lease himself, and was adjudged to hold the leasehold interest which he had secured for the exclusive use and benefit of his principal.

The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interests, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue of these trust relations and in violation of the duty of fidelity imposed thereby with a constructive trust for the benefit of the party whose confidence is betrayed. It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employé, as completely as the relation of trustee and cestui que trust. In *Greenlaw v. King*, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: "The rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest when he had a duty to perform which was inconsistent with the character of a purchaser." In *Hamilton v. Wright*, 9 Cl. & Fi. 111, 122, Lord Brougham declared that it is the duty of a trustee "to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust." And on page 124 he said: "Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and

of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust." The rule upon this subject was clearly and not too broadly stated in the American note to *Keech v. Sandford*, 1 White & T. Lead. Cas. in Eq. (4th Am. Ed.) p. 62, *page 58, in these words: "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." The facts of the case in hand brought it squarely within this rule, charged the title which the agent Comstock acquired with a constructive trust for the benefit of his principals, and furnished substantial ground for their application to a court of equity for appropriate relief.

It is contended, however, that the complainants are entitled to no remedy in equity because they have been guilty of iniquity. It is said that their plan of obtaining from owners options to purchase their lands at fixed prices, of then selling at an advance, and retaining the profits, and of obtaining agreements from owners that they might sell the lands at a price above that fixed in the contracts, and retain the balance for their compensation, was reprehensible, and that they conspired with Bowling to induce Reid and Green to sell their lands at a low price. There are two sufficient answers to these arguments. They are (1) that the record discloses nothing unfair or inequitable in the plans or acts of the complainants, and (2) that the acts to which the defendants object neither conditioned nor affected the equity which the complainants now seek to enforce. There was nothing evil in itself, forbidden by law, or obnoxious to the strictest rules of fair dealing in the plan of business which the complainants had adopted. It contemplated no deceit of the owners of lands. In each case these owners were completely informed either that the complainants proposed to buy their property at the prices which the owners fixed and to make a profit for themselves by selling it again at a higher price, or that they proposed to sell the lands at as high a price as they could obtain, to return to the owners the price which the latter fixed, and to retain the difference as their profit in the transaction. There is no suggestion of iniquity, injustice, or unfairness in such a method of dealing. *Larow v. Bozarth*, 68 Mo. App. 406.

Nor was there anything reprehensible in the endeavors of complainants to obtain from the owners of the lands here in controversy a contract for their purchase at the lowest possible price. They were not the agents of the owners. Bowling was their agent. The complainants are not responsible for his acts and transactions. They are not in issue in this case, and they will not be discussed. Bowling and the owners of the land whom he represented stood upon one side, and the complainants upon the other, in the negotiations for the sale of these lands to the latter. The complainants were prospective buyers. Reid and Green were sellers. The complainants were dealing with the vendors at arm's length. To them the lowest, to Reid and Green the highest, price, was the desideratum, and Trice and

Beamer had the right to use all fair and reasonable means to buy the land from their owners at the lowest price which they were willing to receive for it. There is no evidence in this case that they made any false representations to the executors or to Bowling, or that they used any unfair means to obtain a contract for the purchase of the lands, while the fact that the agent, C. W. Comstock, was willing to take them, and Reid and Green sold them to him at the same price at which the complainants were expecting to buy them, is very persuasive evidence that no fraud was perpetrated upon the executors.

Moreover, if the charges which the defendants make against the complainants were true, they would constitute no defense to this suit. Their alleged offenses were not against the defendants, but against the former owners of this property. These owners have made no complaint and their rights and remedies are not here in question. The only issue here is whether or not the constructive trust which the betrayal of confidence by the agent Comstock has raised shall be enforced. General iniquitous conduct, reprehensible acts toward third parties, do not deprive a suitor of his right to justice in a court of equity. Wrongful conduct in the very act or matter which constitutes the complainant's ground of action, and that alone, will repel from a court of equity on the ground that "he who comes into equity must do so with clean hands." This rule does not disqualify any complainant from obtaining relief who has not dealt unjustly in the very transactions concerning which he complains. *Shaver v. Heller & Merz Co.*, 48 C. C. A. 48, 61, 108 Fed. 821, 834; *Woodward v. Woodward*, 41 N. J. Eq. 224, 225, 4 Atl. 424; *Dering v. Earl of Winchelsea*, 1 Cox, Ch. 318, 319; *Lewis & Nelson's Appeal*, 67 Pa. 153, 166; *Bateman v. Fargason*, 4 Fed. 32, 33, 2 Flap. 660; *Bisp. Eq.* 61; *Mahoney v. Bostwick*, 96 Cal. 53, 61, 30 Pac. 1020, 31 Am. St. Rep. 175. The acts charged against the complainants, even if they had been committed, did not tend to perpetrate any wrong or inflict any injury upon the defendants, raised no equity in their favor, and constituted no defense to the enforcement of the trust which their violation of duty established.

One of the defenses to this suit was that the defendant James C. Comstock, who now holds the title to the lands in question, was a bona fide purchaser thereof for value without notice of the claim of the complainants. The court below found that this defense was not sustained by the evidence, and that James C. Comstock stood in the shoes of his brother, C. W. Comstock, the agent of the complainants. Counsel for the defendants have not argued or suggested in this court that there was any error in this conclusion. But, as the case must now be remanded for final decree, the evidence and the law upon this question have been carefully re-examined. James C. Comstock was a brother of C. W. Comstock. C. W. Comstock procured his option to purchase the land on September 15, 1899. He paid \$7. for it at that time. About October 16, 1899, he paid \$1,925 in part payment of the purchase price. On March 1, 1900, \$6,000 more was paid. The deed was taken to James C. Comstock, and the latter made his note and trust deed for \$30,000. C. W. Comstock managed the land, conducted all the correspondence and business, caused the leases to

be taken to himself, acted in every way as the owner, and his brother, James C. Comstock, acted as his agent in the entire transaction. On January 4, 1900, James C. Comstock deposited with his brother, C. W. Comstock, \$10,000, and they say that out of this deposit the \$2,000 which C. W. Comstock had paid in September and October was repaid to him, and the \$6,000 was paid on March 1, 1900. The option to purchase the land was assigned to James C. Comstock about October 12, 1899. He never paid his brother \$1 for the assignment of this option or for the land, although the evidence is conclusive that the latter considered it of much greater value than the amount of the purchase price he had agreed to pay for it. In February, 1900, before the \$6,000 was paid, James C. Comstock was notified of the claim of Trice and Beamer. These facts compel the conclusion that James C. Comstock cannot defeat this suit on the ground that he is a bona fide purchaser without notice, because the evidence convinces that he is the mere agent and representative of his brother, holding the property for him, and because he received notice of the claim of the complainants before he had paid more than \$2,000 on account of the purchase of the property, and probably before he had paid anything. The actual payment of the money which constitutes the purchase price before the receipt of notice is indispensable to the maintenance of the claim that one is a bona fide purchaser without notice. *Jewett v. Palmer*, 7 Johns. Ch. 64, 67, 68, 11 Am. Dec. 401; *Hardingham v. Nicholls*, 3 Atk. 304; *Harrison v. Southcote*, 1 Atk. 538; *Story v. Lord Windsor*, 2 Atk. 630; *Kiefer v. Rogers*, 19 Minn. 32; *Wallace v. Wilson*, 30 Mo. 335.

The result is that the complainants are entitled to the relief which they sought by their bill. The evidence in this case has been carefully examined. It does not lead to the conclusion that the defendants or either of them intended to perpetrate any injustice or wrong upon the complainants or to do any act which they deemed inconsistent with the rules of honor and fair dealing. But the fiduciary relation through which the agent, C. W. Comstock, procured his information and knowledge of the location, character, and value of this tract of land, his acceptance of the agency, his leading of the probable purchaser to the property, his receipt from his principals of the expenses of his trip, forbade him from purchasing this land for himself, and thereby preventing his principals from effecting a sale of it, and charged it in his hands with a constructive trust in their favor.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with directions to enter a decree to the effect that the defendants hold the title to the 1,925 acres of land described in the bill in trust for the sole use and benefit of the complainants; that upon the payment to the defendants or their attorneys of the amount of money which they have expended in purchasing the lands, with interest thereon at the legal rate, from the respective times of their payments, and upon the payment and surrender to James C. Comstock of his note for \$30,000, which he executed in part payment of the purchase price, or upon the execution and delivery to him of a bond, with sufficient sureties, approved by the judge and conditioned to pay the note of \$30,000, and to hold the defendant James C. Com-

stock harmless therefrom and from the trust deed or mortgage securing the same, the defendants shall convey the lands in dispute to the complainants; that in default of such conveyance the title shall be passed by decree; and that the defendants shall pay the costs of the suit

CLAYTON et al. v. EXCHANGE BANK OF MACON.

In re JOSEPHSON.

(Circuit Court of Appeals, Fifth Circuit. March 17, 1903.)

No. 1,179.

1. FRAUD ON CREDITORS—WITHHOLDING MORTGAGE FROM RECORD—ENHANCEMENT OF CREDIT—ALLOWANCE OF MORTGAGE DEBT IN BANKRUPTCY.

Code Ga. 1895, §§ 2724, 2727, require mortgages to be recorded, and provide that a failure to record will postpone them to subsequent lienees and purchasers. Section 2695 provides that every conveyance or contract made to defraud creditors—such intention being known to the party taking—shall be void, but a bona fide transaction, without ground for reasonable suspicion, shall be valid. A storekeeper who had done business with a bank for 20 years executed mortgages to it, covering his entire property, consisting of realty, and also his stock in trade then existing and to be acquired. The mortgages were withheld from record, though the storekeeper and bank president both denied any agreement therefor. The storekeeper purchased goods, referring his vendors to a rating in a mercantile agency which he had given without mentioning the mortgages. He filed a voluntary petition in bankruptcy, and on the same day and hour, in response to notice thereof by telephone, the bank recorded the mortgages. The bank president testified that he had no reason to suspect the storekeeper's insolvency until three or four days before his bankruptcy, but admitted that he knew that the recording of the mortgages would have destroyed the storekeeper's credit, and that he knew the mortgagor was going to New York to buy goods, and that the purpose of keeping the mortgages off the record was not to impair his credit. *Held*, that the mortgage debts were not entitled to priority in the bankruptcy proceedings over the claims of the vendors subsequently selling goods to the storekeeper.

McCormick, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Georgia.

For a period of about 20 years next preceding the year 1900, Simon Josephson was engaged in business as a merchant in Macon, Ga. During all that time the Exchange Bank of Macon (hereinafter called the "Bank") was engaged in the same town in the banking business, and they had dealings for that period as banker and client. In the years 1899 and 1900 Josephson executed and delivered to the bank notes secured by mortgages for sums amounting, in the aggregate, to more than \$13,250, as follows: (1) Note made May 9, 1899, due at 6 months, for \$5,000, secured by mortgage of same date on real estate in Georgia. (2) Note made September 19, 1899, due at four months, for \$750, secured by mortgage of same date on real estate in Georgia. (3) Note made February 16, 1900, due at six months, for \$2,500, secured by mortgage of same date on real estate in Georgia. (4) Three notes made March 28, 1900, due August 15, September 15, and October 15, 1900, each for \$500, secured by mortgage on real estate, and also on Josephson's stock of merchandise then on hand, and "on future purchases of goods made for the purpose of replacing such stock sold in due course of trade." The foregoing notes were renewed when due, and extended on the payment of interest.

(5) Two notes made July 25, 1900, one due at four months, the other at five months, each for \$1,750, secured by mortgage on real estate in Georgia; also on stock of merchandise on hand and to cover future purchases of goods to replenish stock. In January, 1900, Josephson made a statement to Dun's Mercantile Agency showing the net value of his property to be \$34,070, but did not mention the mortgages. After executing the last mortgage, he went to New York and bought goods. He referred the wholesale merchants from whom he purchased goods to Dun's Commercial Agency to show his financial condition. He contracted many new debts, and on November 17, 1900, at 5 o'clock p. m., he filed his voluntary petition in bankruptcy. All of the mortgages meantime had been withheld from record. But on November 17, 1900, at 5 o'clock p. m., the bank, by its president, filed all of the mortgages in the superior court of Bibb county, Ga., for record. After Josephson was adjudicated a bankrupt, the bank filed in the district court its proof of claim, founded on the notes and mortgages. It claimed a valid lien on the property described in the mortgages. E. S. Clayton and S. H. Myers, the trustees of the bankrupt's estate, filed objections to the claims. These objections were made in behalf of the unsecured creditors, who became creditors, it is admitted here, after the execution of the mortgages, and while they were unrecorded. The validity of the debts was not contested, but it was denied that the bank had a valid lien or was entitled to priority. The objections relied on here were, in substance, (1) that the failure to record the mortgages before the petition in bankruptcy was filed makes them void under the provisions of the bankrupt act; and (2) that they are void under the common law and statutes of Georgia, because withheld from record under circumstances that make them fraudulent against the subsequent creditors of the bankrupt. The mortgages and notes were in evidence. Only three witnesses were examined—Simon Josephson, the bankrupt; C. E. Leonard, discount clerk of the bank; and J. W. Cabaniss, president of the bank. The pertinent substance and effect of their evidence not stated above will be found in the opinion. The referee in bankruptcy overruled the objections to the mortgages, and held that they were valid liens, and the District Court approved the decision of the referee. The trustees appealed to this court, and it is assigned, with proper specifications, that the District Court erred in the decree rendered.

F. C. Foster and C. Henry Cohen (Foster & Butler, on the brief), for appellants.

A. L. Miller, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

The appellants' first contention is that the mortgages executed by Josephson to the bank are void under the provisions of the bankrupt act, because they were not placed on record before Josephson filed his petition in bankruptcy. This view is urged on our attention with great earnestness, and with the citation of many authorities. The view we take of the case, however, makes it unnecessary for us to decide this question.

The appellants' second contention is that the mortgages are void under the common law and the statutes of Georgia. It is conceded by the learned counsel for the appellee that if these mortgages, on the facts shown in the record, are void under the laws of Georgia, they would not be enforced in the federal courts as valid liens against the general creditors of the bankrupt. *Etheridge v. Sperry*, 139 U. S. 276, 11 Sup. Ct. 565, 35 L. Ed. 171. It is provided by statute in Georgia that a mortgage must be recorded. Code 1895, § 2724.

Mortgages on real estate must be recorded in the county where the land lies; on personalty, in the county where the mortgagor resided at the time of its execution, if a resident of the state. If a nonresident, then in the county where the mortgaged property is. *Id.* § 2726. The effect of the failure to record mortgages is provided for by statute:

"Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created and obtained, or purchases made prior to the actual record of the mortgage. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage, or the purchaser has the like notice, then the lien of the older mortgage shall be held good against them." Code 1895, § 2727.

The effect of these statutes, as construed by the Supreme Court of Georgia, is that a judgment obtained before the mortgage is recorded has priority over it, and by the failure to record a mortgage in time the mortgagee risks the precedence of after-acquired mortgages and judgments. *Hardaway v. Semmes*, 24 Ga. 305; *Richards v. Myers*, 63 Ga. 763. The contention of the learned counsel for the appellee is unquestionably correct—that the mere failure to record a mortgage does not affect its validity as between the parties, and that the mortgage would remain an incumbrance upon the property, entitled to satisfaction prior to the claim of creditors who had established no liens on the property. But in view of the facts of this case, it will be seen that a proper conclusion can only be reached by considering not only the registration law, but also the laws requiring mortgages and conveyances to be made and held in good faith.

Both by statute and by the common law that prevails in Georgia, certain acts by debtors are made fraudulent in law against creditors and others, and as to them null and void. Among these:

"Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking; a bona fide transaction on a valuable consideration and without notice or ground for reasonable suspicion shall be valid." Code Ga. 1895, § 2695, subd. 2.

In *Robinson v. Woodmansee*, 80 Ga. 249, 4 S. E. 497, the trial court instructed the jury that:

"If they believed that Robinson made these mortgages, and there was an understanding with the persons receiving them that they should be kept off the record for the purpose of protecting his financial credit, then the mortgages would be fraudulent as to all persons extending credit to Robinson after this date."

The court, commenting on this charge, said:

"We think this part of the charge erroneous. Under the facts of the case, it was not, as a matter of law, fraudulent to agree not to record the mortgages. It is not necessarily a fraud to agree not to record a mortgage. The agreement or understanding may have been made with the most honest intention. It is for the jury to say what the intention was—whether the mortgages were given by the debtor for the purpose of hindering, delaying, or defrauding his creditors. * * * It has been held 'that an arrangement or understanding in regard to withholding mortgages from record until the mortgagors should have trouble did not render the mortgages void, but was

a matter for the consideration of the jury in passing upon the question of fraud.'" 80 Ga. 254, 255, 4 S. E. 500.

The effect of this decision is that an agreement between the mortgagor and mortgagee not to record a mortgage is a badge of fraud, but it does not amount to a fraud in law, that would authorize the court to instruct the jury peremptorily to find the transaction fraudulent, but that the evidence should be passed on by the jury. In the case before us, the proceeding being in accordance with equity procedure and principles, the court has not the aid of a jury, and is required to weigh the evidence, and give it effect according to its weight.

The recording of a mortgage is intended to give notice of the incumbrance on the property. In that regard, it serves the same purpose that the possession of the property by a mortgagee or vendee would serve. In view of that fact, the case of *Smith v. McDonald*, 25 Ga. 379, contains pertinent observations. In that case a party requested the court to charge the jury that a subsequent creditor has no right to complain of badges of fraud that existed before his debt was contracted. Lumpkin, J., delivering the opinion of the court, and commenting on the requested charge, said:

"It is conceded that if a vendor make an absolute conveyance of land, and continue in possession, it is a badge of fraud, as against creditors. Had Daniel B. Smith abandoned the occupancy of this land before this debt was contracted, counsel might very properly have asked the charge which he did. But Daniel B. Smith not only remained in possession to the time when the debt was contracted, but to the date of the judgment and the levy. The badge continuing then required explanation as against the subsequent debt, as well as against debts existing at the time of the sale. Indeed, the presumption is stronger in favor of the new debts than the old, for they may be supposed to have been contracted upon the credit given to the defendant on account of his possession and apparent ownership of the property."

The evidence, without contradiction, shows that the bank advanced money to Josephson for which the mortgages were given. While a consideration is, of course, necessary to sustain the mortgages, this fact is by no means conclusive of their validity. As said by Bleckley, J., in *Phinzy v. Clark*, 62 Ga. 623:

"A fraudulent conveyance cannot stand against creditors, whether made to secure a debt or not. The conveyance must be pure. It must be made bona fide, and with no purpose, known to or suspected by the creditor, to hamper and entangle the property as against other creditors, for the sake of hindering or delaying them. If made partly to secure a debt, and partly to hinder, delay, or in any way defraud other creditors, and the creditor taking the deed has knowledge of this latter intention, or grounds for reasonable suspicion, no title will pass as against the other creditors."

And the learned judge added:

"It is enough that we rule there must be no fraud which would vitiate any conveyance under any section of the Code, or any part of the common law in force here, and that no material badge of fraud must be left unexplained."

A mortgage not at first fraudulent may become so by being concealed, "because by its concealment persons may be induced to give credit to the grantor." And omissions to place deeds on record are often held to be instances of secrecy, within the rule. *Bump on Fraud. Conveyances* (1st Ed.) 82, and cases there cited.

In *Hildreth v. Sands*, 2 Johns. Ch. 35, Chancellor Kent approved

the proposition which was first announced in *Hungerford v. Earle*, 2 Vern. 261, that "a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money." This is approved by the Supreme Court in *Blennerhassett v. Sherman*, 105 U. S. 100, 118, 26 L. Ed. 1080. In *Hilliard v. Cagle*, 46 Miss. 309, a mortgage is held void against existing and future credits. The principle circumstance relied on was the fact that the grantor retained possession of the property, and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unincumbered. The court declared that the natural and logical effect of the conduct of the parties was to mislead and deceive the public, and induce credit to be given to the mortgagor which he could not have obtained if the truth had been known, and the whole scheme was fraudulent as to subsequent creditors. This case did not meet the approval of the Supreme Court of Alabama in *Mobile Savings Bank v. McDonnell*, 87 Ala. 736, 6 South. 703; but it has been quoted and approved by the Supreme Court in *Blennerhassett v. Sherman*, supra, in which case a mortgage was held void chiefly because the mortgagee withheld it from record for the purpose of giving the mortgagor a fictitious credit, by means of which he was enabled to contract other debts, which he could not pay. It is true that in that case the mortgagor was insolvent, and his insolvency was known to the mortgagee. Mr. Justice Woods, in delivering the opinion of the court, cites and reviews many English and American authorities, many of which seem to sustain the proposition that, without regard to the solvency of the mortgagor at the date of the mortgage, a mortgage would be void, as against subsequent creditors, if withheld from record, upon agreement between the mortgagor and the mortgagee, for the purpose of giving the latter a fictitious credit. In the case at bar the president of the bank testified that he had no reason to suspect the insolvency of Josephson, but he admits that he knew his condition to be such that the recording of mortgages for about \$14,000 on his property would have destroyed his credit.

In Alabama there are statutes requiring mortgages to be recorded. If not recorded, they are made void as to purchasers for a valuable consideration, mortgagees, and judgment creditors having no notice thereof. Code Ala. 1896, §§ 1005, 1006. As in Georgia, the unrecorded mortgage is good as between the parties to it, and is good as against creditors who have not obtained a judgment or other incumbrance on the property. The statute in that state, declaring all conveyances void which are made to hinder, delay, and defraud creditors, is not greatly unlike the statute in Georgia. Code Ala. § 2156. In *Lehman v. Van Winkle*, 92 Ala. 443, 450, 8 South. 870, the court had occasion to consider the effect of withholding a mortgage from record, lest it might injure the mortgagor's business and credit. The court said:

"But when, as here alleged, the failure to record is not a mere omission, attributable to inadvertence, inconvenience, or negligence, but is an affirmative and intentional withholding from record, with the ulterior purpose

charged in the bill, we cannot be in doubt that the transaction is tainted with actual fraud, which will vitiate it as against subsequent creditors, and the like, who have been drawn into contractual relations with the mortgagors by assuming their apparent to be their real status with respect to the property covered by the mortgage; and this result follows notwithstanding the conveyance is free from infirmity in every other respect."

In *Mobile Savings Bank v. McDonnell*, 87 Ala. 736, 6 South. 703, after holding, on the particular facts of that case, that the mortgage was not made void, the court indicated that, if it had been withheld from record for the fraudulent purpose of upholding the credit of the debtor, it would have been declared void as against simple-contract creditors whose debts were incurred in the meantime.

In *Baker v. Pottle*, 48 Minn. 479, 51 N. W. 383, it was decided that if a mortgage is withheld from record by an agreement between the mortgagor and mortgagee, in order that the credit of the former may not be impaired, it is a fraud as to any one who becomes a creditor of the mortgagor, relying upon the false appearance of responsibility thus created. *Central Bank v. Doran*, 109 Mo. 40, 18 S. W. 836, is to the same effect.

The fundamental principle involved in all of these cases has never been more aptly and briefly expressed than by Lord Denman, C. J., who said that:

"Where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Pickard v. Sears*, 6 Ad. & El. 469, 33 Eng. Com. Law Rep. 115.

These authorities and principles seem to be clearly applicable to the facts of this case. The mortgages were withheld from record for the avowed purpose of bolstering the credit of the mortgagor so that he might make other debts. Cabaniss, the president of the bank, who had entire charge of the transactions with Josephson, testified:

"I knew that Mr. Josephson was going to New York to buy goods, and that these loans were not on record. I knew that if I had put them on record I would have destroyed his commercial credit at the time." Again: "I know that, as a business man, that if I had this mortgage recorded it would have destroyed his credit. My purpose in keeping it off the records was not to injure him in making the loan, but to benefit him."

Leonard, the bank's discount clerk, testified that he did not send the mortgages to be recorded, but that he "would have sent them if I had not been told not to."

We learn from Leonard that, in due course of business, he would have sent the mortgages to have been recorded if he had not received instructions to withhold them; and we learn from the president of the bank why those instructions were given. Josephson avails himself fully of the favor conferred on him by the withholding of the mortgages from record. He continues to buy goods, and his new creditors are now contesting, through the trustees, the validity of the mortgages. He never mentioned the mortgages. He furnished the commercial agencies with a statement of his financial condition, but did not disclose the fact that any of his property was mortgaged.

He then referred the merchants from whom he was purchasing goods to the commercial agencies for a statement of his condition. It is a matter of common knowledge that commercial agencies, in obtaining statements of the financial condition of merchants, endeavor to learn if they have incumbrances upon their property. If a merchant gives a mortgage on his property for any considerable sum, the fact is often telegraphed to those agencies by their local attorneys or agents. It is conceded by the president of the bank and the bankrupt that if these mortgages had been recorded the credit would not have been extended to the latter by the creditors who now contest the priority of the mortgages. These mortgages were withheld from record for a period of about 16 months. The mortgagor and mortgagee had had confidential business relations as banker and client for a period of about 20 years. When Josephson was ready to file his petition in bankruptcy, the fact was made known, probably by telephone, to the bank. Cabaniss testified that a short time before this petition in bankruptcy was filed—"probably a day or two"—it dawned upon him that Josephson's statements were not correct, and that "he was not as solvent as he made it appear to me." "Up to three or four days before his bankruptcy, I had full confidence in his solvency and his ability to meet his obligations." But notwithstanding these suspicions, the mortgages were still withheld from record, and it was only after receiving the message by telephone that they were filed for record; and the indorsement on the petition in bankruptcy and the indorsements on the mortgages show that they each were filed "at 5 o'clock p. m., November 17, 1902." In this connection it is significant, to say the least, that the filing for record of the mortgages at any time before Josephson was ready to go into voluntary bankruptcy would have given the creditors opportunity to institute within four months of such record involuntary proceedings against him, which, in view of his insolvency, which doubtless existed, might well have resulted in setting aside all the mortgages as unjust preferences, although actually given more than four months prior to the bankruptcy proceedings. Bankr. Act 1898, § 3, clause "b," [U. S. Comp. St. 1901, p. 3422], and section 60 [page 3445]. It may be that the intentional withholding by the mortgagee of a mortgage from record for the purpose of giving the mortgagor a fictitious credit is sufficient of itself to invalidate the mortgage at the suit of one who credited the mortgagor in ignorance of the incumbrance, and undoubtedly it is made invalid when the mortgagor and the mortgagee agree that it shall be withheld for such purpose. In this case both the mortgagor and the president of the bank testified that there was no agreement on the subject. We have not concluded that there was any express agreement, either oral or written. Without attributing any intentional misstatement to either witness, the circumstances surrounding this case show conclusively, we think, that there was a tacit understanding by both parties to the mortgages that they would not be recorded until it could be done without injury to the credit of the mortgagor. This course was to the interest of both parties. It was to the pecuniary interest of both that the mercantile business of Josephson should continue. Exposure of the

mortgages would, as is conceded, destroy the credit of the debtor and stop his business; and the bank was getting more security by upholding his credit, so that he could purchase more goods, which would stand as an additional indemnity to the bank.

It is a circumstance not without weight that two of the mortgages were on the goods in Josephson's store, and that he was permitted to continue to sell them in his retail business, and that the goods purchased to replenish or enlarge the stock, by the terms of the two mortgages, were included in them. It does not appear that the cash realized by the sale of the goods was applied to the payment of the mortgages. The creditors who seek to avoid the priority of the mortgages are those who sold goods to the mortgagor after the execution of the mortgages, and while they were withheld from record.

Up to the very moment that Josephson filed his petition in bankruptcy, both he and the bank, so far as actions could speak—and they often speak more forcibly than words—asserted that the property of the former was not mortgaged. Both seemingly profited by this course. It seems to us inequitable to permit the bank at the last moment to produce the mortgages, and contradict the assertions made by the conduct of both the mortgagor and the mortgagee, to the injury of those who were misled and deceived. It has been said that, if one is silent when he should speak, he will not be permitted to speak when he should be silent; and is it not also just to say that if one, for improper motive, refuses to claim openly under a mortgage when duty to others requires him to do so, he shall not be permitted to assert such claim when justice to others forbids?

The leading facts that constrain us to a conclusion unfavorable to the appellee may be briefly summarized: The mortgagor and mortgagee had intimate business relations for a period of 20 years. The five mortgages covered substantially all of the property of the former. Two of them embraced a stock of goods which the former was permitted to hold and continue to sell. They also embraced new goods purchased to replenish the stock. The law of the state required mortgages to be recorded to keep them good against junior incumbrances. The recording of the mortgages would have destroyed the credit of the mortgagor. They were withheld from record for about 16 months by the mortgagee for the avowed purpose of bolstering the credit of the mortgagor. The mortgagor made a statement of his financial condition to a commercial agency, suppressing the fact that his property was mortgaged. Going to replenish his stock, he referred the wholesale merchants to the financial statement he had made, but said nothing of the mortgages. He made new debts for goods, which, when bought, came under the two mortgages, and filed a petition to be adjudged a bankrupt, and on the same day and hour the mortgagee, being notified by telephone, filed the mortgages for record. We cannot avoid the conclusion that this conduct was unfair, unjust, and inequitable to the new creditors of the mortgagor, who were imposed upon by the apparent freedom from liens of all of Josephson's property. It is the peculiar province of courts of equity to grant relief in such cases. In this case it is equitable and just to reduce things to that condition which the bankrupt and the bank, through its officers,

made the new creditors believe really existed, and that is done by denying the mortgages priority over the debts contracted by Josephson while the mortgages were withheld to give him fictitious credit.

The decree of the district court is reversed, and the case remanded, with instructions to proceed conforming to this opinion. Reversed.

McCORMICK, Circuit Judge, dissents.

DIMMICK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1903.)

No. 887.

1. EMBEZZLEMENT—MINT CLERK—FAILURE TO DEPOSIT MONEY—INDICTMENT.

Where an indictment against a government clerk for failing to deposit money when required by the Secretary of the Treasury, as required by Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], charged that the money was received by defendant on December 11, 1900, and that it was in his possession on December 31, 1900, which was the last day of the quarter in which he could deposit the same in compliance with the rules of the Treasury Department, and that defendant failed to deposit the same on that day, it was not objectionable on the ground that it did not charge the accused with failure to deposit the money, but merely charged a failure to deposit on a specified date.

2. SAME—DESCRIPTION OF MONEY.

Where an indictment alleged that defendant was a clerk in the United States mint, and as such clerk he had in his possession certain money, for the failure to deposit which, as required by Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], he was indicted, it was not objectionable for failure to describe the money which it was claimed defendant failed to deposit.

3. SAME—COUNTS OF INDICTMENT—VERDICT—OPERATION—ACQUITTAL.

Where two counts of an indictment against a clerk of the United States mint charged embezzlement for failure to deposit funds in his hands, as required by Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], and two other counts charged him with the failure to deposit the same as directed by the Secretary of the Treasury, for which a punishment is provided by the same section, a verdict of guilty on the latter counts only did not operate as an acquittal on the ground that the crime of embezzlement charged was with reference to the same moneys referred to in such subsequent count.

4. SAME—JURORS—CHALLENGE.

Where jurors testified that, notwithstanding an impression or opinion formed from newspaper accounts, they could try the cause solely on the evidence, and stated that they would be governed entirely by the evidence produced at the trial, the overruling of challenges to such jurors was not error.

5. SAME—EVIDENCE—TREASURY DEPARTMENT—RULES.

Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], provides that every person who, having moneys of the United States in his hands, fails to deposit the same with the treasurer or some public depositary of the United States when required to do so by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officer of the treasury, shall be deemed guilty of embezzlement thereof, etc. *Held*, in a prosecution under such statute against a clerk of the mint for failure to deposit the proceeds of the sale of old materials, that a rule of

the Treasury Department requiring that all funds received from the sale of such materials shall be separately deposited on the last day of each quarter in which it was received in the treasury of the United States, etc., was admissible.

6. SAME—INSTRUCTION.

Where, in a prosecution against a clerk of the mint for failing to deposit moneys received from the sale of old materials before the expiration of the quarter in which the moneys were received, as required by Treasury Department rules, the quarter after the receipt of such money terminated on December 31, 1900, an instruction that defendant was not guilty if he deposited the money referred to in the indictment at any time before the last of the succeeding quarter, which was March 31, 1901, was properly refused.

7. SAME.

Where, in a prosecution of a clerk of the mint for failing to deposit moneys received for old materials, the court charged that in order to convict defendant the jury must find that his failure to deposit was intentional and willful, and in that connection read Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], under which the indictment was found, such instruction sufficiently covered a request to charge that defendant must be acquitted if he had no notice or knowledge that he was required to deposit the money before the end of the quarter.

8. SAME—EVIDENCE.

A clerk of the mint received money for old materials on the 11th and 14th of December, 1900. He falsely entered the same on the records as having been received on the 3d of the following January. The superintendent of the mint testified that, in a conversation had on February 5th, defendant admitted that he had used the money, and that he knew of the regulation of the mint requiring the deposit of all such moneys on the last day of the quarter in which they were received, which was December 31, 1900. Defendant had been cashier of the mint from September 1, 1898, to September 1, 1899, and from that time was chief clerk. The book containing the treasury regulations for the deposit of money was in his room, and subject to his inspection. *Held*, that a verdict finding defendant guilty of wilfully failing to deposit such money as required was sustained by the evidence.

9. SAME—REQUEST TO DEPOSIT—GENERAL RULES.

In a prosecution of a clerk in the United States mint under Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], providing that every person who, having money of the United States in his hands, fails to make deposit of the same when required to do so by the Secretary of the Treasury, shall be guilty, etc., a general regulation of the Treasury Department requiring the moneys to be deposited on the last day of each quarter in which they were received constituted a sufficient requirement by the Secretary of the Treasury for the deposit of the money.

10. SAME—ARGUMENT OF PROSECUTING ATTORNEY—FAILURE OF ACCUSED TO TESTIFY.

Where, in a prosecution of a clerk of the mint for failing to deposit moneys, L. had testified that the clerk had admitted the offense, and had stated that he had used the money for his own purposes, a remark of counsel for the government, in argument to the jury, that no one had contradicted L. in his statement of the facts with reference to the conversation with defendant, which he withdrew on objection being made that it was a comment on defendant's failure to testify, and after such withdrawal no further exception was taken by defendant, such remark was not error.

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

See 112 Fed. 350, 352.

The plaintiff in error was indicted for violation of the provisions of section 5492 of the Revised Statutes [U. S. Comp. St. 1901, p. 3705], which is as follows:

"Sec. 5492. Every person who, having moneys of the United States in his hands or possession, fails to make deposit of the same with the treasurer, or some assistant treasurer, or some public depository of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the treasury, shall be deemed guilty of embezzlement thereof, and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money embezzled."

He was convicted under the seventeenth, nineteenth, and twentieth counts of the indictment. Judgment on the seventeenth count was arrested. The nineteenth and twentieth counts are the same in form. The nineteenth reads as follows:

"That Walter N. Dimmick, late of the Northern District of California, heretofore, to wit, on the eleventh day of December, in the year of our Lord one thousand nine hundred, at the city and county of San Francisco, State and Northern District of California, then and there being, was then and there a clerk of the United States Mint at San Francisco, State of California, in the District aforesaid, and was known and designated as chief clerk of said Mint, and as such clerk then and there had moneys of the United States of America in his hands and possession, to wit, the sum of three hundred and sixty-six and eighty-nine one-hundredth (\$366.89) dollars, lawful money of the United States of America. That the said money came into the hands and possession of the said Walter N. Dimmick, and was received by him as clerk aforesaid, at the time and place aforesaid, from the sale of personal property belonging to the United States of America, to wit, from the sale of by-products and old materials of the United States Mint at San Francisco, State and Northern District of California aforesaid, and the said Walter N. Dimmick, as clerk aforesaid, then and there having in his hands and possession said sum of money, to wit, the sum of three hundred and sixty-six and eighty-nine one hundredth (\$366.89) dollars, derived as aforesaid, was then and there required and requested by the Secretary of the Treasury of the United States, and the director of the Mint of the United States, to deposit the said money with the Assistant Treasurer of the United States at San Francisco, State and Northern District aforesaid, on the thirty-first day of December, in the year of our Lord one thousand nine hundred, said date being the last day of a quarter of the year one thousand nine hundred. That the said Walter N. Dimmick, as clerk aforesaid, having said money in his hands and possession, as aforesaid, knowingly, willfully and feloniously failed to make deposit of said money with the Assistant Treasurer of the United States at San Francisco, State and Northern District of California, on said thirty-first day of December, in the year of our Lord one thousand nine hundred."

The requirement and request by the director of the mint referred to in the indictment is a general regulation of the Secretary of the Treasury, which was made and which went into effect on November 1, 1890. It reads as follows:

"All funds received from the sale of by-products and old materials, and for assays of bullion, shall be separately deposited on the last day of each quarter in the Treasury of the United States, and the nature of the deposit specified in the certificate of deposit. The original certificate, together with a statement in detail of the receipts from each source, shall be forwarded to the Bureau of the Mint."

George D. Collins, for plaintiff in error.

Denson & Schlesinger, special counsel for the government, and M. B. Woodworth, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It is contended that the indictment does not charge the accused with failure to deposit the money, but merely charges him with failing to deposit it on a specified date, and it is argued that, if the money were deposited on the day before or the day following the specified date, there would be no violation of the law. To answer this it is only necessary to refer to the terms of the statute and the language of the indictment. In the nineteenth count the indictment charges that the money was received by the plaintiff in error on December 11, 1900, and that he still had it in his hands and possession on December 31, 1900, that day being the last day of the quarter; in other words, the indictment charges that the money was not deposited before the 31st, and it then proceeds to allege that the plaintiff in error willfully, knowingly, and feloniously failed to deposit the same on that day. The statute requires, in plain terms, that the person referred to therein who has money of the United States in his possession shall deposit the same when required so to do by the Secretary of the Treasury or the head of any other proper department, and that, if he fail so to do, he shall incur the prescribed penalty. The indictment follows the statute, and charges the commission of the crime which is therein defined.

It is contended that the nineteenth and twentieth counts of the indictment are insufficient, for the reason that the money therein referred to is not described. The rule is that an indictment against a public officer or employé, even for embezzlement of public funds which came into his possession as such officer or employé, need not state what kind of money was embezzled, whether coin, and, if so, whether gold or silver, or bills, or of what denominations, and how many of each. The reason of the rule is too plain to require discussion. No one but the person in the possession of such moneys knows or can know what kind of money it is. *United States v. Bornemann* (C. C.) 36 Fed. 257, and cases there cited. It is contended that the decision in *Moore v. United States*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422, sustains a contrary doctrine, but we do not so understand the ruling in that case. That was a case in which a clerk of the post office was charged with embezzling moneys of the United States. It was objected to the indictment that it contained no direct allegation that the defendant was a clerk in the post office, that it did not describe the money, and that it did not charge that the money came into the possession of the defendant by virtue of his employment. The Supreme Court for those reasons held the indictment insufficient, and said that there was no reason why one who was not such an employé, and who embezzled funds of the government could not properly be charged with the kind and description of money so embezzled. But the court proceeded to say that if the indictment had charged that the defendant was a clerk in the post office, and that he had embezzled the sum stated, and that such sum came into his possession in that capacity, the indictment would have been held sufficient, notwithstanding the general description of the property embezzled as consisting of so many dollars and cents. The indictment in the case under consideration alleges that

the plaintiff in error was a clerk in the United States mint, and that as such clerk he had in his possession the money for the failure to deposit which he was indicted.

It is contended that the verdict operates as an acquittal, for the reason that the plaintiff in error was found not guilty under the fifth and sixth counts of the indictment, which charge him with the crime of embezzlement with reference to the same moneys which are referred to in the nineteenth and twentieth counts. But the fifth and sixth counts are not the same as the nineteenth and twentieth, nor is the offense therein described the same as those for which the plaintiff in error was found guilty. The charge under the nineteenth and twentieth counts is for the failure to deposit when directed to deposit. It is true that by the language of section 5492, Rev. St. [U. S. Comp. St. 1901, p. 3705], it is declared that one who fails to comply with the requirement which directs him to deposit moneys of the United States shall be deemed guilty of embezzlement, but the offense consists, not in the imputed embezzlement of the money, but in the failure to comply with the direction to deposit. The offense may be complete without any actual embezzlement of money. It is committed when it is shown that there is a willful and felonious failure to comply with the specified requirements of the Secretary of the Treasury or the head of the proper department.

The point is made that the court erred in denying the challenges of the plaintiff in error to the jurors M. J. White, B. F. Wellington, and D. B. Crane. All of these jurors, when examined upon their voir dire, testified that they had formed impressions concerning the case, and Wellington stated that he had an opinion, but that it was based entirely upon newspaper accounts. They all testified, however, that they had no such impression or opinion as would prevent them from trying the case solely upon the evidence, and stated that they would be governed entirely by the evidence produced at the trial. There was clearly no error, therefore, in the ruling of the trial court upon the challenges. *Williams v. United States*, 35 C. C. A. 369, 93 Fed. 398.

It is contended that the court erred in overruling the objection of the plaintiff in error to the admission in evidence of section 4 of the regulations of the Treasury Department, which is above referred to in the statement of the case. The statute under which the indictment was brought contemplates that requirements, or, in other words, rules and regulations, may be made by the Secretary of the Treasury, or by the head of any other proper department, or by the governing officers of the Treasury. In *Wilkins v. United States*, 37 C. C. A. 588, 96 Fed. 837, the same point which is here made was made before the Circuit Court of Appeals for the Third Circuit. The court said: "The making of such regulations being, then, an executive act, we next inquire whether, when made, they have the force of law, and whether the courts take judicial notice of their existence. That such is the case the authorities show." There is no support for the contention of the plaintiff in error in the case of *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. In that case Eaton was indicted for alleged violation of certain regulations made by the commissioner of internal revenue to enforce the act of Congress of August 2, 1886 (24

Stat. 209, c. 840 [U. S. Comp. St. 1901, p. 2228]). All that was decided was that there was no statutory authority for the particular regulation for the violation of which the defendant was indicted. So, in *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267, it was held that the Secretary of the Treasury cannot alter or amend a revenue law so that a violation of such alteration or the amendment thereof may become a criminal offense. But in *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813, where the court had under consideration the same statute as in the *Eaton Case*, it was held that the act authorized the Commissioner of Internal Revenue to make certain regulations which would have the force of law, and that by the violation thereof a criminal offense was committed. And in the *Eaton Case* the court admitted the same doctrine, in saying: "Regulations prescribed by the President and by heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in proper sense, the force of law."

It is said that the court erred in refusing to instruct the jury that if the plaintiff in error did at any time before the last day of the succeeding quarter, which was March 31, 1901, deposit with the assistant treasurer the moneys referred to in the nineteenth and twentieth counts, he should be acquitted. The merit of this contention has already been discussed. The statute renders criminal the act of willfully failing to deposit money when required to deposit it. The money was received by the plaintiff in error on the 11th and 14th days of December. He was required to deposit it on December 31, 1900, the last day of the current quarter. The instruction was properly refused.

It is contended that the court erred in refusing to instruct the jury that the plaintiff in error must be acquitted if he had no notice or knowledge that he was required to deposit the money on December 31, 1900. The court properly instructed the jury on this branch of the case, and charged them that, in order to hold the plaintiff in error guilty of a violation of the statute, they must find that his failure to deposit was intentional and willful, and in that connection the court read to the jury the section of the statute under which the indictment was found.

It is contended that there was no evidence in the case to show that the defendant had notice or knowledge of the regulation which was admitted in evidence. But there was evidence to show that the money which he was charged to have received under the nineteenth and twentieth counts was received by him, respectively, on the 11th and the 14th days of December, 1900, and that he falsely entered the same in the records of the mint as having been received by him on the 3d day of the following January. The superintendent of the mint testified to a conversation which he had with the plaintiff in error on February 5th, in which the latter admitted that he had used these sums of money, and in substance admitted that he knew of the regulation. The plaintiff in error was an experienced clerk in the mint. He was cashier from September 1, 1898, to September 1, 1899, and from that time on was chief clerk. The money which, according to the nineteenth and twentieth counts, he failed to deposit, was money received by him as

the proceeds of the sale of by-products of the mint and old materials. It was the business of the chief clerk to collect all such bills and deposit the money with the subtreasury. The book containing the regulation as to deposits was in his room for his guidance. All these facts, together with the other circumstances proven in the evidence, were sufficient to sustain the conclusion of the jury that the plaintiff in error had actual knowledge of the regulation and intended willfully to disobey the same. In this connection the point is made that a general regulation is not sufficient to constitute a requirement under the language of the statute. The trial court ruled adversely to this contention, and we find no error in its ruling. It was proper and fitting to regulate the movements of the employés of the mint by printed and published directions for their guidance. A requirement thus published is as truly a demand upon the employé as would have been a personal notice or demand, and it possesses a superior stability and certainty.

We find no merit in any of the objections which the plaintiff in error makes to the charge which was given to the jury, or the refusal of the court to charge as requested. The court properly instructed the jury on the subject of the good character of the accused, and in regard to reasonable doubt. He informed them that the accused could not be convicted on his own statements without other evidence of the commission of a crime.

It is urged that there was error in that the special counsel for the prosecution, in his argument to the jury, commented upon the fact that the plaintiff in error had failed to testify in his own behalf. What counsel said was this: "In refutation of what counsel says, you will bear me out that no one has contradicted Mr. Leach in his statement of the facts with reference to the conversation with Mr. Dimmick." This remark, unexplained, might well have been regarded by the jury as a comment upon the failure of the accused to testify, for it did not appear that any third person overheard the conversation between the accused and Mr. Leach. But when objection was made, and the attention of counsel for the prosecution was directed to his remark, he denied that he had referred therein to the plaintiff in error or to his failure to take the stand, and upon the suggestion of the court withdrew his remark, and stated that it was not in his mind to comment upon or refer to the fact that the plaintiff in error had or had not been a witness; whereupon the following colloquy occurred: "Mr. Collins: Then I understand the remark is withdrawn? Mr. Denson: Yes." It would thus appear that the remark was withdrawn, and that the counsel for plaintiff in error was satisfied with the withdrawal, and that he took no further exception. Under all the circumstances, we think no error was committed which could affect the substantial rights of the plaintiff in error.

It is contended that there was no evidence sufficient to sustain the verdict. There was evidence that the plaintiff in error received the money in December; that he knew of the regulation; that he failed to deposit the money on the last day of the quarter in which it was received; that he made false entries of the date of its reception, so that it might appear to have been received by him in the following quarter; that he did not deposit it until March 31, 1901; and that on February

5, 1901, he admitted to the superintendent that he had applied the money to his own use. These leading facts, together with other details of the testimony, are sufficient to sustain the verdict of the jury.

We find no error in the record for which the judgment should be reversed. The judgment is affirmed.

WEST COAST NAVAL STORES CO. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1903.)

No. 1,216.

1. WHARVES—CONSTRUCTION BY RAILROAD COMPANY—RIGHT OF PUBLIC USE.

A wharf built by a railroad company, in extension of a street, out into the deep waters of a harbor like that of Pensacola, where ships from all ports come in the carrying on of commerce, and where they load and discharge cargoes, on which wharf the company has laid its tracks, making it a quasi terminal for the transfer of goods between its own line and vessels owned by other carriers, is affected by a public use; and the company cannot permit its use by such vessels or carrying lines as it may select, and exclude others, to the encouragement of a monopoly and the hindrance of competition, but, where such use is permitted by any, it must be open to all on equal terms.

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

By reason of rulings of the circuit court on demurrers, plaintiff in error was compelled to submit to judgment, and has sued out its writ for the reversal of that judgment. The errors assigned all have reference to rulings upon demurrers to pleas filed by defendant in error, and replications filed by plaintiff in error.

The declaration consists of two counts, but, as there is no substantial difference between them, it will only be necessary to give the second count of the declaration, which alleges as follows:

"For that, to wit, before the institution of this suit, the defendant was, in the county of Escambia and state of Florida, a common carrier of goods, wares, and merchandise, for hire, by means of its cars drawn by locomotives over defendant's railways; and the plaintiff was then and there engaged in buying and selling, and shipping from Pensacola and other points in said county, naval stores, consisting of turpentine and rosin in barrels, which plaintiff conveyed to and from its yard, in said county and warehouse, in the city of Pensacola, by means of defendant's cars and locomotives, over defendant's railway, including a switch constructed by defendant for plaintiff from defendant's main line, running into the city of Pensacola, to and into the said yard; and the plaintiff in fact avers that the course of business dealing between plaintiff and defendant then and there was for plaintiff to transfer over said switch and defendant's railway, into the city of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin, to and upon defendant's wharf, extending into the Bay of Pensacola, which wharf was and is conducted by defendant, and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf, and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels, to be in and by such vessels carried to other ports in the prosecution of plaintiff's business, of which defendant had notice; and it was the duty of the defendant, as common carrier as aforesaid, and in the conduct of the wharf as aforesaid, which was and is a public wharf, for a reasonable compensation, which plaintiff was always ready and willing to pay to defendant, to give to the plaintiff the facilities aforesaid; and plaintiff further in fact avers that all of the services in fact rendered as aforesaid to it by

the defendant was for hire, by the plaintiff to the defendant paid as and when required, and it was the purpose and intention of the plaintiff thereafter to continue to prosecute its business aforesaid, of which defendant had notice, and in the prosecution thereof to continue to use the facilities aforesaid, as defendant well knew, paying therefor reasonable and customary hire; and plaintiff had the means and ability, and had made necessary arrangements for the further prosecution of such business, as the defendant well knew; and the plaintiff in fact avers that in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucrative business, the defendant notified plaintiff that it would refuse to permit plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew, and to which plaintiff was constantly adding, as defendant well knew, and from thence hitherto has continued to add in the prosecution of its said business, to be, at, from, or by means of defendant's said wharf, loaded upon or delivered to certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports to which plaintiff intended and had made arrangements to ship the same, of which defendant had notice, or to permit the said wharf and said railway of defendant to be used in the prosecution of plaintiff's business aforesaid, in so far as the prosecution thereof should involve the use of said vessels in shipment of plaintiff's said turpentine and rosin from Pensacola, by means whereof plaintiff sustained great loss and damage, to wit, five thousand dollars (\$5,000) for the difference between what it would have cost plaintiff to carry the same to and load it upon the said vessel by means of defendant's railway and wharf, and what it cost to do so by other means of conveyance and delivery, and in a sum of ten thousand dollars (\$10,000) for what it will cost plaintiff hereafter to make delivery to said vessels in excess of what it would cost to make such delivery by means of defendant's said railway and wharf, and in the sum of ten thousand dollars (\$10,000) on account of delays, annoyances, and embarrassments resulting from the plaintiff being compelled to carry on its business by transporting its goods in carts drawn by mules and horses for miles by said roads and streets, and then shipping the same out to said vessels by means of lighters, and the necessary and inevitable general immediate injury to the business of plaintiff by plaintiff having to carry on its business by such rude and primitive methods side by side with modern modes and facilities, thereby losing prestige in the business community, and being forced to compete with others who have and enjoy unrestricted use of defendant's railway and wharf facilities as aforesaid; and plaintiff is otherwise, by reason of the actings and doings of defendant aforesaid, greatly damaged in its business."

The first plea that the defendant in error filed was held bad on demurrer thereto, in an order which gave leave to plead further. The further plea was demurred to by plaintiff in error. Before any action was taken on this demurrer, defendant in error withdrew all further pleas, and filed three pleas numbered 1, 2, and 3. Plaintiff in error filed demurrers to pleas numbered 2 and 3. The court sustained the demurrer to the plea numbered 2, and overruled the demurrer to the plea numbered 3, which plea is as follows, to wit:

"(3) That the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to and delivery at Pensacola. That neither its charter, nor any statutory law, has compelled or required, or compels or requires, it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of such business as it might desire with such vessels as it might permit to come to and lie at said wharf to take cargo. That, in accordance with such purpose, it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations by which it limited the use of its wharves, including the wharf mentioned in the declaration, 'to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to or consigned to Gulf Transit Company' (an agency of defendant), and making the use of said wharves 'for traffic in connection with vessels other than herein referred to' 'subject to

special arrangement.' The said rules and regulations were in operation and enforced by defendant from the time of their promulgation as aforesaid up to and at the time of the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the 'certain vessels' mentioned in the declaration, and still are in force and operation. That the said 'certain vessels' were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to or consigned to Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection and under traffic arrangements, and was also in competition with the defendant itself, which was at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile. That the defendant has not either notified plaintiff that it would carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its railway mentioned in the declaration, to and on its wharf also mentioned in the declaration. That it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf to be transported by them to the port of New York as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant itself in its rail transportation aforesaid to and from New York City, and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers."

The action of the court in overruling demurrer to plea numbered 3 is the subject of the first assignment of errors.

Plaintiff in error then filed five replications to pleas numbered 1 and 3, to all of which replications defendant in error filed demurrers. Plaintiff in error insists here only upon replication 5, "That said wharf is an extension of a street of the city of Pensacola, abutting on and bounded by the Bay of Pensacola," demurrers to which the Circuit Court sustained by order. This is the subject of the second assignment of errors.

Plaintiff in error filed further replications, 6 and 7, as follows:

"(6) That the said wharf is the extension of a street of the city of Pensacola into the Bay of Pensacola to a distance of more than five hundred (500) yards, all within the limits of the city of Pensacola, and maintained by the defendant by authority and permission of the said city, and that the defendant was, at the time of the happening of the matters and things in the declaration mentioned, a railroad company, incorporated and organized under and by virtue of the laws of the state of Kentucky, and had not before the institution of this suit filed in the office of the Secretary of State of the state of Florida a copy of its charter or reorganization.

"(7) That the said wharf is the extension of a street of the city of Pensacola into the Bay of Pensacola to a distance of more than five hundred (500) yards, all within the limits of the city of Pensacola, and maintained by the defendant without legal authority, other than that conferred by the provisions of an act of Legislature of the state of Florida entitled 'An act to grant the water front of the city of Pensacola,' approved June 2, 1899, otherwise

designated as chapter 4802, p. 191, of the Laws of Florida, and that the defendant was, at the time of the happening of the matters and things in the declaration mentioned, a railroad company incorporated and organized under and by virtue of the laws of the state of Kentucky, and had not before the institution of this suit filed in the office of the Secretary of State of the state of Florida a copy of its charter or reorganization."

Plaintiff in error insists only upon the sixth, of which the latter portion will be eliminated as not essential to the point to be argued here. Defendant in error filed a demurrer to the sixth replication. The circuit court made an order sustaining the demurrer, which action is the subject of the third assignment of errors:

"The court erred in making the order on the 28th of November, 1902, whereby the court ordered and adjudged that defendant's demurrers filed November 17, 1902, to plaintiff's replications numbered 6 and 7, filed November 13, 1902, should be, and were, sustained."

Jno. C. Avery, for plaintiff in error.

W. A. Blount, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The case shows that the Louisville & Nashville Railroad Company is in the possession of a large wharf, built at its own expense on the extension of a public street in the city of Pensacola into the deep waters of the harbor of the city, on which street and wharf it has laid railroad tracks connecting with its main line and depot in the city, over which tracks the railroad company carries and transports goods ordered and intended for shipment by water, making a quasi terminal of said wharf; and the question is whether this wharf is a public wharf, or, if not public, but a private wharf, is it so located and used that the public has a right to have goods intended for shipment by water beyond Pensacola carried to said wharf, and have ships moored at said wharf, and there take on its said goods?

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure." Dutton v. Strong, 1 Black, 23, 32, 17 L. Ed. 29.

In the same case it is held that riparian proprietors have a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays, and arms of the sea, if they conform to the regulations of the state, and do not obstruct the paramount right of navigation, but the right to make such erections terminates at the point of navigability. And of such improvements it is said that the riparian proprietor may construct any one of them for his own exclusive use and benefit; and, if not located in a harbor or other usual resting place for vessels, and if found within a shore of the sea or the unnavigable waters of the lake which has not been used, or held out as intended to be used, by others, the public have no right to make use of the same.

The structure in this case is located in deep water, in a harbor where many ships lie at all seasons of the year; it was built, as shown by the plea, for the purpose of providing facilities for the transaction of such business as the railroad company might desire with such vessels as it might permit to come and lie by said wharf to take cargo; and it limits the use of the wharf to traffic handled by vessels in the regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to or consigned to the Gulf Transit Company (an agency of the railroad), and to traffic in connection with other vessels subject to special arrangement; in short, the use of the wharf is limited by the railroad company to vessels of connecting lines, and to such others as the company sees fit to permit.

In *Indian River Steamboat Company v. East Coast Transportation Company*, 28 Fla. 387, 10 South. 480, 29 Am. St. Rep. 258, where was involved questions very similar to those herein, the Supreme Court of Florida held:

"A railroad corporation, under the laws of Florida, has the right to erect and maintain docks, wharves, and piers, as incidents to its business, and to hold or dispose of them as may be deemed proper; but such corporation engaged in the business of common carrier has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steamboat companies."

And in the opinion said:

"The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian river by means of steamboats, rent from a railroad common carrier its dock on said river on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of delivering and receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this."

In *Barrington v. Commercial Dock Company* (Wash.) 45 Pac. 748, 33 L. R. A. 116, the right of the owner of a wharf located on the shore of Commencement Bay, in the city of Tacoma, where the water at the outer edge of the wharf was of the depth of eight feet low tide—the same situated on a waterway approachable from the sea and the waters of Puget Sound—and where certain vessels approved by the owner of the wharf, competing in business with other vessels, were permitted to land, to exclude certain other vessels in the same competing business, not approved by the wharf owner, was much considered, and the court said:

"The main contention of appellant is that its wharf is a private wharf, and under the control of the owner, and that it has a right to determine for itself with whom it will do business; and counsel confidently cites section 2136, Hill's Ann. St. & Codes, in support of this position. * * * The section, as a whole, while it recognizes the right of private ownership in wharfs, cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature

of a public wharf. Upon this question it was said by the Supreme Court of the United States in *Dutton v. Strong*, 66 U. S. 32, 17 L. Ed. 32, that 'piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.' In *Gould, Waters*, § 119, the author lays down the proposition, and supports it by a great array of authorities, that, 'when wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest, and the wharfage must be reasonable.' The proof in this case shows that numerous steamers landed at appellant's wharf daily, discharging passengers and baggage, as well as freight, from different ports in the waters of Puget Sound and elsewhere; and it also shows that the appellant receives the sum of 25 cents per ton for every ton of freight going out or coming in over said wharf. We think that the language of the court in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, is applicable here, viz., that appellant stands 'in the very "gateway of commerce," and takes toll from all who pass.' In *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622, it is said: 'A wharf is a necessity of modern navigation, and of navigation alone. The sole object of its erection is to facilitate the transportation of passengers and freight upon navigable waters. * * * Every vessel has a license to use, for her safety or convenience, any public wharf on navigable waters, upon paying reasonable wharfage.' We think that, in determining the character of appellant's wharf, regard should be had to the use to which it has been devoted, rather than its private ownership, and that, upon the facts found, the position of the appellant cannot be maintained. As well might the proprietor of a stagecoach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies, which is not the policy of our law to favor."

The foregoing well-considered cases seem to furnish sufficient authority for holding that a wharf built out into the deep waters of a harbor like that of Pensacola, where ships coming from and going to all parts, land, lie, moor, and anchor for rest and loading and unloading, and which is used by the owner for his own business, and for such ships of others engaged in competing business as the owner may see fit to permit, is, by its location and use, open to all ships whose traffic calls them to take goods therefrom.

When the case goes further, and we consider that, in addition, the wharf is a quasi railroad terminal, where all goods, as ordered, are carried, and to which all consignees of goods ought to have access, the reasons are decidedly more potent for holding that such wharf, located in public waters which are free to all, is affected with a public use, and cannot lawfully be farmed out to a small portion of the shipping public, to the encouragement of a monopoly and the hindrance of competition. And the monopoly in the instant case at the wharf is not the only resulting evil. Controlling the wharf, as it claims the right to do, gives the railroad company the entire control at nearly all points on its line as to shipment of goods destined to water transportation beyond Pensacola, both as to route and rates.

The learned counsel for defendant in error has briefed a very plausi-

ble argument in favor of the right of the railroad company to discriminate against shippers and competing vessels for business at the wharf in question, and in favor of such competing vessels as it sees fit to permit, and, with much industry, has collated numerous authorities on the propositions submitted by him. On the proposition that a common carrier may hold itself out to the public as willing to serve it, and every member of it, just as far as it pleases, and its liability will be coextensive with such holding out, he cites *Dickson v. Great Northern Railway Co.*, L. R. 18 Q. B. Div. 176; *Johnson v. Midland Railway Co.*, 4 Ex. 367; *Hosea v. McCrory*, 12 Ala. 349; *Whitemore v. Steamboat Caroline*, 20 Mo. 513; *Lake Shore, etc., v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275. That a common carrier may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities: *People v. Railway Co.*, 57 Ill. 437, and *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, Fed. Cas. No. 2,730; *Hutch. on Carriers*, 75. Counsel also announces the proposition that one common carrier has no right, independent of charter or contract, to use the terminals of another carrier; citing *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. R.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; *Gulf, Colorado & S. F. Ry. v. Miami Steamship Co.*, 30 C. C. A. 142, 86 Fed. 407, 416, 422; *Little Rock & Memphis R. Co. v. St. Louis Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775, 781; *Little Rock & Memphis R. Co. v. St. Louis, I. M. & S. Ry. Co.* (C. C.) 59 Fed. 404. Again, that a transportation company operating a railway and a line of steamboats connecting it at the company's wharf is not required by the third section of the interstate commerce act of February 4, 1887, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155], to permit the boats of a competitor to land at such wharf: *Ilwaca Ry. & Navigation Co. v. Oregon Short Line, etc.*, 6 C. C. A. 495, 57 Fed. 673. Counsel also cites cases too numerous to mention as to the proposition that a railway company has a right to discriminate between draymen, hackmen, etc., desiring to use depot and like facilities of the railroad. These authorities are said to be collected in *Donovan v. Pennsylvania Co.* (C. C. A.) 120 Fed. 215. None of these propositions are, in our opinion, applicable to the present case, and the only one of the adjudged cases cited which seems to bear upon propositions here involved is *Ilwaca Railway Navigation Co. v. Oregon Short Line, etc.*, supra. An examination of that case shows that the Oregon Short Line & Navigation Company controlled both the railway and the steamship line connecting with the wharf in question, and we find nothing decided therein to conflict with our views of the present case. If the wharf involved in this case, although in the deep waters of a navigable harbor, was used by the railroad company solely for its own carrying business in connection with its own lines, a different case would be presented; and we have herein quoted from *Indian River v. East Coast Trans. Co.*, supra, to that effect.

As we hold to the views herein expressed, we are called on to reverse the judgment of the Circuit Court and remand the case, with instructions to sustain the demurrer to the third plea, and otherwise proceed according to law. And it is so ordered.

REID et al. v. PAULY et al.

(Circuit Court of Appeals, Ninth Circuit. February 16, 1903.)

No. 849.

1. INDEMNITY—BUILDING CONTRACTOR—BANKRUPTCY—RIGHTS OF INDEMNITORS—APPEAL—PARTIES.

Where indemnitors of the sureties of a contractor for a county building, after having been compelled to pay judgments against the contractor, and after the contractor's trustee in bankruptcy had recovered from the county a balance due the contractor, consented that a certain part of the amount so recovered be applied to the payment of fees for services, etc., and moved that the trustee be directed to pay the balance to such indemnitors, an appeal by the trustee and others from an order granting the motion was not subject to dismissal on the ground that the county was a necessary party thereto.

2. SAME.

The fact that the trustee was directed to retain a part of the fund adjudged to belong to the petitioners until further order of the court did not affect the right of appeal of others claiming the entire fund.

3. SAME—SUBROGATION OF INDEMNITORS—EQUITABLE LIEN.

Where indemnitors of sureties on the bond of a contractor for the erection of a county building were compelled to pay judgments against the contractor, who was subsequently declared a bankrupt, such indemnitors were entitled to an equitable lien on a balance due from the county to the bankrupt, which the trustee subsequently recovered, to the amount of the judgments so paid.

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

Ben Sheeks and Sullivan & Christian, for appellants.

Judson & Geraghty and A. R. Titlow, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. In 1890 one John T. Long was awarded a contract to build a courthouse and jail for Pierce county, Wash., for the sum of \$270,000. By the laws of that state in force at the time the commissioners of the county were required to take from the person with whom such contract was made "a good and sufficient bond, with two or more sureties who shall justify as bail upon arrest, which bond shall be conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who shall supply such contractor with provisions or goods of any kind, all just debts due to such persons or to any person to whom any part of such work is given, incurred in carrying on such work" (Hill's Ann. Code, § 2415), and which bond should be in an amount equal to the full contract price for the work or improvements, and be executed to the state of Washington, but on which there should be a right of action in the person or persons performing labor or furnishing materials for the value thereof. Long undertook to give the bond so required, with J. R. Addison, W. H. Fife, Van Ogle, Jacob Ralph, Charles T. Uhlman, J. B. Catron, T. A. Bringham, J. L. De Voin, J. C. Mann, and W. B. Kelly, all of the state of Washington, as sureties. That bond makes the state of Washington the obligee, but

recites substantially that it was for the benefit of Pierce county, and its condition, in substance, is to save the county harmless from liens, claims, loss, damage, or expense occasioned by Long's failure to perform his contract. Long, however, did not sign the bond, nor did the sureties therein named justify in the required amount. Those sureties, two days after the date of the bond—which was September 15, 1890—addressed to the board of commissioners of Pierce county this communication and request:

"We, the undersigned, sureties on the bond of J. T. Long to the State of Washington as indemnity to the laborers and material men and all others having claims against the courthouse and jail, do hereby consent that you accept and approve the said bond with the justification of the sureties to an amount of three hundred and ten thousand dollars, and we waive any and all rights which we may have by reason of said bond being accepted with sureties to justify in said amount, only, and we hereby request you to approve said bond with the sureties now thereon. And we request you to make an order and spread the same upon the records of the proceedings of said Board of County Commissioners to the effect that said justification be reduced to said sum."

It seems that the county commissioners accepted the bond, for it appears to have been filed and recorded at the request of the county. A few days thereafter, to wit, September 23, 1890, J. J. Ligon, P. J. Pauly, Sr., P. J. Pauly, Jr., and John Pauly, of St. Louis, Mo., executed to Addison and the other sureties named in the bond first mentioned a bond in the sum of \$270,000, stating the conditions thereof as follows:

"The conditions of the above obligation are such that, whereas one John T. Long has entered into a contract with Pierce County, a corporation of the State of Washington, wherein the said bounden J. T. Long, for a consideration therein named to be paid, to make certain improvements by erecting, completing and furnishing materials for a courthouse and jail to be built in the city of Tacoma, County of Pierce, State of Washington, in accordance with the said contract, plans and specifications therefor, and in said contract agrees to pay all persons performing labor upon said building and doing said work, and to pay for all material furnished and used therein, and all persons who shall furnish said J. T. Long with goods and provisions of any kind, and all claims for damages; and whereas, J. R. Addison, W. H. Fife, Van Ogle, Jacob Ralph, Charles T. Uhlman, J. B. Catron, T. A. Bringham, J. L. De Voin, J. O. Mann, and W. B. Kelly, have become sureties for the said J. T. Long to the said Pierce County to the sum of \$270,000 in good and lawful money of the United States, and have bound themselves as such sureties to said county for the performance by the said J. T. Long of all of the covenants and agreements entered into by the said J. T. Long with said Pierce County for the building of the courthouse and jail above referred to in accordance with the certain contract entered into by the said J. T. Long and the said County of Pierce:

"Now, therefore, the condition of the above obligation is such that if the said J. T. Long shall well and truly perform and fulfill the conditions of the contract entered into between him and the said County of Pierce, in manner and form as he is therein required to do, and at all times hereafter save harmless the said J. R. Addison, W. H. Fife, Van Ogle, Jacob Ralph, Charles T. Uhlman, J. B. Catron, T. A. Bringham, J. L. De Voin, J. C. Mann, and W. B. Kelly, their heirs, executors and administrators, of and from said obligation which the above-named sureties have entered into with the said J. T. Long to the said County of Pierce, and of and from all action, cost, and damage for and by reason thereof, then this obligation shall be void, otherwise to remain in full force and effect."

Long completed his contract in 1893, and, a dispute having arisen between him and the county in respect to the balance due him thereon, he, in that year, brought suit against the county in one of the courts of the state of Washington to recover what he claimed to be due him. He had not, however, paid in full for all of the materials used in the structures, and, as a consequence, he was sued in the courts of the same state by various of the parties furnishing material, in each of which suits judgment was obtained against him; one of which was recovered by the Brown-Haywood Company, a Missouri corporation, to which company all of the other judgments so recovered were afterwards assigned. Based on its own and the assigned judgments, the Brown-Haywood Company, together with Addison and the other sureties named in the bond first mentioned herein, commenced suit in the United States Circuit Court for the Eastern Division of the Western District of Missouri against the Missouri sureties on the bond of September 23, 1890, in which action the Brown-Haywood Company recovered judgment on the 24th day of March, 1899, for the aggregate sum of \$25,305 (92 Federal, 851), the court in that case saying:

“Complainant's [the Brown-Haywood Company] equity may consist in the right to be subrogated to the securities held by its debtor [Long], or it may consist in its right to enforce an agreement made by the defendants [the Missouri sureties on the bond of September 23, 1890] for its benefit, under the doctrine of the case of *Knapp v. Insurance Co.*, 29 C. C. A. 171, 85 Fed. 329 [40 L. R. A. 861].

The defendants to the suit in Missouri, namely, the makers of the bond of September 23, 1890, having paid the amount of the judgment thus given against them, brought, on the 29th day of December, 1900, the present suit against the county of Pierce, state of Washington, John T. Long, and one George T. Reid, as trustee of the estate of John T. Long; the latter having in October, 1898, been adjudged a bankrupt, and Reid having been appointed trustee of his estate, and thereafter having been substituted for Long in his suit against the county of Pierce, and having recovered as such trustee on the 1st day of April, 1901, judgment for the sum of \$28,800 as the balance due from the county of Pierce to Long. Subsequent to its appearance in and answer to the present suit, and during its pendency, the county of Pierce paid to Reid, as trustee of the estate of the bankrupt, Long, the sum of \$28,800, for which he had obtained judgment. In their replication to the answer of the defendants in this suit the complainants said:

“These replicants admit and confess that the services of George T. Reid as trustee of the estate of John T. Long, a bankrupt, and of Potter C. Sullivan as counsel, attorney, and solicitor, and the referee in bankruptcy, and C. J. Nunne and Frank La Wall, as mentioned and set forth in said respondent's and defendant's answer, were services rendered in such bankruptcy proceedings in said answer mentioned and set forth, and they hereby consent that the said sum of \$12,000 paid to said Potter C. Sullivan, and the said sum of \$288 paid to the referee in bankruptcy, and the sum of \$463.45 paid to George T. Reid, trustee of the estate of John T. Long, a bankrupt, for said services, and each and all of the same, together with the sum of \$1,100 claimed by said C. J. Nunne and Frank La Wall, may be allowed to each and all of them in said respective amounts, each and all of which

they admit are paid, save and except the sum of \$1,100 to C. J. Nunne and Frank La Wall for stenographic work and typewriting, which they hereby consent may be paid to them for services in producing the fund received by the said George T. Reid, as such trustee, in the sum of \$28,800; the sum total of the said amounts for all of the said services aforementioned, aggregating the sum of \$13,853.45, which, deducted from said \$28,800, would leave a balance of \$14,946.55 in the hands of said George T. Reid, trustee of the estate of John T. Long, a bankrupt; the whole and each and every part of which these replicants and complainants humbly hereby pray may be decreed and awarded them on account of the matters and things in their bill of complaint set forth in this cause, and which they humbly pray the court to award by decree to them; and establishing by said decree, replicants' and complainants' right thereto by virtue of their equitable lien and assignment of and upon the said fund, and that the same may be decreed to belong to these replicants and complainants free from any claims or incumbrances of any person whatsoever, and held in trust by the said George T. Reid, trustee of the estate of John T. Long, a bankrupt, and directing the said trustee to at once pay over and deliver the same to these replicants and complainants herein in satisfaction of their said claim herein sued on; and they humbly pray as in their said bill they have already prayed."

The day after filing their replication the complainants move the court for judgment against the "defendants George T. Reid, trustee of the estate of John T. Long, a bankrupt, and John T. Long, and against the fund of \$14,946.55, now in the hands of the said Reid, as such trustee, and for an order and decree of this honorable court establishing in behalf of said complainants and replicants an equitable lien upon said fund, and decreeing the same to be held in trust for the use and benefit of said complainants and replicants, and subjecting the same to their rights herein, and decreeing them to be the owners of the same and every part thereof, and entitled to the same at once; and ordering said George T. Reid, as such trustee, to at once pay over and deliver the same upon the order of this court to said complainants and replicants, P. J. Pauly, Sr., P. J. Pauly, Jr., and Margaretha Pauly, as administratrix of the estate of John Pauly, deceased." That motion having come on for hearing, the court, after due consideration, entered an order, which is the subject of the present appeal, reciting and decreeing as follows:

"That said complainants herein, as shown by the pleadings in this cause, had an equitable lien upon said moneys from and after the execution of the contract between the respondents, Pierce county and John T. Long, for the erection and construction of said courthouse, and the execution of the bond by complainants in favor of said Pierce county, upon which complainants were liable as sureties, and as sureties of the sureties of said John T. Long, for materials and labor furnished in the erection and construction of said courthouse, and upon which bond complainants have been compelled to pay, prior to the commencement of this action, the sum of eighteen thousand dollars, under execution on judgment. That said equitable lien attached to said fund and the moneys retained by said Pierce county under the fifteen per cent. reservation clause contained in said contract between said Pierce county and said John T. Long; and that said complainants herein have a prior, superior, and paramount claim and lien upon said fund as against the respondents herein and the other creditors of said John T. Long that have filed their claims in bankruptcy against the said estate of said John T. Long; and that each and every part of the said sum now remaining in the hands of said trustee, to wit, the sum of \$14,946.55, belongs to the complainants herein. And it further appearing to the court that Gladding, McBean & Co., a corporation, has commenced its certain action in equity in this court against said George T. Reid, as trustee of the estate of John T. Long, a

bankrupt, and against said Pierce county, Washington, being cause numbered 784, to recover as principal the sum of \$2.150 and interest thereon; and it further appearing to the court that, after paying the expenses of producing said fund, the sum of only \$14,946.55 remains in the hands of said trustee, which sum is not sufficient to pay the claim and lien of complainants against said fund; and it further appearing that said Gladding, McBean & Co. in said cause are claiming a lien upon said fund, which has not yet been determined by this court: It is therefore ordered, adjudged, and decreed that the respondent George T. Reid, as trustee of the estate of John T. Long, a bankrupt, be, and he is hereby, ordered and directed to pay over to the complainants herein, P. J. Pauly, Sr., P. J. Pauly, Jr., and Margaretha Pauly, as administratrix of the estate of John Pauly, deceased, or to their solicitors herein, Judson & Gerraghty and A. R. Titlow, the sum of thirteen thousand three hundred and forty-six and $\frac{55}{100}$ dollars (13,346.55) at once upon the entry of this order and decree—to which the said defendant and respondent John T. Long excepts, and his exceptions are allowed. It is further ordered, adjudged, and decreed that said George T. Reid, as trustee of the estate of John T. Long, a bankrupt, retain the balance of said fund now in his hands, to wit, the sum of \$1,600, until the further order of this court in this cause. That upon the payment of said sum to said complainants or their said solicitors Judson & Gerraghty and A. R. Titlow, said trustee take a receipt therefor, which he shall hold as his voucher herein."

It thus appears that on their own motion the appellees' rights have become limited to the fund of \$14,946.55 received by the trustee of Long's estate from the county of Pierce. That county was not, therefore, a necessary party to the appeal. The entire fund to which the controversy is now confined is, by the order appealed from, adjudged to belong to the appellees, and the appellant Reid is thereby adjudged to pay over to them forthwith \$13,346.55 thereof. The fact that the trustee is directed to retain in his hands until the further order of the court \$1,600 of the fund adjudged to belong to the appellees in no wise detracts from the right of appeal by those parties who likewise claim the entire fund, and from whom it was taken by the decree. The motion to dismiss the appeal is denied.

Upon the merits we think the case is also quite clear. It is not for us to say whether the suit in the Circuit Court for the Eastern District of Missouri was or was not rightly decided. By the judgment of the court in that case the sureties on the bond of September 23, 1890, were compelled to pay the judgments recovered by the materialmen in the state of Washington. They were thus compelled to pay, and did pay, more than the amount of the fund in controversy. Those judgments were obligations for which not only the Washington sureties were liable upon the bond executed by them, to whose rights the Missouri sureties, as their indemnitors, were entitled to be subrogated (Brand on Suretyship & Guaranty, § 276), but on which the complainants, by reason of the dual obligation of their own bond, were directly liable, as was adjudged by the Circuit Court for the Eastern District of Missouri in the suit against them, where the court said:

"As already observed, the bond in suit, although made to Addison and others as nominal obligees, contains a stipulation requiring the defendants, in effect, to pay materialmen's claims, and thus conform to the obligation imposed on Addison and others by their bond and by the laws of the state of Washington; and, even though the defendants might be released from liability to the obligees named by reason of the change in the contract, they are not released from their liability incurred in favor of material men."

In the latter aspect the complainants' right of subrogation was a right to resort to the securities and remedies which the county of Pierce was capable of enforcing against Long had the security not satisfied his obligations, one of which remedies was the right, based upon the original contract, to appropriate the money retained in its hands. *Prairie State Nat. Bank v. U. S.*, 164 U. S. 227, 232, 17 Sup. Ct. 142, 41 L. Ed. 412; *First Nat. Bank v. City Trust, Safe Deposit & Surety Co.*, 114 Fed. 529, 52 C. C. A. 313. And, as indemnitors of the Washington sureties, the complainants, having paid, under compulsion, the debts for which they were bound, are entitled to subrogation, the same as they would have been had they paid them. *Brandt on Suretyship and Guaranty*, supra; *Am. & Eng. Ency. of Law*, vol. 24 (1st Ed.) p. 226.

The contract between the county and Long under and in pursuance of which the bonds in question were given, provided, in respect to payments, as follows:

"And it is hereby mutually agreed between the parties hereto, that the sum to be paid by the owner to the contractor for said work and material shall be two hundred and seventy thousand dollars (\$270,000), subject to additions or deductions on account of alterations as hereinbefore provided. That such sum shall be paid in county warrants on funds to be provided for the same if the owner elects in current funds by the owner to the contractor in installments, as follows: Eighty-five per cent. of the value of the work done and the material furnished as the work proceeds, as the architect shall estimate.

"It being understood that the final payment shall be made within thirty days after this contract is completely finished: provided, that in each of said cases the architects shall certify in writing that all the work upon the performance of which the payment is to become due has been done to their satisfaction: and provided further, that before each payment if required the contractor shall give the architect good and sufficient evidence that the premises are all free from all liens and claims chargeable to the said contractor; and further, that if at any time there shall be any lien or claim for which if established the owner of the said premises might be liable and which would be chargeable to the said contractor, the owner shall have the right to retain out of any payment then due or hereafter to become due, an amount sufficient to completely indemnify it against such liens or claim until the same be effectually satisfied, discharged, or canceled. And should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharge of any lien on said premises made obligatory in consequence of the former's default."

Upon the fund retained by the county of Pierce by virtue of the contract the complainants were, under the doctrine of the cases above cited, properly held entitled to an equitable lien.

The judgment is accordingly affirmed.

In re SAGOR et al.

Appeal of AMERICAN WOOLEN CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 63.

1. BANKRUPTCY—PREFERENCES—PAYMENT AND NEW SALES UNDER RUNNING ACCOUNT.

Payments by an insolvent on a running account for goods, where new sales succeed such payments, and the net result is to increase the indebtedness, do not constitute preferential transfers of property, under Bankr. Act 1898, § 60a [U. S. Comp. St. 1901, p. 3445].

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

In Bankruptcy. This cause comes here upon appeal by the American Woolen Company, a creditor of the bankrupts, from a judgment of the District Court, rejecting its claim.

Lee M. Friedman and David J. Gallert, for appellant.

M. D. Stiver, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The following excerpts from the opinion of the referee succinctly state the facts and the question presented thereon:

"The American Woolen Company's proof of claim for merchandise sold and delivered shows forty-three different items, aggregating net \$16,530.42, the items being chiefly in three figures, and the dates of the items ranging in a period from January 31, 1901, to July 2, 1901, both dates inclusive. Each of these items represents merchandise purchased on its date, and payable at a specific subsequent date. Within the period above named, and between May 4th and June 12th, both dates inclusive, specified groups of bills of the company, which do not figure in the proof of claim offered, were paid by the bankrupts while insolvent to the company, the latter not knowing and not having reasonable cause to know such insolvency. The bills so paid aggregate \$4,322.82." "Notwithstanding its feature that the items of the transaction between the company and the bankrupts consisted of separate bills of goods bought on distinct dates, some of which were paid for specifically on specific dates (which seems to be at the most nothing more than the purchase of and payment for so much merchandise on such dates), * * * the transaction between the parties presents all the features of an open and running merchandise account, though itemized, and does not constitute a series of distinct and independent debts. * * * It does not seem that at any time the relation of debtor and creditor had ceased to exist between the parties, and the transactions between them closed."

The referee and the district judge held that the sum of \$4,322.82 cash received during the period of insolvency must be returned before the American Woolen Company could file its claim, on the authority of section 57g of the bankrupt act [U. S. Comp. St. 1901, p. 3443], and of *Pirie v. Chicago Title & Trust Co.* (May 27, 1901) 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171.

Examination of the accounts discloses these additional facts: The sales made to the bankrupt subsequent to the first of the payments which he made during insolvency, i. e., the sales on and subsequent to May 9th, aggregate \$4,427.82, no part of which has been paid.

¶ 1. See *Jaquith v. Alden*, 23 Sup. Ct. 649.

The sales made to the bankrupt subsequent to the last payment during insolvency, i. e., subsequent to June 12th, aggregate \$3,863.34. It is apparent that the net result of the transactions subsequent to insolvency has been to increase the bankrupt's indebtedness to the claimant and to increase the bankrupt's estate to the like amount—a condition of things which it may easily be conjectured would not have happened if the bankrupts had not by their payments induced the giving to them of further credit.

In view of the conclusion we have reached upon the merits, some questions as to practice which have been argued need not be discussed.

The sections of the bankrupt act relevant to the questions raised on this appeal are as follows:

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. [U. S. Comp. St. 1901, p. 3445.]

"Sec. 60b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent, acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

"Sec. 60c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"Sec. 57g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." [U. S. Comp. St. 1901, p. 3443.]

"Sec. 68a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid." [U. S. Comp. St. 1901, p. 3450.]

There have been many and conflicting decisions disposing of the questions raised by the application of these sections to the facts in different cases. Among such questions are these: (1) Is a payment of money a "transfer of property"? (2) Does section 57g apply when the creditor acted in good faith, was ignorant of the debtor's insolvency, and had no reasonable cause to believe the transfer was a preference? (3) Does section 60c, the set-off clause, apply only to the cases provided for in section 60b, or does it also apply to those covered by section 60a? (4) What is the precise meaning of the words in section 60a: "The effect * * * will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class"? (5) Do payments and sales under running account, where new sales succeed payments, and the net result is to increase the indebtedness, constitute a preferential transfer, under section 60a?

In *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, decided May 27, 1901, the first two of these questions were specifically answered in the affirmative. As to the third question the opinion of the court was clearly expressed; but

it may fairly be held that, with the other questions disposed of, an answer to it was not necessary to a decision, and it was not discussed. The fourth and fifth questions were not considered; the fifth, indeed, did not arise, for the statement of facts certified to the court recited only the payment of \$1,336.79 on an indebtedness of \$4,403.77. The facts in the case at bar present the situation set forth in the fifth question, and in examining the authorities it will be necessary to consider only those in which a similar situation is presented.

In *re Teslow*, 4 Am. Bankr. Rep. 757, 104 Fed. 229, was decided by Judge Lochren, February, 1900. The statement of facts shows that goods were sold to the bankrupt after a payment was made by him, but the question presented here was not suggested, discussed, or decided.

In *re Fixen & Co.*, 42 C. C. A. 354, 102 Fed. 295, 50 L. R. A. 605, was decided by the Circuit Court of Appeals for the Ninth Circuit, May, 1900. Sales were made subsequent to the receipt of payments, but the total payments during insolvency exceeded the sales during same period, so that the net result was to reduce the indebtedness. The situation suggested by the fifth question did not arise and was not discussed. In *re Christensen* (D. C.) 101 Fed. 802, was decided by Judge Shiras May, 1900. The facts were similar to those at bar, but the discussion was confined to the set-off clauses 60c and 68. The question here discussed was not presented. In *re Soldosky* (D. C.; Lochran, District Judge, Oct., 1901) 111 Fed. 511, and In *re E. O. Thompson Sons* (D. C.; McPherson, District Judge, Jan., 1902) 112 Fed. 651, present parallel cases to the one at bar, but the fifth question was not discussed. They were decided on the "set-off" clauses. In *re H. C. King Co.* (D. C.; Lowell, District Judge, Jan. 22, 1902) 113 Fed. 110, the creditor knew of the bankrupt's insolvency. In *Kahn v. Cone Export Co.*, 53 C. C. A. 92, 115 Fed. 290, Fifth Circuit, the facts are not fully stated, but the decision refers only to the construction of section 60c. The same may be said of In *re Keller*, 6 Am. Bankr. Rep. 343, 109 Fed. 118.

The first discussion of the question upon which the appellant here relies is found in the opinion of the Circuit Court of Appeals, First Circuit, by Putnam, J., In *re Dickson* (Nov. 15, 1901) 49 C. C. A. 574, 111 Fed. 726, 55 L. R. A. 349. The creditors in that case "had been dealing with the bankrupt, selling him merchandise from time to time, at short intervals, and receiving payment therefor substantially every month, each sale being paid for by itself; that is to say, each bill of merchandise sold one month was separately paid for the same month or soon after. The sales, however, and the payments, were entered to the same running account." The account showed that the result of sales and payments during the period of insolvency had been to increase the indebtedness of the bankrupt to the creditor from \$804.21 to \$2,174.20. The facts, therefore, are identical with those in the case at bar. The court held that the decision in the *Pirie Case* requires a literal construction of section 57g, and that any creditor who has received a preferential payment, however innocently, must comply with that paragraph before he can prove any claim whatever. The court then adds:

"While the Supreme Court has adopted a literal construction of the statute in question, and we are bound to follow it, there must nevertheless be a limit to that method of interpretation, and these cases reach it. It is beyond all reason to hold, because a creditor has, in the ordinary course of business, during the four months preceding bankruptcy, received payments which under some circumstances might operate as a preference in some views of the law, that that fact can be held to bar the proof of his claim, when, looking at all the transactions together, they demonstrate not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor, and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph 'a' of section 60."

The next authority which discusses the question is *Petersen v. Nash* (8th Circuit, Nov. 4, 1901) 55 C. C. A. 260, 112 Fed. 311, 55 L. R. A. 344. The decision deals mainly with the "set-off" clause, on a construction of which the case was decided, but the opinion contains the following:

"Nash Bros., by delivering merchandise to the debtor within four months next preceding the institution of proceedings in bankruptcy by her, and extending credit to her therefor, and doing this in the ordinary course of business without knowledge of insolvency, in good faith enhanced the value of the debtor's estate, and while so doing in like good faith received payments on general account for an amount less in the aggregate than the value of the merchandise delivered to her. The giving and receiving, under such circumstances, may properly enough be regarded as one transaction, resulting not in a preferential payment to the creditor, but in reality in the creation of an indebtedness in favor of the creditor for the difference between the two."

When the question next came before the Circuit Court of Appeals, Eighth Circuit (*Kimball v. Rosenham Co.* [March 24, 1902] 52 C. C. A. 33, 114 Fed. 85), it was more fully discussed, and was the point on which the cause was decided. The following excerpts present the argument which commended itself to the court:

"It is not every transfer of property or payment of money that will constitute a preference, but such transfers or payments only as enable the creditors receiving them to obtain greater percentages of their debts than other creditors of the same class. Is a creditor who, subsequent to the receipt of payment on an account current, extends to his debtor new credits, in excess of the amount of the payments, for merchandise which actually becomes a part of the debtor's estate, thereby 'enabled to obtain a greater percentage of his debt' than other creditors of the same class? Take the case in hand: Before the \$850 was paid the creditor had a claim for \$1,878.13 still owing for goods sold before that time, and \$850 more, in all \$2,728.13. After the payments were made it extended new credits, and put into the estate of the debtor new goods, which amounted to \$1,506, on account of which it has received nothing. Hence at the time of the adjudication in bankruptcy its claim was \$3,384.13, while it was only \$2,728.13 before the payments were made. The result is that by virtue of the payments and the subsequent credits the estate of the bankrupt has been increased to the amount of \$656, the claim of the creditor has been enhanced to the same amount, and its loss in a proportionate sum. It has received no benefit, but, on the other hand, has incurred a positive loss by the transaction. * * * It may be said that before the \$850 was paid the claim of the Rosenham Company was \$2,728.13; that after its payment it was only \$1,878.13; and that the moment the payment was made the creditor had secured thereby a preference. This would undoubtedly have been true if the account and the trans-

action had closed there. But it did not, and it is the actual account and the real transaction, and not those which might have been, but were not, that condition this case and its decision. It was not the purpose or the intention of the parties to this transaction to give the creditor a preference by the payment of this \$850, and that payment never had that effect. Parties are presumed to intend the ordinary and natural consequences of their acts. The customary and natural effect of payments upon a live account current is the continuance of the account and the extension of new credits. Stop payments upon such an account, and new credits are not extended, and the account closes. Make payments, and the account continues and further credit is given. The payments upon the old credits constitute the inducement for the extension of new credits, without which those credits would not be made. * * * If at the time when this debtor paid the \$850 on the old credits it had bought goods of the value of \$1,506 of its creditor, and had paid \$850 therefor, leaving a balance of \$656 owing for them, no one would have claimed that it had thereby given a preference. No more did the payment of the \$850 on the old credits, which induced the new credits of \$1,506. The actual effects of the two transactions upon the claim of the creditor, upon the estate of the bankrupt, and upon the claims of the other creditors would have been identical, and their legal effects could not be different. In neither the partial payment, which induces the supposed sale and immediate delivery of goods, nor in the payment upon the old credits, which induces new sales upon credit in excess of its amount, is 'the effect of the enforcement of' the payment 'to enable' the creditor, in the words of the law, 'to obtain a greater percentage of his debt than other of such creditors of the same class.' In both the loss is the creditor's and the gain is the estate's. Nor can the payment of the money on the old credits, which induces the new credits, be either justly or lawfully segregated from the new credits it induces for the purpose of finding a preference that never in fact existed, and never was intended, any more than the partial payment for goods when bought can be segregated from that sale for such a purpose. The payments, and the new credits they induce, are parts of the same transaction, inseparable in the intent of the parties and in their actual and legal effect."

The same question arose in the Circuit Court of Appeals, Third Circuit, April, 1902 (*Gans v. Ellison*, 52 C. C. A. 366, 114 Fed. 734). That court discussed the subject of set-off and the construction of section 60c. It then said:

"Upon the true interpretation of section 60a the preference in such a case as this is the net gain to the creditor upon the transactions between him and the debtor. The net balance in favor of the creditor is the real preference under the law, for only to the extent of such net gain does the creditor 'obtain a greater percentage of his debt than any other creditors of the same class.' And so, on the other hand, only to the amount of the net gain to the creditor is the estate of the debtor impaired. If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate. Otherwise it is plain that such innocently preferred creditor would be compelled to surrender his preference a second time before he could prove his claim against the bankrupt's estate."

And the court quotes with approval from *In re Dickson*, *supra*.

In October, 1902, the Circuit Court of Appeals, First Circuit, reaffirmed their former decision, *supra*. in *Jaquith v. Allen*, 118 Fed. 270.

From this review of the authorities it appears that no court before which the fifth question, *supra*, has been argued has answered it in the affirmative, and the Circuit Courts of Appeal in three circuits have

answered it in the negative. In the absence of some expression of opinion by the Supreme Court constraining to a different conclusion, it would seem to be the proper course to concur with these courts in the construction they have given to the sections of the Bankrupt Act above quoted, and thus secure a uniform administration of the act—manifestly a desideratum for the mercantile community, to whose transactions such construction peculiarly applies.

The judgment of the District Court is reversed, and the cause remanded, with instructions to allow the claim of the American Woolen Company at the full amount proved.

In re COLTON EXPORT & IMPORT CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 78.

1. BANKRUPTCY—PREFERENCES—PAYMENTS ON ACCOUNT.

Payments made to a creditor during the insolvency of the debtor, and within four months prior to his bankruptcy, on account of loans made from time to time previous to the first of such payments, constitute preferences under Bankr. Act 1898, § 60c (Act July 1, 1898, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), which must be surrendered before the creditor can prove his claim, and it is immaterial that all the loans were made during insolvency, and within the four months period.

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

This is an appeal by Arthur B. Leach, a creditor of the bankrupt, from a decree (115 Fed. 158) rejecting the claim of appellant unless he should surrender to the trustee certain payments made to him by the bankrupt, which were held to be preferential.

G. J. Spraul, for appellant.

Payson Merrill, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. In the opinion In re Sagor, 121 Fed. 658, filed at this session of the court, we have discussed the question of preferences at some length, with copious references to the authorities, and a citation of the relevant sections of the bankrupt act. That opinion may be referred to for a statement of the principles involved. It will be sufficient herein to set forth the facts in the case at bar, and to indicate the application to them of those principles.

The company was insolvent on and at all times after October 19, 1900. The petition to adjudge it a bankrupt was filed January 29, 1901. The transactions out of which the indebtedness arose are these:

Loans were made by Leach to the company as follows:

Oct. 20, 1900.....	\$10,000 00
Oct. 30, "	2,447 03
Nov. 9, "	1,978 00
Nov. 13, "	17,602 00
Nov. 22, "	10,000 00
Total	\$42,027 03

Payments were made by the company as follows:

Nov. 27, 1900.....	\$14,185 58
Dec. 5, "	2,551 59
Dec. 10, "	10,690 81
Dec. 12, "	170 07
Total	\$27,598 05
Balance due	\$14,428 98

The court, reversing the referee, held that Leach could not be allowed to prove this balance, although upon surrendering the \$27,598.05 he might prove the \$42,027.03.

Appellant calls attention to the circumstance that all the loans were made to the bankrupt while it was insolvent, but there is no distinction recognized in the act between claims which accrued before and after insolvency. Section 60c (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]) does not apply, because the creditor has not given the debtor further credit after receiving a preferential payment. The facts are not similar to those in the line of cases which are cited in extenso in *Re Sagor*. Payments made by the debtor have not been succeeded by new extensions of credit, and there is no room for the argument that it should be assumed that the payment induced the credit, or that the transaction is the same as if the debtor paid part cash for a new lot of goods and obtained new credit only for the balance. Nor have we a running account, consisting of several items, where the net result of all transactions intermediate the first payment and the filing of petition in bankruptcy has been the increase of the bankrupt's indebtedness and of his estate at the expense of the creditor. On the contrary, from the date of the first payment no new credit was extended, and the result of the transactions thereafter has been to decrease his indebtedness to one creditor at the expense of his estate. The payments were clearly preferential.

The decree of the District Court is affirmed, with costs.

STANDARD LIFE & ACCIDENT INS. CO. v. SALE.

(Circuit Court of Appeals, Sixth Circuit. April 15, 1903.)

No. 1,152.

1. DIRECTION OF VERDICT.

The court below properly refused to direct a verdict when, notwithstanding the view which the court might take of the evidence, it was unable to say that a jury might not, without acting unreasonably, come to a different conclusion.

2. LIFE INSURANCE—WARRANTIES—REPRESENTATIONS.

A life policy provided that "insured * * * makes the following true and complete statements, which are hereby made a part of the contract of insurance, and if any of said statements shall be untrue in any respect, then this policy shall be null and void. * * * (j) I have never had * * * any bodily or mental infirmity * * * except as herein stated. (k) * * * I am in sound condition mentally and physi-

cally, except as herein stated." Held to be warranties, and not mere representations resting on the belief of insured.

8. SAME—GOOD FAITH—EFFECT.

If the fact is not as stated by insured, the warranty is breached, and it makes no difference that insured acted in good faith in making the statement.

4. SAME—RIGHT TO EXACT WARRANTIES.

A life insurance company may require the insured to warrant that he has never had any bodily or mental infirmity, except as stated in the contract of insurance, and that he is in sound condition mentally and physically, except as therein stated.

5. ERRONEOUS INSTRUCTIONS—CURE OF ERROR.

An erroneous instruction given of the court's own motion on a material point is not likely to be corrected by a subsequent correct instruction given by request, when the first instruction is not recalled or explained.

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

H. R. Boyd and C. A. Lightner, for plaintiff in error.
Josiah Patterson, for defendant in error.

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

SEVERENS, Circuit Judge. This is a suit brought by Mary E. Sale, the defendant in error, to recover the sum of \$9,000 upon an accident insurance policy issued to her husband, Dr. E. Paul Sale, June 18, 1900, and in which she was the beneficiary. The insurance was for one year. Dr. Sale was a physician practicing at Memphis, Tenn., and was a member of the faculty of the Memphis Hospital Medical College. On April 29, 1901, while on a visit to a patient, he suffered an accident from being thrown by his horse violently upon a stone pavement, whereby the neck of the femur of his right leg was broken. He did not recover from the accident, and died on the 8th of June following. The policy stipulated for the payment of \$9,000 to the wife of the insured if death should result from the bodily injuries therein mentioned, "as the proximate and sole cause thereof," and contained the following statements and agreement on the part of the insured:

"The insured on the acceptance of this policy makes the following true and complete statements, which are hereby made a part of the contract of insurance, and if any of said statements shall be untrue in any respect, then this policy shall be null and void. * * *

"(j) I have never had fits or disorders of the brain, vertigo, or hernia, or any bodily or mental infirmity or disorder, except as herein stated.

"(k) My habits of life are correct and temperate, and I am in sound condition mentally and physically, except as herein stated."

The insurance company rested its defense upon these grounds: First, that the policy was void for the reason that the insured had, prior to this insurance, suffered a bodily disorder which increased the risk; second, that at the time the insurance was effected he was not in sound physical condition, as he stated; and, third, that the accident was not the proximate and sole cause of the death of the insured.

¶ 3. See Insurance, vol. 28, Cent. Dig. §§ 567, 568.

There were a verdict and judgment for the plaintiff for the sum of \$9,418.50.

Upon the trial of the issues before the court and a jury, it was shown that in the latter part of April, 1900, the insured had an attack of pneumonia or of bronchitis (it is not clear which), and that acute nephritis, or inflammation of the kidneys, was developed; that he was in the care of a physician for some time; that a chemical analysis of the urine made at that time disclosed a derangement of the kidneys, but whether of the nature of Bright's disease, so called, or whether of a merely temporary nature, did not certainly appear; that he dieted for this trouble about six weeks, and seemingly had recovered at the time the policy was issued; and that he resumed his professional practice, and continued it until the time of the accident, in April, 1901. The evidence contained in the record, upon the character and gravity of the disorder of the insured, both before and at the date of the policy, gives ground for widely different conclusions. Whatever view we might ourselves take of the case upon its facts, we are unable to say that a jury might not, without acting unreasonably, come to a different conclusion. The jury adopted that most favorable to the plaintiff, upon the issues presented to them by the court, for they must, at least, have found that Dr. Sale did not believe that he had at any time a serious malady.

There was also evidence showing that, after the accident, very serious kidney derangement appeared; and it is hardly open to dispute, and is perhaps not disputed, that a kidney disorder contributed with the accident to cause the death of the insured. But whether this disorder existed at the time of the accident, or was a consequence developed by it, was, on the evidence, a question for the jury; it being possible to conclude that the latter was the fact. At the close of the testimony, counsel for the defendant moved the court for a peremptory instruction to find a verdict for the defendant. The motion was denied. For the reasons already stated, we think that in this there was no error.

A statute of Tennessee (Laws 1895, p. 332, c. 160, § 22) relating to representations and warranties in contracts of insurance reads as follows:

"Be it further enacted, that no written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material, or defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

But it is clear that it does not change or affect the general law of insurance applicable to the facts in this case, for it is not disputed that the matter which was the subject of the warranty increased the risk of loss, if the statement was not true, and in such case the matter is left by the statute as before.

The learned judge, in his instructions to the jury with reference to the interpretation and effect of the statements of the insured regarding his physical condition previous to and at the date of the issuance of the policy, said this:

"Now, when a man says that he has no bodily infirmity. It means that he does not know or suspect or believe that he has any bodily ailment of a permanent character, such as is calculated to weaken the constitution, impair the strength of the system, or to shorten life. It consequently does not include mere temporary ailment which is curable and passes away by treatment—for example, like a cold or a case of the grip, when it has passed away, or an acute indigestion or colic, or those many ailments which a man may suffer from overeating or overdrinking; acute alcoholism, such as a man getting too much whisky on a sudden occasion, so he would not be habitually subject to it, would be a condition from which he would recover, and would not be a serious ailment, although a very inconvenient one while it lasted."

And further:

"Now, if Dr. Sale knew or believed or suspected that he had a serious ailment of this kind, and stated that he never had any bodily or mental infirmity, that would be a false statement, and would void this policy. On the contrary, if he did not know or believe or suspect it, and was acting honestly, in the belief that he had no physical infirmity, it would not be a breach of this statement, although he may have had a temporary ailment of any kind, which promptly yielded to treatment, and passed away with such treatment."

Then, in summing up the issues on both branches of the case (that is to say, upon the question as to whether the accident was the proximate and sole cause of the death, and upon the question of the truth of the statements in regard to the physical condition of the insured before and at the time of the issuance of the policy), he said:

"Now, if you find either one of these issues in favor of the defendant (that is to say, if you find that chronic Bright's disease combined with the injury as an efficient operative to produce death), why, then, your verdict should be for the defendant; or if you find there was false answer made to this statement in the fact that Dr. Sale at the time did have a serious bodily infirmity, namely, chronic Bright's disease, and that would be serious if he had it, if he knew it, or believed or suspected it, then in that case your verdict should be for the defendant."

These instructions were likely to convey and we think did convey to the jury the impression that the question was not whether the statements were true in fact, but whether the insured believed them to be true. It was correctly held by the court below, and it is not questioned here, that these statements were of things material to the risk. Nor can it be doubted that they were warranties, as distinguished from mere representations resting on the belief of the insured. *Jeffries v. Life Insurance Co.*, 22 Wall. 47, 22 L. Ed. 833; *Ætna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. Ed. 401; *Provident Life Assurance Society v. Llewellyn*, 58 Fed. 940, 7 C. C. A. 579; *Security Life Ins. Co. v. Webb*, 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122; *Rice v. Deposit Co.*, 103 Fed. 427, 43 C. C. A. 270; *Carstairs v. American Bonding, etc., Co.* (C. C. A.) 116 Fed. 449; 1 *Arnold on Insurance*, 577; *May on Insurance*, § 156. The question was not, therefore, one of good faith on the part of the insured, and the warranty would not be fulfilled unless the fact was as stated. That part of the instruction which involved the knowledge of the insured in regard to the disease was specially excepted to, and was not corrected.

From another part of the judge's charge, we infer that he was of opinion that although a statement of the insured might be, in terms, a warranty, yet that, when applied to such a question as that of a man's health, had not the meaning it has when referring to an open and

visible fact, capable of demonstration, but was rather matter of opinion. His language was "that, according to the Moulor and Foster Cases, even a warranty, strictly so construed, with reference to the state of the assured's health, being, in its nature to an accident, matter of opinion, is somewhat different from a warranty as to the existence of a physical fact capable of demonstration and of definite knowledge." We suppose this reference is to *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447. But that part of the opinion in that case bearing on such a question was employed arguendo, in demonstrating that the statements of the insured were not intended as a warranty of the facts, but as a warranty of the good faith of the insured in making them. The whole inquiry was determined when that result was reached. But here that question was settled by the terms of the policy, and there is no room left for the court to find, in doubtful phraseology, a meaning which may be cut down to a representation made of the honest belief of the insured. That has been done which Mr. Justice Harlan said insurers would have to do in order to lay such hard lines for the insured. "If," said he, "those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion." Still, it must be said that questions and answers such as we are considering have generally been regarded as not extending to merely temporary derangements, but only to such diseases or disorders as become settled, and so liable to affect the vitality of the person. The answer which is expected corresponds to the object of making the inquiry, which is not to ascertain the unimportant and casual disturbances which may have happened to the health of the applicant, and which do not ordinarily have any lasting consequences, but only to those of such gravity as might reasonably excite an apprehension that his health and vigor might be affected thereby. This is the extent of the insurer's interest in the subject. And generally it would seem that the applicant would know whether he had been or then was subject to a malady of so grave a character. To be sure, that might not always happen. But at all events, the law is settled that the insurer may require the applicant to warrant himself to have been and to be sound in health, within the meaning of such questions as we are considering; and the applicant, if he chooses to accept the insurance upon those terms, is bound by them. And the law is generally that parties may impose such reasonable conditions to their contractual liability as they may agree upon, if they be not contrary to law.

It is true that the judge gave to the jury an instruction requested by the defendant as follows:

"The policy was issued in consideration of the warranties contained in it. If there was any breach of any of these warranties, that voids the policy, and there can be no recovery thereon. Subparagraphs 'j' and 'k' in section 16, on the back of the policy, are these:

"(j) I have never had fits or disorder of the brain, vertigo or hernia, or any bodily or mental infirmity or disorder.

"(k) My habits of life are correct and temperate, and I am in sound condition mentally and physically."

"These are warranties, and if previous to the time of the issuance of the policy, June 15, 1900, the insured, Dr. Sale, had any bodily infirmity or disorder which was of a serious character, then this statement would not be true; and that would be a breach of the policy, which would discharge the defendant.

"Again, if at the issuance of this policy the said Sale was not in a sound physical condition (that is, if he then had a serious disease which might have permanently impaired his health), that would also be a breach of the warranty, and defeat recovery for plaintiff."

These instructions stated the law correctly. But the mere giving them without recalling or explaining the instructions given on the court's own motion would not be likely to remove the impression already made. In order to render an error harmless, it must be made to appear clearly that the party complaining of it was not prejudiced.

The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed. *Bank of Metropolis v. New England Bank*, 6 How. 212, 12 L. Ed. 409; *Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; *Durant Min. Co. v. Percy Min. Co.*, 93 Fed. 166, 35 C. C. A. 252-255; 11 *Encycl. of Pl. & Prac.* 146, where the rule and its reasons are well stated and explained, and a great number of authorities are cited.

The instructions of the court in regard to the meaning and effect of the condition that the accident must be the proximate and sole cause of the death seem free from fault.

Certain questions relating to the admission of evidence are presented by the record. But as they may not arise in the same form upon another trial, we do not think it important to notice them.

For the error in the charge of the court herein noted, the judgment must be reversed, and a new trial awarded.

In re MUHLHAUSER et al.

(Circuit Court of Appeals, Sixth Circuit. March 18, 1903.)

No. 1,129.

1. BANKRUPTCY—SALE OF PROPERTY BY TRUSTEE—JURISDICTION OF COURT.

Unless there is some special direction in an order for the sale of real estate of a bankrupt, the trustee sells only the interest of the bankrupt therein, and one claiming an interest adverse to the bankrupt, and who is a stranger to the proceedings, is not affected by the sale, and has no interest in the proceeds; nor has the court of bankruptcy, after the property has been sold and conveyed, jurisdiction to adjudicate the rights of such claimant therein.

2. SAME.

A bankrupt corporation owned a manufacturing plant, which was subject to a mortgage and other liens. After an adjudication of the liens and priorities, the property was sold by order of the court, and conveyed to the purchaser. Subsequently the minor children and beneficiaries

under the will of a former part owner of the property asked leave to file a petition in the bankruptcy court, in which they set up their father's ownership of an undivided interest in the property, and that it had been conveyed to the corporation by the executrix, without any order of the probate court, in exchange for stock in the corporation; that petitioners had received nothing from the sale; that the corporation held the property in trust to the extent of their interest therein. The petition prayed that the sale made by the trustee and the adjudication of liens be set aside, and such orders entered as would protect petitioners' interests. *Held*, that the petition stated no ground for setting aside the sale, which could not affect the rights of petitioners, who were not parties to the proceeding, and that leave to file the petition was properly refused on the ground that it presented issues which the court was without jurisdiction to determine, but which could only be determined by a court of equity in a plenary suit to which the executrix and all persons in interest were parties.

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

The F. Muhlhauser Company, an Ohio corporation engaged in the manufacture of shoddy and other wool products at Cleveland, on February 4, 1902, filed an assignment for the benefit of its creditors in the insolvency court for the county of Cuyahoga, and immediately thereafter some of its creditors presented to the District Court for the Northern District of Ohio their petition praying that the said corporation be adjudicated a bankrupt. On the 6th of that month, the F. Muhlhauser Company consenting thereto, the adjudication was made. E. L. Hessenmueller was chosen trustee, qualified as such, and took possession of the assets of the bankrupt, consisting of certain real estate there situated on some of which its factories were built, machinery, and other personal property. A part of this property, which was appraised at the sum of \$221,390.60, was mortgaged to the City Trust Company to secure bonds for money loaned. The trustee filed a petition for leave to sell this portion of the assets. The trust company answered, and filed a cross-petition setting up the mortgage, and claiming certain expenses by way of insurance and other charges incident to the trust, in all, including the mortgage debt and expenses, etc., amounting to \$140,000. Other creditors filed answers and cross-petitions claiming liens on the same property. The referee, upon the hearing, found in favor of the lien claimed by the City Trust Company and certain other claimed liens, and fixed the order of their priority. The property was ordered to be sold. It was bid in by one Stecher, as trustee for the City Trust Company, and the Pearl Street Savings & Loan Company, two of the creditors. The sale was confirmed by the court, and a deed was ordered to be made to Stecher, as trustee, by the trustee in bankruptcy, and this was done, and the price paid to the trustee. Some time after this, these petitioners, without leave of the court, filed an intervening petition, the nature of which is not shown by the record, and which was subsequently withdrawn. Further reference to it is therefore unnecessary. Later on, the petitioners filed a motion for leave to file the petition over which the present controversy arose.

This is the petition of Adolph Muhlhauser, Benjamin Muhlhauser, Frank Muhlhauser, and Hilda Muhlhauser, minors, by Sophie Muhlhauser, their next friend, claiming as heirs and beneficiaries under the will of Frederick Muhlhauser, deceased. It sets forth that the land, buildings, structures, and mill plant, which constituted that part of the property sold by the trustee in bankruptcy as above stated, were previously owned and occupied by Frederick Muhlhauser, Julius Scheldt, and Edward Hessenmueller, each owning one-third part, who were operating the plant, as partners, under the name of F. Muhlhauser & Co.; that Hessenmueller died, and his executor conveyed his interest to Frederick Muhlhauser and Scheldt, and on the next day—February 14, 1885—those grantees deeded the property by quitclaim to F. Muhlhauser & Co., a partnership consisting of the same persons as the grantors in that deed; that thereafter one Schwab acquired one-half of

Scheldt's interest, but no deed was made to him; that the remainder of Scheldt's interest was afterwards acquired by Muhlhauser and Schwab, whereupon the former became vested with a five-eighths and the latter with a three-eighths interest in the property, and they continued the partnership business until Muhlhauser died; that by his will, after making certain bequests, he devised and bequeathed the residue of his estate to his eight children, of whom the petitioners are the four youngest, and, after authorizing the continuance of the partnership for five years, appointed Schwab and the widow, Antoinette Muhlhauser, executors, excusing them from filing bond or inventory; that those persons took out letters, but, Schwab soon after resigning, the widow continued sole executrix; that she, as executrix, and Schwab continued the partnership business until some time in 1894, when they and the four adult children organized a corporation under the name of the F. Muhlhauser Company, with an authorized capital of \$600,000, to which the executrix, in her special and her individual capacity, and Schwab, made a deed of warranty of all said property; that, in consideration of the five-eighths interest in the Muhlhauser estate, the executrix took \$154,000 of the capital stock to herself individually, which she claimed was due her in respect of a legacy to her of \$100,000 under the will, and an allowance of \$20,000 for the support of herself and her children, and also took to herself, as executrix, \$212,000 of said capital stock, which she still holds, and that the interest of the Muhlhauser estate conveyed to the company was then worth \$393,403.25, which was the sum agreed to be paid for it; that, at the time the sale was made, one Selig was appointed by the probate court "guardian of the estate of the petitioners," but that he received nothing in their behalf; that the executrix presented no petition to the probate court for leave to sell, but claimed authority under the will; that she reported the sale to that court as made for cash, and the sale was immediately confirmed, without notice to the petitioners; and that the executrix is not financially responsible.

And it is thereupon claimed that, whatever rights said corporation ever acquired in said property, it held as trustee for these petitioners to the extent of their interests. Their petition further alleges that the City Trust Company and the Pearl Street Savings & Loan Company had notice of the equities of the petitioners in the property on which they took their liens, and that Stecher had such notice when he bid it in for those companies and paid the purchase price therefor; and further, that there was a valuable good will incident to the property, of which that sold was part, and other advantages peculiar thereto, which were of the value of \$100,000, which were not included in the sale, and which are of no value detached from the property sold. The prayer is that Stecher, trustee, the City Trust Company, and the Savings & Loan Company be notified and required to answer, and that the sale to them and the confirmation thereof, as well as the findings of the referee in regard to the liens of said last-named companies, may be set aside, and all such judgments and orders be entered as are necessary to protect the interests of the petitioners.

On being notified, the City Trust Company appeared before the referee and objected to the granting leave to file the petition, for the following reasons:

"First. Said petitioners are not proper parties to this proceeding, inasmuch as they claim adversely to the F. Muhlhauser Company, the bankrupt herein, and the sale made was a sale only of the interests of the F. Muhlhauser corporation in the property sold, whether that interest was much or little, legal or equitable; and the money paid for said property was paid only for such interest, and is the proceeds only of such interest, and is distributable only among persons who are creditors of said corporation.

"Second. Because this court has not jurisdiction to entertain the application: (a) Having no jurisdiction in this proceeding to determine the questions as between the bankrupt and adverse claimants of the property. (b) Because the application confounds the boundaries of the equitable and bankruptcy jurisdictions. (c) Because this court cannot exercise jurisdiction, there not being involved any federal question, nor any question under the bankruptcy law, nor is the residence of the parties such as to give a federal court

jurisdiction. (d) Because the bankruptcy court has not jurisdiction over the persons sought to be brought in, and cannot decide controversies which may exist between them and said petitioners.

"Third. Because said petition discloses upon its face no controversies between the petitioners and said bankrupt, and the creditors of said bankrupt and the persons sought to be brought in, cognizable either in the court of bankruptcy or in any other federal court."

The referee made an order granting the leave prayed. The order was carried by the City Trust Company before the district judge for review, and was by him reversed. Thereupon the petitioners have brought the matter here for a review of the order made by the District Court under the direction of the judge.

C. S. Bentley, for petitioners.

John G. White, for respondents.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, after making the preceding statement, delivered the opinion of the court.

We think the position taken by the learned counsel for the petitioners is quite correct to the extent that it is claimed that, if the proposed petition presents a matter properly cognizable by the bankruptcy court, the orderly course would have been to allow it to be filed, leaving the final adjudication upon its merits to be settled upon full inquiry; with this reservation, however, that, if the case as made by the petition is manifestly frivolous or wanting all color of claim for the relief sought, the court might properly decline to entertain an idle controversy, such as the case supposed would be. We do not, however, think it indispensably necessary to express a definite opinion upon the question whether this petition, properly construed, is of the character last mentioned, because we agree that the order of the District Court was right, for the reason the petition presented issues and sought relief beyond the proper jurisdiction of the bankruptcy court; although we incline to the view that no ground for any relief within the power of the court is shown. The controversy proposed to be brought on was one peculiarly the subject of the jurisdiction of a court of equity, where all the parties interested might be brought in, and the whole subject determined upon plenary procedure. The petitioners were strangers to the proceedings, and other necessary parties, notably the executrix of Frederick Muhlhauser's will, were not present, nor could they then properly be brought in to litigate, with other strangers, questions of general equity in the District Court. The primary function of that court, when sitting in bankruptcy, is that of administration. It takes possession of the bankrupt's assets for that purpose. Of necessity, it must have and exercise such incidental jurisdiction as pertains to a court which takes exclusive possession and control of property. We do not need to define the extent of its powers while it retains the property under its dominion. It is quite clear that they do not follow it after it has been released and passed into the hands of purchasers, and extend to the settlement of the equities which may be claimed in the property by other parties. It is possible that before the sale the court had power, upon application, to settle the rights of parties, and make a special order that the whole title be sold and the

proceeds distributed according to its determination of their interests, or that it be sold and the controversy postponed to the distribution of the fund. Whether that could have been done, or would have been expedient, we do not say. Such practice would seem to be of doubtful propriety where such rights are disputed and their determination would involve a controversy productive of delay in the bankruptcy proceedings. But the rights of purchasers have now become fixed, and such a course is impracticable.

Unless there is some special direction in the order of sale, the trustee in bankruptcy sells, and the purchaser acquires, no other or greater rights in the property than the bankrupt had, except those rights of the bankrupt which are dominated by those of the creditors arising from a disposition of his property forbidden to the bankrupt—an exception not here involved. And it is not claimed that there was any special direction here, or that the court had acquired any authority to order a sale which would divest the interest of the petitioners. Such rights and interests as the bankrupt had, the court had lawful authority to sell. Such rights as these petitioners may have had in the property sold, remain to them, and can be asserted against the purchaser after the sale as effectually as they could have been before the bankruptcy against the bankrupt. The purchaser is subject to the rule of *caveat emptor*. Moreover, it is alleged in the petition that in this case the purchaser bought with full notice of the equities of the petitioners.

Undoubtedly, upon the facts alleged, the bankrupt had some interest in the property sold which it was proper to sell, and the creditors had the right to the proceeds. Only that was sold. The petitioners are not, as we understand, seeking to establish a claim as general creditors of the estate, but to pursue the property in specie, and assert a right therein superior to the rights of creditors. The relief they demand is that the decision of the referee that the property was subject to the liens claimed, and fixing the order of priority, should be vacated, a determination which did not affect them, for they were not parties and had not been notified; and that the sale should be set aside, or, as suggested on the argument, if that is not granted, then, under the prayer for general relief, that the proceeds of the property should be distributed to them in proportion to their interest. But if they had an interest, it was not sold, the order of sale not including it; and they would have no right to share in the proceeds.

Nor were the petitioners in position to prove as general creditors. They disaffirm the sale of the property by the executrix, and allege that, because of its invalidity, their rights in it were not divested. If that be so, they did not become creditors for its value. But we need not pursue that subject, for, as we have said, we think the petition must be construed as seeking to protect their specific interests in the property as they would stand if not affected by the sale of the executrix.

We are of opinion, therefore, that the petition was properly rejected, for the reasons that the controversy evidently proposed by it was one of which the District Court could not properly take jurisdiction, and that, upon any construction which might be put upon it, it clearly did

not present a case which would entitle the petitioner to the relief prayed, nor to any relief of like character which a bankruptcy court could award.

The order of the District Court must therefore be affirmed.

Note. Judge DAY participated in the decision of this case, although not now a member of the court.

FEDERAL OIL CO. v. WESTERN OIL CO. et al.

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

No. 871.

1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE.

A court of equity will not decree specific performance of a contract which is unfair or unconscionable, or where performance by the complainant is entirely optional, and no offer of performance is made.

2. SAME—OIL AND GAS LEASE—DELAY IN COMMENCING OPERATIONS.

An oil and gas lease on 80 acres of land provided that, if a well was not commenced at once, the lessee should pay the lessor \$8.75 per month during the delay. The lessor was to receive as a royalty one-eighth of the oil produced, and \$100 per year for each producing gas well, together with gas for use in his residence. There was no limit as to time, no provision obligating the lessee to make any well, and the contract was terminable at its option. It drilled no well, but made the monthly payments for about eight months, when the lessor refused to accept further payments and leased to another party. *Held*, that the contract contemplated the exploration of the property at once; that the monthly payments were not a part performance, but merely a stipulated sum for delay in performance; and that the contract would not be specifically enforced, because of its want of mutuality and unfairness.

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

For opinion below, see 112 Fed. 373.

The appellant on November 18, 1901, filed its bill in the court below, setting forth that on February 22, 1901, it entered into an agreement with the Bradfords, appellees, as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, R. W. Bradford of Van Buren, Ind., of the first part, hereby grant and guarantee unto the Federal Oil Company (a corporation) of Chicago, state of Illinois, second party, all the oil and gas in and under the following described premises together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas. The first part shall have the one-eighth ($\frac{1}{8}$) part of oil produced and saved from said premises to be delivered in the pipe line with which second party may connect their wells namely: All that certain lot of land, described as follows, to wit: South half of the northwest quarter of section ten (10) town twenty-five (25) north range nine (9) east, in county of Grant and state of Indiana, containing eighty (80) acres, more or less.

"To have and to hold the above-described premises on the following conditions:

"If gas only is found, in sufficient quantities to transport, second party agrees to pay first part one hundred (\$100) dollars annually for the product of each and every well so transported, and the first part to have gas free of

cost for heating and lighting purposes in dwelling house. Second party shall bury all oil and gas lines when same interfere with cultivation, and pay all damage done by reason of operating under this grant.

"In case no well is commenced within one day from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of eight and seventy-five hundredths dollars (\$8.75) for each month such commencement is delayed in advance. A check to the credit of the first part mailed to Van Buren Ind. will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from places of operations. No well shall be drilled nearer to buildings than three hundred feet, unless by agreement and with an understanding between the parties hereto. Second party to erect and maintain gates and keep same closed. Shackle lines shall be high enough for train to pass under. Second well shall be completed ninety days after first well and a well each ninety days thereafter until seven wells are in, then rental to cease.

"The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells, also the right to remove all its property at any time, and may cancel and annul this contract or any part thereof at any time.

"It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns."

The bill alleges compliance by the appellant with the stipulations of the instrument; the payment by it of \$8.75 per month in advance; that the tender of \$8.75 on October 19, 1901, was refused by the Bradfords, who, ignoring the rights of the appellant, placed the Western Oil Company, appellee, in possession, which company, with knowledge of the rights of the appellant, had placed machinery upon the land, had made excavations, and were drilling thereon for oil and gas; that subsequently thereto, and on November 14, 1901, the appellant moved material upon the land for the purpose of erecting a rig thereon to be used in drilling for oil and natural gas, which material was removed by the Western Oil Company, with the knowledge and approval of the Bradfords, and cast upon the highway. The bill alleges that the acts complained of constitute a lien and cloud upon the leasehold title of the appellant, removable only in equity, that it has no adequate remedy at law, and prays an injunction suitably restraining the appellees, and a decree to establish the title of the appellant, and to subordinate all rights of the appellees to the title of the appellant. A demurrer to the bill was sustained by the court below (*Federal Oil Company v. Western Oil Company* [C. C.] 112 Fed. 373), and on January 11, 1902, a decree passed dismissing the bill for want of equity, which decree is brought here for review.

E. H. Adams, for appellant.

Frank E. Gavin and D. J. Cable, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The nature of property in natural gas and oil contained in the earth, and the legal effect of the instrument here in question, have been settled authoritatively by the rulings of the Supreme Court of Indiana (*State v. Indiana & Ohio Oil, Gas & Min. Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; *People's Gas Company v. Tyner*, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; *Heal v. Niagara Oil Company*, 150 Ind. 483, 50 N. E. 482; *Manufacturers' Gas Company v. Indiana Gas Company*, 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768), and by the Supreme Court of the United States in *Ohio Coal Company v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. In the last case the nature of the property right is

thus clearly stated by Mr. Justice White (page 208, 177 U. S., page 583, 20 Sup. Ct., and 44 L. Ed. 729):

"It is apparent that the cases in question [referring to the Indiana cases cited], in accord with the rule of general law, settle the rule of property in the state of Indiana to be as follows: Although, in virtue of his proprietorship, the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession he has no title whatever to them as owner; that is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts, and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners."

The legal effect of the instrument here in question is therefore the grant of a mere use for the purpose of prospecting. The title is inchoate, and for purposes of exploration only until oil or gas is found.

If not found, no estate vests in the lessee, and his title, whatever it is, ends with the abandonment of the unsuccessful search. If found, the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract. *Heal v. Niagara Oil Company*, 150 Ind. 483, 50 N. E. 482; *Venture Oil Company v. Fretts*, 152 Pa. 451, 25 Atl. 732.

The question then arises whether the specific performance of this contract should be enforced in equity. The principles by which courts of equity are guided in respect to the subject are well established. The right to specific performance is not absolute, but rests in judicial discretion—not an arbitrary, capricious discretion, but sound judicial discretion, controlled by established principles of equity, and exercised upon the consideration of all the circumstances of each particular case. The contract must possess certain elements, to demand of equity the exercise of its jurisdiction to enforce performance. It must be upon a valuable consideration. It must be mutual in its obligations and in its remedy. It must be perfectly fair, equal, and just in its terms and in its circumstances, and the situation must be such that the remedy of specific performance will not be harsh or oppressive. The contract must be such that the court is able to make an efficient decree for its specific performance, and to enforce the decree when made. *Pomeroy's Eq. § 1405*.

With respect to the agreement in question, there are two considerations which go far to impeach its fairness:

First, its want of mutuality. No obligation is assumed by the appellant to do anything—either to drill or to pay. It is in fact a mere option. It is undoubtedly true, as urged by the appellant, with respect to enterprises of this character, that a company proposing to obtain natural gas or oil in large quantities for sale or manufacturing purposes finds it desirable to acquire exclusive right to search for the fugitive mineral in a large area or areas; and, though it be not necessary for the proper development of the particular area to drill

a well upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory near to wells deemed sufficient for the development of the territory. That, however, was not the purpose of this contract. It contemplated immediate exploration upon the particular land. A well was to be commenced within one day from its date, and postponement of operation was to be compensated for at the rate of \$8.75 for each month that such commencement was delayed. Bradford was to have one-eighth part of the oil produced, and, if gas only should be found, \$100 annually for the product of each well, and to have gas free of cost for heating and lighting purposes in his dwelling. It was not contemplated, as we read this instrument, that the appellant could indefinitely postpone the commencement of operations upon the payment of \$8.75 per month. That would only compensate during the delay for the gas which Bradford would receive if gas only should be found, and he would receive no compensation for oil if oil should be found by drilling upon other land within the oil district. The appellant had the right at any time to remove its property and cease operations without respect to the interests of Bradford, and with respect only to its own interest; and it could cancel and annul the contract, or any part thereof, at any time. There was here an entire want of mutuality—an utter absence of obligation on the part of the appellant. Equity will not specifically enforce a contract against one party when it cannot be specifically enforced against the other. *Marble Company v. Ripley*, 10 Wall. 339, 359, 19 L. Ed. 955; *Karrick v. Hannaman*, 168 U. S. 328, 336, 18 Sup. Ct. 135, 42 L. Ed. 484. Not only could this contract be not enforced against the appellant, for want of obligation assumed, but it does not offer by its bill to do that which it was the obvious intent of the contract it should do, but which it had not obligated itself to do, namely, to drill for oil and gas. Tender of performance is absolutely necessary, especially in cases of optional contracts. *Kelsey v. Crowther*, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. Ed. 1017; *Richards v. Green*, 23 N. J. Eq. 536. The only effect of a decree would be to drive the appellees out of possession and put the appellant in possession; allowing it to hold the land indefinitely without action upon its part, and to exploit adjacent lands for natural gas and oil, if it had acquired the right so to do, and thus to defeat any participation by Bradford in the oil which may be beneath the surface of his land. It is no answer to say that the appellant could only do this upon monthly payments to Bradford of \$8.75, for that would not compensate him for his share of the oil which it was hoped would be developed, and would permit the appellant if it had obtained like rights upon adjoining lands, and should, by drilling thereon, develop the presence of oil, to obtain the oil beneath the surface of Bradford's land without any participation therein by him. Nor does the fact that the monthly payments had been made for some months after the contract remove from this agreement the want of mutuality. That payment was not part performance of the contract, but merely the stipulated sum for delay in performance. Contracts unperformed, optional as to one party, are optional as to both. The contract here was deter-

mined by the act of Bradford refusing to receive the stipulated sum for further delay, and by placing the Western Oil Company in possession. *Knight v. Indiana Coal & Iron Company*, 47 Ind. 105, 17 Am. Rep. 692; *Huggins v. Daley*, 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320; *Reese v. Zinn* (C. C.) 103 Fed. 97.

Secondly, this agreement, upon its face, is without limit of time. There is no period within which the thing sought to be accomplished must be commenced, or the contract should cease. It is terminable at the will of the appellant. Certainly the contract is most unfair, and it would be unconscionable for a court of equity to place the appellant in a position to forever deprive the owner of the soil of the right to use his land, or to drill for such treasures as the earth may contain. *Munroe v. Armstrong*, 96 Pa. 307.

The decree is affirmed.

SHATTO v. ERIE R. CO

(Circuit Court of Appeals, Sixth Circuit. March 18, 1903.)

No. 1,136.

1 RAILROADS—CROSSINGS—INJURIES—SPEED ORDINANCE—VIOLATION—SIGNALS.

Where a railroad company ran its train over a city street crossing which was much used at a higher rate of speed than was permitted by a city ordinance, and without giving any warning signals, by reason of which plaintiff was injured while going over the crossing, such facts constituted a sufficient showing of negligence on the part of the railroad company to justify a submission of such issue to the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff approached a railroad crossing in a city, with which he was familiar, at about 4:30 in the afternoon. The wind was blowing strongly from the south, and his view of approaching trains from the north was obstructed by a freight train standing on a switch track nearest him and by high board fences, dwelling houses, piles of lumber, etc. Plaintiff had his ears covered, and, as he approached the crossing, looked and listened, and, hearing no train, continued driving his horse at a trot until within 100 feet of the track, when the horse began prancing or single-footing. Plaintiff drove between the cars of the freight train, which had been cut at the crossing, and when his horse got his head beyond the cars he swerved and jumped to the left, when plaintiff was struck by a train approaching from the north on the main track. *Held*, that plaintiff's failure to stop before driving on the track under such circumstances was contributory negligence as a matter of law.

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

W. S. Anderson and Murray & Koonce, for plaintiff in error.

C. D. Hine and John H. Clarke, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case was brought to recover for personal injuries sustained by the plaintiff as the result of a collision between one of the engines attached to a train of the defendant company and the vehicle in which the plaintiff was attempting to cross the track. Upon hearing the testimony for the plaintiff, the trial judge

directed a verdict in favor of the company upon the ground of the contributory negligence of the plaintiff at the time of the collision. This proceeding brings into review the correctness of that instruction.

It may be conceded at the outset that there was testimony sufficient to make a case to be submitted to a jury as to the negligence of the company in running its train at the time at a higher rate of speed than was permitted by the ordinance of the city of Sharon, Pa., within the limits of which city the accident happened, and that there was a failure on the part of the company to give the warning signals required by the exigencies of the situation in approaching the crossing of a much used street. We may, therefore, consider the case upon the theory that the negligence of the company was sufficiently proven, and turn our attention to the question of contributory negligence.

The railroad runs north and south, or nearly so, through a part of the city and across a number of streets, one of which, known as "Ohio Street," crosses the track of the defendant company at an angle, the street running approximately east and west. At a distance about 1,700 feet north of the crossing the passenger station is situated. Crossing Ohio street the defendant company has two tracks. Thirty feet to the west of the main track is the track of one of the divisions of the Lake Shore & Michigan Southern Railroad Company. At a distance of 7 feet and 8 inches east of the east rail of the defendant's main track there was a side track crossing Ohio street parallel with the defendant's main track. This side track extended above and below Ohio street for a considerable distance. On this siding, at the time of the accident, there was standing a train of freight cars, the train having been cut in two so as to permit a space for the passage of people and vehicles of from 9 to 12 feet in width. The view from Ohio street to the east of the crossing up the track to the north was obstructed by high board fences, dwelling houses, piles of lumber, a lumber mill, and the standing cars. At the time of the accident, for a distance of at least 225 feet east of the crossing on Ohio street, no view could be had of a train approaching the crossing from the north. Under these conditions a person approaching from the east on Ohio street could not, because of the freight cars and other obstructions, see up the track to the north until within two feet of the main track. On February 18, 1900, the plaintiff, accompanied by his brother-in-law, started to drive from his home to the west side of the city. In so doing, he drove along Ohio street, approaching this crossing from the east. Ohio street is a much-traveled street, and a common thoroughfare for the people of the city. It was in the afternoon, about 4:30 o'clock. The ground was covered with snow, and the wind was blowing strongly from the south. The plaintiff and his companion were riding in a phaeton with the curtains down, the former driving, and occupying the right-hand seat. The plaintiff's testimony tended to show that at a point from 200 to 225 feet east of the crossing he and his companion moved to the front of the seat, one looking north, and the other south, and listening for a train; that at a point about 90 feet east of the crossing he looked out around the buggy top, but could see nothing to the north because of the cars on the siding

above; that about 25 feet back from the track they looked and listened again, and heard nothing; that he started to drive through the opening between the cars; when his horse got his head beyond the cars, he swerved, and jumped to the left at an angle down the track; that the horse gave a second jump, and jerked the buggy off the ground, then into the middle of the track. The plaintiff testifies that his horse was going three or three and a half miles an hour just before he went past the freight cars. It appears that the plaintiff did not stop. He testifies that he and his companion were looking and listening from a point about 250 feet east of the crossing, and heard no train. The day was cold, and the plaintiff had on "ear tabs." The plaintiff was familiar with this crossing. Until within about 100 feet of the track, the horse was driven at a trot; after that, he was "prancing" or "single-footing." At a distance of 30 or 40 feet from the crossing, the horse pricked up his ears as though he heard something coming from behind. The plaintiff looked back, but saw nothing.

The principles which govern the determination of questions of contributory negligence in cases like the one at bar are well settled. The law requires of one approaching a railway crossing the exercise of his faculties of sight and hearing to avoid injury. While the standard is the care of ordinarily prudent persons under the same or similar circumstances, such care requires that in approaching a situation so dangerous as a railway crossing a person shall at least look and listen at such short distance from the crossing as to enable him to pass in safety. In some jurisdictions it is held that in all cases the traveler approaching the crossing must stop, look, and listen. This court has not gone so far as to require stopping in all cases. Under the peculiar circumstances of the case in *Cincinnati, N. O. & T. P. Ry. Co. v. Farra*, 13 C. C. A. 602, 66 Fed. 496, this court held that it was not contributory negligence, as a matter of law, for Mrs. Farra to drive upon the crossing without stopping. In that case, Judge Lurton, delivering the opinion of the court, said:

"We are not prepared to say that, ordinarily, it would not be the duty of one approaching the crossing to stop and look and listen, if the view of the crossing was obstructed, and the sense of hearing materially affected by the noise of the vehicle in which the person was driving. The Pennsylvania rule, which seems to make it the duty to stop under all circumstances, regardless of obstructions to the view or obstacles to the hearing, has not met with general acceptance, and seems calculated to condone carelessness and recklessness by railroad companies at public crossings, where the rights and duties of the public and the company are reciprocal. Neither are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured."

Where the view of the track is obscured so that one's vision can be of no service in enabling him to know of the approach of a train, and the traveler is required to rely upon his sense of hearing only, it must be an exceptional case which excuses one from stopping and listening before going into the danger which may be impending without other warning than he can get from his sense of hearing. A person, under such circumstances, may not rely implicitly upon the railroad company giving proper signals before approaching the cross-

ing, but must make use of his own faculties for self-protection. Elliott, in his work on Railroads (section 1167), states the rule as follows:

"While it cannot be justly affirmed, as we believe, as a matter of law, that there is a duty to stop in all cases, yet there are cases where the failure to stop must be deemed such a breach of duty as will defeat a recovery by the plaintiff. There are very many cases holding that the surroundings may be such as to impose upon the traveler the duty of stopping, looking, and listening, and these cases, as we think, assert the true doctrine. Some of the courts, in well-reasoned cases, press the rule further, and hold that the traveler must in all cases stop, look, and listen. As we have said, we do not think it can be justly affirmed as matter of law that there is a duty to stop in all cases, but we do think that the duty exists in cases where there is an obstruction to sight or hearing, and that, where the surroundings are such that but one conclusion can be reasonably drawn, and that conclusion is that it is negligence to proceed without halting, the court should without hesitation direct a verdict if no halt is made. In the majority of cases, however, the question is one of fact, rather than of law."

And in a note to the same section the author says:

"There is, however, substantial agreement upon the proposition that, when a reasonably effective observation cannot be made without stopping, then the traveler must stop and look and listen."

Subject to qualification under very peculiar circumstances, such as those in the Farra Case, where a woman incumbered by children was driving towards the crossing obscured more than usually by weeds and undergrowth, of which she is not shown to have had previous knowledge, negligently suffered to grow on the company's right of way, we think the rule stated by this author is the correct one. It may be added that the question of contributory negligence becomes one of law only when fair-minded men from the established or conceded facts would draw the conclusion of a want of ordinary care. Where opposing inferences may be drawn, the question of negligence, under proper instructions, must be submitted to the jury.

Applying these general principles to the case made out, did the court err in instructing the jury to return a verdict for the defendant? The plaintiff was familiar with the crossing. He knew that it had the two tracks—the siding and the main track just beyond. He knew that he could not see a train coming from the north because of the intervening obstructions. He saw the cars standing with an opening through which he might drive. Once through the opening by a horse's length, and he was practically upon the main track with no probable means of escape from death or injury. He could see nothing, and a strong wind from the south was blowing up the track, and carrying the sound of any train approaching from the north away from him. Under such circumstances he was bound to use the only sense which could help him to avoid danger with the more vigilance. He did not stop. He did not even slow his horse to a walk. He was riding in a curtained carriage, with "tabs" on his ears for protection against the cold. It seems to us that these are circumstances which call for the traveler to stop and listen with unimpeded hearing for an approaching train. In not doing so, and in driving upon the track in the manner stated, with his ears muffled, we think there was contributory negligence as a matter of law. It is argued that it would

have done no good to stop and listen. We cannot agree to this supposition; certainly not to the extent of exonerating the plaintiff from using the precautions obviously necessary for his protection, because they could not have changed the result. We think it only reasonable to suppose that, had he stopped and listened with open ears before going between the open cars, he must have heard the noise of the approaching train. Had he halted for a moment before going between the cars, the train would have passed in safety. Upon general principles we think the court did not err in giving a peremptory instruction for the defendant because of the contributory negligence of the plaintiff under the circumstances shown. While there are some resemblances, yet there are important differences between the facts of this case and that of *Cowen, Receiver, v. Grabow* (decided at this term) 120 Fed. 258. The obstructions to a view of the track were in such case much the same. But Shatto was seated in a phaeton, with the curtain down. Grabow was standing up in an open wagon. Shatto and his companions did not stop, though they looked to the right and left when about 90 feet from the crossing, and again when about 25 feet. Although there was a strong wind blowing from the direction from which the train came, and a view of the track was so obstructed as that he could not see to the north, and he was compelled to depend upon his hearing, he did not stop to better hear, and did not remove his "ear tabs," which were necessarily an obstacle to listening to advantage. Grabow, though without "ear tabs," did in fact stop and listen, when a few feet from the track. The Grabow Case presents somewhat exceptional facts. This conclusion renders it unnecessary to consider the correctness of what the court said in taking the case from the jury as to the application of the so-called Pennsylvania rule of "stop, look and listen" in the federal courts when the accident happens in that state.

Judgment affirmed.

Note. This case was decided and opinion prepared while Judge DAY was a member of this court.

BROWN et al. v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 35.

1. TUG AND TOW—LIABILITY OF TUG FOR LOSS OF TOW—TOW WITHOUT ANCHOR.

In a northeast storm of extraordinary violence, in the night, libelants' scow, which was loaded with stone, and had been placed in a fleet in the Hudson river off Haverstraw, broke adrift, and was injured upon the rocks. She had no anchor, and had been made fast to another scow. The fleet had been made up by respondent's tug in the afternoon and evening, with the purpose of starting down the river at 9 o'clock that night. The tug then went to Grassy Point to await the time for starting. The weather had been threatening during the afternoon, with snow, but was not so dangerous as to render it negligence for the tug to assemble the fleet. About 8 o'clock the wind and snow increased so

as to render it dangerous to start with the fleet, and also to approach the fleet in the darkness, and the tug remained away. There was no safe harbor for boats at the place during easterly storms, and it was the practice to allow scows, when so made up into fleets, to ride out storms in the open bay, which they had always previously done in safety. *Held*, upon findings that, owing to the snow and darkness, it would have been dangerous for the tug to approach the fleet at any time after 8 o'clock, and that the master had no knowledge that libelants' scow had no anchor, as it was her duty to have, that the tug was not negligent, nor liable for any part of the damage.

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

For opinion below, see 110 Fed. 780.

This cause comes here upon appeal from a decree which awarded half damages to the libelants for an alleged breach of a contract of towage, as a result of which their scow No. 31 suffered loss and damage in a storm in Haverstraw Bay on the night of November 26, 1898.

J. P. Kirlin, for appellant.

John T. Foley, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. Libelants' scow had been loaded with stone at Brown & Fleming's dock, about a mile above Verplanck's Point, and towards evening was taken from there by one of the respondent's tugs and towed over to a place off Grassy Point where tows were usually made up preparatory to being taken to New York. The captain of scow 31 describes the making up of the fleet as follows: The respondent's tug Townsend, just as it was beginning to get dark, took him over Haverstraw Bay to the usual meeting place, where he found four other boats—two brick barges ahead, and a brick barge and the stone scow Katie D. behind them. He made fast to the stern of the Katie D. This he puts at about 6 o'clock, or a little after. It was expected that the tug would start downriver with the fleet at high water, about 9 p. m. Having brought No. 31 to the fleet, she left them, and went to Grassy Point, about one-fourth mile distant, partly to tie up there until the hour of starting, and partly to inquire for other boats. After No. 31 joined company, only one more boat came, the Gladys, which lay alongside of her, tailed to one of the brick barges, the Star, which was there when she came. The Gladys was brought out by a small tug of the respondent, the Ingalls, some time between 8 and 9 p. m. There is conflict in the testimony as to the time at, and the order in, which the various boats arrived, but the captain of the libelants' scow is so clear and positive in his statements above given—he was repeatedly asked about them—that we are inclined to accept his account. Starting as he did before and arriving after dark (after a course of more than three miles), he was more likely to note the time accurately, through the circumstance, than would those on other boats, which were moved only a few hundred yards after darkness had once set in. The position of the various craft making up the flotilla, with No. 31 and the Gladys

in the last tier, corroborates him strongly. At the time the tow was thus made up by the addition of the Gladys, the entire flotilla was held by the anchor of one of the leading stoneboats. Apparently that was sufficient to hold them in good weather, and, with only one anchor down, the flotilla was in better shape to receive the tug when it should return at high water to take them down the river, and avoided risk of fouling when the tide turned.

When scow No. 31 was taken from Verplanck's Point, about 5 p. m., the weather was threatening. It had begun to snow about 2 p. m., the wind being to the northward and eastward. By the time she was made fast to the flotilla the storm had increased and become more threatening, but apparently no one apprehended that it would become too severe to start at high water, as planned; and, when the tug left the flotilla, her master said he would be back in about two hours. The District Judge finds that:

"By the records of the nearest station of the Weather Bureau, the wind increased from 16 to 19 miles between 4 and 6 o'clock, to 26 miles between 7 and 8, to 27 miles from 8 to 10 o'clock, to 34 from 10 to 11, and to 48 from 11 to midnight; continuing about the same all the next day."

The maximum velocity was 54 miles from 11:13 to 11:45. The storm that thus raged over the bay was one of most unusual severity. When it ceased, more than 25 wrecks were scattered along the banks of the Hudson. It was not a local storm, but extended down the New England coast. A year later it was described in periodicals as "The Great November Storm of 1898."

The six boats of the flotilla hung on the single anchor of the *Lizzie* and *Louise* until after 11 o'clock, when, the flotilla having turned with the tide, the *Washburn* put down one of her anchors. Subsequently, when she had drifted about a quarter of a mile, and was ashore in the mud, she put down the other. At about the time the *Washburn* put down her first, anchor word was passed that the boats behind must cast off their lines, as they could not be held together any longer. The scow *Star*, which was astern of the *Washburn*, dropped back, and, putting out her own anchors, rode out the storm in safety. The *Katy D.* had but a small anchor, and therefore slacked off her lines and hung onto her two leaders. None of the flotilla except the *Gladys* and No. 31 sustained any material damage. The captain of No. 31 objected to letting go, as he had no anchor. The *Gladys* volunteered to take a line from him, and, after they were made fast together, both boats cut loose from the *Katy D.* and the *Star*, and began to ride on the single anchor of the *Gladys*, which was then put overboard. The anchor of the *Gladys* held for about an hour, but finally proved insufficient for both vessels, and they drifted shoreward together. The *Gladys* foundered. Her crew abandoned her and went on board No. 31, which finally fetched up on shore, some distance below, at about 2 a. m.

There is no harbor for boats in Haverstraw Bay, with a northeast or southeast wind, and at times they are obliged to ride out storms in the open bay. If, after the fleet is made up in the manner described, heavy weather comes on, which makes it unsafe to proceed with the tow to New York at the expected time, the practice has al-

ways been to leave the scows riding at their anchors at the place where the tow is made up. In storms of exceptional severity, the boats, by slacking their own lines, drop apart, and each one rides at its own anchor. No instance previous to the one in question has been mentioned in the testimony where any barge thus left at anchor in bad weather has gone ashore or suffered damage.

The master and pilot of the tug Townsend, after making their inquiries about other boats at Grassy Point, returned to their tug about 8 p. m. They found that—

"The wind had so much increased, and that the snow was so thick, as they testify, that they could not see the boats at anchor, and did not know where to find them; and on consultation they agreed that it would be dangerous to start down river with the tow, as expected; and accordingly, without any further attention to the tow, they lay at the dock at Grassy Point until about 1 a. m. when, in consequence of the violence of the storm, and injuries to the tug by pounding there, the tug left Grassy Point and made her way to Verplanck's Point, where she passed the rest of the night without further damage."

The District Judge held the scow in fault for not having any suitable anchor on board. We concur in his conclusion, that "if she had had a suitable anchor, as the rest of the fleet had, it is not probable that either the Gladys or No. 31 would have suffered serious damage." From this finding of negligence the libelants have not appealed. He further held that there was no negligence attributable to the tug, either for taking the scow from Verplanck's Point dock to the flotilla, or for determining, when the storm increased, not to start out with the tow. The tug was held in fault, however, for not returning to the tow about 9 p. m., finding out that the scow had no anchor, and taking her back to "partial protection" on the south side of Verplanck's Point. We do not understand that the District Judge suggested that the flotilla could have been towed by the Townsend against the gale across the bay in safety. Certainly the evidence would warrant no such finding. But it was held that "on going to the tow, and upon finding that the tow had no anchor, the tug should have taken her to a less exposed place, if this was possible."

It may be noted that on the easterly shore the only sheltered place south of the point is a cove where the depth of the water is but 4 to 6 feet (No. 31 drew 10 feet), and without an anchor the tug could not have been kept in the mouth of the cove, where the water is deeper. The evidence of disinterested witnesses shows that it would have been most hazardous to undertake to haul her up the river to the dock from which she had been taken. Moreover, by the time the gale had begun to rage fiercely it would have been perilous for the Townsend, unable to make out lights through the thickly falling snow, to start athwart the wind, searching for the boats. There was great risk of collision with them, or of stranding the tug herself on the mud flats. The conclusion of the District Judge was evidently influenced by two findings of fact in which we are unable to concur. He finds that her master knew or ought to have suspected that the scow had no anchor. The master testified most positively that he had not the slightest intimation until after the accident that the scow had no anchor. It is true that, in response to a question, he says

he did not see an anchor on board of her. Of course, if none were there, he couldn't see one, but this answer in no way imports that he had looked to see whether she had an anchor or not. It in no way conflicts with his testimony that he had no intimation that this necessary part of her equipment was lacking. The District Judge further finds that the weather was such that the Townsend could have gone to the tow between 8 and 9 p. m. "without danger or difficulty, as the tugs Mabel and Ingalls went between these hours with additional scows, and placed them in the tow." We are satisfied that the preponderance of the evidence is the other way, as before pointed out, and that all the boats were in the flotilla before No. 31 arrived, except the Gladys, which was brought by the light-draft tug Ingalls a few hundred feet only from her anchorage near the flotilla.

We are of the opinion that, until the gale became so severe as to induce a reconsideration of the decision to start for New York at high water, there was no occasion for the Townsend to keep in the immediate vicinity of the anchored tow, and that, when that decision was arrived at, the condition of the weather was such that it was highly problematical if she would not have done more harm than good by undertaking to find the flotilla in the darkness on a lee shore. We are not prepared to hold the master in fault because, in the exercise of his best judgment, he decided not to hunt for the tow. In the exceptional character of the storm, and the negligence of the owner of the scow in not equipping her with anchors, we find enough to account satisfactorily for this accident, without holding the tug in fault.

The decree of the District Court is reversed, with costs, and cause remanded, with instructions to dismiss the libel, with costs.

THE CITY OF MACON.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 97.

1. COLLISION—STEAMER STRIKING GROUNDED VESSEL.

The steamer City of Macon, passing down the Savannah river in the daytime, struck and injured the Teviotdale, which was aground across the center of the channel, but leaving room for other vessels to pass in safety. She had been aground for some time, and was known to be by those in charge of the Macon, who could see her for several miles. On approaching, the Macon's signal was answered by a cross-signal, from which the master of the Macon concluded, as he testified, that the Teviotdale was in motion. *Held*, that such conclusion was unwarranted, and did not relieve the Macon from the presumption of negligence arising from the collision.

2. SAME—DAMAGES.

A steamer solely in fault for a collision with another which was grounded is liable for all the damage resulting, although a large part of it might have been avoided by a different handling of the injured vessel after the injury was received, where those in charge exercised their best judgment, which was concurred in by the local pilot and tugmen.

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

In Admiralty. Appeal from a decree of the District Court (100 Fed. 139) in favor of John R. Crooks, libellant, for the sum of \$37,744.11, damages for collision, against the steamship City of Macon. From this decree the Ocean Steamship Company of Savannah, owner and claimant of the City of Macon, duly appealed to this court.

Julien T. Davies and Herbert Barry, for appellant.
Henry Galbraith Ward, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. On the afternoon of the 24th day of April, 1899, the British steel steamship Teviotdale, loaded and on her way to the sea, grounded in the Savannah river opposite the lower end of Elba Island, and from 6 o'clock until the time of the collision she was lying at right angles to the channel, or nearly so. The deep channel at this point is about 500 feet wide. The Teviotdale is 350 feet in length and 43 feet beam. At the time in question she was drawing 24½ feet forward and 24 feet 6½ inches aft. She was proceeding, until she took the ground, under her own steam and with the assistance of two tugs. At about half past 5 o'clock the Macon left Savannah bound for New York. She is about 300 feet in length and was drawing 16½ feet forward and 18½ feet aft. After executing a number of unusual maneuvers the Macon, at about half past 6 o'clock, collided with the Teviotdale, striking her 60 feet aft of her stem inflicting a wound which extended above and below the water line. The tide was at flood at the time of the collision, extreme high water being about an hour later.

The District Court found the Macon solely at fault and in this ruling we concur. There was no vis major, no disturbance of the elements, no fog or wind and no unusual condition which interfered in the least with the safe navigation of the river. It was broad daylight and a vessel could be seen plainly all the way from Savannah to Tybee Island at the mouth of the river. It is admitted that the Teviotdale was seen by the Macon from the time she left the city wharf until the collision occurred. Clearly, then, it is not a case of inevitable accident. In such circumstances, when a collision occurs, it is due to faulty seamanship. The Teviotdale being aground and helpless the presumption is that she was not responsible for the accident. *The Granite State*, 3 Wall. 311, 18 L. Ed. 179; *The Louisiana*, 3 Wall. 164, 18 L. Ed. 85.

Unless some act of omission or commission on the part of the Teviotdale is shown, which contributed to the injury, the Macon must be held alone responsible. The attempt to inculcate the Teviotdale because she blew one blast of her whistle is evidently a defense suggested by the exigencies of the litigation. Three days after the accident, when the subject was fresh in his mind, the master of the Macon made a written report to the local inspectors of steam vessels at New York in which he makes no mention of signals or of any negligent act of the Teviotdale, but attributes the accident to the sudden sheering of the Macon occasioned by her touching bottom. He says:

"I attempted to pass under slow headway when the Macon took bottom sheering for the Teviotdale. I immediately reversed engine to full speed back but could not check headway sufficiently to prevent the accident."

In his testimony he says that when between 400 and 500 feet away he blew two blasts to indicate that he was directing his course to port and intended to pass under the bow of the Teviotdale and that the latter answered with one blast, which induced him to think that she was afloat and was directing her course to starboard, and that in the confusion of the moment he swung to starboard and struck the Teviotdale. It is not easy to say from the proof just where the Macon was when the exchange of signals took place, but it is probable, in view of the admission of the answer that the vessels were half a mile apart at the time, that she was distant considerably more than 500 feet.

Even if the rules for signaling at sea were applicable to inland waters—and we do not intend to intimate that they are—it is clear that the Teviotdale's whistle, whenever given, could not have deceived the Macon's pilot as to the salient features of the situation. He knew that the Teviotdale was aground, that she was lying directly across the channel, that her propeller was not revolving, that she had not moved perceptibly during the entire time and that tugs were about her bow endeavoring to pull her off. The master of the Macon was an experienced seaman, conversant with the navigation of the river, and to assert that he supposed that the Teviotdale was under way is to attribute to him an inexcusable stupidity for which no foundation can be found in the evidence. A finding that he was ignorant of the true situation would convict him of being mentally incompetent and this he certainly was not.

Again, it is asserted that the Macon was caught in an eddy caused by the tide flowing around the bow and stern of the Teviotdale. If this were true it was a situation which an experienced pilot should have anticipated. It is quite probable that a large vessel, 350 feet long, lying across a channel 500 feet wide, with the tide running in, will produce some disturbance in the water; eddies would naturally be formed at her bow and stern, but this condition should have been foreseen and guarded against.

The problem presented to the Macon was not an unusually difficult one. Either she could pass safely or she could not. If she could not she should not have made the attempt, at least not until she had slowed down, or stopped if necessary, and acquainted herself with the exact truth of the situation. If, on the other hand, she could have proceeded safely—and that this was possible is demonstrated by the fact that several other vessels passed without mishap—it was her duty to proceed cautiously and not change her course and reverse when she was so near the Teviotdale that such maneuvers would inevitably tend to bring her into collision.

The master of the Macon does not deny that he could have avoided the collision. He says:

"I reversed my engine when within 300 feet of the Teviotdale. The effect of this was to throw the Macon's bow to starboard very fast, and counter-

act the wheel. I think the reversing of the propeller caused me to strike the Teviotdale. If I hadn't stopped I would have gone across his bow."

Upon the whole case we are forced to the conclusion that the misfortune of the Teviotdale in getting aground was not a fault and that the accident was caused solely by the negligence of the Macon.

The Question of Damages.

The blow was not a severe one, the Macon was not injured at all, the Teviotdale's wound was about two feet long, its greatest width being about six inches. There was a crack above and below the aperture extending about 18 inches in each direction. About a foot of the opening was below the water line.

The commissioner awarded the libellant \$32,645.71, which with interest and costs makes the aggregate of the judgment \$37,774.11. That such a large award should result from so slight a wound seems astonishing and we enter upon the examination of this branch of the case with an inclination to reduce the damages if this can be done with justice to all concerned.

After the collision there was but a short time in which to act if the vessel was to be moved to a place where she could lie on an even keel, as only an hour elapsed before it was high water. A wound had been received the exact extent of which was unknown, the vessel was making water and as it was necessary to send to Savannah, seven miles distant, for competent machinists in order to make permanent repairs, only temporary repairs were possible during the period of high water. A serious question confronted the master of the Teviotdale; should he make the attempt to move his vessel where she would lie on a level bottom or leave her where she was? If he adopted the latter course there was danger that she might receive structural injury at low water and, on the other hand, she might fill and sink if she were moved into deeper water. We are inclined to think that he adopted the wiser course. Until the nature of the injury had been ascertained and the wound repaired prudence suggested that he should remain where he was. There can be no serious question as to the truth of this proposition. The next high tide was about half past 7 on the morning of the 25th.

The mechanics arrived from Savannah about five hours after the accident and immediately began the work of repair. In order to reach that part of the wound which was under water it was necessary to take out a portion of the cargo. The repairs were not completed until after high water on the morning of the 25th and at 8:30 that evening the Teviotdale was moved. Whether it would have been wise to have moved her on the morning tide presents the same problem which confronted the Teviotdale on the evening previous. In view of the serious strain received by her bottom on the 25th it is now probable that a large part of the damage might have been prevented had she been taken off on the morning tide. But this strain could not have been foreseen and if those in charge of the vessel exercised their best judgment in the emergency it is all the law required of them.

As was said in the *Magnolia*, Fed. Cas. No. 8,958, 3 Am. Law Reg. 465:

"The inquiry must be, whose fault was it that such condition existed? A party who has involved himself and others in a peril cannot be heard to complain of the want of the clearest judgment in the selection of the modes of extrication."

The local pilot and the tugmen seem to have concurred with the master in thinking that it would have been bad judgment to float the vessel after the collision. That this could have been done, with an hour more of flood tide, we have no reason to doubt. That these men took what they thought to be the safest course, as each emergency arose, cannot be successfully disputed. They acted in good faith and we have looked in vain for proof of such palpable fault on their part as will release the *Macon*. The wound inflicted by the *Macon* was the proximate cause of all the damage received by the *Teviotdale*; but for that she would have proceeded on her journey to Hamburg.

We have in the collision a natural and obvious cause for all the subsequent disasters which befell the *Teviotdale*. The court is not justified in entering the realms of conjecture for the purpose of theorizing as to what might have been the result had the sequence of events been different after the blow was given. The collision is sufficient to account for it all.

The judgment of the district court is affirmed with interest and costs.

UNITED STATES v. NORDLINGER.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 141.

1. CUSTOMS DUTIES—LEGHORN CITRON—FRUIT PRESERVED IN SUGAR.

Leghorn citron, preserved by being cut in halves, boiled and soaked in salt water, freshened, and then covered with syrup and boiled down, and fresh sugar placed thereon, and the process repeated until the peel is thoroughly impregnated with the sugar and cured, is taxable as "fruits preserved in sugar," under Tariff Act 1883, par. 302, 22 Stat. 504, and is not entitled to admission free under paragraph 704, 22 Stat. 519, as dried fruits not specifically enumerated.

2. SAME—WORDS AND PHRASES—TRADE MEANING—EVIDENCE.

Evidence as to the trade meaning of a term used in the tariff act is inadmissible unless such meaning differs from the ordinary dictionary meaning of the term, or its meaning in common speech.

3. SAME—CUSTOMS AND USAGES—EXISTENCE—CONFLICTING EVIDENCE.

Where, on an appeal from a classification of imported citron for duty, the importer claimed that the term "fruits preserved in sugar," as used in Tariff Act 1883, par. 302, 22 Stat. 504, was a trade term having a peculiar trade meaning as applied to preserved fruits, but the evidence as to such meaning, and whether it differed from the ordinary meaning of the term, was conflicting, it failed to show a general custom with regard to the use of such term, which would, therefore, be construed according to its ordinary meaning.

¶ 2. Interpretation of commercial and trade terms in tariff laws, see note to *Dennison Mfg. Co. v. U. S.*, 18 C. C. A. 545.

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

For opinion below, see 115 Fed. 828.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York, reversing a decision of the board of general appraisers, which affirmed a decision of the collector of the port of New York as to the classification for customs duties of certain imported merchandise.

J. Frank Lloyd, for the United States.

Albert Comstock, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise involved is citron imported from the Mediterranean, and known specifically as "Leghorn citron," because Leghorn is the place of largest export. The importation was under the tariff act of 1883, 22 Stat. 488, and the relevant paragraphs read as follows:

"Par. 302. Comfits, sweetmeats, or fruits preserved in sugar, spirits, syrup, or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, thirty-five per centum ad valorem."

"Free List: Par. 704. Fruits, green, ripe, or dried, not specially enumerated or provided for in this act."

The language of the free-list paragraph is most comprehensive. "Fruits" covers a large family, and the adjectives "green, ripe, or dried" indicate the three great groups into which that family may be divided. No one contends that the article in question is a comfit, a sweetmeat, or a jelly. If, therefore, we eliminate those specific articles, we may set down as a paraphrase of the two sections the following:

"All fruits shall be admitted free of duty, whether they be green, ripe, or dried; but if such fruits, whether green, ripe, or dried, be preserved in sugar, in spirits, in syrup, or in molasses, they shall pay a duty of thirty-five per centum ad valorem."

This is precisely what Congress has said, and there is nothing in the act to indicate that Congress intended anything different from what it did say. Two questions are presented: First, is this citron a fruit, green, ripe, or dried? and, second, is it preserved in sugar, in spirits, in syrup, or in molasses? When those questions are answered, its status for duty purposes should be determined.

Citron is the fruit of the citrus or citron tree. In its present condition no one contends that it is green or ripe, no one disputes that it is dried. It belongs, then, to the family of fruits, and falls within the great group of that family designated as "dried fruits." In common speech, and by the language of trade and commerce, as this record shows, it is a dried fruit. It has been put in its present condition by the following process: The fruit is cut in halves, and the pulp removed. The rind, which is much thicker than that of a lemon, is then placed in sea water, in casks; then put in water and boiled until it is soft and tender; then put into fresh-water tubs until the salt is drawn out; then put into what are known as "syruping tubs," and covered

with syrup, and, after it has stood a while in the syrup, that is drained off, and it is boiled down, and fresh sugar added, and it is put back over the fruit again, and this process is kept up until the citron or peel is thoroughly impregnated with the sugar and cured. Fruit thus treated has certainly been preserved in sugar (or in syrup), and would seem to come fairly within the exception. The importers, however, contend that, although in fact preserved in sugar, the language of trade and commerce requires that it shall be admitted free of duty, and a most voluminous record has been presented to enforce such contention. It is suggested that the phrase "fruits preserved in sugar," has such a meaning in trade that citron, although in fact within its terms, must be excluded from the provisions of paragraph 302.

Before examining the testimony, it should be noted that evidence merely tending to show that citron is known as a dried fruit in trade is not determinative of the case. Common knowledge would give it the same classification. There can be no doubt that it belongs to that group, the important question being whether it is also covered by the exception to that group which Congress created when it provided that all fruits when preserved in sugar should pay duty. The tariff act under construction was passed March 3, 1883. The testimony as to trade meanings, therefore, should be confined to a period anterior to that date. By so confining it, very much of the evidence must be rejected, notably the bulky package of newspaper market reports and price lists, practically all of which were published long subsequent to 1883. It should also be noted that it is not a name to which the importers seek to affix a special trade meaning, as was the case in *Mad-dock v. Magone*, 152 U. S. 371, 14 Sup. Ct. 588, 38 L. Ed. 482 (toys), *Bogle v. Magone*, 152 U. S. 627, 14 Sup. Ct. 718, 38 L. Ed. 574 (sauces), and *American Net & Twine Co. v. Worthington*, 141 U. S. 472, 12 Sup. Ct. 55, 35 L. Ed. 821 (gilling twine). It is a phrase which would seem to have been selected rather as descriptive of what Congress had in mind than as importing some special trade meaning. It is understood, of course, that a phrase has sometimes been held to have a peculiar meaning when used in a tariff act, because trade used that phrase, and used it with such peculiar meaning (*Toplitz v. Hedden*, 146 U. S. 257, 13 Sup. Ct. 70, 36 L. Ed. 961), but quite frequently the use of descriptive language is found to indicate an intention not to use words in any sense different from that which characterizes them in common speech. *Maillard v. Lawrence*, 16 How. 251, 14 L. Ed. 925; *De Forest v. Lawrence*, 13 How. 274, 14 L. Ed. 143; *Seeberger v. Cahn*, 137 U. S. 97, 11 Sup. Ct. 28, 34 L. Ed. 599; *Barber v. Schell*, 107 U. S. 617, 2 Sup. Ct. 301, 27 L. Ed. 490; *Newman v. Arthur*, 109 U. S. 132, 3 Sup. Ct. 88, 27 L. Ed. 883. Again it is essential to the admission of testimony as to trade meaning that such meaning should differ from the ordinary dictionary meaning, or that of common speech, otherwise such testimony is immaterial. *Maddock v. Magone*, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482. Finally, to give to descriptive language some special trade meaning different from its ordinary meaning by proof of commercial usage, the evidence must show that such usage is "definite, uniform, and general, not partial, local, or personal." *Id.*, 152 U. S. 368, 14 Sup. Ct. 588, 38

L. Ed. 482. See, also, *Berbecker v. Robertson*, 152 U. S. 376, 14 Sup. Ct. 590, 38 L. Ed. 484; *Saltonstall v. Wiebusch*, 156 U. S. 602, 15 Sup. Ct. 476, 39 L. Ed. 549; *Sonn v. Magone*, 139 U. S. 421, 16 Sup. Ct. 67, 40 L. Ed. 203; *Patton v. U. S.*, 159 U. S. 506, 16 Sup. Ct. 89, 40 L. Ed. 233; *Dennison Mfg. Co. v. U. S.*, 18 C. C. A. 543, 72 Fed. 259.

The fundamental question in the case is one of fact. Does the proof show that the phrase Congress has used to cut exceptions out of the three great groups of fruits is used in trade and commerce so uniformly with a peculiar meaning that it must be assumed that Congress used it with the same meaning, and thus made the descriptive words selected by it less comprehensive than they would be in ordinary use; for, even in tariff acts "language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown." *Maddock v. Magone*, *supra*. The burden of proof is upon the importers. How far is the evidence helpful to a conclusion that by the definite, uniform, and general understanding of the trade, which deals in such articles, the phrase "fruits preserved in sugar" has a meaning so restricted as not to include the dried fruit citron, although it is in fact preserved in sugar? Eighteen witnesses called by the importers (L. Nordlinger, B. Levy, Materne, Seggerman, Hirsh, E. J. Nordlinger, Auerbach, Mendelsohn, Landbrodie, Levis, Walsh, Stewart, Webber, Wilkins, Rosenfield, Young, Derrick, and White) and 14 witnesses called by the government (Levy, L. Nordlinger, Cavanna, MacCune, Colvin, Murtagh, Clark, Gelpi, Leslie, Bonney, Beebe, Hoffman, Steele, and Dudley) were either not asked to give the commercial meaning of the phrase "fruits preserved in sugar, spirits, syrups, or molasses," or else testified that they had never dealt in articles of that class, or only to a very limited extent, and therefore did not undertake to give a commercial meaning. Eleven witnesses called for the government (Madden, Githens, Jenkins, Oliver, Bigley, Lowry, Mackenzie, Pfister, Mackie, Gordon, and Des Bordes) testified that the phrase, "fruits preserved in sugar, spirits, syrup, or molasses," did not have a commercial signification different from its ordinary descriptive meaning. Of the other government witnesses La Manna says there was such a trade term known as "fruits preserved in sugar, syrup, spirits, or molasses," which would include French glacé fruits, and such other fruit crystallized or preserved in sugar, generally served upon the table and eaten as they were. Ericson says that the term "fruits preserved in sugar" would be too indefinite, would not be specific enough as to whether it was in syrup or crystallized, or glacé or candied; that the commercial term is "preserved fruits"; that there was a commercial phrase "fruits preserved in syrup," but not "fruits preserved in molasses." Henry says the phrase "fruits preserved," etc., was not known as a commercial phrase; that the term most ordinarily used was "preserves." Ballejo says that the trade term was "preserves," and so does Des Bordes. Baird says that a preserved fruit is a fruit put up in a sugar syrup and sold as a preserve. Aplin says that the phrase "fruits preserved," etc., did not have a commercial meaning different from its ordinary descriptive meaning,

and that "preserves" covers only fruits in more or less syrup, and in a moist condition. Of the importer's witnesses, Keller says that he had a commercial familiarity with the class of "comfits, sweetmeats, and fruits preserved," etc., and that under that head would come candies, glacé fruit, preserves in jars and syrups. Brady says that he dealt in the commercial class of "comfits, sweetmeats, and fruits preserved," etc., and that glacé fruits, Wisbaden fruits, and French preserves put up in sugar and brandy belonged to that class, which had the common characteristic of being fit to be eaten in the condition they were in. Lange, Goldmark, and Horner testified to the same effect. None of these witnesses were asked specifically if the phrase in the statute had a special trade meaning. That specific question, however, was put to the remaining witnesses called for the importer with this result: Gordon says that the phrases "fruits preserved in sugar," "in syrup," "in spirits," "in molasses" are "hardly commercial terms; only explanatory." Graham says that the phrase "fruits preserved," etc., is "merely descriptive." Ohrenstein says there are "no trade terms known as 'fruits preserved in sugar,'" etc. Weisel says the phrases "fruits preserved in sugar, in syrup, in spirits, in molasses," are none of them trade terms. Stetten says that he doesn't recollect "fruits preserved in syrup" or "fruits preserved in molasses" as trade terms. On the other hand, Blank says that "fruits preserved in syrup" is a trade term, but that "fruits preserved in sugar" and "fruits preserved in molasses" are not trade terms.

Upon this record we are unable to reach the conclusion that the phrase "fruits preserved in sugar" has such a definite, uniform, and general trade meaning that it will not operate to draw out of the third great group of fruits named in the free list, viz., "fruits dried," fruits which, although dried, are also in fact preserved in sugar.

The decision of the Circuit Court is reversed, and the decision of the board sustained.

NORTH AMERICAN TRANSPORTATION & TRADING CO. v. HOWELLS
et ux.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1903.)

No. 905.

1. DEPOSITIONS—DEDINUS POTESTATEM—DE BENE ESSE.

An application to take depositions under a *dedimus potestatem*, as authorized by Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], cannot be granted under Rev. St. § 863 [U. S. Comp. St. 1901, p. 661], which relates only to the taking of depositions *de bene esse*, and which section is expressly excluded from the operation of section 866.

2. SAME—REMOVAL OF CAUSES—FILING RECORD—TIME—PRIOR COMMISSION TO TAKE DEPOSITIONS.

Where an action was removed to the Circuit Court from a state court, and before the first day of the next succeeding term, within which defendant was required to file the record and appear, plaintiff applied for a commission to take the deposition of a witness, merely alleged to be a necessary and important witness and residing at such a distance that it was impossible to have him present in person, without any showing of necessity for haste in the taking of the testimony before the time for

filing the record had expired, the commission was erroneously granted, and the deposition taken thereon inadmissible.

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

Bausman & Kelleher, for plaintiff in error.

Allen, Allen & Stratton and Wm. E. Humphrey, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was commenced in one of the courts of the state of Washington by the defendants in error, as plaintiffs, to recover damages alleged to have been sustained by Anna Gerow Howells, wife of her coplaintiff, by a fall into the hold of one of the defendant's steamers. The defendant to the action moved the state court for the transfer of the cause to the Circuit Court of the United States for the District of Washington, which motion was granted on the 20th day of July, 1901. The first day of the then next session of the Circuit Court was the first Tuesday in December, 1901, by which time the defendant to the action was by law required to file the record in the Circuit Court; but, by rule 74 of the court below, either party to the suit was authorized to file the record therein at any time after the removal proceedings had become effective. On the 24th day of August, 1901, and before the filing of the record in the court below, the plaintiffs in the action gave the defendant thereto notice of an application to the Circuit Court for a commission upon interrogatories to take the deposition in California of Dr. Butler, the physician of the injured plaintiff. On the hearing of the application, which occurred September 4, 1901, the defendant appeared specially, objected to the jurisdiction of the court to issue such a commission, and declined to file cross-interrogatories. The court overruled the objections, allowing the defendant an exception to its ruling; but the court, in its order, provided that "all testimony taken under the commission provided for herein shall be taken subject to all legal objections at the trial of this cause." The defendant having filed no cross-interrogatories, the deposition was taken on those of the plaintiffs alone, and was returned to the Circuit Court on September 18, 1901—prior to the filing of the record of the case in that court; the record not being filed until November 27, 1901. The deposition was not published until July 14, 1902—the day prior to the time set for the trial of the case. On the trial the plaintiffs offered it in evidence, to which the defendants objected on the ground that it was "taken at a time when the court had no jurisdiction to issue such a commission, and in that the record had not been filed in this court by either party on removal from the state court." The objection was overruled, an exception by the defendant allowed, and the deposition read in evidence. It was material to the issues involved, and, if erroneously admitted, it was, of course, an error of which the plaintiff in error may rightly complain. So that the real and only question here involved is whether or not the commission under and by virtue of which the deposition was taken was legally issued.

The defendants in error rely in part upon the provisions of section 863 of the Revised Statutes [U. S. Comp. St. 1901, p. 661] as authority for the taking of the deposition. The provisions of that section are not only limited by its terms to depositions *de bene esse*, but its provisions are expressly made inapplicable to section 866 of the Revised Statutes [U. S. Comp. St. 1901, p. 663], by virtue of which the court below granted a *dedimus potestatem*, under the authority of which the deposition in question was taken. That section is as follows:

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five, shall not apply to any deposition to be taken under the authority of this section."

The distinction between the two methods of taking testimony will be found fully stated in the third edition of Foster's Federal Practice, on pages 634 to 650.

It is well settled that when a sufficient case for removal is made in the state court its jurisdiction *eo instante* comes to an end, and that of the federal court attaches. But it does not seem to be so well settled what powers the federal court can exercise prior to the filing therein of the record in the cause, nor, indeed, even where the record is filed by the plaintiff before the day on which the defendant is by law required to file it. Indeed, there is much contrariety of opinion and some confusion in the cases upon that subject, many of which will be found cited and reviewed by Judge Hammond in *Hamilton v. Fowler* (C. C.) 83 Fed. 321. He there thus summarizes his conclusions, as a result of his consideration of the statute and of the authorities:

"First. That the federal court, during the intermediate time between the filing of the petition for removal and the coming of the first day of the next session of the court, has the most plenary jurisdiction over the case, and may do with it anything that it could do with a case originally brought in the court, or that any court may do with any case of which it has acquired rightful jurisdiction; but, in the doing of those things, it must be governed, as in all cases, by the rules of practice and procedure applicable to that particular class of cases to which the one in hand belongs. Second. That, in the class of cases comprehending those removed from a state court, the acts of Congress regulating the removal and the practice therein have prescribed the next term of the federal court as the earliest day when the parties to the suit are required to appear in the federal court, so that the case may proceed in the ordinary way to a final hearing in due course of proper practice and procedure, and until that time they are not required to appear and proceed; but, upon due notice for that purpose, if any extraordinary procedure be necessary to preserve the property in litigation or the rights of the litigants, either party may be required to appear for such extraordinary purpose, and either may bring along the record, and file it for a proper hearing of the application, whatever it be; and while the court has the jurisdiction, as it always has, to proceed even erroneously, it has no rightful authority to proceed erroneously, and it would be error, before the return day, to hear any application not falling within the limits above indicated."

Section 3 of the removal act of March 3, 1887 (24 Stat. 553) as amended by the act of August 13, 1888 (25 Stat. 433 [U. S. Comp. St. 1901, p. 510]), provides that the condition of the removal bond shall be for the payment of costs; for the removing party's appearance and entering special bail in such suit, if special bail was originally required therein; and further provides that "the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

While conceding the plenary jurisdiction of the federal court over the parties and subject-matter of the suit from the time the removal proceedings in the state court are perfected, the court, in *Hamilton v. Fowler*, in our opinion, very properly observed:

"Because a court has jurisdiction of the parties and of the case, it does not follow that it would be proper to do anything which, according to the rules of practice and procedure, cannot be done at that particular time. These rules of practice and procedure, if regulated by statute, are imperative, and control the power of the court, for statutory rules of procedure and practice cannot be changed by precedent of decision or by rule of court, but the statute must govern in all cases. As here, when the statute says that the parties shall have until the first day of the next term of the court to file their record, it means that they shall have that time; and, when the statute says that 'the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court,' it means that it shall not thus proceed before that time, and anything that has not already been done in the case cannot be done until that time, in the normal and orderly course of procedure; but if any extraordinary steps are necessary for the preservation of the thing within the jurisdiction, or the protection of the rights of the parties to the thing within the jurisdiction, or to the use of the thing within the jurisdiction, the court may deal with these extraordinary conditions according to the circumstances of the case, and upon such due and regular notice as may be prescribed by rules of practice or otherwise; but it is only as to these extraordinary and necessitous conditions that the power of the court can be invoked to proceed with the case before the time appointed by the statute for proceeding with it. This distinction is one of practical importance, because, under the statute, both parties understand that the first day of the next term of the federal court to which the case is removable is the day when they are expected to be in court to proceed with the case; and like a party served with a writ in an original case, returnable to a particular day, it is not to be expected that they will appear at any time prior thereto, in the ordinary course of practice, while, as to extraordinary emergencies, they may be expected and required to appear whenever rules of court or notices to that end are served upon them; and this is in full analogy to all other methods of practice generally known to our courts."

"Keeping in mind, then, the proper distinctions between the jurisdiction over the case, and the power and authority to proceed according to the law governing the practice of the court, whatever that be, there is no difficulty in maintaining at the same time the jurisdiction of the case and the rights of the parties as to the matter of procedure, and, along with both, of preserving the thing in controversy against any impairment or destruction by reason of any delay."

The same views were indicated by Judge Severens in *Torrent v. Lumber Co.* (C. C.) 37 Fed. 727, where he said:

"I do not agree to the proposition that there is an intermediate state in which a case is resting after the filing of the petition and bond in the state court, and before the day when the record must be filed in the federal court, and in which the jurisdiction of the latter court is inchoate, and can only be exercised piecemeal, as necessity requires. On the contrary, it appears to me

that the correct view of the matter is to regard the jurisdiction over the case as being absolutely and completely acquired by the federal court upon the instant when the state court loses it, and that is upon the proper filing of the petition and bond in the latter court. And it seems to me that the concession that the court may exercise its authority over the case upon its own views as to the necessity for it is tantamount to an admission that its jurisdiction is fully vested. But in the exercise of its jurisdiction, the federal court is bound to follow the course of practice prescribed by law. If it fails to do this in dealing with the case, its authority is erroneously exercised. It is not, therefore, a question of jurisdiction, but of regularity only. This appears to me to be the view of the subject taken by the Supreme Court in *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643, where it is said in the opinion delivered by Chief Justice Waite, at page 15, 104 U. S., 26 L. Ed. 643: "We are aware that in the Removal Cases, 100 U. S. 475, 25 L. Ed. 593, and *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354, it is said, in substance, that, after the petition for removal and the entering of the record, the jurisdiction of the circuit court is complete; but this evidently refers to the right of the circuit court to proceed with the cause. The entering of the record is necessary for that, but not for the transfer of jurisdiction."

The necessity for the record, to enable the federal court to exercise its jurisdiction in the usual and orderly proceedings applicable to the case, was also indicated by this court in the case of *Cœur D'Alene Ry. & Nav. Co. v. Spalding*, 35 C. C. A. 295, 93 Fed. 280.

The present case presented to the court below nothing calling for the exercise of any extraordinary power on its part, nor was there even any showing made indicating any necessity for immediate haste in the taking of the testimony for which the commission was applied for and granted; it being based solely upon an affidavit stating "that Dr. E. S. Butler, a resident and citizen of San Diego, California, is a necessary and important witness for the plaintiff herein, and, by reason of the distance of the present residence of the said witness, it is impossible to have said witness present in person." There was nothing before the Circuit Court even indicating the character of the pending action in which it was proposed to take the testimony—nothing to indicate to the court what direct or cross interrogatories would be pertinent or appropriate. We think, therefore, that there was no legal basis for the commission granted by the court below under which the deposition in question was taken, and therefore that it was erroneously admitted in evidence.

We notice a statement by Judge Phillips in his opinion in the case of *Kansas City & T. Ry. Co. v. Interstate Lumber Co.* (C. C.) 36 Fed. 9, 11, that it was "held orally by Judge Dillon, when judge of this circuit, that between the time of the order of removal in the state court, and the filing of the record in the United States court, depositions might be taken *de bene esse*." The defendants in error contend that that ruling is an authority directly in point in support of the action of the court below. In that counsel is mistaken, for the reason that such depositions are taken without the interposition of the court, and at the instance of the party desiring them, upon the prescribed notice.

For the error above pointed out, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

INSLEY v. GARSIDE et al

(Circuit Court of Appeals, Ninth Circuit. March 9, 1903.)

No. 829.

1. BANKRUPTCY—CLAIM OF SURETY—PURPOSE TO CONTEST LIABILITY—EFFECT.

The contingent claim of the surety of a bankrupt principal, who, in his petition for allowance of his claim, expressly limits his admission of his liability as surety to the bankruptcy proceedings, thereby indicating an intention to contest his obligation, is improperly allowed.

2. SAME—PROVABILITY OF CLAIM.

Under Bankr. Act 1898, § 571 (Act July 1, 1898, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), providing that, whenever a creditor whose claim is secured by the individual undertaking of any person fails to prove his claim, the surety may do so in the creditor's name, and, if he discharge such undertaking, shall be pro tanto subrogated to the creditor's rights, the contingent claim of a surety of a bankrupt principal is not provable; it being the creditor's claim only that is provable.

Appeal from the District Court of the United States for the District of Alaska, Division No. 1.

J. F. Malony and Malony & Cobb, for appellant.

Winn & Shackelford (Charles B. Marks, of counsel), for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This is an appeal by the trustee of the estate of one I. J. Sharick, a bankrupt, from a judgment allowing a claim against the bankrupt estate in favor of the appellees, George W. Garside and William Winn, and decreeing its priority over all other claims against the estate. The claim of Garside and Winn arises out of these facts: Sharick, who was carrying on the jewelry business at Juneau, Alaska, in the name of the Alaska Jewelry Company, obtained in the court below a decree of divorce against his wife, Caroline Sharick. Thereafter Mrs. Sharick filed therein a petition praying that the decree be modified or annulled, and that she be awarded and decreed to have alimony of and from said I. J. Sharick. Mrs. Sharick also commenced an action in the same court against I. J. Sharick and the Alaska Jewelry Company for a division of the stock of jewelry, which she alleged to be community property of herself and I. J. Sharick. In the latter action, the court having appointed a receiver of the jewelry, it was ordered by the court that:

"Upon the defendants, I. J. Sharick and the Alaska Jewelry Company, executing a good and sufficient bond herein in the sum of \$2,000, conditioned that the said I. J. Sharick shall pay off and discharge any decree that may be rendered against him in this cause, or in the cause of I. J. Sharick against Caroline Sharick, or that the said Alaska Jewelry Company and I. J. Sharick shall have the said property now in the hands of a receiver forthcoming to abide any decree that may be rendered in either of the above-mentioned proceedings in favor of the said Caroline Sharick, affecting the said property, then that the temporary receiver herein return all the property in his hands and be discharged."

Thereupon a bond was given by I. J. Sharick and the Alaska Jewelry Company, as principals, with George W. Garside and William Winn as sureties, to Caroline Sharick, in the sum of \$2,000, conditioned that:

"Whereas, the said Caroline Sharick has filed her petition in the case of I. J. Sharick vs. Caroline Sharick, to have a certain decree of divorce in said cause rendered in the United States District Court for Alaska, October 3d, 1899, set aside or modified, and has also filed the above-entitled cause as ancillary thereto, and has procured the honorable District Court of the United States for Alaska to appoint a temporary receiver for the stock of jewelry now in the store of the Alaska Jewelry Company on Seward street, Juneau, Alaska, inventorying \$3,154.30; and whereas, the said court has directed the temporary receiver to return said property to the said Alaska Jewelry Company and I. J. Sharick, upon their executing a bond in the sum of \$2,000: Now, if the said I. J. Sharick shall pay off and discharge any decree that may be entered against him in favor of Caroline Sharick in the above-mentioned proceedings, or if the said Alaska Jewelry Company and I. J. Sharick shall have said property forthcoming, to abide any decree that may be rendered by said court in the above-mentioned proceedings in favor of the said Caroline Sharick affecting said property, then this obligation shall be null and void; otherwise to remain in full force and effect."

Upon the execution of the bond the court ordered—

"That Emery Valentine, the temporary receiver herein, be, and he is hereby, directed and required to turn over and deliver to the defendants I. J. Sharick and the Alaska Jewelry Company all the property now in his hands as temporary receiver herein, and that thereupon he be discharged from further duties as temporary receiver herein."

For security against liability on that bond, Sharick and the Alaska Jewelry Company at the same time executed to Garside and Winn a chattel mortgage purporting to cover the stock of jewelry, which had been inventoried and found by the court to be of the value of \$3,154.30, which chattel mortgage contained the following:

"The purpose of this conveyance is such that, whereas, the said G. W. Garside and Wm. Winn have signed for us a bond as sureties thereon, the sum of \$2,000 in a certain cause pending in the United States District Court for Alaska, wherein Caroline Sharick is plaintiff and I. J. Sharick and the Alaska Jewelry Company are defendants,

"Now, if the said bond and the obligations thereunder incurred shall be discharged by order of the court, then this conveyance shall be null and void, otherwise to remain in full force and effect.

"It is further understood and agreed that the grantors herein shall remain in possession and full control of said stock, and shall have the right to sell the same in ordinary course of trade, but the money realized on all such sales shall be deposited with S. Blum at the close of each day, and shall not be paid out by the said S. Blum prior to the discharge of said bond, except to pay for articles bought to replace articles sold from said stock or to replenish the same, and all articles so bought and entered in said store to replace said stock are hereby embraced in and covered by this mortgage to all intents and purposes the same as if they now constituted a part of said stock. The said S. Blum is also authorized to pay the necessary running expenses of said store.

"It is further agreed and understood that if the grantors herein shall fail to turn over the said money and comply with all the conditions herein contained, the said grantees are hereby authorized and empowered to take possession of said store building and the stock therein contained, and retain possession of the same during the life of this mortgage."

The action of Mrs. Sharick against I. J. Sharick and the Alaska Jewelry Company, and her petition in the divorce suit, were consolidated and tried together by the court below, which found, among other things, that the decree of divorce was obtained by I. J. Sharick through fraud, and without notice to his wife; that while they were man and

wife they accumulated by their joint efforts a large amount of property; that in 1896 they were living, with their children, in Tacoma, Wash., where Sharick was conducting a jewelry business, and was the owner of a stock of merchandise of the value of \$15,000; that in the month of January of that year he deserted his wife and children, and, without notice to her or to his creditors, left Tacoma for South America, taking with him the most valuable part of his stock, and finally located at Juneau, Alaska, taking there with him money and property of \$3,000 or more in value.

The tenth, eleventh, twelfth, and thirteenth findings made by the court in the consolidated case referred to are as follows:

"Tenth. Whether the \$3,000 admitted by I. J. Sharick to have been brought by him to Juneau was the result of his earnings, or was the proceeds of the community property taken by him from the stock of goods at Tacoma, the court is unable to determine with certainty. Mr. I. J. Sharick has been so impeached by other testimony in the case that the court cannot give credit to his statement that said \$3,000 was earned by him after leaving Tacoma. The only inference the court can draw is that it was a part of the community property, or the avails thereof, taken by him from Tacoma at the time he deserted his wife and family.

"Eleventh. That Caroline Sharick, the plaintiff, did not desert said I. J. Sharick, and in no wise violated her marriage obligations toward I. J. Sharick.

"Twelfth. That I. J. Sharick did desert Caroline Sharick and her children.

"Thirteenth. That I. J. Sharick is now indebted to divers and sundry persons in the sum of \$1,000; that he has property of the value of about \$2,000 over and above his indebtedness."

Based upon these findings, the court below decreed—

"That the former decree of divorce be, and is, modified in the matter of alimony only, and that the said Caroline Sharick do have and recover of I. J. Sharick, as alimony, the sum of \$800, and the said I. J. Sharick is hereby required to pay the same to said Caroline Sharick forthwith; and there is hereby set aside to said Caroline Sharick, out of the stock of goods heretofore involved in this case, goods to the amount in value of the said sum of \$800, as her separate property, and as in satisfaction of the alimony hereby adjudged to her; and it is further ordered that, in case the said I. J. Sharick shall fail to pay said sum of money as hereinbefore directed, that Emory Valentine be, and he is hereby, appointed receiver in this action to take charge of the said goods, jewelry, and merchandise, upon giving a good and sufficient bond in the sum of \$3,000, conditioned for the faithful discharge of his duties as receiver in this behalf, and that he set aside a certain portion of the said goods at the invoice price to this plaintiff, to the amount and value of \$800; that he shall cause to be sold at public vendue so much of the remaining goods and merchandise, to the highest and best bidder for cash, as will be sufficient to pay the cost and expense of this suit and the sums of money heretofore ordered to be paid as alimony pendente lite, and cost and disbursements so ordered paid, and as yet remaining unpaid; that upon the delivery of said goods by the said I. J. Sharick to the said receiver, and all thereof, except such as has been sold in a due course of business and can be duly accounted for by the said I. J. Sharick, the bond heretofore given by the said Sharick, conditioned for the payment of any sum of money that might be adjudged against him, the said Sharick, in this behalf, and have the property heretofore invoiced forthcoming to abide the result of any decree that might be rendered in these proceedings, is hereby set aside and discharged, and the sureties discharged from the obligation thereof as to any default that may hereafter be made by said Sharick in that behalf."

On the 28th day of March, 1901, certain creditors of I. J. Sharick filed their petition in bankruptcy against him, which resulted in the

seizure of the stock of jewelry by the marshal under the order of the bankruptcy court; in the subsequent adjudging of Sharick a bankrupt; in the appointment of C. D. Rogers as referee in bankruptcy, the presentation to him by the appellees, Garside and Winn, of their claim against the bankrupt's estate, based upon the aforesaid bond and chattel mortgage, and the decree of the court below, from which the present appeal is taken, allowing that as a preferred claim to the extent of \$584, and directing its payment out of the funds of the estate in the registry of the court. It is not pretended that the appellees have ever paid anything on the bond executed by them; and, in their petition for the payment of their claim out of the estate of the bankrupt in preference to all other claims, there is, so far from any unqualified admission of any liability on their part, a strong inference of a denial of any such liability. Yet the judgment appealed from gives them \$584 of the funds of the estate of the bankrupt, in preference to all other claims against it, leaving them at liberty to make the contest indicated by subdivision 14 of their petition, which is as follows:

"That your petitioners are advised, and being so advised, for the purpose of these proceedings only, and not by way of confession to said Caroline Sharick, allege that they are liable upon said bond for the sum of \$1,025.65, with interest thereon at the rate of eight per cent. per annum from the 27th day of March, 1901, to the said Caroline Sharick."

But over and above this is the fact that, conceding that Mrs. Sharick's demand against the bankrupt, as established by the judgment against him, is provable in bankruptcy, it is her claim that must be proved. It was her claim against I. J. Sharick that was secured by the bond executed by the appellees. She is the creditor of the bankrupt, not the sureties of her debtor. Section 57i of the present bankruptcy act (Act July 1, 1898, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) expressly provides:

"Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name; and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor."

The rights of the appellees in the premises are thus stated and defined by the statute in plain and unambiguous language. Referring to it and persons in the position of the appellees, Collier on Bankruptcy (3d Ed.) p. 383, says:

"Where the bankrupt is the principal debtor, and there is a fixed liability on his part, even though the liability of his surety to the creditor is not fixed, and though, as a consequence, the liability of the bankrupt principal to the surety is not fixed, yet the surety, by the provisions of section 57i, may prove the claim, if the creditor does not do so. But in this case it is the fixed liability of the bankrupt to the creditor which is proved, not the contingent liability of the bankrupt to the surety. The surety proves not his contingent claim, but the claim of the creditor, and he must prove it in the creditor's name. If he makes such proof, and discharges such undertaking in whole or in part, he is to that extent subrogated to the rights of the creditor."

The judgment appealed from is reversed, with costs.

DAVIS v. MILLS et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 64.

1. LIMITATION OF ACTIONS—DEMURRER.

Where the statement of plaintiff's cause of action shows that plaintiff could not under any circumstances avoid the defense of limitations, such defense may be set up by demurrer in an action pending in Connecticut.

2. CORPORATIONS—REPORTS—FAILURE TO FILE—LIABILITY OF TRUSTEES—LIMITATIONS—APPLICATION OF FOREIGN STATUTE.

Gen. St. Conn. 1888, § 1379, providing that "no suit for any forfeiture on any penal statute shall be brought, but within one year next after the commission of the offense," does not apply to an action in the federal court sitting in Connecticut against trustees of a Montana mining corporation, residing in Connecticut, to recover debts of the corporation, as authorized by Civ. Code Mont. § 451, by reason of the trustees' failure to file annually a specified report of the company's business, as required by such section.

3. SAME—STATUTES—REPEAL.

Comp. St. Mont. § 45, providing that in any action for a penalty or forfeiture, when the action is given to an individual, except where the statute imposing it prescribes a different limitation, the action shall be commenced within one year, was repealed by Code Civ. Proc. Mont. § 515, subd. 1, declaring that an action on a statute for a penalty or forfeiture, when the action is given to an individual, shall be brought within two years, and section 3482, declaring that, in all cases provided for by the Code, all statutes previously in force, whether consistent or not, were repealed and abrogated, unless expressly continued.

4. SAME.

Under Code Civ. Proc. Mont. tit. 2, prescribing the time for the commencement of actions, and declaring (section 554) that such title shall not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, Code Civ. Proc. Mont. § 515, providing that an action on a statute for a penalty or forfeiture shall be brought within two years, unless a different limitation is prescribed by the statute, has no application to such action.

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

John A. Shelton, for plaintiff in error.

W. W. Hyde, for defendants in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The plaintiff is a citizen of Montana, and the owner, by assignment, of three causes of action (for goods sold and on promissory note) against the Obelisk Mining & Concentrating Company, a Montana corporation. The indebtedness of the company upon these causes of action accrued July 31, 1892, July 1, 1892, and December 12, 1892, respectively.

The defendants are citizens of Connecticut, resident continuously therein for more than 12 years last past, and at all the times mentioned

¶ 1. See Limitation of Actions, vol. 33, Cent. Dig. §§ 670, 671, 673.

¶ 4. Limitation of actions against corporate officers, see note to *Patterson v. Wade*, 53 C. C. A. 7.

in the complaint were trustees of the said company. The statutes of Montana provide that within 20 days from the 1st day of September every such company shall annually file a specified report, and that, if it "shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made." Section 460 of chapter 25 of division 5 of the Compiled Statutes of Montana, which was in force when the cause of action arose, re-enacted as section 451 of the Civil Code of Montana, which went into effect July 1, 1895.

The Obelisk Company did not make and file such report within 20 days from the 1st day of September, 1893, or at any time, except on September 20, 1890, and on September 1, 1892. It is conceded that, under the decisions in Montana, the cause of action accrued against the directors upon the failure to file the first report due next after the debt matured, and that the continuance of the default on the part of the directors in successive years did not have the effect of renewing their liability. The three causes of action here sued upon therefore accrued against the defendants not later than September 22, 1893. This action was brought July 30, 1897, to enforce a joint and several liability of defendants for the debts of the company above set forth.

The defendants have demurred to the complaint, assigning as three separate grounds of demurrer that the causes of action all accrued more than one, more than two, and more than three years prior to the commencement of the action.

The plaintiff contends that the defense of the statute of limitations cannot be set up by demurrer. This is wholly a question of Connecticut practice, and there is authority supporting this contention in *O'Connor v. Waterbury*, 69 Conn. 206, 37 Atl. 499. But in a later cause in the same state it was held that, where there was no possible question of the avoidance of a statute of limitations by a new promise, so that plaintiff need not be given an opportunity to reply to such a defense, a different rule applied. "The plaintiff stated its claim fully, and the statement showed that it could not under any circumstances maintain it against the defendant's objection. It was therefore his right to set this up by demurrer." *Hartford & C. R. R. v. Montague*, 72 Conn. 692, 45 Atl. 961.

Defendants rely upon a Connecticut statute which reads as follows: "Sec. 1379. No suit for any forfeiture upon any penal statute shall be brought, but within one year next after the commission of the offense." Referring to this statute, the Supreme Court of Errors in Connecticut has held that it is applicable only to a statute "that declares a forfeiture and deals with an offense. And it must be a forfeiture and an offense in the sense in which these terms are used in a penal statute. * * * Penal statutes, strictly and properly, are those imposing punishment for an offense against the state. And the expression 'penal statutes' does not ordinarily include statutes which give a private action against a wrongdoer." *Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1. See, also, *Wells v. Cooper*, 57 Conn. 52, 17 Atl. 281; *Borough v. Hall*, 64 Conn. 426, 30 Atl. 47.

We are of the opinion that the provisions of section 1379 do not apply to such a cause of action as is set forth in the complaint.

Defendants further rely upon sections 45 and 50 of the Compiled Statutes of Montana, which read as follows:

"Sec. 45. (1) In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory, except where the statute imposing it prescribes a different limitation; (2) an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process shall be commenced within one year."

"Sec. 50. If when the cause of action shall accrue against a person he is out of the territory, the action may be commenced within the time herein limited, after his return to the territory; and if after the cause of action shall have accrued he depart from this territory, the time of his absence shall not be a part of the time limited for the commencement of the action."

Section 42, however, was repealed two years before this suit was brought, by the Code of Civil Procedure. That Code contains the following sections:

"Sec. 510. The periods prescribed for the commencement of actions * * * are as follows: * * *

"Sec. 515. Within two years: (1) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

"Sec. 541. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

"Sec. 3482. * * * in all cases provided for by this Code, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated."

"Sec. 3450. This Code takes effect at twelve o'clock noon on the first day of July, A. D. 1895."

The effect of this legislation was to abrogate the old section 45 of the Compiled Statutes on July 1, 1895.

Defendants further rely upon section 515 of the Code of Civil Procedure, above quoted. That Code and the Civil Code, which contains the provision imposing liability for failure to file report, went into effect on the same day. Civ. Code, § 4650. In the Code of Civil Procedure there is a title, numbered 2, and containing four chapters (sections 470 to 559), which deals with the time of commencing actions. It contains section 515, above quoted, and also contains the following:

"Sec. 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created [sic]."

This section makes the provisions of section 515 inapplicable to such a cause of action as that set out in the complaint.

As to the question whether the last-quoted section (554), applies to the action at bar, this court has not reached a conclusion. *Hobbs v. National Bank*, 37 C. C. A. 513, 96 Fed. 396; same case on rehear-

ing, 41 C. C. A. 205, 101 Fed. 77; Brunswick Terminal Co. v. Nat. Bank of Baltimore, 40 C. C. A. 22, 99 Fed. 635; Whitman v. Citizens' Bank, 49 C. C. A. 122, 110 Fed. 503.

In view of the conflicting decisions, this question will be certified to the Supreme Court, and decision on this writ of error will meanwhile be reserved.

In re CITY TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 18, 1903.)

No. 1,117.

1. BANKRUPTCY—LABOR CLAIMS—PRIORITY—STATUTES—CONSTRUCTION.

Rev. St. Ohio 1890, § 3206a, provides that, in all cases where property of an employer is placed in the hands of an assignee or trustee, claims for labor performed within three months prior to the appointment of such trustee shall be first paid. Section 6355 declares that every person who shall have performed any labor "as an operative" in the service of an assignor shall be entitled to receive out of the funds, before the payment of other creditors, the full amount of wages due for such labor within 12 months preceding the assignment, but that such provisions shall not prejudice securities given or liens obtained in good faith, etc., with certain exceptions. *Held*, that such sections were not inconsistent, since section 6355 deals only with the fund in the hands of an assignor or trustee, and applies only to such laborers as are operatives, and, having been subsequently enacted, deprives such laborers of the general preference created by section 3206a.

2. SAME—MORTGAGE LIENS—PRIORITY.

Under Rev. St. Ohio 1890, § 6355, as amended by Act April 5, 1889, declaring a preference in the distribution of the proceeds of the property of an assigned estate in the hands of the trustee, in favor of every person who shall have performed any labor as an operative in the service of the assignor, for labor performed within 12 months preceding the assignment, but declaring that its provisions shall not prejudice securities given in good faith, for value, except certain judgments by confession, or security given with intent to create a preference or to secure a pre-existing debt, other than on real estate for the purchase money thereof, which should be invalid as against such labor claims, the claims of operatives of a bankrupt were not entitled to priority in the distribution of its estate as against a mortgage executed in good faith to secure bonds issued for money loaned, and a bona fide assignment of the bankrupt's equity in the bonds, executed more than six months before bankruptcy to secure a valid debt.

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

Bacon & Clay, Smith & Taft, and White, Johnson, McCaslin & Cannon, for petitioners.

Nathan Loeser and Walter C. Ong, opposed.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This is a petition to review an order of the District Court awarding priority to certain claims for labor filed with the trustee in bankruptcy over two certain liens under a mortgage as hereinafter set forth. The F. Muhlhauser Company, an Ohio corporation, carrying on business at Cleveland, Ohio, on the 15th day of

March, 1901, duly executed and filed for record its mortgage lien on certain realty to secure bonds in the sum of \$150,000, and also a mortgage on certain chattels to secure the same bonds, which was duly filed on March 15, 1901, and afterwards refiled on March 12, 1902, as required by the statute. On March 15, 1901, the City Trust Company loaned to the F. Muhlhauser Company \$140,000, taking as collateral security therefor the said issue of bonds. On August 14, 1901, the F. Muhlhauser Company assigned to the Pearl Street Savings & Loan Company its equity in the bonds to secure a debt in the sum of \$21,531.52. On February 4, 1902, a deed of assignment for the benefit of creditors of the F. Muhlhauser Company was duly executed by that company and filed in the court of insolvency of Cuyahoga county. On the 6th of February the corporation was adjudicated a bankrupt. The labor claimants asked to have their claims for work and labor performed within three months next preceding the assignment allowed in preference to the mortgage liens of the City Trust Company and the Pearl Street Savings & Loan Company. Such labor claims were presented in the aggregate sum of \$4,379.31. The referee held in favor of the priority of the mortgage liens. The District Court, upon the authority of *In re Laird*, 109 Fed. 550, 48 C. C. A. 538, decided by this court in June, 1901, reversed this finding, and awarded priority to the labor claimants over the liens in question. *In re Laird* was decided on an interpretation of section 3206a of the Revised Statutes of Ohio of 1890, undertaking to fix a charge or lien upon the fund in cases where the debtor's property is placed in the hands of a receiver, trustee, or assignee, in favor of labor claims accruing within three months. In that case the property of a partnership had been placed in the hands of a receiver in the state court, and the property converted into money before the intervention of bankruptcy proceedings. We held that the fund passed into the possession and jurisdiction of the bankruptcy court, impressed with a charge amounting to a lien in favor of the labor claims. The question made in this case had no reference to the rights of lienholders under section 6355 of the Revised Statutes of Ohio of 1890, regulating general assignments. The controversy was between general creditors and labor claimants, where the property was placed in the hands of a receiver in the state court. We have no disposition to qualify the conclusions reached as to the construction and application of section 3206a, in view of the facts presented in the case of *In re Laird*. A similar construction was given to the statute of Iowa, in terms much similar to the Ohio statute, in *Reynolds v. Black*, 91 Iowa, 1, 58 N. W. 922. Judge Adams, of the Southern District of New York, gave the statute of that state the same effect in a well-considered opinion in *In re Jacob Slomka*, 9 Am. Bank. R. 124, 117 Fed. 688.

We are now to consider section 3206a of the Revised Statutes of Ohio of 1890, in connection with section 6355. These sections are:

"Sec. 3206a. * * * And in all cases where property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver, or trustee is appointed, shall be first paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust."

"Sec. 6355. All taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee or trustee; out of the proceeds of the property assigned in preference to any claim against the assignor, and every person who shall have performed any labor as an operative in the service of the assignor, shall be entitled to receive out of the funds, before the payment of other creditors, the full amount of the wages due to such person for such labor performed within twelve months preceding the assignment, not exceeding three hundred dollars. But the foregoing provisions shall not prejudice or any way affect securities given or liens obtained in good faith, for value, but judgments by confession on warrants of attorney rendered within two months prior to such assignment, or securities given within such time to create a preference among creditors, or to secure a pre-existing debt other than upon real estate for the purchase money thereof, shall be of no force or validity as against such claims for labor to the extent above provided, in case of assignment."

The first-quoted section was passed in April, 1883. The latter section was amended, as hereinafter stated, in April, 1889. It is a settled rule of statutory construction that the later declaration of the legislative will impliedly repeals the earlier, if the two are irreconcilable. It is equally true that repeals by implication are not favored, and, if possible, both enactments must stand, and apparently conflicting provisions be reconciled. Endlich on Interpretation of Statutes, § 182.

The provisions of these statutes, in certain respects, are not conflicting. Section 3206a applies to all classes of labor claims, and creates a preferential charge on the fund when the property has been placed in the hands of an assignee, receiver, or trustee. Section 6355 is a part of the chapter regulating the administration of estates of insolvent debtors, and deals with the distribution of the fund in the hands of the assignee. It does not have to do with estates placed in the hands of receivers or trustees, nor does it make provision for all claims of laborers, but for those who shall perform labor as operatives in the service of the assignor. All laborers are not operatives. Generally speaking, an operative is a person employed as a workman in mill or factory; a skilled workman; an artisan; especially one who operates a machine in a factory. Standard Dictionary. Several cases are found in the Ohio Reports dealing with the question as to what constitutes an operative, within the meaning of this section. It will not be profitable to cite them now, as we are not concerned with a question of that class. It is enough to say that this is one class of labor claims broadly covered in section 3206a, which in section 6355 are made the subject of special provision. It is a settled principle of statutory construction that where a case is specifically provided for in clear and distinct terms, the special statute will prevail over the terms of a general law which might otherwise govern the case. Endlich on Interpretation of Statutes, § 399, and note. This is clearly the result where the last declaration of legislative intention on a particular subject is repugnant to the provisions of a general law. And without regard to priority of enactment, the specific provisions will control as exceptions to the matters embraced in other general provisions. *Townsend v. Little*, 109 U. S. 504-512, 3 Sup. Ct. 357, 27 L. Ed. 1012.

Section 6355, in so far as it undertakes to provide for the payment of operatives' claims for labor performed within 12 months preceding

the assignment, not exceeding \$300, has long been a part of the Ohio statute law. On April 5, 1889, the following important amendment was made to this section:

"But the foregoing provisions shall not prejudice or in any way affect securities given or liens obtained in good faith, for value, but judgments by confession on warrants of attorney rendered within two months prior to such assignment, or security given within such time to create a preference among creditors, or to secure a pre-existing debt other than upon real estate for the purchase money thereof, shall be of no force or validity as against such claims for labor to the extent above provided in case of assignment."

The liens set up in this case were created more than two months prior to the assignment, and, according to the findings of the referee, were obtained in good faith and for value. Consequently, if this section is to apply, they are of that class of liens which are not to be postponed to the labor claims of operatives in the employ of the assignor. The referee has found that the claims in this case are those of operatives of that class. While we realize the general principle which gives to this kind of legislation a liberal construction, with a view to carrying out its beneficent purposes, we do not think it was the intention of the Legislature to give to laborers of this class the benefit of both sections 3206a and 6355. As we have said, the broad provisions of 3206a might include all classes of laborers; but in section 6355 the Legislature is dealing with a distinct class, fixing the right to preferential payment in cases of assignment. We think the principle to which we have heretofore adverted is controlling. The special provision covering the very class of claims set up in this case must control over the general terms of another section of the statutes, which, standing alone, might be held to include them. As to the claims of operatives in the employ of the assignor, the law gave certain preferential payment out of the fund to be realized. By the amendment of April 5, 1889, it was expressly declared that such claims shall not prejudice or in any way affect certain liens obtained in good faith and for value. In this case we think both the lien and the laborer's claims come within the express terms of section 6355 as amended, which should be given controlling effect. In this view of the law, we think there was error in giving priority to the labor claims over the liens in controversy.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

Note. This case was decided and opinion prepared while Judge DAY was a member of this court.

TYEE CONSOL. MIN. CO. V. LANGSTEDT.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1903.)

No. 875.

1. ERROR—DISMISSAL OF WRIT—DATE OF FILING ASSIGNMENT OF ERRORS.

A writ of error will not be dismissed because the assignment of errors bears the file mark of the clerk of the trial court of a date later than that on which the petition for the writ was filed and allowed, where from its date and from reference thereto in the petition it appears that

the assignment of errors was in fact presented to the court and lodged with the clerk on the same date as the petition.

2. LIMITATION—EJECTMENT—EVIDENCE OF POSSESSION.

Under Code Civ. Proc. Alaska, c. 2, § 4, which provides that no action to recover real property or the possession thereof shall be maintained unless it shall appear that plaintiff or one of his predecessors in title was seised or possessed of the premises within 10 years before the commencement of the action, the legal title is sufficient to establish both seisin and possession, unless an ouster by actual adverse possession is shown.

3. ADVERSE POSSESSION—REQUISITES—EXCLUSIVE AND HOSTILE CHARACTER.

A finding, in an action of ejectment by the owner of the legal title to a mining claim to recover a portion thereof, that defendant had been in the "actual, open, notorious, and continuous possession" of the land described in the complaint, with claim of ownership for a longer time than that required to bar the action by adverse possession, will not sustain a judgment for defendant on that ground, but it must further appear that his possession was both exclusive and hostile.

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

The plaintiff in error brought ejectment to recover the possession of a certain portion of the land patented to it as a lode-mining claim. The defendant pleaded the statute of limitations. Thereupon the parties stipulated as follows:

"It is hereby stipulated by and between the parties to this action, and by and between their respective attorneys, that the issue involved in this case is the question of the statute of limitations; that is to say, if the court finds that the plaintiff has commenced its action against the defendant within the time limited by law, then the plaintiff shall have judgment against the defendant; if the court shall find that the plaintiff did not commence its action against the defendant within the time limited by law, then the defendant shall have judgment.

"It is further stipulated and agreed that the Bonanza King lode claim, described in the complaint herein, was located on January 29, 1884, by one Walter Pierce; that said Pierce conveyed by deed said Bonanza King lode claim to M. W. Murry on May 13, 1884; that receiver's receipt issued to said Murry on May 20, 1890, and that United States patent for said Bonanza King lode claim issued to said Murry from the government of the United States on December 26, 1890; that thereafter said Murry conveyed by deed said Bonanza King lode claim to one Frank Griffin, and that said Griffin, on May 28, 1895, conveyed by deed said Bonanza King lode claim to the Tye Consolidated Mining Company, the plaintiff herein.

"It is further agreed that this stipulation shall affect and extend to eight cases, numbered 29a, 30a, 32a, 33a, 35a, 37a, 38a, and 39a, inclusive, as the same now appear upon the calendar of this court at this term."

The stipulation left to the court the decision of the question whether the defense as pleaded was a bar. The court found thereon, in the precise words of the answer, as follows: "That the defendant and his grantors and predecessors in interest have been in the actual, open, notorious, and continuous possession, for a period of more than ten years prior to the commencement of this action, of the land in controversy. That the defendant, his grantors and predecessors in interest, during the entire period of ten years as above set forth, and ever since, have claimed to be the owners of said land, and that they now claim adversely to the plaintiff." Thereupon the court concluded that the cause of action accrued more than 10 years prior to the commencement thereof, and dismissed the same.

John G. Heid, R. E. Lewis, and Alfred Sutro, for plaintiff in error.
Lorenzo S. B. Sawyer and Crews & Hellenthall, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

A motion is made to dismiss the writ of error upon the ground that no assignment of errors was filed with the clerk of the court below at the time of filing the petition for the writ. The motion is made upon the condition of the record as it appears, showing the file marks of the clerk of the court at Juneau, Alaska. From these indorsements of the clerk it appears that the petition for the writ was filed on June 23, 1902; that the writ was issued on that day, and was filed on July 10, 1902; and that on the same day the assignment of errors was filed. The case of *Frame v. Portland, etc., Co.*, 47 C. C. A. 664, 108 Fed. 750, is cited in support of the motion. In that case the Circuit Court of Appeals for the Eighth Circuit held it indispensable, under rule 11 (32 C. C. A. cxlvi), that the assignment of errors be filed before the issuance of the writ, to the end that the judge to whom application is made for the writ may be informed of the alleged errors upon which the petitioner relies, in order to decide whether the prayer of the petition shall be granted, and that the opposing counsel, as well as the appellate court, may be informed of the questions of law which are to be raised for consideration. On referring to the transcript in the present case, it will be seen that the assignment of errors bears date June 23, 1902, the date of the presentation of the petition, and that in the petition reference is made to it as "the assignment of errors filed herewith." The fair inference from these facts is that the assignment of errors was in fact presented to the trial court, and was lodged with the clerk thereof, at the time when the petition for the writ was filed, and that, through some oversight of the clerk or misconception of his duty, the file mark was not placed thereon until July 10th. In the absence of a showing to the contrary, the presumption will be indulged that such was the case, and the motion to dismiss will therefore be denied.

This case presents on the merits the single question of law whether the cause of action was barred by the statute of limitations. The lode claim in controversy was located as a mining claim on January 29, 1884, by one Walter Pierce, who on May 13, 1884, conveyed the same to W. W. Murry. The receiver's receipt was issued to said Murry on May 20, 1890, and on December 26, 1890, he received a patent from the United States. His grantee commenced the present action on December 24, 1900. The defendant in error answered, denying every allegation of the complaint, and alleging that he and his grantors and predecessors in interest had been in the "actual, open, notorious, and continuous possession" of the tract of land described in the complaint more than 10 years prior to the date of the commencement of the action, and during that period, "and ever since, have claimed to be the owner of said tract of land, and that the defendant now claims adversely to the plaintiff." A stipulation was filed whereby it was admitted that the mining claim was located and that patent issued as above stated, and the parties submitted to the court the decision of the question of law whether the facts pleaded in the answer constituted a bar to the action, and agreed that judgment should follow accordingly.

In the view we take of the record which comes before us, we are not called upon to decide the question whether an adverse possession could have been initiated against the plaintiff in error before the date when its patent issued from the United States. The statute of limitations applicable to this case is found in the Code of Civil Procedure of Alaska (chapter 2, § 4), which provides as follows:

"Within ten years, actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestors, predecessors, and grantors, was seised or possessed of the premises in question within ten years before the commencement of the action."

A legal title gives a right of possession as well as the legal seisin, and possession coextensive with the right, until there is an ouster by adverse possession. Said the court, in *United States v. Arredondo*, 6 Pet. 691, 743, 8 L. Ed. 547:

"The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title. This seisin and possession is coextensive with his right, and continues till he is ousted thereof by an actual adverse possession."

What is an "actual adverse possession"? In *Armstrong v. Morrill*, 14 Wall. 120, 145, 20 L. Ed. 765, the court said:

"It is well-settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted, as well as open, notorious, actual, exclusive, and adverse. * * * The possession must be adverse, as seisin and possession are supposed to be coextensive with the right, and that the possession continues till the party is ousted thereof by an actual possession in another under a claim of right."

In *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532, the court thus defined the requisites of an adverse possession:

"It must be an open, visible, continuous, and exclusive possession, with a claim of ownership such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claimants."

In *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, the court held invalid a judgment which had been rendered on a special verdict which found the defendant's possession to be open, continuous, notorious, and adverse with the claim of ownership. The court ruled that, in order to make out the defense to the action of ejectment, the possession must, in addition to the features specified in the special verdict, have been shown to be actual and exclusive. Said the court (at page 608, 150 U. S., and page 233, 14 Sup. Ct., 37 L. Ed. 1195):

"A possession not actual, but constructive; not exclusive, but in participation with the owner or others falls very far short of that kind of adverse possession which deprives the true owner of his title."

Again, in *Lowndes v. Huntington*, 153 U. S. 31, 14 Sup. Ct. 758, 38 L. Ed. 615, the court reiterated the rule that such possession, to avail against the legal title, "must be adverse and exclusive."

Measured by these utterances of the Supreme Court, the possession of the defendant in error was not adverse, and did not amount to disseisin of the plaintiff in error or its grantors. It was actual,

open, notorious, and continuous, with a claim of ownership, but it lacked two essential requisites: It was not shown to be either exclusive or hostile. The averment in the answer that the defendant "now" claims adversely, if it have any significance, serves only to strengthen the inference that prior to the commencement of the action his claim was not adverse. The possession not being adverse, the statute of limitations never began to run. It was error, therefore, to enter judgment upon the stipulation in favor of the defendant in error.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the foregoing views.

STAR BREWERY OF CHICAGO et al. v. UNITED BREWERIES CO.

(Circuit Court of Appeals, Seventh Circuit. October 9, 1902.)

No. 889.

1. TRADE—ILLEGAL COMBINATIONS—EXECUTED CONTRACT—RIGHTS OF AGENT.

Where a brewery was conveyed to plaintiff under a contract contemplating the consolidation of several brewery plants, and the formation of plaintiff corporation to own and operate the same, and, after the conveyance, defendants, who had previously been the officers of the brewery conveyed, were employed by plaintiff as its agents to operate the plant, which they did for some time after the conveyance, defendants, on being discharged as managers, were estopped to assert title to the plant adverse to plaintiff, on the theory that the conveyance was in furtherance of an illegal combination in restraint of trade.

2. SAME—RIGHTS OF CORPORATION.

Where the property of a brewing company was transferred to plaintiff under an agreement for the consolidation of various brewing plants in a city, and its officers were employed by plaintiff to manage and operate the property, and after being discharged as managers took possession of the plant, and barricaded and locked the same to prevent plaintiff from continuing possession, the corporation previously owning the plant could not avail itself of such wrongful acts of its officers, and assert, in an action of ejectment, that the conveyance was void as in restraint of trade.

3. CONTRACTS—CONSTRUCTION.

A contract for the sale of a brewery to a consolidated corporation provided that the amount of incumbrances on the property which the seller was unable to remove should be deducted from the purchase price, and that the property should be conveyed free and clear from all liens and claims whatever, and, if at the time of conveyance the real estate should be incumbered, the amount of the cash payment should be reduced by the amount of the incumbrance, and that the business should be conducted by the officers of the vendor on salaries as agents for the vendee until payments provided by the contract were made. A deed to the property conveyed the same subject to two incumbrances. *Held*, that the payments contemplated in the agreement had reference to the purchase money to be paid to the seller only, and therefore the officers of the vendor were not entitled to possession of the property until the vendee had paid incumbrances specified in the deed, the amount of which had been deducted from the price.

¶ 1. Validity of monopolistic contracts, as affected by public policy, see note to *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.

See Principal and Agent, vol. 40, Cent. Dig. § 160.

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

The action is in ejectment by the United Breweries Company, a corporation created under the laws of the state of New Jersey, against the plaintiffs in error, to recover certain described real estate. Under a plea of the general issue, the cause was tried to a jury. The plaintiff below introduced in evidence a full-covenant warranty deed to the property in question, dated August 9, 1898, executed by the Star Brewery of Chicago, one of the plaintiffs in error, by Patrick H. Rice, its president, and Thomas J. Rice, its secretary, two of the individual plaintiffs in error, to the United Breweries Company, the defendant in error, conveying the property stated in the declaration. This deed was subject to two trust deeds—one to Henry Rieke, dated March 7, 1890, upon a portion of the property, and one to Francis B. Peabody, dated November 27, 1893, upon another part of the property. This deed was executed in pursuance of an agreement, dated December 2, 1897, between Patrick H. Rice and one Durand, of New York, by which Rice agreed to cause to be conveyed the property of the Star Brewery of Chicago, including the lands in question, to Durand or his nominee, and to acquire the ownership of the real property and principal assets of 17 other brewing or malting companies in the city of Chicago, and to convey such property to a corporation to be created with a capital of \$9,000,000, which corporation so to be created should execute a trust deed of all the property to be conveyed to it to secure the payment of \$3,750,000 of bonds; the amount of incumbrances upon the property, and which Rice might be unable to remove, to be deducted from the purchase price of the property; the amount of such incumbrances so deducted to be deposited with the trust company acting as trustee under the deed, to be used in payment and discharge of the incumbrances upon the property. The purchaser agreed to pay, upon the performance of the conditions of the agreement, \$150,000 in cash, and \$500,000 in the stock of the company to be organized. Upon delivery of the deed the United Breweries Company went into possession of the property, and employed P. H. Rice, the former president of the Star Brewery Company, as manager, and Thomas J. Rice as assistant manager, to operate the plant. The business was conducted under the direction of Mr. Baumgartl, the president of the United Breweries Company. Patrick H. Rice received a salary of \$4,800 a year, rendering to the United Breweries Company daily reports of the business of the branch. Thomas J. Rice, the assistant manager, received a salary of \$2,400 a year. He left the employment of the United Breweries Company in October, 1899, and entered into another business. Patrick H. Rice continued as manager of the Star Brewery for the United Breweries Company until July 31, 1900, when he was discharged from his employment by the United Breweries Company. Upon his dismissal, Patrick H. Rice barricaded the brewery, locked the doors and windows, and placed a guard on the outside to prevent the United Breweries Company from continuing in possession of the plant; claiming right so to do for and in the interest of the stockholders of the Star Brewery Company, the former owner of the property.

The rulings assigned for error may be thus classified: (1) With respect to the exclusion of evidence tending to prove that the United Breweries Company was an illegal combination in restraint of trade, and that the deed in question was given in furtherance thereof; (2) with respect to evidence claimed to give the Star Brewery the right to remain in possession until the payment of all liens upon the property.

Under the direction of the court, the jury found the issues for the plaintiff below—that the defendants unlawfully withheld possession of the premises, and that the plaintiff's estate in the premises had been established on the trial to be in fee simple—upon which verdict judgment was rendered for a recovery of possession of the property, to review which judgment this writ of error is sued out.

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

Patrick C. Haley, for plaintiffs in error.
Levy Mayer, for defendant in error.

JENKINS, Circuit Judge (after stating the facts as above). We do not need to consider the questions whether the United Breweries Company was bound by the agreement entered into by its promoters previous to its organization; whether that agreement was merged in the deed to the Breweries Company; whether the evidence exhibited the existence of an illegal combination—for the reason that we are satisfied that the transaction was closed, and the property was in fact turned over to the breweries company, which went into possession, and the contract supposed to be illegal must be deemed to have been executed. We cannot distinguish this case from that of Gilbert, Sheriff, v. American Surety Company of New York (herewith decided) 121 Fed. 499. The two Rices—one the former president and the other the former secretary of the Star Brewery Company—operated the brewery as the agents of the Breweries Company and at the expense of the breweries company, receiving salaries from it and making daily reports of the business. Their possession was the possession of the breweries company. Denial of the right of that company to its rightful possession, and the forcible exclusion from its possession, were wrongful and without justification; and, as we have pointed out in the case referred to, one may not, under such a condition of things, allege illegality in the agreement which led up to the conveyance to defeat possession by the vendee of the property conveyed. The Rices acted as agents of the Breweries Company, and are estopped to assert title adverse to their principal. Nor can the Star Brewery Company of Chicago avail itself of the wrongful act of Rice.

It is urged that the agreement between Patrick H. Rice and Durand tended to prove that possession was not to be delivered until satisfaction of all liens upon the property. It is sufficient to say that the question is not material, in view of the fact that possession was delivered and the business was operated by the United Breweries Company through its agents. The contract in question was executed December 2, 1897. The deed bears date the 9th day of August, 1898, and conveys the property absolutely, with covenant of title and covenant for quiet and peaceable possession. It may well be said that the agreement was merged in the deed. But aside from that, we are of opinion that the agreement is not susceptible of the construction contended for. It provided that the conveyance of the property should be free and clear of all liens and claims whatsoever; that, if at the time of the receipt of the purchase price the real estate should be incumbered, the amount of the cash payment should be reduced by the amount of such incumbrance. It provided that the vendor should cause all debts of the Star Brewery Company to be paid within 90 days from the receipt of the purchase price, except the debts and liabilities which may have been deducted from the purchase price, or which may have been assumed by the purchaser. It provides that the purchaser should pay at the time of the conveyance and transfer of the property, and as the purchase price of the property, the

sum of \$150,000 in cash, and the further sum of \$500,000 in shares of the company to be organized. The provision of the agreement upon which the contention is founded is this:

"The business of said company [meaning the Star Brewery Company] shall be conducted by its officers in the manner and upon the same salaries as heretofore until the payments herein provided for are made."

The deed conveyed the property subject to two incumbrances, one of which still remains unpaid to the extent of \$40,000, the time of payment of the principal of which has been extended, and the interest promptly paid, and its payment further secured by pledge of the bonds of the United Breweries Company, greater in amount and value than the amount of this incumbrance. It is clear to us that the payments contemplated by the agreement had reference to the purchase money to be paid to the seller. This is made manifest by the provision that, if the property should remain incumbered at the time of the conveyance, the owner would accept in lieu of the cash payment provided for the amount less the amount of any incumbrance. That agreement was carried out. The amount of the incumbrance was deducted, the balance was accepted, and the property conveyed subject to the incumbrance, and possession delivered. It is clear that the clause in question did not refer to incumbrances upon the property, but merely to the cash payment to be made to the seller. The judgment is affirmed.

McINTOSH et al. v. PRICE et al.

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

No. 856.

1. REVIEW ON ERROR—FINDINGS OF FACT.

Findings of fact made in an action at law tried to the court stand as the verdict of a jury, and cannot be disturbed by the appellate court when supported by evidence.

2. MINING CLAIMS—EXCESS IN WIDTH—RIGHT TO RELOCATE EXCESS.

A second locator cannot enter within the boundaries of a placer mining claim as staked by a prior locator, and make a valid location of ground of which the first locator is in actual possession, and which he is engaged in working, on the ground that the first claim as staked exceeded the width prescribed by the local rules and regulations. Conceding (but not deciding, the area of the claim being less than that permitted by the regulations) that as to the excess in width the original location was void, and such excess subject to relocation, the owner was entitled to select the portion which he would hold, and to draw in his lines, and could not be ousted from the portion he was engaged in working in good faith by a second locator thereon.

3. SAME—RECORD OF LOCATION NOTICE.

In an action involving a placer mining claim in Alaska located before survey, and before Congress had made any provision for recording location notices, evidence in respect to the recording of the notice is immaterial, and error cannot be predicated on the admission of incompetent evidence to prove such fact.

4. SAME—MARKING BOUNDARIES.

The locator of a placer mining claim sufficiently complied with the law as to markings where he designated the boundaries by reference to the

corner of a prior claim, where he placed a substantial stake monument, and by placing at each of the other corners and in the center of each end line substantial stakes, so that the boundaries could be readily traced.

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

Thompson, Murane & Thompson and Chas. J. Pence, for plaintiffs in error.

Gordon Hall and Edward J. Hill, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This is an action of ejectment brought by the defendants in error to recover the possession of a strip of mining ground 18 feet wide at one end, 29 feet at the other, and 1,061 feet long. This land was located as a placer mining claim on August 27, 1900, by E. G. Gould, the grantor of the plaintiffs in error, and was again located on October 26, 1901, by Gould and his grantees. The defendants in error asserted the right to possess said strip by virtue of a location made on May 29, 1899, by Thorulf Kjelsberg, of a placer claim purporting to be, both by the notice of location and by the recorder's certificate, 1,820 feet in length and 660 feet in width, but which in fact was so staked upon the ground as to include a tract 1,061 feet long by 770 feet in width, and by virtue of a location made by Magnus Kjelsberg, the brother of Thorulf, on August 13, 1900, purporting by the notice and the recorded certificate to include a tract 1,320 feet long and 660 feet wide, but so staked upon the ground as to mark a tract 1,061 feet long and 671.9 feet wide at one end, and 689 feet wide at the other. These locations were attempted to be made under local mining rules and regulations, which prescribed that a placer location should be 1,320 feet in length by 660 feet in width. As marked upon the ground by the boundary stakes of the second location, the claim was wider than the prescribed 660 feet by about 18 feet at one end and 29 feet at the other. It was this excess over the prescribed width that the plaintiffs in error and their grantor subsequently located, claiming that as to that portion of the claim located by the Kjelsbergs their location was void. The case was tried before the court without a jury. The court made full findings of the facts, including therein the facts above recited, and in addition thereto found that both Thorulf and Magnus Kjelsberg duly staked their claim, and prior to August 17, 1900, made valuable discoveries of gold thereon, and that, at the time of the location made by E. G. Gould, Thorulf Kjelsberg, by his agents and associates, was actually engaged in working, excavating, digging, and rocking gold in that part of the Kjelsberg location which is within the boundaries of the ground in controversy. It is earnestly contended by the plaintiffs in error that this finding is unsupported by the evidence, but the fact so found was testified to by Magnus Kjelsberg, and the findings of the court upon the facts stand as the verdict of a jury when reviewed in an appellate court. *Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. Co.*, 52 C. C. A. 219, 114 Fed. 417, and cases there cited.

The principal questions involved on the review of the case in this court are: First, was the Kjelsberg location void as to all ground therein included in excess of the width of 660 feet? And, second, if it was void as to such excess, could a subsequent locator enter upon that part of the claim of which the defendants in error were in the possession and from which they were actually engaged in extracting the gold, and make a valid location thereof? The local mining rules so referred to give to a locator of a placer claim 20 acres, but require that it be located 1,320 feet in length and 660 feet in width. Both Kjelsbergs by their locations professed to comply with this rule, but in fact deviated therefrom by staking a claim shorter and wider than the rule prescribed, but containing within the boundaries so marked less than the allotted 20 acres. Much of the discussion upon the review of the case in this court refers to the interesting question whether such a local mining rule is mandatory, and whether the failure to comply therewith as to the prescribed width renders the Kjelsberg location void as to the excess in width. We do not find it necessary to determine that question, as we are very clearly of the opinion that if any portion of the ground located by the Kjelsbergs was subject to relocation, as being in excess of the permitted width, the owners thereof in possession, under the circumstances found by the trial court, could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim in which they were working, and which was the valuable portion thereof, and oust them from possession by making a location thereon. The defendants in error were given no notice that the width of their claim was excessive, or that any part of their location was void, and they were given no opportunity to draw in their lines so as to comply with the local mining regulations. The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim one who has located a placer claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon that portion of his claim. A case directly decisive of the question in *Haws v. Victoria Copper Mining Co.*, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436. In that case the Victoria Mining Company was in possession of and was engaged in working certain mining claims. One of its employes, discovering what he conceived to be fatal defects in the location notices of the claims, conceived the secret intention of taking possession of the property for his own benefit, secured the assistance of another, and made locations on the ground then occupied by his employer, set stakes and posted notices, and in the nighttime ousted the mining company from its possession. The court held that such an intruder and trespasser could not make his wrongdoing successful by asserting a flaw in the title of him against whom the wrong had been committed. In *Eilers v. Boatman and Others*, 111 U. S. 357, 4 Sup. Ct. 432, 28 L. Ed. 454, the Supreme Court, affirming the decision of the territorial court of Utah in *Eilers v. Boatman*, 3 Utah, 167, 2 Pac. 66, held that one cannot locate ground on which another is in the actual possession under claim and color of right, because such ground is not vacant and unoccupied. In *Ather-*

ton v. Fowler, 96 U. S. 515, 24 L. Ed. 732, the court held that no right of pre-emption can be established by settlement and improvement on public lands where the claimant has obtained possession by breaking into the inclosure of one who had already settled upon, improved, and inclosed the same land.

The plaintiffs in error rely upon the case of Richmond Mining Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273. In that case the plaintiffs, three in number, had located a lode mining claim 800 feet in length along the ledge, whereas they were entitled under the local mining rules and the statute to 200 feet each. The court said:

"We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with rights previously acquired. It appears by the facts found that 140 feet of the east end of the plaintiffs' location is lost to them by the superior right of the Tip Top claim, leaving only 60 feet of excess; and this, if it were necessary, might be excluded by the government at the other or western end of the claim when it comes to issue the patent, which would leave plaintiffs only the 600 feet in one body, in regular form. This also would interfere with no prior rights, and would give plaintiffs the benefit of their claim to the extent of 200 feet for each locator."

It is claimed that the sentence, "unless it interferes with rights previously acquired," indicates that in the opinion of the court the excess might be cut off from the claim, and the locations be held good for the remainder, provided that at the time when it was done no one else had asserted a right to any portion thereof. But we do not so understand the language of the court. "Rights previously acquired," so referred to, evidently mean rights acquired prior to the time when the rights of the plaintiffs were initiated. The court conceded that from one end of their claim 160 feet was taken off by the rights previously acquired by the Tip Top claim, the location of which was made prior to the location of the plaintiffs, and proceeded to say that the 60 feet of excess might, when patent issued, be taken off at the other end, and that the claim would be held good for the remaining 600 feet, unless it interfered with rights previously acquired; that is to say, rights by previous location, such as the rights of the owners of the Tip Top claim.

Error is assigned to the rulings of the court in permitting the defendants in error to introduce evidence of local mining rules and regulations without first showing the proper organization of a mining district, and in permitting Magnus Kjelsberg to answer the question, "Who was the recorder of the district on June 5, 1899?" and in permitting the defendant in error to introduce in evidence the record notice of location of Thorulf Kjelsberg. In the view we take of the case, all these questions become immaterial. At the time of the Thorulf Kjelsberg location the land was unsurveyed, and Congress had not undertaken to require a record of mining locations or to prescribe the essentials thereof. The Magnus Kjelsberg location was made after the Code of Alaska had gone into effect. It was made to perfect the original location. The only ground upon which the validity of the record of this second location is disputed is that no reference is made therein to natural objects or monuments sufficient to identify the same. The trial court found that Magnus Kjelsberg designated the claim

"by placing at the northeast corner of Bench Claim No. 1, below Snow Gulch on Glacier Creek, first tier, a substantial stake monument," and by placing at each of the other corners, and near the center of each end line, good and substantial stakes, so that, as marked upon the ground, the boundaries could be readily traced. This is a sufficient compliance with the law. It is not always possible to connect a location with a natural object. It is sufficiently identified if reference be made to a permanent monument, such as the stake which is described in the findings, or to the boundaries of the adjoining claim, Bench Claim No. 1. *Lindley on Mines*, § 383; *Hammer v. Garfield Mining Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964.

The judgment of the District Court is affirmed.

CUNNINGHAM v. HOLLEY, MASON, MARKS & CO. et al.

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

No. 821.

1. CORPORATIONS—PAYMENT FOR STOCK IN PROPERTY—LIABILITY OF STOCKHOLDERS.

Where, on the organization of a corporation by mutual agreement, full-paid stock was issued to the incorporators in payment for property transferred by them to the corporation, one of the incorporators who participated in such agreement, and who afterward became a creditor of the corporation, cannot assert its invalidity for the purpose of holding the other stockholders liable for unpaid subscriptions, on the ground that the property was not in fact equal in value to the par value of the stock.

2. SAME—ACTION AGAINST STOCKHOLDERS—EVIDENCE.

In such an action by the creditor against the other stockholders, where the agreement under which the stock was issued was pleaded as a defense, parol evidence was admissible to prove the same, as was also a certificate of the stock issued to one of the defendants to show that by its terms it was full paid.

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

The plaintiff in error brings this writ to review the judgment of the Circuit Court in an action which he brought against the defendants in error as stockholders of the Spokane Hydraulic Mining Company, a corporation, to recover upon the unpaid balance of their subscription to the capital stock of said corporation the amount of a certain judgment which he had recovered against the corporation. The complaint alleged, in substance, that the capital stock of the corporation was \$500,000, consisting of 5,000 shares, of the par value of \$100 each, and that the defendants in error were the holders thereof; that the corporation became indebted to the plaintiff in error in the sum of \$6,688.55 "on divers accounts incurred" during the time at which the defendants in error were subscribers to and owners of said capital stock; that an action was brought in the superior court of Spokane county, Wash., against the corporation, on said indebtedness, and on March 16, 1899, judgment was duly rendered in favor of the plaintiff in error for the sum of \$8,819.05. The defense of the defendants in error was, in substance, that the corporation was organized for the sole purpose of developing certain placer mines and water rights, and that at the time of its organization it was agreed by and between all the persons interested therein that the amount of the capital stock should consist of the aggregate value of said claims and water rights, together with \$70,000 to be paid by the stockholders of the corporation, and that the transfer to the corporation of said claims and water rights and

the payment of said \$70,000 to the corporation should amount to and be taken for payment of the par value of the total capital stock of said corporation, and that the shares thereof should issue to the stockholders as fully paid up and nonassessable; that it was honestly and in good faith agreed that the said property, together with the said sum of \$70,000, was of the fair value of \$500,000, and a fair price and compensation for the said capital stock, and that the defendants in error in good faith believed that the expenditure of said cash upon and for the benefit of the property so conveyed would make the latter of the actual cash value of the nominal stock; that the plaintiff in error was a party to said agreement; that he was interested in and owned part of the property so conveyed to the corporation, and participated in the organization and incorporation of the company, and knew of said agreement, and knew that the stock was issued as fully paid up and nonassessable. Upon the issues so tendered the jury found for the defendants in error, and a judgment was thereupon rendered.

W. B. Heyburn and E. M. Heyburn, for plaintiff in error.
Stephens & Bunn, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It is assigned as error that the court overruled the demurrer to the answer. It is contended that the facts set up in the answer concerning the understanding between the stockholders, whereby it was agreed that the placer claims and water rights, together with the sum of \$70,000, should be taken as and for the full payment of the capital stock of the corporation, constitute no defense as against a creditor of the corporation, unless it is also averred that the property so transferred was at the time of the transfer thereof of the full actual value of the sum for which it was taken. It is alleged in the answer, however, that the plaintiff in error was a party to the agreement by which the property and money so subscribed were taken and accepted in full payment of all the capital stock, and the shares were issued as paid up and nonassessable. A party to such an agreement cannot, as against other stockholders with whom he agreed and contracted, assert the invalidity of the transaction. There is in Washington no statutory prohibition against the payment of stock subscriptions by the transfer of property to the corporation in the place of cash. *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115; *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605. When stock is so paid for and property is so taken in payment, it is the general rule that the transaction cannot be impeached, even at the suit of a creditor of the corporation, except for fraud. "Where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account." *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 345, 7 Sup. Ct. 231, 30 L. Ed. 420; *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068. And this is especially true where the creditor has dealt with the corporation with full knowledge of the transaction whereby the shares were paid for or was a party thereto. *Fort Madison Bank v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; *Adamant Manufacturing Co. v. Wallace, et al.*, 16 Wash. 614, 48 Pac. 415; *First National Bank v. Gustin, etc., Mining Co.*, 42 Minn. 327, 44 N. W. 198, 6 L.

R. A. 676, 18 Am. St. Rep. 510; Walburn v. Chenault, 43 Kan. 352, 23 Pac. 657; Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630.

The foregoing discussion is applicable to the rulings of the court on the admission of evidence which are assigned as error. It is contended that the court erred in admitting in evidence a certificate of stock issued to one of the defendants in error for the purpose of showing that it was issued as paid up and nonassessable, and in admitting the oral testimony of defendants as to the terms and conditions of the agreement which was pleaded in the answer. We find no error in any of these rulings. The testimony of the defendants in error, which is contained in the bill of exceptions, showed that the corporation was organized by one Jesse Coulter, and that the placer claims and water rights stood in his name; that the agreement as to the payment for the capital stock was substantially as it was set forth in the answer; that Coulter was to transfer to the corporation the claims and water rights, and was to receive in lieu thereof stock in the corporation, and the other stockholders were to pay the sum of \$70,000, which was to be used in improving said property and developing the same, and that the transfer of the claims and water rights and the payment of the money was to be taken as full payment of all the capital stock. The plaintiff in error in his testimony admitted that he was a partner with Coulter in one of the mining claims; that he was entitled to receive stock for that interest so conveyed to the company through Coulter; that Coulter had authority to make any agreement he chose with the stockholders in regard to the stock being fully paid up; that, after the organization was completed, Coulter told him all about it; and that he fully ratified all that Coulter did. There was no witness in the case who attempted to contradict the evidence that the agreement was made substantially as set forth in the answer. Coulter himself, although called as a witness for the plaintiff in error, was not interrogated as to that agreement or the terms thereof. Such being the state of the pleadings and the evidence, there was no error in the ruling of the Circuit Court in admitting the certificate of stock in evidence, or in admitting any of the other testimony referred to in the assignments of error.

Error is assigned to certain instructions which the court refused to give to the jury, one of which was that a stockholder in a corporation, who has not paid for his stock, is not relieved of liability to creditors of the corporation because of any "secret understanding or agreement between the stockholders and the corporation that his stock shall be considered as fully paid when there is nothing in the records of the corporation that would take it out of the regular rule as to liability." The answer to this contention is that there was no "secret" understanding unknown to the creditor even suggested by the evidence in the case, nor was the understanding one that did not appear in the "records" of the corporation. The plaintiff in error was bound by the knowledge which his trustee and partner, Coulter, possessed, and the records of the corporation showed that all the stock was issued as fully paid up. Nor did the court err in refusing to instruct the jury that the stock ledger of the corporation is evidence of ownership of stock by the stockholder. There was no issue

to which such an instruction was applicable. The defendants in error in their answer had admitted that they were stockholders.

It is assigned as error that the court refused to instruct the jury that if they believed from the evidence that the corporation acquired all of its property from Coulter, and that the consideration paid him was 1,500 shares of the capital stock, it cannot be held that any other portion of the capital stock of the corporation was rendered fully paid up by reason of the purchase of said property in consideration of the capital stock of the corporation. This instruction would have taken from the jury the right to find, according to the evidence, that the defense set up in the answer was true as pleaded. There was no error in refusing it, nor was there error in refusing to instruct the jury to find for the plaintiff in error.

Error is assigned to several of the instructions which were given to the jury. Most of the points so raised have already been considered with the demurrer to the answer. It is contended that the instructions permitted the jury to find that the stock was fully paid up, regardless of the actual value of the property so transferred at the time of the transfer, and that the jury were allowed to find that if the defendants in error in good faith believed at the time of the incorporation that the property so transferred and the expenditure of the \$70,000 so to be paid would, when expended thereon, make the property of the company of the reasonable cash value of the entire capital stock of the company, then the stock was fully paid up thereby. This instruction must be taken in connection with the admitted fact that the plaintiff in error was a party to the agreement which was made. When so considered, and in view of that fact, it is free from error.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

In re LYON.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 60.

1. BANKRUPTCY—CREDITOR—PREFERENCE TO INDORSER OF CHECK.

A creditor holding a check given by his debtor, who transfers the same to a bank by indorsement, remains a creditor, within the meaning of the bankruptcy act, and the payment of the check to the bank after the debtor's insolvency, and within four months prior to his bankruptcy, constitutes a preferential transfer of property to the indorser, under section 60a, c. 541, Act July 1, 1898, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

2. SAME—PREFERENCES—INDEPENDENT DEBTS.

At the time a bankrupt became insolvent he owed a creditor a balance of account accruing prior to November, for which he had given a post dated check, and also an account accruing in December. *Hell*, that the payment of the check thereafter constituted a preference, which affected the entire indebtedness, and not the payment of an independent debt, and that it must be surrendered to entitle the creditor to prove his account.

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York (114 Fed. 326), expunging the claim of petitioning creditors, unless they shall surrender the sum of \$210.15, alleged to have been paid to them by the bankrupt when insolvent.

Stillman F. Kneeland, for petitioner.

Perry I. Trafford, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. This case, although it involves the question of preferential transfers of property, presents questions totally different from those discussed in *Re Sagor*, decided at this session, 121 Fed. 658. The relevant sections of the bankrupt act are:

"Sec. 57g, c. 541, Act July 1, 1898, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

"Sec. 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment, or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The facts are as follows: Batten & Co. were newspaper agents, who were in the habit of rendering monthly statements to the bankrupt, the work charged for each month being payable at the end of that month or the first of the following. On November 6, 1899, there was found to be due for advertising done for said bankrupt the sum of \$1,888.61. The debtor thereupon gave to the creditor his check dated November 6th for \$202.25, and on that day and subsequently several other post dated checks for similar amounts. Payment of these checks as they came due reduced the amount of this indebtedness by the end of December to \$630.47. During December additional obligations to Batten & Co. were incurred for advertising, aggregating \$546.02, and it is for this latter sum that claim has been filed. On January 2, 1900, the unpaid balance of \$630.47 for advertising prior to November was provided for by delivering to the creditors three checks of the debtor, dated January 2d, January 8th, and January 20th respectively. It is this last check only which is the subject of controversy; the earlier ones were paid on or about their respective dates, but during the entire period the debtor was solvent. The final check was drawn to the order of Batten & Co. on the Astor Place Bank, where Lyon had an account, was post dated January 20, 1900, and called for \$210.15. Batten & Co. held it till January 20th, and, on that day, in the ordinary course of business, duly indorsed and transferred the same to the National Shoe & Leather Bank, in which the firm had an account. On the following day the check was paid through the clearing house by the Astor Place Bank to the Shoe & Leather Bank, and the amount thereof charged by the Astor Place Bank against the account of the bankrupt. It was found by the

referee, and is not disputed, that Lyon became insolvent on January 20, 1900, and that the payment of the check was a preferential transfer of property, under section 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. The District Judge held that the effect of the delivery of the check to the petitioners was to diminish the assets of the bankrupt when insolvent, to the detriment of its other creditors, and was therefore a payment when insolvent, and a payment directly for the benefit of the petitioners through the medium of its bank. Evidently the words "delivery of the check" should be "payment of the check," for delivery of the check was not made during insolvency.

The case may be best disposed of by considering the successive propositions advanced by the appellants.

It is contended that upon the transfer of the check to the Shoe & Leather Bank the title thereto passed to the bank, and that, therefore, the bank became the sole creditor of the maker for the amount. No doubt the title did thus pass; but it does not follow that Batten & Co., who became indorsers of the check, ceased to be creditors of the bankrupt, within the terms of the act. Section 1, subd. 9, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], provides that the word "creditor" shall include any one who owns a demand or claim provable in bankruptcy. Section 57i, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], provides for proof of claim by persons situated as indorsers are. The indorsers, being solvent, it was immaterial to the bank whether Lyon's check was paid or not; payment of it was wholly for the benefit of Batten & Co. This whole question has been discussed exhaustively by the Circuit Court of Appeals, Eighth Circuit, in *Swarts v. Siegel*, 117 Fed. 13, reversing decision of the District Court in 114 Fed. 1001, and also decision of the District Court in *Re Siegel-Hillman Dry Goods Co.*, 7 Am. Bankr. R. 351, 111 Fed. 980, and we concur in the opinion therein expressed, that "an indorser, an accommodation maker, or a surety on the obligation of a bankrupt, is a creditor, under the act of 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract, within four months before the filing of the petition for adjudication in bankruptcy, will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt, unless the amount is first returned to that estate."

Appellant further contends that the payment of the former independent claim for ante November Bills was not a preference on the separate claim filed against the estate for the December bills. Reference is had to *The Abraham Steers Lumber Co.* (D. C.) 110 Fed. 738 (Judge Thomas), affirmed by this court 112 Fed. 406, 50 C. C. A. 310. In that case one Sizer on December 23, 1899, sold to the bankrupt merchandise of the value of \$232.46, for which he received

Jan. 24, 1900, cash.....	\$ 29 68
Jan. 24, 1900, note, payable and paid April 23.....	200 00
Jan. 31, 1900, cash.....	2 78

\$232 46

At subsequent dates Sizer sold the bankrupt merchandise, as follows:

March 10	\$357 80
Aug. 16	20 62
	<hr/> \$378 42

Judge Thomas held that if the note could be regarded as a payment at the date of its delivery, January 24th, the \$232.46 need not be returned as a condition of proving debts arising on and after March 10th, for in such case the payments ending January 31st could have no relation to the subsequent account, since before the indebtedness of March 10th accrued the relation of debtor and creditor would have ceased. This court concurred, holding that "payment, notwithstanding it was a preference, being upon a distinct and independent debt from that which is sought to be proved, need not be surrendered by the creditor." Judge Thomas, however, further held that in the case before him it would be error to apply "the note as a payment at the time that it was delivered; for it was not a payment, even if it may be deemed to have extended the time of payment of the account. * * *

After the giving of the note and before its maturity (April 23d) and payment, to wit, on March 10th, the bankrupt bought goods amounting to \$357.80, so that at such date the bankrupt owed Sizer the note representing an account for goods sold and the additional sum of \$357.80. While the payment was distinctly on the note, and for the purpose of extinguishing it, yet it was a partial payment of a portion of the whole amount of the indebtedness owing from the bankrupt to the creditor." This court affirmed the District Judge, and expressed full concurrence in his views. In the case at bar the mere giving of the post-dated checks was not payment, certainly not such a payment of money as would constitute a transfer of property, within the language of section 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. The transfer of property took place when funds of the estate were actually turned over to the holder of the check. At that time Lyon, being then insolvent, owed Batten & Co. \$210.15 on account of ante November advertising, and \$546.02 for December advertising. Under the rule approved in the Abraham Steers Case, the payment of the \$210.15 must be considered not as the extinguishment of a wholly independent debt, but as a partial payment of the whole amount due.

The decree of the District Court is affirmed.

ULSEN v. COOK INLET COAL FIELDS CO.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1903.)

No. 861.

1. SERVANT'S PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action by a trainman for injuries from the derailing of a train examined, and *held* to require the submission of the question of contributory negligence in riding between the engine and first car to the jury.

3. SAME—CONSIDERATION OF ACTUAL EVENT.

It is error to measure and determine the question of contributory negligence solely by what actually happened.

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

W. E. Crews, T. R. Lyons, and Lorenzo S. B. Sawyer, for plaintiff in error.

Oscar Foote, R. W. Jennings, and Chickering & Gregory, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action for damages for personal injuries sustained by the plaintiff in error, who was plaintiff in the court below, while working for the defendant to the action on a railroad it was constructing from a point in Alaska, called "Homer," to its coal mines, distant about seven miles. The road was being built to carry coal from the mines to the ocean. The motive power was a 10-ton engine, which, together with two flat cars, constituted the train on which the plaintiff was riding at the time he was injured. The plaintiff, with other employés, was sent to Homer by the defendant company with its master mechanic, one Starkey, for the purpose of constructing the road, and at the time of the accident had been so engaged about two months. For the first three days he helped Starkey set up the engine, and was then put to work with the grading crew. The character and condition of the road at the time of the accident, so far as then constructed, are indicated by this extract from Starkey's testimony:

"Q. State to the jury the character of the rails that were used on that roadbed—the kind, and character, and condition. A. We had all sorts of rails. Had thirty-pound rails, and thirty-five-pound, and some forty-pound. The forty-pound rails were thrown out—there was about seven or eight of them—and left at the spit at Homer. They got the road built about two and a half miles, and run out of rails, and, to get it along a little further, waiting for a boat to bring some more, they straightened these forty-pound rails out, and laid them down temporarily on every other tie or two, with the intention of taking up those rails as soon as the boat came in; and, instead of taking them up, when they received the others, they were left there. Q. State whether or not you ever notified the officers of the corporation of the condition of those rails. A. We talked it over, yes, sir; and every time we would pass over them—Mr. Ray (who was the president and general manager of the road), or any of them—they would make the remark that it was a bad piece of road, and it ought to be fixed. Q. State the character of the rails as to being new or secondhand rails. A. The first three miles of road was secondhand rails, and the rest of them was new ones. Q. State where this accident occurred, with relation to that road, as to the point you speak of. A. Occurred about two and a half miles from Homer. Q. There where the defective rails were? A. Yes, sir. They were only half tied—every other one. Q. I'll ask you to state the kind and character of the cars—whether box or flat cars, or what. A. The trucks were shipped from Seattle, and the bodies of the cars were made up there—put together. Q. What were they, new or old trucks? A. Generally old trucks. Q. Secondhand, were they? A. Trucks that they used to use in Seattle on the old horse-car lines. Q. State what condition they were in as to the flanges. A. They were in bad shape; yes, sir. Q. Mr. Starkey, you have stated the platforms were up there. Were there any springs under them? A. They had one or two cars

with springs and one or two or three without. Q. Was there any standards on the sides of the cars, sticking up from the sides to keep the rails from falling out? A. No, sir."

There was evidence, without conflict, to the effect that prior to the accident the train had jumped the track many times; one of the witnesses saying as many as 50 times. When the accident occurred, the then rear car was fastened to the engine by a bar, called a "draw" or "Johnson" bar, described by Starkey as a "thirty-pound rail flattened at each end, with a hole in each end." During the morning of the day of the accident the plaintiff was sent from the grading crew to help load and unload some rails. Starkey was the engineer of the locomotive, and had charge of the train. After loading, the rails were taken up about five miles to the end of the track and unloaded, after which the train was run back, and, after backing for about two miles, and while going about six miles an hour, the cars jumped the track. One toppled over on its side; the other swung around, breaking the Johnson bar, which caught and broke the leg of the plaintiff, who was sitting on the engine, and between it and the first car.

Upon the conclusion of the evidence the court below, on motion of the defendant, directed the jury to return a verdict for the defendant, which was accordingly done; the court being of the opinion that, notwithstanding the evidence tended to show, and, in the expressed opinion of the court, did in fact show, negligence on the part of the defendant, it also showed that the plaintiff was guilty of contributory negligence in sitting where he did, and therefore that he could not recover. Starkey testified that he was in charge of the construction of the road, and of the train in question, that no orders of any character or from any source were given as to where on the train the employes or others should ride, and that "they could ride anywhere they could get on." Starkey further testified that "the only safe place to ride on the train would have been in the cab of the locomotive," but that it was not possible for the plaintiff to have ridden in the cab on the occasion in question because "the seats were all full." He further testified, in answer to the question whether the plaintiff's position on the train was "ordinarily safe or unsafe," and whether it "increased the hazard," that "the way the equipments were and the cars were handled, why that was as safe as any place on the train. In fact, if he was sitting on the side of the car next to where the brakeman was, and the car turned over, why I don't know what would have happened." The plaintiff also testified that the position he took was as safe as any place on the train, except on the inside of the cab, where he could not go, because it was full.

In view of the condition of the road, the character of the train, the method of its operation, and the testimony mentioned, the question of contributory negligence was, in our opinion, plainly one for the jury. The error into which the learned judge of the court below fell may be seen from this excerpt from his views, expressed in ruling upon the motion:

"Now, in this case we find a man riding between the engine and the two cars, as the engine was backing with the cars toward Homer; and the witness Starkey says that was as safe a place, and Olsen (plaintiff) also states it was as safe a place, as anywhere on that train. That cannot be true. Why? Because what occurred in this instance proves that it cannot be true. Had this man been on the cars— One of them turned up on one side so the wheels were in the air, to be sure, but, if he had been sitting on this car, he simply would have been thrown off. If the train were going but six miles an hour, he would in all probability not have been injured. The only danger was in the car turning over on him, and even that might not have been fatal. But in the view of this evidence, can any reasonable man say that a man would not have been safer on those flat cars in most any position than between the cars and the engine? Counsel urges that this man was not located at the front end of the cars, the real place of danger. That is true. But under the testimony here, and the showing made, was it not safer, even on the front end of the cars, than between the cars anywhere?"

From this it will be seen that the court measured and determined the question of contributory negligence by what actually happened.

For the error committed in the respect indicated, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

UNITED STATES v. AUSTIN, NICHOLS & CO. SAME v. LEGGETT et al. SAME v. SCHERING & GLATZ. SAME v. BOGLE & SCOTT.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

Nos. 157-160.

1. CUSTOMS DUTIES—FILLED GLASS BOTTLES.

Glass bottles filled with merchandise at ad valorem rates, holding not more than a pint, are not subject to duty under Tariff Act 1894, par. 88 (Act Aug. 27, 1894, c. 349, 28 Stat. 513), as vials holding not more than a pint and not less than a quarter of a pint, or as "all other glassware."

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

Henry L. Burnett, U. S. Atty., and Charles Duane Baker, Asst. U. S. Atty.

Albert Comstock and Everett Brown, for appellees.

Before WALLACE and COXE, Circuit Judges.

COXE, Circuit Judge. When these appeals were first presented to this court the only question argued was whether bottles holding not more than one pint, and imported filled with merchandise at ad valorem rates, are dutiable as part of the value of their contents under section 19 of the customs administrative act of June 10, 1890, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]. The question was certified to the Supreme Court in the following words:

"Should the value of the bottles filled with ad valorem goods be added to the dutiable value of their contents, under section 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?"

The question was answered by the Supreme Court in the negative.

United States v. Nichols, 186 U. S. 298, 22 Sup. Ct. 918, 46 L. Ed. 1173.

The appeals are now presented upon a single proposition not heretofore brought to the attention of this court, namely, that the bottles in question should have been assessed under paragraph 88 of the tariff act of 1894 (Act Aug. 27, 1894, c. 349), as bottles holding not more than one pint irrespective of the nature of their contents.

Paragraph 88 is as follows:

"Green and colored, molded or pressed, and flint and lime glass bottles holding more than one pint, and demijohns and carboys, covered or uncovered, whether filled or unfilled and whether their contents be dutiable or free, and other molded or pressed green and colored and flint or lime bottle glassware, not specially provided for in this act, three-fourths of one cent per pound; and vials, holding not more than one pint and not less than one-quarter of a pint, one and one-eighth cents per pound; if holding less than one-fourth of a pint, forty cents per gross; all other plain green and colored, molded or pressed, and flint lime and glassware, forty per centum ad valorem." 28 Stat. 508, 513.

The Supreme Court say:

"It will be observed that by paragraph 88 a duty was imposed upon bottles holding more than one pint whether filled or unfilled, but upon vials holding less than one pint there was, probably, by mistake, no provision that they should pay duty if filled."

In other words, the court decided that the paragraph did not impose a duty upon bottles holding not more than one pint if the bottles were filled when imported. That the bottles in controversy are directly within this decision is admitted. Counsel have stipulated in writing that "the bottles in question hold not more than one pint and were imported filled with merchandise which was liable to ad valorem duties, and were assessed for duty at the respective ad valorem rates applicable to their contents as a part of the value of the same."

The present position of the appellant is not made entirely clear from the briefs submitted, but we assume it to be that the bottles in question are dutiable under the provision of paragraph 88 for a duty of $1\frac{1}{8}$ cents per pound upon "vials holding not more than one pint and not less than one quarter of a pint."

The further suggestion is made that the last clause of paragraph 88, providing for an ad valorem duty of 40 per centum, is applicable. It is true that a vial is a small glass bottle, and, if the subdivision quoted had contained the words "filled or unfilled," found in the preceding clause, there would probably be little difficulty in applying it to the merchandise in controversy, there being no evidence of commercial designation as in the Grace Case, *infra*. The difficulty with this contention is that it leaves out of view the decision of the Supreme Court which construes the clause quoted precisely as if the words "when not filled" were added thereto. So that paragraph 88, after specifically enumerating vials holding a pint or less, provides no duty upon such vials when filled.

It is possible that the specific question certified to the Supreme Court might have been answered without construing paragraph 88, but the decision cannot be regarded as obiter in this respect, especially

when it appears that a contrary construction was pressed upon the attention of the court by the Attorney General. But in any view we fail to see how a construction which differs from that adopted by the Supreme Court can be maintained. The same interpretation was adopted by this court and by the Circuit Court in a number of cases. *U. S. v. Ross*, 33 C. C. A. 361, 91 Fed. 108; *Merck v. U. S. (C. C.)* 99 Fed. 432; *Smith v. U. S. (C. C.)* 91 Fed. 757. See, also, *Grace v. Collector*, 24 C. C. A. 606, 79 Fed. 315, decided by the Circuit Court of Appeals for the Ninth Circuit.

That the concluding clause of paragraph 88 is inapplicable seems obvious; "vials holding not more than a pint" having been previously enumerated are certainly not covered by a provision for "all other plain, green * * * and lime glassware." If pint vials could, upon this proof, be differentiated from pint bottles there might be some reason for the contention that the "catch-all" clause at the end of the paragraph is brought into operation. But the appellant contends that the merchandise in question is aptly described by the word "vial" and that "the duty is fixed in unmistakable terms upon such vials." There is no dispute as to this proposition; both parties agree regarding it.

We have, then, a provision first, for bottles holding more than a pint; second, for bottles holding not more than a pint or less than a quarter of a pint; third, for bottles holding less than a quarter of a pint; and, fourth, for all other glassware.

The appellant's contention seems to be that although a vial when filled is not dutiable under the preceding subdivisions of the paragraph it is dutiable as "other glassware" under the concluding subdivision. In other words, the identical bottle if empty pays 1¹/₈ cents per pound and if filled it pays 40 per centum ad valorem. It seems plain that, for tariff purposes, a glass vial or bottle does not lose its identity because it happens to be filled; certainly it does not, because of its contents, become another article of glassware.

There has been a complete change of front on the part of the appellant since the case was here before. It was then conceded by all that paragraph 88 of the act of 1894 was not involved in the controversy. The brief for the appellant then submitted contains the following words in italics:

"The bottles involved in these appeals and which hold not more than a pint are not subject to duty as bottles by the act of 1894."

It was only after the Supreme Court decided that the administrative act was also inapplicable that the ingenious theories alluded to above were advanced. It is by no means certain that the latest contentions of the appellant are fairly presented by the present records. It is, however, unnecessary to pass upon this question as we are of the opinion that the bottles in controversy were not dutiable under paragraph 88 of the act of 1894.

The judgments are affirmed.

BLACK v. TRAVELLERS' INS. CO.

(Circuit Court of Appeals, Third Circuit. April 10, 1903.)

1. LIFE INSURANCE—BODILY INFIRMITY—WARRANTY.

A bodily infirmity is something that materially impairs the bodily powers, and to constitute a breach of a warranty against the existence of it there must be something that amounts to an actual inroad on the physical health or condition.

2. SAME—WHEN QUESTION FOR THE JURY.

It was warranted by the insured that he had never had any bodily or mental infirmity; but it was shown that while a soldier in the Civil War he had received a gunshot wound in the back of the head, by which the external table of the skull was fractured, a piece about half an inch square taken out, and a slight depression of the inner table produced, on the strength of which he had received a pension from the government, which had been afterwards increased on account of alleged resulting vertigo and impaired vision. Aside from the pension record, however, there was nothing to show that the wound had affected his general health, which, according to other evidence, was uniformly good. *Held*, that it was error to direct a verdict in favor of the defendant; the case being for the jury under all the evidence.

3. SAME—EVIDENCE—RECEPTION OF PENSION.

The mere reception of a pension by the insured did not establish that he was affected with a bodily infirmity, but only that he had so represented to the general government. It was evidence on the subject, but not conclusive, regardless of the other proof.

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

A. T. Black and W. K. Jennings, for plaintiff in error.

John A. Murphy, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. In the application on which the policy in suit is based, dated September 26, 1896, the decedent represented and warranted that he had never had "any bodily or mental infirmity." It was proved, however, at the trial that while a soldier in the Civil War he received a gunshot wound in the back of the head, by which the external table of the skull was fractured, a piece about half an inch square taken out, and a slight depression of the inner table produced. On the strength of this, in December, 1868, he was granted a pension by the United States government of \$8 a month, which was increased to \$12 in July, 1886, and in December, 1889, to \$14 on account of alleged resulting vertigo and impaired vision. Upon this showing the learned trial judge directed a verdict in favor of the defendant, holding that the condition produced by the wound was a bodily infirmity within the meaning of the warranty, and constituted a breach of it. In our judgment, this was error, the question being for the jury, and not for the court, under the evidence. Aside from the pension record, there was nothing to show that the wound, which healed over quite speedily, mate-

¶ 1. See Insurance, vol. 28, Cent. Dig. § 690.

rially affected the general health of the insured, which, according to the testimony of several witnesses, was uniformly good. And while it is no doubt true that the injury could not be said to have been of such a passing or temporary nature as to escape the remembrance of the decedent, particularly in view of the constant receipt of his pension, yet it certainly could not be declared as a matter of law to be a bodily infirmity without evidence that it affected to some extent his actual physical condition. An infirmity of the body, as the term implies, is something that materially impairs the bodily powers. In a case where this is clearly made out, it is no doubt the duty of the court to take the question from the jury and dispose of it; but ordinarily it is for them to pass upon, and it ought, in our judgment, to have been left to them here. In *Boos v. Mutual Life Insurance Company*, 64 N. Y. 236, the decedent declared in his application, which was made a warranty, that he had had no severe sickness or disease in the last seven years. The fact was that within that period he had been sick with pneumonia for 10 days, and had also had a sunstroke on another occasion, which laid him up for 8 or 10 days. There was other evidence, however, to show that during the time so covered he was, as a rule, a strong, healthy man, doing severe manual labor. The company asked for binding instructions, but the court submitted it to the jury to say whether these were severe sicknesses within the meaning of the policy, which should have been disclosed to the company, and a finding in the plaintiff's favor was sustained. In *Bancroft v. Home Benefit Association*, 120 N. Y. 14, 23 N. E. 997, 8 L. R. A. 68, to the question in the application, "Have you received any wound, hurt, or serious bodily injury?" the insured had answered, "No." The proof was that while fencing he had received a thrust or blow on the throat from the point of a foil, which produced a wound, and caused the raising of some blood, as the result of which he was confined to his bed for about three days. It was held that the words "hurt" or "wound," as used in the application, meant an injury causing an impairment of health or strength, or rendering the person more liable to contract disease, or less able to resist its effects; and, as no such result followed from the injury in question, it did not fall within the terms of the policy. So, in *Standard Insurance Company v. Martin*, 133 Ind. 376, 33 N. E. 105, the insured warranted that he had never been physically injured, nor had any "bodily or mental infirmity." The evidence was that while a boy he had received an injury to the left foot, and was afterwards seriously injured in the right leg. The jury found, however, that both foot and leg became well and strong, and that he had as complete use of them as ever, and it was held that, according to the reasonable interpretation of the application, the decedent did no more than represent that he was free at the time from any serious physical injury, and that any which he had previously suffered had disappeared, and left no trace that would render him unfit for accident insurance. In *Insurance Company v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, one of the questions in the application was whether the insured had ever had any serious illness or personal injury, and it was shown that 10 years before she had been seriously injured by

falling from a tree. The jury were instructed that, if the effects were temporary, and had entirely passed away, and were not such as to impair her health or shorten her life, the failure to disclose the occurrence did not avoid the policy; and this was affirmed by the Supreme Court. To substantially the same effect are *Insurance Company v. Trefz*, 104 U. S. 197, 26 L. Ed. 708; *Bernays v. United States Accident Association (C. C.)* 45 Fed. 455; and *Home Insurance Company v. Gillespie*, 110 Pa. 84, 1 Atl. 340. These decisions serve to show the position taken by the courts with regard to this class of cases, and just how far they are prepared to go. They sustain the views expressed above that an injury or infirmity, the existence of which constitutes a breach of the warranty, must be such as amounts to an actual inroad upon the physical health or condition of the insured, and that this, as a rule, is a question for the jury.

It is said, however, that the insured had obtained a pension from the government on the strength of his wound, which had been increased a few years before because of resulting vertigo and impaired vision. But the mere reception of a pension did not establish that he was affected with a bodily infirmity, but only that it had been so represented by him to the pension department. However far in that direction this may have gone, it is not conclusive on the question of the existence of a disability regardless of the other proofs. *New Home Life Association v. Owen*, 39 Ill. App. 413. It is no doubt evidence upon the subject which the administrator has to face, and it may be difficult to persuade a jury that the decedent could draw the pension which he did and yet be free from any serious bodily ailment. But even on the most disadvantageous showing it amounts to no more than a declaration or statement by the decedent, which, like any other, it is for the jury to consider and pass upon along with the other evidence; nor are we prepared to say that a verdict contrary to it could not be sustained.

The judgment is reversed, and a venire facias de novo awarded.

WESTERN UNION TELEGRAPH CO. v. CITY OF TOLEDO et al

(Circuit Court of Appeals, Sixth Circuit. March 11, 1903.)

No. 1,120.

**1. TELEGRAPH COMPANY—CALL-BOX SERVICE—RIGHT TO OCCUPY STREETS—
PERMISSION OF COUNCIL—NECESSITY—PREVIOUS DECISION—LAW OF THE
CASE—COMPLIANCE.**

On appeal from the granting of a preliminary injunction restraining a city from interfering with the construction of a district telegraph system in its streets, the injunction was vacated, and the cause remanded, the court holding that the complainant company should have made the usual application for a permit in accordance with the city's regulations, and that it had no right to construct its works in defiance of those requirements. The company then petitioned subordinate city officers for a permit, and was informed that they did not have authority to issue

¶ 1. Rights of telegraph and telephone companies to use of streets, see note to *Southern Bell Telephone & Telegraph Co. v. City of Richmond*, 44 C. C. A.

one until the applicant had first obtained a permit from the common council. *Held*, that these facts failed to constitute a compliance with the previous decision.

2. **SAME.**

The determination of a legal question made upon reversing an order granting a preliminary injunction, becomes the law of the case.

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

Henry D. Estabrook (John W. Warrington, of counsel), for appellant.

M. R. Brailey and Chas. K. Friedman, for appellees.

Before LURTON and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. This case was here before on an appeal by the city of Toledo from an order granting a preliminary injunction restraining it from interfering with the construction of a district telegraph system by the telegraph company, the present appellant, in the streets of the city. The case was fully argued, and a decision was here rendered, reversing the order of the Circuit Court upon the ground that it was improvidently made, and remanding the cause for further proceedings. 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730, to which report reference may be made for the facts then presented. After the cause was remanded, the Circuit Court permitted the telegraph company to file a supplemental and amended bill. The only amendment or supplemental matter added which is important to be now considered consisted of an allegation that since the former appeal the company "petitioned the superintendent of fire-alarm telegraph and the city civil engineer to grant to your orator permits to lay in its said conduits heretofore built in said city such cables as it might deem necessary for the proper conduct and operation of telegraphing, and to connect the wires in said cables with its main and various branch offices throughout the city of Toledo, and with its call boxes located in various business blocks and public buildings in said city, where the owners of such business blocks and the superintendents of such public buildings desire to have the use and advantage of the same; thus enabling the tenants and occupants of such buildings to call up messengers of your orator to come and receive their messages to be sent over the lines of the Western Union Telegraph Company; such call-box service to be similar to that which is now owned and operated, and which for many years last past has been owned and operated, by the Postal Telegraph-Cable Company in the City of Toledo"; and that the officials mentioned made the following reply:

"The wires, cables, fixtures, etc., pertaining to the local messenger call-box system, which you include in your request, were erected under the temporary injunction granted by Judge Clark, which has been dissolved, and his decision reversed, were not constructed under the supervision or approval of the proper officials of the City of Toledo. Furthermore, we have not the authority to issue a permit or grant any rights to any person, company, or corporation for any such purpose without the applicant having first obtained a permit, license or franchise from the common council of the city of Toledo.

As you are aware, we have been especially instructed by the common council not otherwise to issue permits for such a messenger call-box system."

To this amended and supplemental bill the defendants demurred for want of equity. The court sustained the demurrer, and, the complainant not asking to plead further, dismissed the bill. The complainant then prayed an appeal, which was allowed.

On the former appeal this court distinctly held, in the opinion delivered by Judge Wanty, as will be seen by reference thereto, that "the complainant should have made the usual applications for permits to string its wires, stating exactly what was required, in accordance with the regulations of the city, with which it had been accustomed to comply; and it had no right to construct its works in defiance of those requirements." The propriety and the necessity for making such applications and obtaining such permits as required by the regulations of the city, were pointed out in a previous part of the opinion, where it was said:

"It is necessary for its fire protection, and a proper knowledge of the obstructions in its streets, and the use to which its public places are being subjected, for the city to know, before any construction is put in, what is contemplated, and to have the work done under the supervision of its officers; and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city."

We are at a loss to understand why, in the face of that decision, the complainant should have neglected to apply to the common council, and, instead of doing so, should have applied to subordinate officers of the city, having no authority in the premises, as the complainant should have known, and as it was informed by the officers to whom the application was made. At all events, such a proceeding furnishes no ground for the conclusion drawn by the bill that the city refuses to grant the permit required. There is nothing whatever which gives any substantial reason for supposing that the permit will not be granted when it is applied for in such form as will enable the common council to exercise its proper functions of prescribing the manner and supervising the execution of the work.

Much argument is expended with a view to induce the court to modify its former decision. But this ought not to be expected. That decision became the law of the case upon all the questions determined thereby; and, whatever may be our power in that regard, considering that the former decision was upon an order granting a preliminary injunction, it is our duty to adhere to the determinations there made. Otherwise they would remain continually open. *Stoll v. Loving* (a case lately decided by this court) 120 Fed. 805.

Upon the former appeal in the present case our judgment reversing the order of the Circuit Court in the end turned upon the question whether the telegraph company, upon the case stated in the bill, was bound to make application to the common council for a permit before it could lawfully construct its projected works; and we held that it was so bound. What has since been done by the telegraph company in no wise relieves it from that obligation.

The court below was bound by the former decision of this court,

and could not do otherwise, consistently therewith, than to sustain the demurrer, as it did. Its decree dismissing the bill is therefore affirmed. The costs in both courts will be paid by the appellant.

MOORE v. MOORE.

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

No. 802.

1. APPEAL—ASSIGNMENT OF ERRORS—ABSENCE OF FILE MARK.

Where an assignment of errors found in the record on appeal recites that the appellant "presents this assignment of errors, together with his petition for appeal," and the petition for appeal, which was allowed and filed by the clerk, also refers to the assignment of errors as presented and filed therewith, it will be presumed that such assignment was presented to the court and lodged with the clerk, and the appeal will not be dismissed because it does not bear the clerk's file mark.

2. SAME—REVIEW—FINDINGS OF FACT.

Findings of fact made by the trial court on conflicting evidence will not be reviewed on appeal unless obviously opposed to the weight of the evidence.

3. TRUSTS—HOLDING TITLE TO LAND FOR ANOTHER—CONTRACT BETWEEN TRUSTEE AND CESTUI QUE TRUST.

The location of public land in the name of one person for the joint use and benefit of himself and another, where both selected the land and occupied it and expended money in its improvement, creates a trust in respect to the land, and a contract between the trustee of the title and his cestui que trust, by which the latter relinquishes his right in the land, will not be sustained unless it affirmatively appears to be fair and just.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

Arthur K. Delaney, R. W. Jennings, and George H. Pippy (L. P. Shackleford, of counsel), for appellant.

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

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. A motion is made to dismiss the appeal upon the ground, first, that no assignment of errors was filed in the court below; and, second, that the paper which appears in the record as an assignment of errors does not comply with the requirements of rule 11 of this court. An assignment of errors is found in the record, but there is no indorsement of a file mark thereon by the clerk. It begins with the recital, however, that the appellant "presents this assignment of errors together with his petition for appeal." The last paragraph of the petition for appeal recites that the appellant "doth herewith present and file his assignment of errors together with the bond on appeal." The petition was filed on January 27, 1902, and on the same date an order was made that the appeal be allowed as prayed for. From these facts it is sufficiently evident that the assignment of errors and the petition for appeal were presented to the court on the same date, and were lodged with the clerk thereof. In the ab-

sence of a showing to the contrary, it will be presumed that such was the case. The failure of the clerk to indorse the assignment of errors as filed cannot defeat the appellant's appeal. *Mutual Life Insurance Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088. The assignment specifies as errors the refusal of the court to make certain findings which were tendered by the appellant, error in making the findings which were made, and error in the conclusions of law. We find in it no such defect as to justify a motion to dismiss the appeal. The motion will be overruled.

On the merits of the case the assignments of error challenge the findings and conclusions of the court in a suit which was brought by the appellee against the appellant for a partition of a certain tract of land consisting of about six acres, in Skaguay, Alaska. The appellee is the father of the appellant, and at the time of testifying in the case was 76 years of age. The land in controversy was a portion of a 160-acre tract, which had been selected by the appellant and the appellee, and which had been occupied jointly by both, but the location whereof stood in the name of the appellant, in trust for the mutual benefit of both. The appellant contended that the whole of said six-acre tract had been set apart to him, and that his father's interest therein had been divested by the execution of certain contracts which had been made and entered into, whereby he had acknowledged the sole and exclusive right of the appellant thereto. The appellee contended that the six-acre tract had been partitioned by a verbal agreement whereby the east half thereof was set apart to him, and the west half was set apart to the appellant, and that the appellee thereafter was induced to sign the contracts by fraudulent misrepresentations, and in ignorance of their purport. The trial court, upon the issues and the evidence which was offered, found that the appellee was induced to sign the contracts to save himself and his son from litigation in connection with a certain wharf business in which they were jointly engaged at Skaguay, and that he was under constraint, and the court applied to the transaction the rule that a contract made between a cestui que trust and his trustee cannot be sustained unless it affirmatively appear to have been fair and just. *Perry on Trusts*, § 194. The conclusion of the trial court upon the conflicting evidence of the facts involved in the controversy will not be reviewed in this court, unless it is shown to have been obviously opposed to the weight of the evidence. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Tate v. Holmes*, 22 C. C. A. 466, 76 Fed. 664; *North Am. Exploration v. Adams*, 45 C. C. A. 185, 104 Fed. 404. A perusal of the brief record of the testimony convinces us that no error was made.

The appellant makes the point of law that the court erred in assuming upon the admitted facts that the relation of cestui que trust and trustee existed between the parties to the suit. He contends that the conclusion that a trust existed was deduced solely from the fact that there was joint occupation of the premises by the father and the son, and he urges that the essential elements of a trust are lacking in that no evidence was offered of an agreement or words sufficient to raise a trust, no definite subject of a trust was shown, and no object thereof

was ascertained. The trust, as it was found by the court, rested on the fact that the location of the land stood in the name of one of the parties for the joint use and benefit of both, and that both had selected the site of the location and had expended money thereon in its improvement, and that the recorded title stood in the name of the appellant for both. These facts are sufficient to create a trust the subject whereof was the land. Nothing more was necessary. The parties thereto could by mutual agreement carry out the trust, whenever they deemed it necessary to do so, or, in the absence of an agreement, could adjust their rights by a suit in partition, as has been done.

We find no error for which the decree should be reversed. It is accordingly affirmed.

FENLEY v. POOR et al.

(Circuit Court of Appeals, Sixth Circuit. April 17, 1903.)

No. 1,132.

1. BANKRUPTCY—MORTGAGEE OF HOMESTEAD—SECURED CREDITOR.

Under the provisions of the bankruptcy act contemplating the allowance of exemptions to a bankrupt by the trustee and court, a homestead passes to the trustee; and hence the mortgagee of a homestead is a "secured creditor," within the definition of the act making the term include a creditor who has security on property of a nature to be assignable thereunder, and cannot prove his debt as an unsecured claim.

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

This is an appeal in a bankruptcy proceeding wherein the trustee set apart to the appellee Roberts the house and lot which he occupied as a homestead, which was appraised at \$1,000, and which, under the Kentucky statute, was exempt. Several years prior to the bankruptcy proceedings, Roberts and his wife had placed a mortgage on this property for \$600, upon which at the time the homestead was set apart there was due \$760. Being allowed a homestead not exceeding in value \$1,000, under the statute of Kentucky, the bankrupt filed a petition which, after it was amended, asked to have \$760, the balance of \$1,000, to which he claimed he was entitled, set apart out of other real estate which he owned at the time of the adjudication in bankruptcy. The District Court denied this petition, and, in the opinion filed at the time, suggested that, the mortgage being on exempt property, the mortgagee was not a secured creditor, within the meaning of the bankruptcy act, and should therefore prove her claim as a general creditor, and, to the extent that she received dividends from the bankrupt's estate, the bankrupt should have the benefit by having the mortgage indebtedness on his homestead reduced by that amount. Elizabeth W. Poor, the mortgagee, then filed her claim for \$760 against the bankrupt estate; setting up the fact that she was secured by a mortgage on real estate, describing it, and filing the mortgage as part of the claim. The trustee objected to the allowance of this claim because he insisted it was a secured claim, but his objections were overruled by the referee, and the trustee took the matter before the district judge, who sustained the referee, and allowed the claim against the estate, from which judgment the trustee appealed to this court.

W. M. Fenley, for appellant.

J. G. Tomlin, for appellee Poor.

S. D. Rouse, for appellee Roberts.

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

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The question presented is whether or not a debt secured by a mortgage upon real estate in which the bankrupt has a homestead can be proved against the bankrupt's estate as an unsecured claim. The appellees contend that such a claim is not a secured claim, because, in the definition in the bankruptcy act, it is stated that the term "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under the act, and that the homestead of the bankrupt is not so assignable. In construing the exemption statute, the Court of Appeals of Kentucky, in the case of *Gaines v. Casey*, 10 Bush, 92, draws a distinction between the homestead exemption and the legal title to the fee, and holds that the right to a homestead may be waived by mortgaging it, and that such security would terminate whenever the debtor ceased to be a housekeeper or removed from the premises, although, if the mortgage was of the fee, it could not be thus affected. This construction would leave the fee, which is separate and distinct from the homestead exemption, assignable, even under the contention of the appellees. But the definition in the bankruptcy act refers to the nature of the property, and, if it is such as to be assignable under the act, the fact that it includes exemptions under the state laws in force at the time of the filing of the petition could not affect its nature and make it nonassignable. The act provides that the bankrupt shall make claim under oath to his exemptions, and file the same in triplicate, and also makes it the duty of the trustee to set apart the bankrupt's exemptions and report the items and estimated value to the court, and makes it the duty of the judge to determine all claims of bankrupts to their exemptions. These provisions clearly indicate that the whole estate of the bankrupt is assigned, under the law, to the trustee, and that then the claim of the bankrupt is to be made for his exemptions, which are to be set apart by the trustee and determined by the court. The fact that the debtor has a homestead right in a tract of land does not change the nature of the property and make it nonassignable. In *re Sisler* (D. C.) 96 Fed. 402. The homestead right may be abandoned, or, if there be no objection or application on the part of the bankrupt to have the homestead set apart to him, the property may be sold, and the proceeds distributed among his creditors. *Collier on Bankruptcy* (4th Ed.) pp. 80, 81, 82, and cases in notes. The property is of a nature to pass to the trustee, and after it passes it may be either set apart to the bankrupt or converted into money. There are cases in which real estate of greater value than is allowed by the statute as exempt, in which the bankrupt has a homestead right, is converted into money, and the amount of the exemption is paid to the bankrupt, and the balance distributed among his creditors. In *re Oderkirk* (D. C.) 103 Fed. 779. When the property is sold by the trustee, or is set apart as exempt, the trustee has no further interest in or control of it; but

the security of the mortgagee is not affected thereby, and he is no less a secured creditor because the property covered by his mortgage has been set apart as exempt. In re Little (D. C.) 110 Fed. 621. The claim should not have been allowed as an unsecured claim. It could only participate in the dividends after the value of the security is deducted from the amount of the debt.

It follows that the order appealed from must be reversed, and the cause remanded, with directions to disallow the claim, as one unsecured.

IN RE BROOKLYN FERRY CO. OF NEW YORK.

THE ALASKA.

(Circuit Court of Appeals, Second Circuit. February 4, 1903.)

No. 51.

1. COLLISION—STEAM VESSELS CROSSING—FAILURE TO CONFORM TO SIGNAL AGREEMENT.

Where a ferryboat, which had stopped and reversed when her second signal of one whistle to a tug on her starboard hand, on a crossing course, was unanswered, afterward received an assenting and then a cross signal from the tug, and assented to the latter, but continued to go backward under reversed engines while the tug was attempting to pass astern of her in accordance with the agreement, she was in fault for the resulting collision, although her navigation up to that time had been careful, and the initial fault was that of the tug in confusing the signals.

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

This cause comes here upon appeal from a final decree of the District Court, Eastern District of New York (115 Fed. 564), which divided the damages resulting from a collision between the colliding vessels, the ferryboat Alaska and the dock department tug Richard Croker. The latter vessel did not appeal.

Herbert Green, for appellant.

Jas. C. Cropsey, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. There was conflict in the testimony as to the movements of the vessels and the sequence of signals exchanged. We may, therefore, on this appeal, accept the findings of fact made by the District Judge, who heard and saw the witnesses, especially as he found the facts in accordance with the narrative of the accident given by the appellant's witnesses. He finds that the Alaska was crossing from Greenpoint avenue, Brooklyn, to Twenty-Third street, New York—the Richard Croker coming down the river—and that they were approaching each other on courses which gave the Croker the right of way; that when the vessels were 500 or 600 yards apart the Alaska blew one whistle, to indicate that she would navigate so as to allow the Croker to cross her bows; that, no answer being re-

¶ 1. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

ceived, she gave another signal of one whistle, and sheered a little to starboard, but, noticing no change of course by the Croker, the Alaska stopped and reversed; that the Croker then blew one whistle, and immediately thereafter blew a two-blast signal, thereby crossing the Alaska's signal, and announcing a maneuver which would take her across the stern, instead of across the bows, of the ferryboat, and began to navigate in accordance with such signal, sheering slightly to port; that the Alaska answered the two-blast signal immediately with two blasts, but made no further change in her own navigation. The District Judge (115 Fed. 565) condemned her in these words:

"When the Alaska agreed to the two signals, she should have tried to carry them out, and not leave the burden upon the Croker alone. What she did was to go astern, as if she had given an alarm signal, which she did not, but should have given when the first signal was crossed."

In this conclusion as to the propriety of the Alaska's navigation we concur, although she began her navigation with great carefulness, ran at a slow rate of speed, and stopped and reversed when no answer was received to her earlier signals. But manifestly it is faulty navigation to announce that one's boat is directing its course forward to port, when she in fact is backing and making sternway. She cannot be excused for this fault on any theory that it did not contribute to the accident. We are unable to find from the evidence that a forward movement of the engines and a starboard helm ordered at the same time that her two-blast signal was blown would not have so shifted her position that the Croker would have slipped under her stern. The only other suggested excuse is in extremis, but, on the statements of her own witnesses, the boats were too far apart when the two-blast signals were exchanged to excuse her fault on that ground. The one-blast signal of the Croker was instantly followed by her two-blast signal, and the latter at once responded to. The master of the Alaska says that when the Croker blew the one whistle she was from two to three lengths of his boat off (her length is 175 feet), and the lookout of the Alaska says three or four lengths. There seems to have been sufficient space between them when the Croker crossed the Alaska's signal to allow the latter's master to navigate, with a proper exercise of judgment.

The decree of the District Court is affirmed, with interest and costs.

NATIONAL MECHANICAL DIRECTORY CO et al. v. POLK et al.

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

No. 825.

1. PATENTS—INFRINGEMENT—STATION INDICATORS.

The Pierce patent, No. 254,429, claims 1, 2, and 3, for a station indicator, consisting of a case provided with apertures covered with glass, in which is placed webs having printed matter on each side, and moved by means of drums and rollers actuated by suitable mechanism, for the purpose of displaying the printed matter beneath the glass plates on each side simultaneously, are infringed by an indicator which accomplishes the same purpose in the same manner, and differing only in the mechanism for moving the webs.

2. SAME--SUIT FOR INFRINGEMENT--INJUNCTION.

Where it was shown that infringing machines were made by a corporation under license from an individual defendant, based on a patent transferred to him by a second corporation by a contract requiring him to build and operate a certain number of the machines, both the individual defendant and the second corporation were so connected with the infringement as to be properly included in the injunction.

8. SAME--EVIDENCE.

Where the articles of incorporation of a defendant corporation declared that one of the purposes of its organization was "to own, manufacture, sell, and lease directory machines," without describing or specifying them, oral testimony of one of the incorporators was admissible to show that the machines meant were those for which a patent had been applied for by one of the incorporators, and the same as those which were alleged in the bill to infringe complainant's patent.

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

Walter F. Haas and Haas & Garrett, for appellants.

G. E. Harpham, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Ralph L. Polk and Wm. E. Murdock, as owners of letters patent No. 254,429, issued December 28, 1886, to W. H. Pierce, for a station indicator, brought suit against the Los Angeles Modern Directory Company, the National Mechanical Directory Company, and Geo. W. Maxwell to enjoin them from infringing said letters patent. They obtained a decree as prayed for, and the two defendants last named have taken their appeal therefrom.

It is assigned as error that the court overruled the appellants' motion for a nonsuit at the close of the testimony taken for the appellees. We might treat the motion for a nonsuit as a motion to dismiss the bill as to said appellants if it appeared by the record that such motion had been made, but the record which is before us is silent upon that subject.

Error is assigned to several of the findings of the court, which we find it unnecessary to discuss, for the reason that it does not appear that such findings were made, or that they were involved in the conclusions which the trial court reached. Such, for example, is the assignment that the court held that the shifting mechanism contained in the appellants' machine was the mechanical equivalent of that described in the letters patent of the appellees. What the court found and held is set forth in the interlocutory decree. It was there adjudged that the Los Angeles Modern Directory Company had manufactured and used machines embodying the invention which is set forth in the appellees' letters patent, and covered by the first three claims thereof; "that the same were manufactured and used by the procurement and direction of the defendant Geo. W. Maxwell, and he was to participate in the profits of such manufacture; that the defendant the National Mechanical Directory Company since complainants became the owners of said letters patent, and before the filing of the bill of complaint herein and within this district, have threatened to infringe upon the complainants' rights as secured to them under the first three

claims of said letters patent, and that complainants are entitled to an injunction against all of the defendants herein restraining and enjoining them from violating and infringing upon complainants' said rights under the first three claims of said letters patent." The patent which is the subject of the suit relates to an invention which is thus described by the inventor: "My invention relates to an automatic duplex indicator for the display of advertisements printed on one web, simultaneously to the display of names of stations, streets, places, or any other matter on both sides of another web." To accomplish this, he provides a web or strip of fabric, with drums and supporting rollers, so arranged that matter printed on both sides of the web can at will be so moved as to display the printed matter on both sides simultaneously in situations neighboring each other; and, second, to combine with this web a web which carries printed matter on one side only, and mechanism to operate both webs, in order to display simultaneously matter printed on one side of one web, and matter printed on both sides of another web, to be operated at will, move both ways simultaneously, and cause the printed matter on both sides of one of the webs to be carried beneath another glass to be viewed, and simultaneously to carry the printed matter on both webs out from view beneath said plates; and, third, to provide specific mechanism by which both webs may be moved simultaneously in both directions, at the will of the operator.

The first three claims which were held by the court to be infringed are the following: (1) In an indicator for display of printed matters for public advertisement of facts, the combination with web, D, having printed on its opposite surface sides, 1 and 2, matters, F and G, at suitable intervals, of the group of rollers, e, e, e, and drum, E, and group of rollers, e', e', e', and drum, E', all arranged substantially as described, whereby matters printed on both sides of the web are displayed at the same time in the same direction, and suitable mechanism under control of the operator for operating said drums alternately, substantially as and for the purposes set forth. (2) The combination, with a case provided with apertures covered with glass plates and web, D, connected at its opposite ends with drums, E, E', and having matters, F and G, printed on its opposite side surfaces, 1 and 2, at proper intervals, of rollers, e and e', arranged in groups and in relation to each other, and to the apertures and web and its drums, as described, and whereby the matter, F and G, will be simultaneously displayed beneath the glass plates when the web is moved, substantially as and for the purposes set forth. (3) The combination, with a case provided with viewing apertures of web, D, having printed matters, F and G, at intervals on its respective opposite side surfaces, 1 and 2, and having its opposite ends connected with drums, E, E', respectively, and rollers, e, e', arranged in groups in relation to each other and to the said apertures, drums, and web as above described, and mechanisms substantially as described, which are adapted to revolve the respective drums alternately for rolling said web on each, respectively, while it is being unrolled from the other, substantially as and for the purposes set forth.

The machine which was found to be manufactured and used in infringement of these claims has the same arrangement of drums, rollers,

and webs which are described in the appellees' patent, and is the same in all respects, with the exception of the nature of the printed matter thereon, and the specific mechanism for moving the webs in both directions at will. It is contended that infringement is avoided by reason of these differences. It is argued that the words, "substantially as and for the purposes set forth," which are found in the appellees' claims, are words of limitation, and restrict the appellees to the entire combination, including the mechanism described and illustrated in said letters patent. The purposes set forth in the appellees' patent are to display printed matter which is printed on both sides of a web simultaneously in situations neighboring to each other. It is not denied that this is done in the infringing machine. It is true that the shifting mechanism by which the travel of the web is produced in the machine which was found to infringe differs from that which is used in the appellees' patent. The former is conceded to be a mechanism which is more expeditious and efficacious than that which is described in the latter, but it accomplishes the same result. In none of the three claims which are the subject of the appeal is a precise mechanism described or claimed. All that is claimed is "suitable mechanism, under the control of the operator, for operating said drums alternately, substantially as and for the purposes set forth." The purposes set forth have been described. They do not indicate that the inventor limited himself to the use of a particular mechanism, although a particular mechanism is described and is claimed in other claims of the patent. If the appellees are entitled to the protection of the first three claims of their patent, and the court so held, and no exception has been taken thereto, they are clearly entitled to the use of any mechanism which will accomplish the result which is attained. There is no contention that by the state of the prior art the appellees are limited to the use of the described mechanism. Nor can it be said that the use to which the appellants devoted their machine is not covered by the claims of the appellees' patent. Their invention is not limited to the display of names of stations, streets, or places, but covers the display of "any other matter."

It is contended that the record fails to show that Geo. W. Maxwell was an infringer, or that evidence was offered to justify the equitable injunction against the National Mechanical Directory Company. It was admitted that the Los Angeles Modern Directory Company made the machine, which was found to infringe the appellees' first three claims, and that it made it under an agreement which had been made and entered into on May 24, 1900, between said Maxwell and that corporation. In that agreement it was recited that Maxwell had invented certain new and useful devices in mechanical directories for which he had applied for letters patent, and a list of his applications for patent was set forth, including that under which it was shown that the infringing machine was made, and that Maxwell transferred to the company said patent rights for the seven southern counties of California, except the city of San Diego. The agreement shows that Maxwell had undertaken to incorporate, inaugurate, and put into operation the proposed directory business, and he agreed to repay to the incorporators \$5,000, which he acknowledged had been paid to him

by the incorporators for that purpose. The corporation bound itself to pay Maxwell 10 per cent. of the gross proceeds of the business until he should receive \$10,000. Both parties agreed that that sum should be paid to the National Mechanical Directory Company, in pursuance of an agreement which had been made between that company and Maxwell on March 29, 1900, by which the corporation transferred to Maxwell the identical rights which Maxwell transferred to the Los Angeles Modern Directory Company, and for which Maxwell was to be paid \$10,000 under the same terms of payment as were provided in the first agreement. In the second agreement Maxwell agreed with the National Mechanical Directory Company to commence operations within 60 days from April 1, 1900, and to have 800 mechanical directories in use and operation in the city of Los Angeles within nine months from that date. It thus appears that the manufacture of the infringing machine by the Los Angeles Modern Directory Company was by the procurement of and with the assent of the National Mechanical Directory Company. The articles of incorporation of that company declare that among the purposes of its incorporation are "to own, manufacture, sell, and lease directory machines, * * * and to do a general printing, publishing, indexing, advertising, and directory business." Maxwell was one of the incorporators. There is no specification in the articles as to the nature or description of the directory machines which were therein referred to. In order to show what machines were intended to be made and used, one of the incorporators was called as a witness for the appellees, and he testified that the intention of the incorporators was to manufacture the machines on which Maxwell had applied for a patent, and such as were subsequently manufactured by the Los Angeles Modern Directory Company, and that such a machine was one of the machines referred to in the agreement between Maxwell and the National Mechanical Directory Company. Error is assigned to the admission of this evidence, and it is contended that the same was incompetent, for the reason that no incorporator or stockholder can be permitted to testify what was the intention of the corporate body. But the evidence was not admitted for the purpose of showing what was the intention of the corporation. It was admitted for the purpose of explaining the language of the articles. The articles referred to the manufacture of directory machines, without describing or specifying them. It is evident that the incorporators had some particular machine in view. Such being the case, any witness who knew what was referred to was competent to testify as to that fact. Maxwell was properly enjoined as an infringer by reason of his connection with the two corporations. *Robinson on Patents*, § 897; *Trent v. Risdon Iron & Locomotive Works*, 42 C. C. A. 529, 102 Fed. 635; *Toppin v. Tiffany (C. C.)* 39 Fed. 420. And the National Mechanical Directory Company, having been shown to have been incorporated for the purpose of manufacturing these machines, was justly held to have threatened to infringe upon the appellees' rights as secured under the first three claims of their letters patent, and were properly enjoined.

The decree of the Circuit Court is affirmed.

FOWLER v. CITY OF NEW YORK et al

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 54.

1. PATENTS—SUIT FOR INFRINGEMENT—DEMURRER.

Where a bill for infringement makes profert of the patent, it will be regarded as a part of the bill, and will be examined on demurrer.

2. SAME—NOVELTY—BITRANSIT RAILWAY SYSTEM.

The Carpenter patent, No. 570,451, for a bitransit railway system, is void for lack of patentable novelty.

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

Appeal from a decree (110 Fed. 749) sustaining the demurrer filed by the defendants, and dismissing the bill on the ground that the patent upon which the bill is based is void for lack of patentability.

Eugene H. Lewis, John W. Suggett, and William W. Dodge, for appellant.

George L. Rives, John R. Bennett, and T. D. Merwin, for appellees.
Before WALLACE and COXE, Circuit Judges.

COXE, Circuit Judge. This is an equity action for the threatened infringement of letters patent, No. 570,451, granted November 3, 1896, to Benjamin F. Carpenter for a "bitransit railway system." The specification contains five double-column pages of description and ten claims. It explains with painstaking elaboration and minuteness the difficulties encountered in providing rapid transit in large cities and the remedies proposed by the patentee for overcoming these difficulties.

The defendants demurred upon the ground that the patent upon its face discloses an entire lack of patentable novelty and that the claims are not for combinations but for aggregations merely. The demurrer was sustained and the bill dismissed. The complainant appeals.

The first proposition argued is that the patent cannot be considered for the reason that it is not set out in extenso in the bill or attached thereto.

The bill makes profert of the patent in the following language:

"Which said letters patent, or an exemplified copy thereof, your orator will produce as your honors shall direct."

This is the usual form of pleading in patent causes; it is simple and convenient and avoids the necessity of copying into the bill long public documents accessible to all. In an infringement suit the foundation of the complainant's case is the patent; without it the action cannot stand for a moment and when its validity is challenged it is the duty of the complainant to present it to the court for inspection. If the bill be attacked because the patent is not set out at length the

¶ 1. Pleading in infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

See Patents, vol. 38, Cent. Dig. § 515.

complainant is entitled to produce it in support of the bill and he will not be permitted to suppress it when its validity is challenged.

There can no longer be a doubt that where, in an infringement suit, profert of the patent is made in language similar to that quoted, supra, the patent is regarded as a part of the bill and will be examined on demurrer. *Heaton Peninsular B. F. Co. v. Schloctmeyer*, 18 C. C. A. 674, 69 Fed. 592; *Chinnock v. Paterson P. & S. Co. (C. C.)* 110 Fed. 199; *International Lumber Co. v. Maurer (C. C.)* 44 Fed. 618.

Section 4886 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382] provides that "any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter or any new and useful improvement thereof * * * may obtain a patent therefor."

After describing generally what he proposes to accomplish the patentee says:

"From the above description it will be perceived that my invention furnishes a new method of handling the passengers to secure quick delivery at various points between the ends of an express route."

In other words, the patent describes a new plan for handling the large number of passengers who patronize the public vehicles provided for rapid transit in large cities. It is argued that this is patentable as a "machine" under the language of the statute just quoted.

If a scheme for handling the traveling public in congested districts can, for patent purposes, be regarded as a machine, it is by no means easy to perceive why a new plan for reorganizing the police force, or mobilizing the army or manipulating the guests at crowded public functions, may not also be aptly described as a machine and patented as such.

Conceding, arguendo, that a plan such as is disclosed in the Carpenter patent may, if new and useful, be patented as a machine, it is manifest that no mere abstraction, no idea, however brilliant, can be the subject of a patent irrespective of the means designed to give it effect. In the case at bar patentability must be found, if at all, in the mechanical means and appliances used to carry out the proposed plan. These are all admittedly old. The tracks, turnouts, cars, platforms, motors, loops, partitions, gates and staircases described by the patentee had all been used for years prior to the date of the application to facilitate the transportation of freight and passengers on railways. The feature of the patented system principally relied on to support invention seems to be the arrangement of the tracks, two for express trains and two for local trains, in connection with "island" platforms between the local and express tracks, upon which tracks the trains run in the same direction. By this arrangement a passenger can board a local train, ride upon it until he reaches a station where express trains stop, disembark from the local, cross the platform, board the express and ride upon it until he reaches the express station near his destination, where he may, if he likes, again cross the platform and take a local train which will deposit him still nearer the point he desires to reach. The island platforms are provided with

partitions and gates to prevent crowding. Of this plan the patentee says:

"A conjunctive or co-operative service is thus maintained, and such arrangement and operation I term the 'bitransit' system."

While conceding that island platforms were old he points out the distinction that they were used on roads having two tracks only, and is of the opinion that their use in conjunction with a four-track road is "an entirely novel feature."

The patentee contributes the further information that where the tracks on opposite sides of the platform are not on the same level "adequate staircases" may be provided for the use of the passengers. Again he says that where the express tracks are located outside of the local tracks the approach to the local tracks may be through openings in the center of the street.

Another "feature" of the system, which is, apparently, regarded as novel, for it is incorporated in the claims, is the introduction of loops or switches by means of which trains may be shunted over from one track to another. It is thus described:

"The object of the loop is simply to transfer the trains from the up track to the down track at a given point, and such tracks may be connected with the same effect by suitable switches."

We have thus referred to those features which seem to be relied upon by the patentee and by counsel as constituting the essential elements of the "bitransit system." It is unnecessary to comment upon the remaining suggestions of the specification, as they deal with the most obvious and commonplace propositions.

After giving careful consideration to the arguments advanced on behalf of the complainant we find it impossible to discover any ground for sustaining the patent. The rapid transit problem has been for years a most serious one, especially in the city of New York where the principal obstacles have been lack of space and lack of money to complete such a tremendous undertaking as a suitable subway. Given a four-track road devoted wholly to the transportation of passengers and any competent railroad engineer would know at once how to manage it. He would know where to locate the stations, loops and switches, and he would assuredly arrange for the ingress and egress of passengers so that they would not be compelled to cross the tracks at grade. To plan all these details would undoubtedly require ability of a high order, but not inventive genius. The organizer of such a system would have all the materials ready at his hand with nothing remaining but to adapt them to the new environment.

The court will take judicial knowledge of the fact that for a quarter of a century, at least, it has been customary for travelers living at small towns to take local trains to large cities, remain at the station and, upon the arrival of the express, cross the platform and board it. Even if it be true that, prior to 1895, the trains on either side of island platforms ran in opposite directions, it surely did not involve an exercise of the inventive faculties to run these trains in the same direction. As before pointed out the reason why this was not done before is that there was no necessity for it. The moment

that a four-track passenger railroad was projected the wisdom of such an arrangement was obvious.

The case of *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, is directly in point. The alleged invention consisted in apparatus for transferring grain from one car to another. The court held the patent void on demurrer and, in order to emphasize the absurdity of the complainant's contention, used language which seems almost prophetic of the "bitransit system." The court says:

"Suppose, for instance, it were old to run a railroad track into a station or depot for the reception and discharge of passengers, it certainly would not be patentable to locate such station between two railroad tracks for the reception of passengers on both sides, and to add to the accommodations a ticket office, a newspaper stand, restaurant, and cigar stand, or the thousand and one things that are found in buildings of that character."

Compare this language with the following quotation from the Carpenter patent:

"Safe and convenient access to the transfer platforms is then effected by extending staircases upward or downward to the street, (as the case may be,) and the platforms thus furnish not only the shortest and easiest means of transfer between the cars of the slow and fast trains, but may, when required, afford means of access to and from the street and accommodations for station purposes with ticket office and waitingroom."

We have considered each of the claims separately and find that the same difficulty is applicable to all, namely an entire lack of patentable novelty.

We are of the opinion that the decree of the Circuit Court is right and should be affirmed, with costs.

KILBURN et al. v. HOLMES et al.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1903.)

No. 847.

1. PATENTS—INFRINGEMENT—USE BY PATENTEE'S CONSENT.

Plaintiff, while holding the office of chief engineer of the board of state harbor commissioners of California, made an invention for improvements in wharf construction, for which he obtained a patent. He subsequently made plans for wharves to be constructed by the board containing his invention, but advised the board that, if such construction was adopted, he claimed a royalty for the use of his invention. A contract was then entered into between plaintiff and the board, reciting such claim, and that the board claimed the right to use the invention without any liability, and providing that the board might use the invention, and in consideration of such use plaintiff would not claim royalty in excess of a sum equal to 10 per cent. of the cost of any wharf on which it might be used, which sum the board agreed to pay in case plaintiff's right should be established by final judgment of a court of competent jurisdiction. *Held*, that under such agreement plaintiff could not maintain an action for infringement of his patent, in which such infringement was denied, it being essential to such a recovery to prove use of the invention without his consent.

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

M. A. Wheaton, I. M. Kalloch, and James H. Budd, for plaintiffs in error.

John H. Miller and Stratton & Kaufman, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This action was brought to recover damages for an alleged infringement of letters patent numbered 646,553, for improvements in wharf construction, dated April 3, 1900, issued by the United States to the plaintiff Holmes as inventor and to his coplaintiff, Uhlig, as assignee of a one-half interest in the invention patented. The original defendants were Paris Kilburn, P. J. Harney, and Rudolph Herold, Jr., then constituting the board of state harbor commissioners of the state of California, but before the trial of the action in the Circuit Court P. J. Harney and Rudolph Herold, Jr., having ceased to be members of that board, John C. Kirkpatrick and John D. MacKenzie, their successors in office, were substituted as defendants in their place. The complaint charges that the defendants, without the license or consent of plaintiffs, constructed and used certain wharf structures containing and embracing the invention patented by the said letters patent. The answer sets up several defenses, one of which is a denial of the infringement charged in the complaint. The action was tried by a jury, and a verdict returned in favor of the plaintiffs for the sum of \$5,000 damages, and the Circuit Court thereupon gave judgment for that sum in favor of plaintiffs and against the defendants in their representative capacity as members of the board of state harbor commissioners of the state of California. The case is before this court upon a writ of error prosecuted by the defendants.

I. The evidence shows that the plaintiff Holmes made the invention described in the letters patent sued on while he was holding the office of chief engineer of the board of state harbor commissioners. As such chief engineer it was his duty to give to the board the benefit of his professional knowledge as a mechanical engineer, and prepare plans and specifications for the construction of wharves for the state, when so directed by that body. The wharves referred to in the complaint were constructed in accordance with plans and specifications prepared by the plaintiff Holmes after such letters patent were issued, and contain the invention therein described. But before such plans were submitted for its consideration and approval he notified the board of harbor commissioners that, if the plans were adopted, it was his intention to collect from the state a royalty for the use of his invention. After this notice, and before the construction of the wharves mentioned in the complaint, the plaintiffs and the persons then constituting the board of harbor commissioners entered into a written agreement, which, after reciting that the plaintiffs in this action claim the right, as owners of the letters patent sued on, to collect royalty from the state board of harbor commis-

sioners and from the state of California for the use of the methods set forth in the claim under said letters patent, and that the board of harbor commissioners are desirous of constructing certain wharves and piers along the water or harbor front of the city and county of San Francisco, "and claims and asserts the right on its part to use the methods specified in said letters patent without any liability" to the plaintiff therefor, proceeds as follows:

"It is agreed that the said board may forthwith proceed to construct docks, piers, or wharves along said harbor front and upon property within their jurisdiction, using any of the methods under said letters patent, or any part thereof, wherein wooden cylinders or cylinder piers are specified as a part thereof. That in consideration and in case of the use of the methods specified in the letters patent, said second parties [the plaintiffs in this action], upon their part will only make and assert as against the said board of state harbor commissioners, or the state of California, a sum for royalty equal to ten (10%) per cent. of the cost of the construction of any such wharf or pier as may be so constructed. * * * The parties hereto agree that the said second parties shall, upon the adoption of plans and specifications for any wharf or pier containing or including methods covered by the claims of said letters patent, forthwith institute an action against the said board, in any court of competent jurisdiction, asserting their claim to said royalty of ten (10) per cent., and asking judgment against the said board for the amount thereof. * * * Should the court in such action by final judgment determine that said board is liable to said second parties for the royalty specified for its use of any of the methods included in said letters patent in any work so constructed, then it agrees that it will thereupon issue to said second parties a warrant or warrants for the amount so found to be due them by the final judgment or decision of such court, not to exceed ten (10) per cent. of the cost of said wharf, pier, bulkhead, or other work."

When the evidence was closed, the defendants asked the court to instruct the jury to render a verdict in their favor upon the ground, among others stated, that there was no evidence "showing or tending to show infringement by the defendants, or by either or any of them." The motion was denied, and the ruling was excepted to, and is assigned as error. There is no escape from the conclusion that this requested instruction should have been given. Under the pleadings it was incumbent upon the plaintiffs to show that there had been an unauthorized use by the defendants of the invention described in the patent sued on, but the evidence shows without any conflict that in the use of this invention the defendants acted with full consent of the plaintiffs, and under an agreement with them for the payment of a stipulated royalty for such use. It is true that under the agreement the payment of the royalty was to be contingent upon the final judgment of a court of competent jurisdiction, determining the liability of the board of harbor commissioners to pay the same. But the fact that the payment was to be made upon a contingency does not affect the question. What was done by the defendants was done under the agreement and with the full consent of the plaintiffs. This conclusion renders the decision of the question of the implied license claimed by the defendants, and all other questions presented by the assignments of error, unnecessary.

Judgment reversed.

SMITH. et al. v. LOWE et al.

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

No. 837.

1. POLICE POWERS—INSPECTION LAWS AFFECTING INTERSTATE COMMERCE—UNLAWFUL MEANS OF ENFORCEMENT.

Under the rule that the police power of a state cannot obstruct interstate commerce beyond the necessity for its exercise, state officers cannot accomplish, under the protection of a valid law, results which the state is forbidden to accomplish by legislation; and it is open to the courts to determine whether their action is within the lawful and constitutional powers conferred upon them by the statute, or whether it exceeds such powers, and amounts to an unconstitutional obstruction of interstate commerce.

2. SAME—EQUITY JURISDICTION.

The Idaho sheep quarantine act of March 13, 1899, Sess. Laws, p. 452, provides that whenever the governor has reasons to believe that scab or any other infectious disease of sheep has become epidemic in certain localities outside the state he must, by proclamation, designate such localities, and prohibit the importation from them of any sheep into the state, except under such restrictions as, after consultation with the sheep inspector, he may deem proper. *Held*, that a bill by sheep owners, alleging that defendants, acting under a proclamation issued by the governor under such act prohibiting the importation of any sheep from an adjoining county in another state for the period of 40 days, prevented complainants from driving their sheep across the line into Idaho for pasturage on their own and the public lands within the state as they were accustomed to do each spring, and for shipment to market, stated a cause of action for equitable relief by injunction, where it also alleged that such sheep were free from disease, and had been so found by the United States inspectors; that there was no infectious disease epidemic on the range where they were or had been; and that the reasons stated in the proclamation for such prohibition were false and groundless, and were based on statements made by defendants and others for the purpose of excluding sheep of other owners, and securing a monopoly of the grazing on the public lands within the state; and where it also showed that the exclusion would work irreparable injury to complainants.

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

The appellants, who are citizens of the state of Utah, brought their bill for an injunction against the appellees, citizens of the state of Idaho, alleging therein substantially the following facts: That the appellants own 72,500 head of sheep, which they had in former years grazed during the spring, summer, and fall of the year in the states of Idaho and Wyoming upon their own lands and upon the public domain, and that in the winter and early spring they ranged their sheep on the deserts in Utah and Nevada, but chiefly in Box Elder county, Utah, the county which constitutes the greater part of the northern boundary of that state. That on March 21, 1901, the sheep were in said Box Elder county, Utah, near the Idaho line, and the appellants were about to take them over the state line into the state of Idaho for the purpose of obtaining pasturage on the public domain and upon the land of the appellants in that state and in Wyoming. That said sheep were wholly dependent upon the winter snows for water while in said Box Elder county, Utah, and where they were on March 21, 1901, the time of the commencement of the suit. That, if said sheep were detained where they were then, or were prevented from passing to their accustomed spring and summer range in the states of Idaho and Wyoming, they would be destroyed, and would die for want of water and feed, neither of which could be obtained where they

then were, or whence they had come on said desert. That the appellants were and had been endeavoring to drive their sheep over the said public domain from the state of Utah into the states of Idaho and Wyoming, and were prevented from so doing by the appellees. That one-third of the sheep were on their way to the eastern market in the states of Nebraska, Missouri, and Illinois. That it was necessary for them to have feed, which, according to the customary way of raising sheep in that locality, could only be obtained profitably by grazing on the public domain. That, if not prevented by the appellees, the appellants would so transport their sheep from the state of Utah, through the states of Idaho and Wyoming, to the said markets. That the balance of said sheep would remain in the state of Idaho, and be grazed there during the summer. That without the said privilege the appellants would be irreparably damaged. That the appellees, their associates, confederates, and agents, were preventing the appellants from driving their sheep into the state of Idaho in order to obtain for themselves and their associates the exclusive use of the said public range in the state of Idaho, and the grass growing on the lands of the government of the United States therein. That, if the appellants drive their sheep into the state of Idaho, upon the said public domain, the appellees will threaten to and will force said sheep back where they then were upon said desert, where there is no food or water, and by so doing will cause irreparable damage to the appellants. That the alleged authority of the appellees for their acts is contained in a legislative act of the state of Idaho and a proclamation issued by the governor of that state, the former of which reads as follows:

"An act establishing quarantine against diseased sheep, prescribing the duties of the governor and state sheep inspector in relation thereto; and providing penalties, for the infraction of its provisions.

"Be it enacted by the Legislature of the state of Idaho:

"Section 1. Whenever the Governor of the state of Idaho has reasons to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation, designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper.

"Any person or corporation, who, after publication of such proclamation, receives in charge any such sheep from any of the prohibited districts and transports, conveys or drives the same to and within the limits of any of the counties of this state, is punishable by a fine not exceeding one thousand (\$1,000) dollars, nor less than two hundred (\$200) dollars, and is liable for all damages that may be sustained by any person by reason of the importation of such prohibited sheep.

"Sec. 2. Whenever the proclamation of the Governor, issued as hereinbefore provided, shall prohibit the driving or importation of sheep into this state from another state or territory, or subdivisions thereof, it shall be the duty of the state sheep inspector or any of his deputies, to drive or transport said sheep so coming into this state in violation of said proclamation back across the state line from which they came, using all necessary force in so doing; provided, that the state sheep inspector or his deputies may employ such assistance as may be necessary for the enforcement of the provisions of this act; and the costs of such deportation shall be a lien upon said sheep: provided, that if the fine and costs in this act provided shall not be immediately paid the deputy sheep inspector shall retain a sufficient number of said sheep to pay such fine and costs, which sheep shall be sold to pay the same, by the deputy sheep inspector, in the same manner as provided by law for the sale of personal property to satisfy a judgment, and for such services the deputy sheep inspector shall receive and retain such fees as is allowed sheriffs for like services to be taxed as costs.

"Sec. 3. Any person failing or refusing to assist such deputy sheep inspector, as in the preceding section provided, shall be punished as in section 6517 of the Revised Statutes of Idaho (1887) made and provided."

Sess. Laws 1901, pp. 25, 26.

The proclamation is as follows:

"Whereas, under the provisions of the act of the Legislature of the state of Idaho, entitled, 'An act establishing quarantine against diseased sheep, prescribing the duties of the governor and state sheep inspector in relation thereto, and providing penalties for the infraction of its provisions,' it is made my duty, whenever I shall have good reason to believe that scab, or any other infectious disease of sheep has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, that I shall thereupon, by proclamation, designate such localities, and prohibit the importation of sheep from such localities, except under such restrictions as I, after consultation with the state sheep inspector, may deem proper; and,

"Whereas, I have received statements from reliable wool growers and stock raisers of the state of Idaho, and have also received an official report from the state sheep inspector, based upon personal examination, as well as affidavits of responsible citizens of this state, to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities and districts, to wit, in the counties of Rich, Cache and Box Elder in the state of Utah, in the county of Uintah in the state of Wyoming, and the county of Elko in the state of Nevada; and,

"Whereas, from such statements, reports and affidavits, I have reason to believe that the disease known as scab or scabbies has become epidemic among sheep in said above-stated localities or districts; and,

"Whereas, it is known that sheep from said districts are being moved, driven and imported into the state of Idaho, and that such sheep from said districts, if moved, driven or brought into this state, will thereby spread infection and disease on the ranges and among the sheep of this state, which act would result in great disaster:

"Now, therefore, I, Frank W. Hunt, Governor of the state of Idaho, by virtue of authority in me vested, and after due consultation with the state sheep inspector, do hereby prohibit the importation, driving or moving into the state of Idaho, of all or any sheep now being held, herded, or ranged within said infected districts, or that may be driven through said districts, viz., the counties of Rich, Cache and Box Elder in the state of Utah, the county of Uintah in the state of Wyoming, and the county of Elko in the state of Nevada, or which may hereafter be held, herded or ranged within, or driven through, said infected districts, for a period of 40 days from and after the date of this proclamation. After the termination of said 40 days, sheep from said infected districts may be moved into this state only upon compliance with the terms of the act of the Legislature of the state of Idaho, entitled 'An act to suppress contagious and infectious diseases of sheep, to create the office of sheep inspector,' etc., approved March 7, 1901 [Sess. Laws 1901, p. 142]. That any sheep imported into this state from the said infected districts, over any railway, and which are unloaded at any point in this state for the purpose of feeding or grazing upon the ranges within this state, shall be held and quarantined within two miles of the point where unloaded for a period of 15 days. And at the expiration of said 15 days, said sheep shall be inspected by the state sheep inspector, or his deputies, and if found free from disease may be allowed to graze upon the ranges, or if said inspection shall show that said sheep are diseased, before they shall be allowed to travel over or graze upon the ranges, they shall be held and dipped as provided in the act of the Legislature of the state of Idaho, entitled 'An act to suppress contagious and infectious diseases of sheep,' etc., approved March 7, 1901 [Sess. Laws 1901, p. 142], until said sheep are cured of all disease. That the quarantine proclamation heretofore issued by me, on the 11th day of February, 1901, is hereby revoked."

That the facts which are claimed to exist, and which are referred to in said proclamation as reasons for making the same, are false and groundless, and were given to said Governor, if he has received the same, for the sole purpose of inducing him to assist the appellees, their associates and confederates, in obtaining for themselves the monopoly of the grazing lands on the public domain of the United States in the state of Idaho. That the

said sheep of the appellants were free from scab, and the district referred to in said proclamation through which the said sheep had traveled and had been grazed was free from scab and disease of all kinds. That the laws of the United States provide for the inspection of sheep passing from one state to another, and for the inspection of said diseases referred to in said proclamation and law of the state of Idaho. That the federal government employs inspectors of sheep, who inspect all sheep passing from one state to another, and determine whether said sheep are infected with disease, and particularly the disease known as scab; and said inspectors had and were then inspecting the said sheep, and the appellants had caused their said sheep to be so inspected in conformity with the laws of the United States and said inspection disclosed that the sheep and the range upon which they then were and had been was free from disease, particularly the disease of scab.

To this bill of complaint the defendants demurred for want of equity. The demurrer was sustained, and thereupon a decree was entered dismissing the appellants' bill, from which they take their appeal.

Arthur Brown, James H. Moyle, Brown & Henderson, and Lindsay B. Rogers, for appellants.

Frank Martin, W. E. Borah, and E. J. Dockery, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

Assuming, as we must, that all the facts pleaded in the bill of complaint are true, the question is presented whether a case is stated for equitable relief. Upon the application for a temporary restraining order in the court below, investigation was had upon affidavits and upon the oral evidence of witnesses taken in court. The court found that such evidence indicated that the sheep were not diseased, and that, according to the testimony of the chief witnesses upon both sides, sheep having the disease of scab could be so far cured as to render a passage through the country safe from the spread of the disease by dipping them twice at intervals of 10 days. The court sent the chief sheep inspector of the state and the United States inspector to personally inspect the sheep. The result of their inspection was that the sheep were found practically free from disease. The court said later, in ruling upon the demurrer, "The simple facts in this case are that the sheep were not so diseased as to justify their exclusion." But, after entertaining the motion for and granting a temporary injunction, the attention of the court was directed to the recent cases of *Rasmussen v. Idaho*, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820, and *Smith v. St. Louis & Southwestern Railroad Company*, 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847. Upon the authority of those decisions the demurrer to the bill for want of equity was sustained, the court drawing therefrom the conclusion that when the law is upon its face one to prevent the spread of disease in a state, and is a constitutional exercise of the legislative power, the state officers may be relied upon to enforce it in good faith, and in justice to all. In other words, the conclusion reached was that state officers claiming to act under and justifying their acts by a law which is valid, are not subject to control or injunction by the courts. We are unable to agree with that conclusion, nor do we find support for that doctrine in either of the cases above referred to or in any decision

of the courts. In the Rasmussen Case the validity of the act of the Idaho Legislature of March 13, 1899—which is the act under which the defendants justify their course in the present suit—was in question. It was held that the act is not in conflict with the Constitution of the United States. There was no suggestion in that case of unlawful action under the law. The sole question was of the legality of the act. So, in the case of *Smith v. St. Louis & Southwestern Railroad Company*, the court considered a similar quarantine law of Texas, which made it the duty of a live stock sanitary commission, upon receipt of "reliable information" of the existence of certain diseases among cattle, to make careful examination of animals believed to be infected with such disease, and to ascertain what, if any, disease existed; and, if the disease was found contagious or infectious, it was made the duty of the commission to direct and enforce "such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease," and to provide that no domestic animal infected with such disease should be permitted to enter or leave the district or grounds so quarantined, except by authority of the commissioners. It was held that this statute, as construed and applied, was not in conflict with the Constitution of the United States. In that case, as in the Rasmussen Case, there was no question of misconduct of the commissioners, and there was no contention that their action was controlled by improper motives, or was unjustified by the facts, except that it was contended that it did not affirmatively appear that the action of the commission was taken on sufficient information. But the court held that it did not appear that it was not taken on sufficient information, and therefore applied to the case the presumption which the law attaches to the acts of public officers. The inference fairly to be drawn from the language of the decision is that, if it had appeared that the action of the sanitary commission was taken on insufficient information, a different case would have been presented.

It is contended that the decision of the Circuit Court finds support in the case of *Compagnie Francaise v. Board of Health*, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209. But there, as in the cases above referred to, the sole question was of the validity of the quarantine law. The quarantine had been established by the State Board of Health of Louisiana, a corporation whose existence and powers were derived from the act of the Legislature of that state (section 8 of act No. 192, p. 444, of the year 1898) authorizing the State Board of Health, in its discretion, to "prohibit the introduction into any infected portion of the state persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease." Under this power the Board of Health excluded healthy persons from a locality infested with a contagious disease, and its power to do so was sustained by the court. No question was raised of the perversion of the law for private gain, or selfish interest, or for any improper purpose. Indeed, it is difficult to conceive how any such question could have arisen. The law did not require the Board of Health to obtain information, or to have good reason for its action, but committed the

whole matter to its judgment. In the exercise of its judgment, the board established the quarantine. It was not contended that its judgment was improperly influenced, or that its action was unwise. The case, as it was presented to the court, was one which involved only the power of a state to prevent citizens in good health from entering a quarantined district. The power was sustained, evidently upon the theory that the entrance of such persons added fuel to the flame, furnished new subjects for the disease, extended its ravages, and prolonged its life.

A leading case upon the law of quarantine is *Railroad Company v. Husen*, 95 U. S. 465, 24 L. Ed. 527, a case in which the court had under consideration an act of the Legislature of Missouri, which provided that no Texas, Mexican, or Indian cattle should be driven or otherwise conveyed into or remain in any county of that state between March 1st and November 1st in each year. The question was whether the statute was in conflict with the clause of the Constitution giving to Congress the power to regulate commerce, and whether it was a proper exercise of the police power. The court said, "It is a plain regulation of interstate commerce, a regulation extending to prohibition," and the court held also that it was not a lawful exercise of the police power of the state. The decision in that case recognizes the right of a state to pass sanitary laws and laws for the protection of property within its borders, and its right to prevent persons and animals suffering from any contagious or infectious disease from entering the state, and its right to establish quarantine and reasonable inspection laws, but it denies its right to interfere with transportation into the state "beyond what is absolutely necessary for its self-protection. The court said, "It may not, under the cover of exercising its police powers, substantially prohibit or burden either foreign or interstate commerce." Of the statute then under consideration, the court said:

"It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle between March 1st and November 1st in any year, no matter whether they are free from disease or not.' * * * The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise. * * * And, as its range some times comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The application of the doctrine of that case to the present discussion leads to the inquiry: Can state officers accomplish under the protection of a valid law the very results which the state is forbidden to authorize by legislation? Here are state officers who, if the allegations of the bill are true, are so using the police power as to obstruct "interstate commerce beyond the necessity for its exercise." The contention of the appellees, followed to its logical conclusion, is that, if the act under which state officers proceed to establish a quarantine is of itself valid and constitutional, it matters not to what extent such authority be abused, nor upon what grounds or information the officers proceed. No matter how arbitrary their act, or how unfounded in necessity or reason, it must be presumed that

it is done in good faith, and the bona fides thereof is not subject to investigation. By this doctrine the power of congress to regulate interstate and foreign commerce is practically taken away, and vested in the executive officer of the states. The act of the Legislature of Idaho authorizes the Governor to proceed when he "has reasons to believe" that the conditions exist for his action. It contemplates that his action shall be well grounded in fact, and that, in the absence of such reasons, he has no authority to proceed. Such a limitation would necessarily be imported into the law if the act had been silent on the subject. The provisions of the Constitution must necessarily impose restrictions on the action of state officers, and restrain them from exercising the police power further than is reasonably necessary to secure protection against disease. It is alleged in the bill that the sheep in question were not diseased, and the court so found upon a hearing had upon the application for a temporary injunction. It is not disputed that danger of contagion from sheep diseased with scab or scabbies is removed by a simple treatment applied twice with an interval of 10 days. It is averred also, and it is not disputed, that to exclude sheep for 40 days at the usual time when such sheep are brought from Nevada and Utah into Idaho for summer pasturage is, in effect, a total exclusion. It is alleged that the true purpose of the proclamation and of the acts of the appellees is to prevent the admission of the appellants' sheep to the pasture on the public domain within the state of Idaho, and to reserve such pasturage for the sheep of the inhabitants of that state. If these averments are true, we think the appellants are entitled to equitable relief, and that the court erred in sustaining the demurrer and dismissing the bill.

The cause will be remanded, with instructions to overrule the demurrer, and for such further proceedings as may not be inconsistent with the foregoing views.

MOORE et al. v. HAMMOND et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1903.)

No. 817.

1. EQUITY—SUFFICIENCY OF BILL—GROUNDS FOR RELIEF.

A bill alleged that complainants and S. agreed verbally to co-operate in a scheme to secure the building of a railroad and to obtain subsidies therefor, the profits to be divided; that S., acting for all, as defendant knew, made a written contract with defendant by which defendant was to secure a contract for the subsidies, and undertake to build the road, and S. was to procure the necessary money by a short loan until the road was built, and its securities could be marketed, paying such commissions for the loan as should be agreed on, the profits of the enterprise to be divided between S. and defendant, but, if either failed to carry out his part of the contract, he was to have no share in the profits. It was then alleged that S. failed to obtain the money because defendant refused to agree on the commission to be paid, but no facts were stated showing that S. procured any one able and willing to lend the money at any rate of commission. It was further alleged that defendant obtained the money, built the road, and secured thereby property of large value, donated as subsidies, to recover an interest in which com-

plainant sued. *Held*, that the bill stated no cause of action against defendant, since it affirmatively appeared therefrom that S. never became entitled to any share of the profits under the terms of his contract with defendant.

2. CONTRACTS—PARTIES—RIGHT TO SUE.

A bill alleged that S., on behalf of himself and complainants, entered into a contract with defendant by which they agreed to jointly prosecute a certain enterprise and divide the profits; that defendant knew of complainant's interest in the contract; that the enterprise was carried out, and large profits realized, which were divided between defendant and S. in fraud of complainant's rights. *Held*, that the contract pleaded created no contractual relation between complainants and defendant which would support a suit; the remedy of complainants, if any, being against S.

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

For opinion on demurrer to bill, see 110 Fed. 897.

George A. Brodie and Emmons & Emmons, for appellants.
C. W. Fulton, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The court below sustained a demurrer to the amended bill of complaint, and thereafter dismissed it at the complainants' cost. The appeal therefore presents only the question of the sufficiency of the bill. It was brought against Hammond, one John C. Stanton, and a corporation called the Astoria Company. It alleges that in the month of April, 1894, Stanton, who was never served with process, never appeared in the suit, and was subsequently dismissed therefrom on the motion of the complainants, entered into a parol agreement with one Campbell and the complainants to the effect that they should unite their efforts to secure the right of way, together with certain bonuses and subsidies, for building and equipping a line of railroad from the city of Astoria along the south shore of the Columbia river, in the state of Oregon, to a railroad station called "Goble," on the Northern Pacific Railroad, in Columbia county, of that state, secure the necessary money for and build and equip, or procure other parties to build and equip, the same; that each of the parties should devote such of their time and attention to the matter as should be thought desirable; that each should pay his own expenses, and that the profit that might be derived from such operations should be divided, one-third to Stanton, one-third to Campbell, and one-third to the complainants jointly; that no contract should be entered into without the concurrence of all of those parties, and that any contracts made should be made in the name of such party or parties as might be agreed upon, and, if not made in the names of all the parties, then the party or parties receiving the contract should execute a suitable declaration of trust showing the rights of all of the parties to the agreement stated.

It is alleged that each of the four persons named expended considerable time and money in prosecuting their enterprise and in discussing various plans, and that on the 30th day of November, 1894, Stanton, acting under the above-mentioned contract, and for the

benefit of himself, Campbell, and the complainants, entered into the following contract:

"Memorandum of Agreement, made this 30th day of November, A. D. 1894, by and between Ed I. Bonner and A. B. Hammond of Missoula, State of Montana, hereinafter called the party of the first part, and J. C. Stanton, of New York City, and H. I. Kimball, of Atlanta, State of Georgia, hereinafter called the party of the second part, witnesseth:

"That whereas certain parties in Astoria, Oregon, own a railway now in operation from the west side of Young's Bay southerly along the Pacific Coast some sixteen miles, and known as the Seaside Railway Company—which said company also own and control the grant from the United States Government to build a drawbridge across said Young's Bay, and

"Whereas, the citizens of Astoria have donated certain lands and other property, and placed the same in the hands of the Astoria Savings Bank Trustees, to be used as a subsidy under the control and direction of a committee of twenty-one named by them for the building of the Columbia River and Astoria Railway, from Astoria to a connection with the Northern Pacific R. R. at Goble; and

"Whereas, the party of the first part is willing to enter into contract with the owners of the said Seaside Railway for its road and franchise, including the grant for the said drawbridge from the U. S. Government, also to enter into contract with the committee controlling said subsidy—for the construction of said Columbia River and Astoria Railway, which said contracts are to have the approval of the party of the second part; and

"Whereas, the said party of the second part has heretofore had preliminary negotiations with parties who are to undertake to furnish the money necessary to buy said Seaside Railway, also to build said Columbia River & Astoria Railway—and is confident of their ability to secure such money:

"Now, therefore, in consideration of one dollar in hand paid each to the other—the receipt of which is hereby acknowledged, agree as follows, to wit:

"First. It is mutually agreed that all parties hereto shall unite their influence in securing for the party of the first part the most favorable contract with the said Seaside Railway Company and with the said Subsidy Committee.

"Second. The said party of the first part hereby agreed to enter into contract with the said Seaside Railway Company for the purchase of its railway and franchise, also to enter into contract with the said Subsidy Committee for the building of the said Columbia River and Astoria Railway, upon the best terms obtainable.

"Third. The said party of the second part hereby undertakes to finance the entire enterprise and secure the funds required for the purchase of the said Seaside Railway and its franchises, and for the construction of the said Columbia River & Astoria Railway—in accordance with the proposed contracts with said parties, and the party of the first part. It being mutually understood that the plan of raising such money suggested by the said party of the second part, viz., of borrowing the full amount required for an average term of about two years at 6 per cent. per annum interest—and the payment of such commission as may be agreed upon between the lenders and all the parties hereto—and pledging as security for such loan, all of the subsidies which may be procured—also all of the securities, stock and bonds which may be issued upon said properties, is accepted.

"Fourth. It is hereby mutually agreed that all of the parties hereto shall work to secure additional subsidies, this having special reference to the property on the west side of the Astoria harbor—and that in every department of the work herein contemplated by either party there should be mutual conference and co-operation.

"Fifth. It is hereby further mutually agreed that in case it should be found desirable to interest other parties in this enterprise that it may be done upon the mutual consent of the parties hereto, and whatever interest in the enterprise it is found necessary to part with for such purpose should be deducted from the whole, each of the parties hereto surrendering its pro rata share.

"Sixth. It is hereby further mutually agreed that the parties hereto shall

work in good faith, each aiding the others whenever possible—and that in all contracts and in all property or profits the interest of each party shall be as follows, viz.:

"5/9 to the parties of the first part, and 4/9 to the parties of the second part.

"Seventh. It is hereby further mutually agreed and understood that in case the said party of the first part fails to secure the contracts herein referred to, that they will surrender all claims and not be entitled to any interest therein—and in case the party of the second part fails to secure the money to carry out said contracts, as contemplated, and that burden falls upon the party of the first part, the said party of the first part shall not in such case be bound to divide any of the profits of the enterprise with the said parties of the second part.

"In witness whereof the said parties have hereunto affixed their hands and seals at Portland, Oregon, the day and year first above written in quadruplicate.

Edward I. Bonner,

"By A. B. Hammond. [Seal.]

"A. B. Hammond. [Seal.]

"J. C. Stanton. [Seal.]

"H. I. Kimball. [Seal.]"

It is alleged that at the time of the making of the contract of November 30, 1894, Hammond, Bonner, and Kimball knew that the complainants and Campbell were interested with Stanton therein, and that Stanton subsequently reported the same to the complainants and Campbell, and notified them that he had taken the contract in the names of Kimball and himself, but for the use and benefit of Kimball, himself, Campbell, and the complainants, and that it was thereupon further agreed between the complainants, Stanton, and Campbell "that from thenceforth they would work together in furtherance of the objects" of the contract of November 30, 1894, and that Stanton, Campbell, and the complainants' interests "therein and thereunder should be the same as theretofore agreed upon under said verbal agreement, to wit, one-third to said complainants, one-third to said Stanton, and one-third to said Campbell." It is alleged that Kimball, Stanton, Campbell, and Hammond, "in pursuance of the contract, did unite their influence in securing for said Hammond and said Bonner the most favorable contracts, as contemplated" by that of November 30, 1894, both with the Seaside Railway Company and with the subsidy committee therein mentioned; that thereafter, and about December 1, 1894, Hammond, acting for himself and Bonner, in pursuance of the contract of November 30, 1894, entered into a contract with certain persons therein described as the "committee of direction" and the Astoria Savings Bank, a corporation, by which Hammond and Bonner undertook to build the railroad described for certain subsidies, by the terms of which contract the actual work of construction of the railroad was required to be commenced on or before the 1st day of April, 1895, and that at least \$100,000 should be expended in such construction on or before July 1, 1895, which road should be completed and ready for operation on or before the 30th day of October, 1896. It is alleged that Stanton, Kimball, Campbell, and the complainants proceeded in good faith, with the knowledge and approval of Hammond and Bonner, to perform the conditions and agreements required by the contract of November 30, 1894, on the part of Stanton and Kimball, "and particularly to secure

additional subsidies and the necessary money with which to build" the road, and that they did secure, or aided in securing, certain additional subsidies, especially with reference to real property on the west side of the Astoria Harbor, of the value of \$500,000. It is alleged that Hammond acted for both Bonner and himself, and that for a time he co-operated with Kimball, Campbell, and the complainants, especially in the matter of securing the additional subsidies, and for a time pretended to co-operate with them for the purpose of securing the necessary money with which to build the road, but "that said Hammond and Bonner never acted in good faith in trying to secure said necessary money, and did not in fact try to secure said necessary money, or aid in securing the same, nor did said Hammond proceed in good faith to the performance of any act in aid of the said Stanton, Kimball, Campbell, and the complainants in procuring said necessary money." It is alleged that Stanton, Kimball, Campbell, and the complainants did a large amount of work in furtherance of the contract of November 30, 1894; that Hammond "refused to state what commissions he was willing to pay or should be paid in securing said money, and refused to work" with the complainants, Stanton, Kimball, or Campbell in trying to secure money, "and refused to aid them whenever possible—in fact, refused to aid them at all—and, having in the name of himself and said Bonner the contract for said subsidies and regarding said railway," refused to make any contract for procuring the necessary money, "and refused to inform said Stanton, Kimball, Campbell, or complainants, or any parties whom they sought to interest, or from whom they sought to secure said money, what kind of a contract he, said Hammond, would make or agree to, and refused to give any paper of any kind, or make any agreement of any nature, that would enable anybody to investigate the situation, and, if satisfactory, accept the specified terms." It is alleged that by reason of such refusal on the part of Hammond, acting for himself and Bonner, Stanton, Kimball, Campbell, and the complainants were, and that each of them was, prevented "from procuring the necessary money with which to build said railroad, and prevented from 'financing' said enterprise, which otherwise they would have been able to do, and would have done." It is alleged that pending the negotiations Bonner assigned all his interest in the contract of November 30, 1894, to Hammond, and that Kimball, with the approval of Hammond, assigned all his interest therein to Stanton, and that it was thereupon agreed that Stanton should hold the same for the benefit of himself, Campbell, and the complainants in the proportion above stated, of which agreement Hammond had notice. It is alleged that, after refusing to co-operate with Stanton, Kimball, Campbell, and the complainants, Hammond proceeded to and did procure the railroad mentioned to be built, and acquired and procured to be conveyed to him the subsidies referred to, and that he has also acquired a large amount of other property and money as further subsidies for the building of the railroad, aggregating upwards of a million of dollars in value. It is alleged that the profits realized by Hammond are large, and consist of various classes of property in part described in the bill; that the

work done and money expended by Stanton, Kimball, Campbell, and the complainants in securing subsidies and in carrying out the plan and purpose specified in the contract was of great value; that neither Campbell nor the complainants have received any compensation for their services so rendered, nor have either of them been repaid any part of the moneys so expended by them. It is alleged that the refusal of Hammond and Bonner to co-operate with Stanton, Kimball, Campbell, and the complainants in their efforts to secure the money with which to build the road was a fraud upon them, and each of them, by which Hammond sought to deprive them of their part of the profits of the enterprise, and that Hammond has appropriated the entire profits to his own use. It is alleged that the complainants were unable to get any information from Hammond in respect to his actions or intentions in the matter, and that they were informed by Stanton from time to time that no definite action had been taken in regard to the raising of money for the construction of the road, but that its building was still in contemplation, "and complainants did not know that said road had been built until very recently, and as soon as they discovered the fact that it had been built, and said bonuses and profits appropriated by said Hammond to his own use, they immediately began the investigation of the facts and the preparation of this bill of complaint." It is alleged that Stanton had been requested to join in the suit, but had refused to do so; that Stanton, after acquiring the interest of Kimball, and while Hammond was building the road, entered into a conspiracy with him to cheat and defraud Campbell and the complainants out of their rights in the premises, and in pursuance of such conspiracy Stanton and Hammond "secretly and fraudulently concealed from said Campbell and said complainants what was being done in regard to said enterprise and in regard to the carrying out of said contract as aforesaid, and refused to give said Campbell or said complainants any information in regard thereto, and said Stanton and said Hammond have secretly and fraudulently divided the profits realized on the carrying out of said contract, the acquisition of said subsidies, and the building of said railroad as aforesaid, between themselves." It is alleged that Hammond claims to have conveyed certain of the property mentioned in the bill to the defendant the Astoria Company, which conveyance was without consideration, and with knowledge of the facts alleged in the bill. It is alleged that complainants have acquired all the interest of Campbell. The prayer is that Hammond be required to account to the complainants, and that they be adjudged to be the owners of an undivided two-thirds of four-ninths of the real property described in the bill, and that a conveyance thereof be decreed to them, as well as a decree for profits, etc.

We are of the opinion that the bill makes no case against Hammond, for several reasons. In the first place, the complainants claim only a portion of the right secured to Stanton by the contract of November 30, 1894. By that contract he and Kimball constituted the "party of the second part" thereto, and their undertaking was to finance the entire enterprise and secure the funds required for the purchase of the Seaside Railway and its franchises, and for the con-

struction of the contemplated railroad. Their plan was stated in the contract and expressly accepted by Hammond and Bonner; and the contract expressly declared that Stanton and Kimball had already had preliminary negotiations with parties who would undertake to furnish the necessary money, and were "confident of their ability to secure such money." The consequence of their failure in that regard is also distinctly declared in the contract itself, as follows:

"It is hereby further mutually agreed and understood that, in case the said party of the first part [Hammond and Bonner] fail to secure the contracts herein referred to, that they will surrender all claims and not be entitled to any interest therein—and in case the party of the second part [Stanton and Kimball] fails to secure the money to carry out said contracts, as contemplated, and that burden falls upon the party of the first part, the said party of the first part shall not in such case be bound to divide any of the profits of the enterprise with the said parties of the second part."

It is not pretended that either Stanton or Kimball ever secured any money for the purposes contemplated, or produced any one willing, under any conditions or circumstances whatever, to advance the required money, or any part thereof, but that burden, according to the averments of the bill itself, fell upon and was borne by Hammond. It is true that it is alleged that the latter refused to state what commissions he was willing to pay or that should be paid to secure the money, or the kind of a contract he would make to that end, and that he refused to work with the complainants Stanton, Campbell, or Kimball in good faith in an effort to secure the funds. "The kind of a contract" upon which the money was to be provided by Stanton and Kimball was expressly proposed by them, and accepted by Hammond and Bonner in the written agreement executed by and between those parties. The determination of the question of commissions did not rest with Hammond alone. The contract, as has been seen, provided for the payment of such commissions "as should be agreed upon between the lenders and all the parties" thereto. Manifestly, until some one was found who would loan the money, the question of commissions was premature; and when it should arise it was to be determined no more by Hammond than by Stanton, and not by those two, even, but by all of the parties to the contract, together with the lenders. It is not alleged that Hammond or Bonner put any obstacles in the way of Stanton and Kimball's securing the money. No fact is alleged from which the court can see, or even infer, that their failure to secure the money they contracted to secure was caused by any act of Hammond or Bonner, or their refusal to do anything demanded by their contract to be done. There is not a fact alleged even tending to show that Stanton or Kimball ever had any particular person, corporation, or company, even in contemplation, willing to furnish the required amount upon any sort of terms or conditions. Upon such a bill, it is idle to claim that the failure of the parties who contracted to furnish the funds was caused by the other parties. Moreover, Hammond had no contractual relations with the complainants. His and Bonner's contract was with Stanton and Kimball. The fact alleged that the complainants and Campbell had a verbal agreement with Stanton by which they were to be entitled to a certain portion of Stanton's profits under his contract with

Hammond and Bonner, of which verbal agreement Hammond and Bonner had knowledge, did not in any wise establish any contractual relations between the complainants and Stanton on the one part and Hammond and Bonner on the other. *Rockafellow v. Miller*, 107 N. Y. 507, 14 N. E. 433; *Burnett v. Snyder*, 76 N. Y. 344; *Bates on Partnership*, §§ 164, 167; *Johnstone v. Robinson* (C. C.) 16 Fed. 903; *Am. & Eng. Enc. of Law* (1st Ed.) 933.

It is nowhere alleged that there was ever any contract between the complainants and Hammond. Their only interest could, according to the averments of the bill, come through Stanton, and, as Stanton never acquired any, for the reason that he wholly failed to furnish the funds he contracted to furnish, it follows that the bill is without equity, and was properly dismissed.

The judgment is affirmed.

UNITED STATES v. FIDELITY TRUST CO. (WYMAN et al., Interveners).

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

No. 899.

1. PLEADING—ISSUES AND VARIANCE—EFFECT OF ADMISSIONS IN ANSWER.

The bond of an Indian agent was conditioned that he should account for all public funds and property, all money belonging to the Indians under his charge coming into his hands, and all other funds received by him by reason of his position. The complaint, in an action by the United States on such bond, alleged that on settlement of the agent's accounts a balance was found due the United States, which the agent had failed to pay or account for. A statement of the agent's account was also filed as a bill of particulars, which showed that the item on which the action was based was a sum charged to the agent as having been received by him from a third person, to be paid to Indians under his charge for work done by them. *Held* that, the money being recoverable on the bond by the United States for the benefit of the Indians, the fact that such money was not due to the United States as alleged in the complaint, or that it was not properly chargeable in his account so as to render the statement competent evidence of its receipt, did not preclude its recovery in the action, where the defendants, advised by the bill of particulars of the exact nature of the claim, in their answer admitted the receipt of the money, and alleged as a defense that it was properly paid out, which defense was not sustained by the evidence.

2. LIMITATIONS—ACTION BY UNITED STATES.

A state statute of limitations cannot bar an action by the United States on the bond of a public officer.

3. RES JUDICATA—REJECTION OF CLAIM AGAINST ESTATE—WASHINGTON STATE.

Under Ballinger's Ann. Codes & St. Wash. §§ 6226, 6230, which provide that claims against the estate of a decedent shall be presented for allowance to the executor or administrator, and if disallowed by them to the judge of the superior court, and especially in view of section 6233, which provides for bringing suit in the proper court on a claim rejected "by either the executor, administrator, or the court," the rejection of a claim by the court is not an adjudication which can be pleaded in bar of a subsequent action thereon in a federal court, which has jurisdiction.

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

This is an action brought by the United States on the bond of Moses P. Wyman, formerly agent of the Crow Indian Agency, in the state of Montana. In the original complaint it was alleged that on February 4, 1890, the agent was appointed, and that on April 1, 1890, he executed his bond and took his oath of office, and that he held said office until February 28, 1894; that during the time while he held said office there came into his hands directly from the United States \$88,672.57, and from sales of property belonging to the United States, sold by him, \$111,457.84, amounting in all to \$200,130.41, which he received for the use of the plaintiff, of which sum he disbursed and accounted for \$199,119.91, but did not account for or disburse the balance of \$1,010.50, which sum he converted and appropriated to his own use, in breach of his trust and the conditions of his bond; that the plaintiff made demand upon the agent and his bondsmen for said balance; that on October 18, 1898, the said agent died in Pierce county, Wash., and the Fidelity Trust Company was appointed his administrator; that the plaintiff's claim was duly filed with the said administrator for said balance, but was rejected and disallowed. With the complaint the plaintiff in error filed a bill of particulars, setting forth a statement of the account of said agent from April 1, 1890, to February 28, 1894, showing a balance of \$157.50 in the agent's favor; but thereafter, in a supplemental account, made on September 26, 1896, charging the agent under his bond with the sum of \$1,168.00, upon information purporting to show that in the fall of 1891 he contracted with one David G. Browne for the Indians of said agency to haul 200 tons of hay to Fort Custer for Browne, for which the Indians were to receive \$5 per ton, and that for such hauling by the Indians Browne paid the agent for the Indians \$1,168, which the agent never paid to the Indians, but appropriated to his own use; upon which, upon a statement of the whole account of said agent made by the Auditor of the Interior Department, Treasury Department, on July 14, 1899, a balance of \$1,010.50 was found against him under his bond. The Fidelity Trust Company answered the complaint, and alleged that said agent, before the commencement of the action and during his lifetime, satisfied and discharged the plaintiff's alleged claim by payment thereof. The defendants in error, Jessie J. Wyman and Nellie M. Browne, by leave of the court, intervened as the heirs at law of said Moses P. Wyman and also answered the said complaint. They alleged that "on or before February 28, 1894, the said Moses P. Wyman duly and lawfully paid out and expended all of the said sum of \$1,010.50 for account of said plaintiff, as will more fully appear upon the trial for cause." Thereafter the interveners moved the court that the plaintiff be required to set forth the terms of the bond, and to declare what the supposed moneys or funds were from which the balance of \$1,010.50 was alleged to have been taken and appropriated by the said agent to his own use. The motion was allowed by the court, and thereupon the plaintiff filed an amended complaint setting forth the bond in hæc verba, the condition whereof is as follows: "The condition of the foregoing obligation is such, that, whereas the President of the United States has appointed the said Moses P. Wyman to be agent for the Indians of the Crow Agency in Montana by commission dated February 4, 1890, and said Moses P. Wyman shall, at all times, during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same and for all public funds, including funds designated in regulations of the Indian department as miscellaneous receipts, and moneys belonging to the Indians under his charge which shall or may come into his hands, and all other funds received by him by reason of his position as Indian agent, and for all public property placed in his charge, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue." The amended complaint alleged, further, that on July 14, 1899, upon a settlement of said agent's account, duly made by the Treasury Department and the Auditor of the Interior Department, it was found and determined by said auditor that there was a balance due the United States from said Indian

agent on account of such agency and upon said bond of \$1,010.50, and a certificate to that effect was duly made by said auditor. The amended complaint proceeded to allege a demand upon the agent, and set forth the facts of his death, and the appointment of the administrator of his estate, and the due presentation of said claim to said administrator, and its rejection thereof. The Fidelity Trust Company, answering the amended complaint, admitted that on September 12, 1899, the plaintiff filed with said administrator its claim against said estate for \$1,010.50, and that the administrator rejected the same, and that on March 8, 1900, the plaintiff again filed with the administrator the said claim, which was again rejected and disallowed. For a further and separate defense, the trust company alleged that before the commencement of the action, and during the lifetime of said Moses P. Wyman, the said Wyman satisfied and discharged the plaintiff's alleged claim by payment thereof. The answer then proceeded to set up the defense that the action was barred by reason of the following facts: That on October 3, 1898, said Moses P. Wyman died, and on January 26, 1899, his will was admitted to probate, and the trust company was duly appointed administrator with the will annexed; that the administrator duly published notice to creditors of said estate, requiring them to present their claims within one year after the date of such notice, the first publication whereof was made on February 2, 1899; that on September 12, 1899, the plaintiff presented to said administrator for allowance its claim for \$1,010.50, and the administrator indorsed said claim as rejected, and forthwith notified the plaintiff thereof; that on September 12, 1899, on the disallowance of said claim, the plaintiff presented the same to the superior court of the state of Washington for Pierce county, having jurisdiction of such matters, and the court disallowed the same; that this action was not begun within a period of three months after the rejection of said claim; that thereafter, on March 8, 1900, the plaintiff again presented for allowance the said claim, which claim was on said date duly indorsed as rejected, and the plaintiff was notified thereof; that said presentation on March 8, 1900, was not made within one year after the date of said publication of notice to creditors. To this second defense the plaintiff demurred, on the ground that the facts therein alleged constituted no defense, and the court sustained the demurrer. The interveners also answered the amended complaint, admitting the execution of the bond, but denying that the said Moses P. Wyman was indebted to the plaintiff in the sum of \$1,010.50 or, in any sum whatever, and they denied that the said supplemental account of July 14, 1899, as stated in the amended complaint to be between the said agent and the plaintiff, is duly stated as to the item of \$1,168, wherein it is supposed that that amount or any amount of money whatever was in the fall of 1891, or at any other time, paid to the said agent in his official capacity by one David G. Browne for or on account of the plaintiff, or for which the agent was in any manner accountable to the plaintiff. The answer proceeds to allege that at the expiration of the term of office of said agent the United States was indebted to him in the sum of \$157.50; that the account of said agent so stood until July 14, 1899, when the Interior Department received information that said agent had in 1891 received \$1,168 of one David G. Browne for account of the United States as such agent, and that upon this information a new and so-called supplemental account statement by direction of the Treasurer's Department was made up against said agent by the auditor of that department for the Department of the Interior, by charging that amount additionally against said agent's accounts, whereby the account was changed from one showing a balance of \$157.50 in the agent's favor to one showing a balance of \$1,010.50 against him; that said supposed sum of \$1,168 was never received by said agent from said Browne, but that it is true that in the latter part of the year 1891, while said Moses P. Wyman was Indian agent and acting as such, he was requested by one David G. Browne, who then had a government contract to furnish hay for the use of the government at Fort Custer, Mont., to take and receive from him, the said Browne, the sum of \$1,000, to be held by said Moses P. Wyman upon his own personal and private account, and not as Indian agent, and for and on account of said Browne, to be by him, the said Wyman, paid out for and on account of said Browne to certain Crow Agency

Indians owning and having teams of their own, a large number of whom had been hired by said Browne to haul 170 ⁹/₂₅ tons of hay, at the rate of \$5 per ton, from Dana's Ranch, near the Crow Agency, to the government post at Fort Custer; that on account of such hauling the agent paid out to the Indians \$851.80 on account of their services so rendered to Browne, and for the remainder accounted to the said Browne. The answer sets up the further defense that the action is barred by reason of the facts so set forth in the answer of the trust company, to all of which portion of their answer a demurrer was interposed, which was sustained by the court.

The case was tried before the court without a jury, and on the evidence adduced the court found, among other findings of fact, the following: "That on the 14th day of July, 1899, upon the settlement of his, the said Moses P. Wyman's accounts, as such agent, made by the Treasury Department of the United States and the Auditor of the Interior Department thereof, it was found and determined by said auditor that there was a balance due the United States from said Indian Agent Wyman, on account of such agency, and upon said bond, the sum of \$1,010.50, and a certificate to that effect was made by said auditor; that the item out of which this balance so certified grew was on account of money paid by a man named David G. Browne to Moses P. Wyman, Indian agent, to pay for the hauling of something over two hundred tons of hay by the Crow Indians under his charge, they to be paid for said hauling at the rate of five dollars per ton; that the Indians hauled the hay, though the amount thereof was ascertained to be less than two hundred tons; that the said Wyman did not pay the said money to the Indians, nor return the same to Browne, or account for it to the government; that the money intrusted to Wyman was the money of a private individual, to wit, David G. Browne; that no portion of it was drawn from the treasury of the United States, and that the government never had any right or claim to it." Upon those findings of fact the court drew the legal conclusion that no part of the money in question ever belonged to or was due to the United States, and that the evidence offered on the part of the government failed to prove the particular breach of bond sued on and assigned in the complaint, and that the evidence offered on the part of the government in the case was inadmissible, incompetent, and wholly insufficient to prove the issue on its part. This legal conclusion and the judgment so rendered are assigned as error.

The court also found that the claim of the government is not barred by the state statute of limitations, regarding either the time of presenting a claim against the decedent's estate or the time within which to bring an action for the rejection of such a claim. Judgment was rendered for the defendants in error; whereupon the plaintiff in error sued out the present writ, and the defendants in error, the said interveners, made joinder therein, and assigned as cross-errors that the trial court sustained the demurrer of the plaintiff in error to that portion of the answer to the amended complaint which set up the defense that the action was barred, and the defense that the court had no jurisdiction of the cause, for the reason that the plaintiff had prosecuted its claim and demand in the superior court of the state of Washington for Pierce county against the administrator of said decedent, and that the trial court erred in not holding that the moneys alleged to have been received by Moses P. Wyman from David G. Browne were received by him only as the bailee and agent of said Browne.

Jesse A. Frye and Edward E. Cushman, for plaintiff in error.

George W. Fogg, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The plaintiff in error brought this action against the administrator of the agent for the Crow Indians, alleging the failure of the agent to account for certain money received by him as such officer.

The complaint set forth the total sums received by the agent, and the total disbursements by him made, showing a balance of \$1,010.50, which it was alleged was unaccounted for. With the complaint was filed as a bill of particulars the account of the agent as settled by the Auditor of the Treasury Department and the certified transcripts from the Commissioner of Indian Affairs. This account showed that, on the expiration of the agent's term of office, a balance was found due him of \$157.50, and that a supplemental account was thereafter stated charging him with \$1,168, alleged to have been received by him for the services of certain Crow Indians in hauling hay for one Browne from Dana's Ranch to Fort Custer, in the fall of the year 1891, against which sum the agent was credited with the balance due him, leaving, according to the account, \$1,010.50 which had not been accounted for. The administrator thus had notice that the balance of \$1,010.50 sued for was claimed by the government to arise out of money which the agent had received for the services of the Indians in hauling hay for Browne in the fall of 1891. The administrator then filed his answer, and therein, among other defenses, alleged that the agent had satisfied and discharged the claim arising out of this transaction by the payment thereof. When the interveners appeared and answered they also had notice of the nature of the plaintiff's claim. In their answer they referred to the specific item on which the balance was claimed in favor of the United States, and alleged that the money so received by the agent for the Indians was not \$1,168, as charged in the account, but was the sum of \$851.80, which they alleged was the money of Browne, and that the said agent paid the same to the Indians on account of their services in hauling hay for Browne. In support of that defense they produced in evidence the deposition of David G. Browne, who testified that the Indians had earned \$851.80 in hauling hay on his account, and that he had paid that amount to the agent, to be by him paid to the Indians on account of their services. They failed, however, to prove that the agent had paid any of the said money to the Indians, and the court found that he had received the money from Browne as alleged in said answer, but that no part thereof has been paid to the Indians. Notwithstanding these findings of fact, the court denied a judgment to the plaintiff in error on the ground, as stated in the opinion, as follows:

"The government has no interest in the transaction, except incidentally from its obligation to compel its agent to deal honestly with the Indians. This interest, obligation, and right of the government is quite different from the right of a creditor to whom money is due. It is my opinion that the auditor committed an error in the adjustment of Wyman's accounts, as shown by his statement of differences in charging this item of \$1,168. Therefore the evidence offered by the government fails to prove the particular breach of the bond alleged in the complaint. If Wyman embezzled money which he should have paid to the Indians or returned to Browne, such conduct constituted a breach of the conditions of this bond, and the government is entitled to prosecute an action upon the bond to recover damages for the benefit of the injured individuals; but the rules of pleading cannot be disregarded, and a recovery cannot be permitted when the allegations of the complaint are not sustained by the evidence, although the obligor may be in fact guilty of a breach not assigned in the complaint. If this complaint

were amended so as to charge Wyman with misappropriating money earned by the Indians, still the government would not be in any better position, because the evidence introduced on the part of the government is, in my opinion, incompetent to prove such fact. * * * There is no evidence tending to prove that he received money from Browne, except a deposition of Browne taken at the instance of the defendant; but, if a new issue were to be tried, this evidence would not be available for the government, because it would be unfair to use the defendant's evidence, procured to disprove a different charge, to supply what is lacking to make a complete *prima facie* case for the plaintiff."

We think that in taking this view of the case the court failed to give due regard to the state of the pleadings. The answers of the administrator and the interveners not only do not put in issue the averment of the complaint, as aided by the bill of particulars, that the agent received from Browne money to be paid to the Indians, but they expressly admit the receipt of such money by the agent, and proceed to plead affirmatively that the money was properly paid out by him. It cannot be disputed, and the Circuit Court so held, that the United States, as representing the Indians under its charge on the agency, had the right to bring an action to recover money which the agent received for the services rendered the Indians. *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; *United States v. Boyd*, 27 C. C. A. 592, 83 Fed. 547; *United States v. Flournoy Live Stock, etc., Co.* (C. C.) 69 Fed. 886. It is immaterial that in the complaint it is alleged that the money was money of the United States. If it be conceded that the United States could sue upon the bond to recover the money, it must follow that it could recover it upon the facts found in the present action, when we consider that before making their defense the defendants in error were by the pleadings properly advised of the precise nature of the demand upon which the action was brought. The bill of particulars which was filed in aid of the original complaint specified the nature of the demand, and directed attention to the item out of which it arose, and gave notice that the money sued for was that which the agent had received from Browne for and on account of the services rendered by the Indians. The defendants in error, in making answer both to the original complaint and to the amended complaint, framed their defense with express reference to that item of the account. To make out the case of the plaintiff in error, it was not necessary to refer to the deposition of Browne. That deposition proves no more than the answers had already admitted to be true. The defendants in error went to trial admitting that the Indians had earned \$851.80 by hauling hay, and that Browne had given the agent that sum with which to pay them. Their defense, as they pleaded it, was that the agent had paid the Indians. The court found that this was not true, and that no part of the money was so paid out by the agent. There was no objection taken to any of the testimony on the ground that the action was brought to recover money as the money of the United States, when in fact it was money due the United States in a fiduciary capacity. The defendants in error were in no way misled by the averments of either the original complaint or the amended complaint. They failed to sustain the specific de-

fense which they pleaded, and on the facts as found by the court we think the plaintiff in error was entitled to judgment for the sum of \$851.80, less the balance of \$157.50, which was due the agent on the settlement of his accounts with the United States on July 14, 1899, or \$694.30, with legal interest thereon from the date of such settlement.

We find no error in the ruling of the Circuit Court that the claim of the plaintiff in error was not barred by the state statute of limitations. *United States v. Thompson*, 98 U. S. 486, 25 L. Ed. 194; *United States v. Belknap* (C. C.) 73 Fed. 19; *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373. Nor do we find ground for holding, as urged by the defendants in error, that the rejection of the claim by the judge of the superior court for Pierce county was res judicata. The rejection was not a judgment. There was no suit upon the claim in that court. The presentation of the claim to that court was not only ex parte, but it would seem to have been unauthorized by statute. The statutes of Washington (Ballinger's Ann. Codes & St. §§ 6226, 6230) provide that a claim against the estate of a decedent shall be verified by affidavit and presented to the executor or administrator, and that if the executor or administrator allow the claim it shall then be presented to the judge of the superior court for his allowance or rejection. There is no provision that a claim rejected by the executor or administrator may be presented to the judge of the superior court. But, however this may be, it is clear that section 6233 contemplates that after rejection of the claim by the superior court an action may be brought thereon. It provides: "When a claim is rejected by either the executor, administrator, or the court, the holder must bring suit in the proper court against the executor or administrator within three months after its rejection; otherwise the claim shall be forever barred."

The judgment is reversed, and the cause remanded, with instructions to enter judgment for the plaintiff in error in accordance with the foregoing views.

W. C. PEACOCK & CO., Limited, et al. v. PRATT, Assessor and Collector.

(Circuit Court of Appeals, Ninth Circuit. February 9, 1903.)

No. 897.

1. TAXATION—CONSTITUTIONAL PROVISIONS—POWERS OF TERRITORY.

Article 8, § 1, of the Constitution of the United States, requiring that "all duties, imposts and excises shall be uniform throughout the United States," establishes the rule only for taxation by the federal government, and has no application to the powers of taxation of a state or territorial legislature.

2. SAME—TERRITORY OF HAWAII—POWERS CONFERRED BY ORGANIC ACT.

The provision of the organic act of the territory of Hawaii that "the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable" includes full and comprehensive power to legislate in the matter of taxation.

3. SAME—INCOME TAX LAW—DISCRIMINATION BETWEEN CORPORATIONS.

A provision of an income tax law exempting from its operation private schools, colleges, commercial colleges, and fraternal benefit societies does not make an illegal discrimination which renders the law invalid as to other corporations or persons upon whom the tax is imposed.

4. SAME—UNIFORMITY OF METHOD—EQUAL PROTECTION OF LAWS.

The provision of the fourteenth constitutional amendment which forbids states to deny to citizens the equal protection of the laws does not require taxes to be levied by a uniform method and at the same rate upon every class of property, but the manner of taxation with respect to each class is left to the legislative discretion.

5. SAME.

The exemption of insurance companies from the operation of an income tax law does not render it invalid as to other corporations who are made subject to the law, where the exemption is expressly made on the ground that such companies are required by another law to pay a tax on the premiums received.

6. SAME—DISCRIMINATION—EXEMPTION OF REASONABLE PERSONAL INCOME.

A law imposing an income tax on persons and corporations does not discriminate illegally against the latter because it allows each person, or the persons composing one family, a reasonable income exempt from the tax; nor is \$1,000 per year an amount so unreasonable as not to be within the legislative discretion.

7. SAME—EFFECT OF UNCONSTITUTIONAL PROVISIONS.

The fact that an income tax law does not expressly exempt the salaries of judges from the tax, or that it authorizes unreasonable searches and seizures, or requires the production by a taxpayer of evidence incriminating himself, in violation of the Constitution, does not invalidate the law as a whole, and the protection of the Constitution because of such illegal provisions can only be invoked by one against whom they are sought to be enforced.

8. SAME—HAWAIIAN INCOME TAX LAW—VALIDITY.

The income tax law of the territory of Hawaii (Act No. 20, pp. 31-35, Sess. Laws 1901) is not invalid, as to its provisions imposing a tax on the incomes of corporations, as being in violation of the Constitution of the United States or the organic act of the territory.

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

The appellants were the complainants in a bill in equity brought to enjoin the collection of an income tax authorized by the act of the Legislature of Hawaii Territory, known as Act No. 20, pp. 31-35, Sess. Laws 1901. The sections of the law which are involved in the discussion on the appeal are the following:

"Section 1. From and after the first day of July, A. D. 1901, there shall be levied, assessed, collected and paid annually upon the gains, profits and income over and above one thousand dollars, derived by every person residing in the territory of Hawaii from all property owned, and every business, trade, profession, employment or vocation carried on in the territory, and by every person residing without the territory from all property owned, and every business, trade, profession, employment or vocation carried on in the territory, and by every servant or officer of the territory, wherever residing, a tax of two per cent. on the amount so derived during the year preceding.

"Sec. 2. There shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of two per cent. on the net profit or income above actual operating and business expenses, from all property owned, and every business, trade, profession, employment or vocation carried on in the territory of Hawaii, of all corporations doing business for profit in the territory, no matter where created and organized: provided, however, that nothing therein contained shall apply to corporations, companies or associations conducted solely for charitable, religious, educational or scientific purposes, including

fraternal beneficiary societies, nor to insurance companies taxed on a percentage of the premium under the authority of another act.

"Sec. 3. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the territory of Hawaii, or of municipalities hereafter created by the territory, the principal and interest of which are by the law of their issuance exempt from all taxation; profits realized within the year from sales of real estate, including leaseholds purchased within two years, dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended on the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all other gains, profits and income derived from any source whatsoever.

"Sec. 4. The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among shareholders from any fund or account, or carried to the account of any fund or used for construction, enlargements of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporation. In computing incomes, the necessary expenses actually incurred in carrying on any business, trade, profession or occupation, or in managing any property, shall be deducted, and also all interest paid by such person or corporation on existing indebtedness. And all government taxes and license fees paid within the year shall be deducted from the gains, profits or income of the person who, or the corporation which, has actually paid the same, whether such person or corporation be owner, tenant or mortgagor; also all losses actually sustained during the year incurred in trade or arising from losses by fire not covered by insurance, or losses otherwise actually incurred. Provided, that no deduction shall be made for any amount paid out for new buildings, permanent improvements or betterments made to increase the value of any property or estate. Provided, further, that no deduction shall be made for personal or family expenses, the exemption of one thousand dollars, mentioned in section 1, being in lieu of same. Provided, further, that where allowable herein, only one deduction of one thousand dollars shall be made from the aggregate annual income of all the members of one family composed of one or both parents and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except where two or more wards are comprised in one family, in which case the aggregate deduction in their favor shall not exceed one thousand dollars. Provided, further, that in assessing the income of any person or corporation there shall not be included the amount received from any corporation, as dividends upon the stock of such corporation, if the tax of two per cent. has been assessed upon its net profits by said corporation as required by this act, nor any bequest or inheritance otherwise taxed as such."

"Sec. 6. It shall be the duty of all persons of lawful age, having an income of six hundred dollars or more for the preceding year, from all sources and of all corporations made liable to income tax, to make and render a list or return, between the first and thirty-first days of July of each year, in such form as the treasurer of the territory may direct, to the assessor of the division in which such persons or corporations reside, locate or do business, of the amount of their or its income, gains and profits as aforesaid; and all guardians, trustees, executors, administrators, agents, receivers, and all corporations, or persons, acting in a fiduciary capacity, shall make or render a list or return, as aforesaid, to the assessor of the division in which such person or corporation, acting in a fiduciary capacity, resides or does business, of the amount of income, gains, and profits of any minor or person for whom they act; and the assessor shall require every list or return to be verified by the oath or affirmation of the person or authorized officer of the corporation making the same. If any person or corporation refuse or neglect to render such return within the time required as aforesaid, or renders a return, which in the opinion of the assessor is false and fraudulent, or contains any

understatement, it shall be lawful for the assessor to summon such person, or any of the officers of such corporation, or any person having possession, custody or care of books of account containing entries relating to the business of such person, or corporation, or any other person he may deem proper, wherever residing or found, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogations under oath, respecting any income liable to tax or the returns thereof. False, willful testimony, given before such assessor shall be deemed perjury and punishment as such."

"Sec. 8. When any person or corporation having a taxable income, refuses or neglects to render any return or list required by law, or decline to take oath or affirmation thereto, the assessor may make such assessments as he may consider just, and the same shall be binding and conclusive upon all parties and shall not be subject to appeal. In case of any false or fraudulent return or valuation by any taxpayer, the assessor shall add 200 per cent. to the just valuation of the income of such taxpayer and the amount of the tax assessed on such increase shall become part of the tax on the said income."

Section 9 provides for an appeal to the "tax appeal court."

The bill further avers as ground for resorting to a court of equity that the defendant in the bill, the appellee, is threatening to collect said tax, and that if the appellants should pay the same under protest, and the law afterward should be determined unconstitutional, they could not procure the return of the money so paid, for the reason that in the meantime, under the system of finances adopted in Hawaii, the moneys received would have been paid out to persons having demands on the treasury of that territory, since the former and present expenditures of the territory are largely in excess of its income, and that there is now a large and constantly increasing deficit in its treasury.

A demurrer was interposed to the bill for want of equity and for multiplicity, and on the ground that the appellant had a full, complete, and adequate remedy at law. The demurrer was sustained and the bill was dismissed. From the decree of the court ordering such dismissal, this appeal is taken.

Thomas Fitch and Joseph J. Dunne, for appellants.
Robertson & Wilder, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The appellants, by their bill, seek to enjoin the enforcement of the income tax law of Hawaii, on the ground that it violates both the organic act of the territory and the Constitution of the United States, in that it contains illegal discriminations, fails to exempt the salaries of judges, and compels taxpayers to furnish evidence against themselves which may result in their criminal prosecution. The only restriction of the powers of the territorial Legislature contained in the organic act is the provision that the "legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable." There is no express limitation of power in the matter of taxation. The section so quoted is identical with that which has usually been inserted in the organic acts creating territorial governments. It provides, in effect, that the territorial Legislature may not invade the domain of Congress as to subjects of legislation; but, aside from that, it concedes to it all the powers of a legislature of the states. *Clinton v.*

Englebrecht, 13 Wall. 434, 20 L. Ed. 659; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832. In *Clinton v. Englebrecht* it was said:

"The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress."

The provision that the legislative power shall extend to "all rightful subjects of legislation" includes, therefore, full and comprehensive power to legislate in the matter of taxation. Section 8, art. 1, of the Constitution, requiring "that all duties, imposts, and excises shall be uniform throughout the United States," can have no application to the powers of taxation of a state or territorial legislature. It is a rule only for taxation by the United States. The decisions of the Supreme Court construing and applying that provision of the Constitution and the most of the discussion thereof found in the opinions filed in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, and on rehearing, 158 U. S. 607, 15 Sup. Ct. 912, 39 L. Ed. 1108, so freely quoted from and earnestly relied upon by the appellants, can have no bearing, therefore, upon the present discussion.

It is urged that section 2 of the law makes illegal discriminations in favor of private schools, colleges, commercial colleges, fraternal benefit societies, and fire, life, and marine insurance companies. The corporations so exempted from the income tax are all of the character of corporations usually recognized as proper subjects of exemption from taxation, with the single exception of insurance companies; and, as to those, the act states the reason of their exemption. It is because a tax is imposed on a percentage of their premiums under the authority of another act. In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, it was said that the federal Constitution imposes on the states no restraint against unequal taxation. But that remark must be construed in the light of subsequent utterances of the court, in which due effect was given to that portion of the fourteenth amendment which forbids a state to deny to citizens within its jurisdiction the equal protection of the laws. The rule is that unequal taxes may not be imposed upon property of the same kind, in the same situation, and used for the same purpose. But the protection afforded by the fourteenth amendment has never been carried to the extent of requiring that the same tax shall be imposed in the same manner upon every class of property, irrespective of its nature or condition or class. In *Kentucky Railroad Tax Cases*, 115 U. S. 337, 6 Sup. Ct. 57, 29 L. Ed. 414, the court, after referring to the fact that there was nothing in the Constitution of Kentucky requiring taxes to be levied in a uniform method upon all descriptions of property, remarked:

"The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class so that the law shall operate equally and uniformly upon all persons in similar circumstances."

In *Bells Gap Railroad Company v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892, Mr. Justice Bradley said that the fourteenth amendment was not intended to require a state to adopt an iron rule of taxation. So in *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. Ed. 663, Mr. Justice Miller said:

"Perfect equality and perfect uniformity of taxation, as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized."

In *Home Ins. Co. v. New York*, 134 U. S. 594, 606, 10 Sup. Ct. 593, 33 L. Ed. 1025, Mr. Justice Field said:

"But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate. * * * Nor does the amendment prohibit special legislation."

In *Pacific Express Co. v. Seibert*, 142 U. S. 339, 351, 12 Sup. Ct. 250, 35 L. Ed. 1035, the court not only approved the doctrine of the cases above cited, but said that a system which imposes the same taxation upon every species of property, irrespective of its nature or condition or class, "will be destructive of the principle of uniformity and equality of taxation, and of a just adaptation of property to its burdens." In *Western Union Telegraph Co. v. Indiana*, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725, it was held that, in enforcing the collection of taxes, one rule may be adopted in respect to the admitted use of one kind of property, and another rule in respect to the admitted use of another, in order that all may be compelled to bear their proper share of the burdens of government. In *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 618, it was held that a state law requiring a license in respect of elevators and warehouses situated on the right of way of a railroad at points other than its terminal, without requiring such license in respect of elevators and warehouses differently situated, was not a classification so unreasonable as to amount to a denial of the equal protection of the laws.

It is contended that the exemption of incomes to the extent of \$1,000 is an illegal discrimination. The power of state legislatures to grant reasonable exemptions from taxation is undisputed. It has been upheld on grounds of enlightened public policy—a public policy which seeks to exclude from taxation the living expenses of the average family, and thus to enable the poor man to escape becoming a public burden. It rests upon the theory that the exemption results in ultimate benefit to the taxpayer, which compensates him for the additional burden of taxation which he is thereby called upon to bear. It does not apply to corporations, for the reason that they have no corresponding expense. But the exemption must be reasonable and impartial, and must be extended to all who are similarly situated. It is urged that the exemption in question is unreasonable. If the power to make exemptions be once conceded, the amount of the exemption is largely within the discretion of the Legislature—a discretion which is not subject to review in the courts unless it be clearly shown to have been abused. In the discussion of the national income tax law in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, Mr. Justice Field thought that the exemption of

incomes to the extent of \$4,000 was a discrimination that vitiated the whole legislation; but Mr. Justice Harlan and Mr. Justice Brown, on the rehearing of that case (158 U. S. 675, 694, 15 Sup. Ct. 912, 39 L. Ed. 1108), were of the opinion that the exemption was not unreasonable. The national income tax law of August 5, 1861 (12 Stat. 309), exempted incomes of \$800, and those of July 1, 1862, and June 30, 1864 (12 Stat. 473, and 13 Stat. 281), each exempted \$600. In no case to which our attention has been directed was question ever made of the validity of those exemptions. When we regard the general policy of such exemptions and their purpose, and consider the annual expenses of maintaining the average family, we are unable to discover any ground for holding that an exemption of incomes to the extent of \$1,000 from an income tax law is unreasonable, or that its allowance is an abuse of legislative discretion.

It is contended that the act violates section 1, art. 3, of the Constitution, in that it does not expressly exempt the salaries of judicial officers, and that it violates the fourth and fifth amendments, in that by section 6 it authorizes unreasonable search and seizure of private papers, and compels the taxpayer, in a criminal case, to furnish evidence against himself. As to both of these objections, it may be said that, if the act is unconstitutional in the respects referred to, it does not follow that the whole law is thereby invalidated. The provisions of the Constitution so referred to stand as limitations of the power of the territorial Legislature to tax the salaries of judges, to authorize unreasonable searches, and to enforce the production of evidence, and those limitations must be read into the terms of any law that deals with those subjects. If by virtue of the Constitution the salaries of judges are exempt, that exemption operates upon the income tax law with the same effect as if it had been expressed therein. If the act authorizes unreasonable search, or requires the production of evidence, in violation of the fourth and fifth amendments, the taxpayer may invoke the protection of those amendments whenever he shall be called upon to submit to the search or to produce the evidence. The law in other respects is not rendered invalid either by the failure of the Legislature to exempt a salary which by the Constitution is exempt, nor by incorporating therein unconstitutional provisional remedies for the better enforcement of the law. The tax law is still enforceable without the aid of such remedies. In *Allen v. Louisiana City*, 103 U. S. 80, 26 L. Ed. 318, it was said:

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. * * * The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature."

In *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. 471, 30 L. Ed. 588, a part only of a taxation law of Arkansas was held unconstitutional. The court said:

"The statute declared that, in making its statement of the value of its property, the railroad should omit certain items. That clause being held

invalid, the rest remained unaffected, and could not be fully carried out. An exemption which was invalid was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident that the Legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause.”

Upon a careful consideration of the act and of the averments of the bill, we discover no ground for enjoining the collection of the tax, and find, therefore, no equity in the bill. The act was undoubtedly intended to remedy the depletion of the revenues of the territory which is described in the bill. It contains no evidence of an intention to unjustly or unfairly discriminate. It places the burden of taxation upon the points of strongest resistance, where it is easiest borne. The same objections to the law that are here urged were presented to the Supreme Court of Hawaii Territory in *Robertson v. Pratt*, 13 Hawaii, 590, and the law was sustained by the majority of the court. There being no equity in the bill, it becomes unnecessary to consider the other grounds of demurrer.

The decree of the District Court dismissing the bill is affirmed.

BRADLEY TIMBER CO. v. WHITE et al.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1903.)

No. 1,218.

1. ACTS OF BANKRUPTCY—PETITION—JOINDER.

Bankr. Law, § 32, c. 541, Act July 1, 1898, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], provides that, in the event petitions are filed against the same person in different courts, they may be consolidated. General Orders in Bankruptcy, rule 6, provides that, in case two or more petitions shall be filed in different districts against the same person, the first hearing shall be had in the district where the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date, if charged in either of the other petitions; and rule 7 declares that, where two or more petitions shall be filed against a common debtor, alleging separate acts of bankruptcy committed on different days within four months prior to the filing of such petitions, and the debtor shall contest the adjudication, the petition shall be first tried that alleges the commission of the earliest act of bankruptcy, and, in case the several acts are alleged in different petitions to have been committed on the same day, the different proceedings shall be consolidated and heard as in one petition. *Held*, that a petition was not objectionable for joinder of several acts of bankruptcy known to the creditors, and committed by the insolvent within four months prior to the filing of the petition.

2. SAME—PETITION—ALLEGATION OF TIME—SUFFICIENCY.

Where an involuntary bankruptcy petition was filed July 23, 1902, and two jurats to the oaths of creditors verifying the same were dated the 12th and 16th of July, 1902, and the petition alleged that the bankrupt within four months preferred certain creditors named, and, in addition, specifically alleged a transfer of lumber to its president on April 11, 1902, and on specific days thereafter in April, 1902, up to April 29, 1902, which transfer was alleged to be a preference to the president as a creditor, and to constitute an additional act of bankruptcy, it was not demurrable for want of facts showing an act of bankruptcy committed within four months.

8. SAME—ANSWER.

An answer to an involuntary bankruptcy petition setting up grounds of objection to the petition previously alleged in a demurrer which had been overruled, and denying that defendant owed certain of the petitioners, and that it owed them over \$500, admitting insolvency, but denying that it had committed the acts of bankruptcy charged in the petition, and demanding a trial by jury, was objectionable as not conforming to the form prescribed by the orders of the United States court, as prolix, and as neither admitting nor unequivocally denying the material allegations of the petition.

4. SAME—STRIKING ANSWER FROM FILES—FILING SUBSTITUTED ANSWER—WAIVER OF ERROR.

Where, after an answer was stricken from the files, defendant filed another answer, error, if any, in striking the previous answer was waived.

5. SAME—BEST EVIDENCE—COURT RECORDS—ORIGINALS.

Original papers filed in a suit in a state court, identified by the proper custodian, are not objectionable as secondary evidence in a suit in a federal court on the ground that certified copies of such papers are primary evidence thereof.

6. SAME—SUFFERING PREFERENCES—DISCHARGE—RESISTANCE OF LEGAL PROCEEDINGS.

Under the bankrupt law providing that, if an insolvent suffers or permits a judgment against him which will result in a preference, and fails to vacate the same within at least five days before a sale or disposition of property affected by such preference, it shall constitute an act of bankruptcy, that an insolvent resists legal proceedings by a creditor to obtain a preference does not prevent such preference constituting an act of bankruptcy, if the bankrupt fails to discharge the preference within the time provided.

7. SAME—DIRECTION OF VERDICT—MOTION BY BOTH PARTIES—EFFECT.

A motion by both parties for a peremptory instruction is equivalent to a request for a finding of the facts by the court, and, if the court directs a verdict for one of the parties, both are concluded by the facts thereby found.

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

In this case White and two others, creditors of the Bradley Timber Company, a manufacturing and trading corporation under the laws of the state of Alabama, filed a petition against said corporation, praying to have it adjudged a bankrupt. The petition alleges that the corporation is insolvent, and within four months preceding the filing thereof had committed at least three several acts of bankruptcy—one by a preference payment to creditors of large sums of money, the amounts and dates of which were unknown to the petitioners, to be shown at the hearing by the books of the corporation or other competent evidence; second, that with intent to give a preference before other creditors had made a large transfer of lumber (16 cars) to the president of the corporation who was also a creditor; and, third, that on a date given, to wit, the 13th of May, 1902, did suffer or permit, while so insolvent, a certain creditor (Kory & Sons) to obtain preference through legal proceedings without having, at least five days before a sale or final disposition of the property affected by such preference, vacated or discharged such preference. Service having been made upon the corporation, counsel appeared, and demurred to the petition for insufficiency upon the ground that there was a misjoinder of several different and distinct acts of bankruptcy in one petition, and because it failed to state issuable facts showing that any act of bankruptcy had been committed, and because of divers and sundry alleged defects in the petition. On hearing this demurrer was overruled, and thereupon the Bradley Timber Company filed an answer, mainly setting up the grounds set forth in the demurrer, denying that it owed certain of the petitioners, denying it owed petitioners over \$500, admitting insolvency,

but denying that it had committed acts charged in the petition; and, as a part of the answer, demanded a trial by jury. On this answer being filed, petitioners filed a motion to strike the same from the files, which was granted, with leave to the Bradley Timber Company to file a proper denial of bankruptcy by law in the form prescribed by the Supreme Court of the United States. On the same day the Bradley Timber Company filed an answer, denying it had committed the act of bankruptcy set forth in the petition; admitted insolvency, and claiming it should not be declared a bankrupt for any cause mentioned in the petition, and prayed for a jury. A jury trial was thereupon ordered, and, a jury being impaneled, the case was heard, the jury finding the issues in the cause for the petitioners, and upon this verdict the Bradley Timber Company was adjudicated a bankrupt. A motion for a new trial was made and overruled, the learned district judge filing a written opinion reported in 119 Fed. 989.

The bill of exceptions found in the record shows that numerous objections were made to the original petition for insufficiency; that the appellant complained of and excepted to the rulings of the court in the matter of pleadings prior to the jury trial; that on the trial appellant objected to the introduction of evidence because of the insufficiency of the petition, and particularly objected to the admissibility of evidence tending to show the judgment obtained by Kory & Sons; but the bill does not show any objection made to evidence showing a transfer to Turner, president of the corporation, of 10 car loads of timber shipped away for Turner's account. The bill further shows that at the close of the evidence the petitioners requested the court to charge the jury that, if they believed the evidence, they should find for petitioners, and the defendant (plaintiff in error here) requested the court to give a charge in writing, to wit: "The court charges the jury that, if they believe the evidence in this case, their verdict must be for the Bradley Timber Company." The court refused the last-mentioned charge, granted the one in favor of the petitioners, and to this action the defendant excepted. And defendant also requested the court to give the following charge in writing: "If the jury does not believe the evidence, they should find a verdict for the defendant," which charge the court refused, and to this action of the court exceptions were taken. The bill also shows that the Bradley Timber Company moved the court to set aside the verdict of the jury and grant a new trial on the grounds last above mentioned, and, further, that the court erred in admitting evidence with reference to the judgment preference in favor of Kory & Sons.

In this court 47 specific errors are assigned, relating to the defects in the pleadings, to the introduction of evidence in regard to the Kory & Sons judgment, and to the refusal to give, and giving the charges requested.

Frederick G. Bromberg, for appellant.

William C. Fitts, for appellees.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). A question much pressed on this writ of error is whether, in a suit to adjudge an insolvent debtor a bankrupt, because within the four months preceding he has committed an act of bankruptcy, more than one act of bankruptcy may be alleged in the petition. It can hardly be doubted that if an insolvent debtor within four months has committed several distinct acts of bankruptcy, and only one can be alleged in a petition to declare him a bankrupt, other petitions may be filed against the same insolvent debtor by the same or other creditors setting up the other acts of bankruptcy. It would seem that this answers the question, for it is not to be presumed that the law requires, or the courts will permit, several simultaneous or consecutive actions where one would answer the purpose. The bankrupt law itself contemplates that in a proper

case the insolvent debtor may be called upon to answer for more than one act of bankruptcy at the same time; for section 32, c. 541, Act July 1, 1898, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], provides, in the event petitions are filed against the same person in different courts, they shall be transferred to one, and be there consolidated, and proceeded with to the greater convenience of the parties in interest. Rule 6, General Orders of the Supreme Court in Bankruptcy, provides that, in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date if such earlier act is charged in either of the other petitions. The seventh rule provides that, where two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against the adjudication in bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and, in case the several acts of bankruptcy are alleged in different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition.

In the instant case there is only one object sought by the petition; that is, the adjudication of the timber company in bankruptcy. While several distinct acts or grounds are assigned for such action, they all lead to the same one conclusion. By allowing several acts of bankruptcy to be set forth in one petition with a view to have one adjudication in bankruptcy, we cannot see that any positive injury results to the insolvent debtor. Certainly not if the failure of the creditors on one alleged act of bankruptcy will not be *res judicata* to prevent the creditors from bringing another action. On the other hand, if it should be *res judicata*, it furnishes a sufficient reason why all the acts of bankruptcy committed by the insolvent within four months, and known to the creditors, should be included in one petition.

It is further contended that the petition of creditors was insufficient, and wholly defective, because, it is said, the petition does not show an act of bankruptcy committed within four months next preceding the filing of the petition; and because it fails to state facts on which the court can say that an act of bankruptcy has been committed, such as will apprise the defendant what act is relied upon to constitute an act of bankruptcy, and because the petition is not dated. The petition was filed on July 23, 1902. The two jurats to the oaths of creditors verifying the same are respectively dated the 12th of July, 1902, and the 16th of July, 1902. The preference charged in favor of the Bush Grocery Company and Michael Lyons Grocery Company is not given specific dates in the petition, the allegation being general that it was within four months. The preference charged in favor of Turner, president of the company, specifically sets out the transfer of cars of lumber was on April 11, 1902, and on specific days thereafter in April, 1902, up to April 29, 1902. As the petition must take date from the

day of filing, the transfers of lumber to Turner are shown by the petition to be within four months, and the facts alleged with regard to this transfer are sufficiently specific to show an act of bankruptcy, and fully apprise the defendant company of the facts and circumstances charged against it as constituting the act of bankruptcy. The preference in favor of A. Kory & Sons is specifically charged as on the 13th day of May, 1902—clearly within four months, counting either from the dates of the jurats or the filing of the petition. The facts with regard to the preference of Kory & Sons are not as fully set forth as good practice requires, and, if the petition of the creditors had relied solely upon that preference as an act of bankruptcy, the petition would have been so far defective as to require amendment. As, however, the creditors did not rely wholly upon that preference as an act of bankruptcy, and as, in fact, the defendant was fully, if not better, informed of the matter than the petitioning creditors could be, we think no reversible error intervened. At all events, as the petition is sufficient in fully stating a preference in favor of Turner, president, there was no error in overruling the demurrer to the petition.

The plaintiff in error also contends that the court erred in striking from the files the first answer filed by the Bradley Timber Company, but we think that in this he can hardly be serious, because the said answer seems obnoxious on all the grounds alleged in the motion to strike. The alleged answer does not conform to the form for answers prescribed by the United States Supreme Court orders. It is prolix, and admixed with supposed grounds of the demurrer to the original petition, which had already been disposed of by the court. It is not properly verified, and it did not admit, nor unequivocally deny, upon the oath of a competent person, the material facts alleged in the petition. Besides, another answer was filed. See *Campbell v. Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280.

The transcript shows that on the trial of the case before a jury the plaintiffs below offered in evidence the original files and papers in the circuit court of Mobile county, Alabama, in the case of A. Kory & Sons v. Bradley Timber Company, the minute book of the court showing the judgment rendered in the case, the original execution issued therein, the sheriff's return thereon showing levy, advertisement, and the sale thereunder, all of which judgment, entry, execution, sheriff's indorsement and return thereon were admitted over the objection of defendant below. The objections of the defendant, which were numerous, and are brought here under numerous assignments of error, attack the evidence offered in every possible shape, being so minute and particular that it would seem difficult for any small error to escape, and they are based on objections to the sufficiency of the original petition in the case, and upon the proposition that the original papers, although identified by the proper custodian, were in fact secondary evidence, and therefore not admissible as long as certified copies, which it is alleged would be primary evidence, were obtainable. So far as the objections to the admission of this evidence on the ground of insufficiency of the petition are concerned, we have already passed upon that matter, and adversely to plaintiff in error. The proposition that original files and papers, when identified by the proper custodian, con-

stitute secondary evidence, is not, in our judgment, tenable; for, while we know the general rule to be that such documents are proved by certified copies, yet we can think of but one objection to the introduction of originals, and that is that a court of record is not likely to consent to permit its files and records to be carried to another forum, where they may be indefinitely impounded. We think there is no error in the ruling of the court in respect to this evidence.

On the trial the petitioners below introduced one R. P. Roach, attorney of record for A. Kory & Sons in the suit against the Bradley Timber Company, as a witness, who testified that he collected the money under the execution; that there were no pleas introduced by the defendant, and it was a judgment *nil dicit*. Defendant below objected to this evidence as immaterial and irrelevant. The court overruled the objections, and the defendant excepted. Defendant's counsel then asked the witness, "Did not the Bradley Timber Company resist A. Kory & Sons in the matter of obtaining said judgment, and, if so, to what extent did it make resistance?" Petitioners below objected to said question, because it called for immaterial and irrelevant evidence, and because the record was the best evidence. The court sustained this last objection, and the defendant excepted thereto. In this court the plaintiff in error does not insist upon the objections to the inadmissibility of Roach's evidence for the petitioners, but does insist that the court erred prejudicially in sustaining the objection to the question last propounded the witness. We doubt if any of the evidence of witness Roach was relevant to the issue involved. Whether or not an insolvent makes resistance to legal proceedings of a creditor to obtain preference is not very material. It may show good faith on his part, but the act of bankruptcy declared in the law is "suffering or permitting" a judgment which will result in a preference, and a failure to vacate the same within at least five days before a sale or disposition of the property affected by such preference. The bankrupt law seeks to prevent, and, if obtained by any means, to set aside, preferences obtained against an insolvent within four months; and, in order to effect an equal distribution of insolvent's property among creditors, it contemplates a resort to the bankruptcy court in all cases of such preferences, no matter whether the bankrupt has consented thereto or opposed the same. If a bankrupt fails to discharge a preference obtained through legal proceedings within at least five days before the property affected by the preference is disposed of, that is an act of bankruptcy, and on the proof of the same the insolvent may be adjudged a bankrupt. *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 393.

The remaining assignments of error complain of the peremptory charge in favor of the petitioners and the refusal of the peremptory charge in favor of the defendant. As to this matter, it seems to be settled that, where each party asks the court to instruct a verdict in its favor, it is equivalent to a request for a finding of facts, and, if the court directs the jury to find a verdict for one of them, both are concluded on the findings of facts. *Beuttell v. McGone*, 157 U. S., 154, 15 Sup. Ct. 566, 39 L. Ed. 654. In that case it was held that, where both parties asked the court to instruct a verdict, both affirmed

that there was no disputed question of fact which could operate to deflect the question of law. And Mr. Justice White, for the court, said:

"This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof"—citing *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694.

In the instant case, the judge having found the facts and instructed for the plaintiffs below, we need only inquire whether there was any evidence to support such finding; and in this record we find, irrespective of the evidence in regard to the judgment in favor of Kory & Sons, that there was sufficient evidence to prove that a large quantity of timber belonging to the Bradley Timber Company was, within four months prior to the institution of the bankruptcy proceedings, and when said timber company was insolvent, transferred to and appropriated by the president of the Bradley Timber Company, apparently to pay an indebtedness of said timber company to the said president.

On the whole case we perceive no reversible error, and the judgment of the district court is therefore affirmed.

ROBERTS v. PACIFIC & A. RY. & NAVIGATION CO. et al.

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

No. 840.

1. REMOVAL OF CAUSES—SUIT AGAINST CITIZEN AND ALIEN.

In a suit by a plaintiff, who is a citizen of the state where it is brought, against two defendants, the fact that one is a citizen of a different state, and the other an alien, does not deprive a federal court of jurisdiction, nor prevent a removal from a state court under the judiciary act of 1887-88 (Act March 3, 1887, 24 Stat. 552, as amended by Act Aug. 13, 1888, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507]), where either defendant might have removed the suit if sued alone, and they join in the petition for removal.

2. SAME—PETITION—ALLEGATION OF CITIZENSHIP.

An allegation in a petition for removal that one of the petitioners is a corporation organized under the laws of a foreign country is a sufficient allegation that it was a citizen of such country when the action was commenced against it.

3. CONTRACT—ACTION FOR BREACH—CONSTRUCTION OF WRITINGS.

Where the correspondence between the parties introduced in evidence clearly constituted a contract for service to be performed by plaintiff for a specified compensation, it was the duty of the court to so determine; and it was error to submit such issue to the jury, and to admit for their consideration thereon, in connection with the correspondence, a subsequent agreement with respect to the same services made after a breach of the prior contract by defendants, as shown by their own testimony.

¶ 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.

¶ 2. Averments of citizenship to show jurisdiction in federal courts, see note to *Shipp v. Williams*, 10 C. C. A. 261.

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

The plaintiff in error, a citizen and resident of the state of Washington, brought an action against the defendants in error, one of which is a corporation of the state of West Virginia, and the other a corporation of British Columbia, to recover damages for breach of a contract alleged to have been made and entered into on December 16, 1898, by the terms of which the plaintiff in error had agreed to haul freight from the summit of White Pass to Lake Bennett, Alaska. The action was commenced in the superior court of the state of Washington for King county, and was thence removed to the Circuit Court. A motion was made to remand on the ground that the case was not removable. The motion was denied. 104 Fed. 577. Thereafter the cause was tried before a jury, and a judgment was rendered upon their verdict in favor of the defendants in error. The defendants in error had denied in their answer that they had entered into a contract with the plaintiff in error. Concerning that issue the following correspondence which passed between the plaintiff in error and the manager of the defendants in error, which was all the correspondence between the parties, was offered and admitted in evidence:

"Seattle, Wash., Dec. 14, 1898.

"Pacific & Arctic Railway and Navigation Co., British Columbia-Yukon Railway Co., Dexter Horton Bldg., Seattle, Wash.—Gentlemen: In keeping with my conversation of yesterday with your general traffic manager, Mr. L. H. Gray, in reference to freighting goods for you from the White Pass, or summit of the mountain, to Lake Bennett in the Northwest Territory, I wish to say that if you will guarantee to furnish me at least one hundred tons per month commencing Jan. 15, 1899, and extending to about April 15, 1899, or until the roads break up in the spring, and pay me therefor at the rate of four and one-half cents per pound on delivery of goods at Lake Bennett, and haul my feed and supplies from Skagway to the summit of the mountains for one and one-half cents per pound, and give me a free pass over your road during the time of said work, I will agree to put on sufficient teams to handle, with expedition, the amount above stated or more, when we find that there will be more to haul, you, of course, giving me sufficient notice to procure the extra teams, and will endeavor to work to your interest in the handling of said freight and protect you from any combination that might be formed for the purpose of advancing rates; any piece of machinery or other freight, weighing more than five hundred pounds, to be paid for extra, as may be agreed upon hereafter. An early reply will greatly oblige,

"Yours truly,

G. W. Roberts,

"Room 622, New York Block, Seattle."

"Seattle, Wash., December 16th, 1898.

"Mr. G. W. Roberts, Room No. 622, N. Y. Bldg., City—Dear Sir: Referring to your favor of December 14th, 1898, my file No. 74, will say that we expect to haul from Skaguay to the summit of White Pass about 4,000 tons of freight, between January 15th and April 15th. We accept your rate of 4½ cents per pound from Summit of White Pass (International Boundary) to Lake Bennett, but we cannot agree to give you any special amount in a specified time, as the elements are beyond our control, and there is a possibility of the steamers being delayed in reaching Skaguay. We do agree, however, to treat you fairly by dividing the freight with you and other parties in proportion to their carrying capacity. You can depend upon the White Pass & Yukon Route acting fairly and squarely with you; and, it is my opinion that you will be offered at least 25 or 30 tons of freight per day. We will agree to allow your sleds and harness repaired and horses shod at our blacksmith shops along the trail, at actual cost.

"I consider the above a fair proposition and await your acceptance.

"Yours truly,

L. H. Gray,

"L. H. G.-M.

G. T. M."

"Seattle, Wash., Dec. 17th, 1898.

"White Pass & Yukon Route, L. H. Gray, G. T. M., Seattle, Wash.—Dear Sir: Referring to your favor of Dec. 16th in reference to carrying your freight from the summit of White Pass to Lake Bennett, I have considered your proposal to give me a rate of 4½ cts. per lb. and hereby accept the same.

"Very truly yours,

G. W. Roberts."

It was proven, also, over the objection of the plaintiff in error that on February 15, 1899, the plaintiff in error signed, at the instance of the defendants in error, the following paper, known as "Defendants' Exhibit No. 2":

"Skaguay, Alaska, February 15th, 1899.

"Mr. L. H. Gray, G. T. M., W. P. & Y. R., Seattle, Washington—Dear Sir: We, the undersigned, hereby agree to protect the following freighters' rates during good sledding:

Between Heney and Summit..... 1c. per pound

Between Summit and Log Cabin..... 1c. per pound

Between Summit and Lake Bennett..... 2c. per pound

Between Log Cabin and Lake Bennett..... 1c. per pound

"If absolutely necessary to protect Dyea competition and Packers' rates from Skaguay, we will confer with you and arrange some satisfactory basis of rates.

"Yours truly,

G. W. Roberts."

Ballinger, Ronald & Battle and J. D. Jones, for plaintiff in error.
John P. Hartman, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It is assigned as error that the court denied the motion to remand the cause to the state court. It is argued that since the plaintiff in error was a citizen of the state of Washington, and one of the defendants in error was a citizen of West Virginia, and the other an alien, no cause was made for removal under the removal act of 1887 (24 Stat. 552 [U. S. Comp. St. 1901, p. 507]), and under the doctrine as stated in Black's Dillon on Removal of Causes, §§ 68, 84, in the latter of which sections it is said:

"But a different question is presented when a plaintiff, citizen of the state where the suit is brought, sues two defendants, one of whom is a citizen of another state, and the other an alien. Here there is no community of citizenship between any of the parties. Yet the cause is not removable, because it does not come within any of the provisions of the statutes. It is *casus omissus*. It cannot be said to be a controversy between citizens of different states, because one of the parties is not a citizen; and it cannot be described as a controversy between citizens of a state and foreign citizens or subjects, because one of the defendants is not a foreigner."

According to this doctrine, an action brought by a citizen of a state against a citizen of another state and an alien is not removable, although, if two actions had been brought by the same plaintiff—the one against the alien and the other against the citizen—both would have been removable. The act of March 3, 1887, as corrected by the act of August 13, 1888, § 2, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509], provides for removing to the Circuit Court of the United States "cases that might have been originally commenced therein." The first section defines the original jurisdiction of the Circuit Courts,

and declares that they shall have jurisdiction of cases involving the prescribed jurisdictional amount, "in which there shall be a controversy between citizens of different states * * * or a controversy between citizens of a state and foreign states, citizens and subjects." It is true that the present case does not present a controversy which is wholly between citizens of different states, nor does it present one which is wholly between a citizen and subjects of a foreign state; but can it be said, in view of the fair intendment of the statute, that it is not a case in which there is a controversy between citizens of different states, or a controversy between a citizen of a state and a foreign subject? Considering the purpose of the act and the general scope of its provisions, we think its language should be construed as comprehending the present case. There is here presented a controversy between the plaintiff in error and each of the defendants in error. It is true that the latter are sued jointly, but notwithstanding that fact a controversy exists as to each. The act does not declare that the controversy shall be one wholly between citizens of different states. That fact is of important significance when it is observed that in the second section, providing for removal of causes, it is declared:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

In the present case if there were a separate controversy which was wholly between the plaintiff in error and the corporation of West Virginia, the whole case would have been properly removable at the instance of that corporation alone. The language so used in the statute indicates that, in the contemplation of Congress, a controversy might exist between citizens of different states which was not wholly between such citizens, but which might involve an alien jointly sued or jointly suing, and that such a case would be embraced in the comprehensive provision in which the jurisdiction of the Circuit Court is defined in the first section of the act above quoted. It would be a construction entirely inharmonious with the general purpose of the act and its provisions to hold that a citizen is deprived of his right of recourse to the federal courts by reason of the fact that he is jointly sued with an alien, who, if sued alone by the same plaintiff, would have that right. But a single case is cited in Black's *Dillon on Removal of Causes* to sustain the text—the case of *Hervey v. The Illinois Midland Railway Company*, 7 Biss. 103, Fed. Cas. No. 6,434. In that case the ground of removal was that a separate controversy was presented, which was wholly between citizens of different states. The court found that the controversy was not separable, within the meaning of the act of March 3, 1875 (18 Stat. 473), providing for removal "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be wholly determined as between them." Incidentally the court remarked:

"Now, 'citizens of a state,' there, means citizens of one of the United States; and the suits contemplated are suits between citizens of one of the states of the Union, on one side, and foreign states, or citizens or subjects, on the other."

This language which is relied upon as giving support to the doctrine which is contended for by the plaintiff in error was used with reference to a point not presented in the case then before the court, and the remark of the court has not the force of a precedent upon the question involved. Several cases were cited by the plaintiff in error as tending to sustain the point of law which he contends for, only two of which we find it necessary to advert to: *Tracy v. Morel* (C. C.) 88 Fed. 801, and *King v. Cornell*, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60. In the first of these cases, Munger, District Judge, sustained a motion to remand on the ground that the petition did not show that the citizenship of one of the defendants, whose citizenship and residence were alleged to be unknown, was in fact diverse from the citizenship of each of the plaintiffs. After denying its jurisdiction upon that ground, the court proceeded to remark, "Nor can jurisdiction be sustained on the ground that it is a controversy between citizens of a state and foreign citizens or subjects," and quoted with approval the language of section 84 of Black's *Dillon on Rem. Causes*. The motion to remand in that case raised only the question whether the petition to remove was filed too late, and the remarks of the court so quoted were obiter. We are unable to find in the case of *King v. Cornell* any support for the contention of the plaintiff in error. All that was held in that case was that by the act of March 3, 1875, the second clause of section 639 of the Revised Statutes, giving the right to an alien to remove a cause which presented as to him a separable controversy, was repealed, and that thereafter, where a citizen of a state sued in the court thereof a citizen of the same state and an alien, the latter was not entitled to remove the suit to the Circuit Court. The decision, it is true, reaffirms the general doctrine which has always been recognized that the federal courts have jurisdiction only of cases which are expressly enumerated in the words of the constitution and laws. What we hold in the present case is that the cause is within the language of the statute, in that it presents a controversy between citizens of different states, as well as a controversy between a citizen of a state and a foreign citizen.

It is contended further that the cause was not properly removable, for the reason that the petition for removal alleges concerning the British Columbia Yukon Railway Company only the fact that it was at the time of the filing of the petition a corporation incorporated under the provincial legislature of the province of British Columbia. It is true that, in order to present a case for removal, it must be shown that the citizenship of the parties was at the beginning of the action, as well as at the time of filing the petition, such as to authorize the removal. But where it is alleged in the petition that one of the parties is a corporation incorporated under the laws of a particular state or country, it necessarily follows from that averment that it was so incorporated at the time when it became a party to the

action. A corporation is incorporated but once, and thereby it becomes a citizen of the country under whose laws it is organized. It does not change its residence or citizenship. It appears, however, from the complaint, which is a part of the record on the removal, that the British Columbia & Yukon Railway Company was incorporated at the time of the commencement of the action. In determining whether a case for removal is presented, reference may be had to the whole record. *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 453, 12 Sup. Ct. 935, 36 L. Ed. 768.

Error is assigned to the admission of certain evidence upon the trial. To sustain the allegation of the complaint that a contract had been entered into, the correspondence between the parties was admitted in evidence. The court submitted to the jury the question whether these writings, together with other evidence consisting of certain conversations which preceded them, constituted a contract. No error is assigned, however, to the submission of that question to the jury; and the question whether or not the writings prove that a contract was made and entered into would not now be before us, were it not for the fact that the court permitted the defendants in error to offer in evidence the subsequent writing known as "Defendants' Exhibit No. 2." L. H. Gray, who was the manager of both the defendants in error, testified on their behalf that he notified the plaintiff in error, after the latter arrived in Alaska with his teams, outfit, and horses, that the defendants in error could not give him any freight, on account of the high rates he wanted from the Summit to Lake Bennett, and notified him and other packers that it would be necessary to reduce the rates still lower, whereupon the plaintiff in error replied that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates, which must be had to compete with the Dyea Trail, but that thereafter he signed said Exhibit No. 2, which was received and read in evidence; that later the witness notified the plaintiff in error that he must make a still lower cut in the freight rate from the Summit to Lake Bennett; and that the plaintiff in error stated that he did not want freight upon those rates. To this evidence and the exhibit the plaintiff in error objected on the ground that the defendants in error had not pleaded a rescission or modification of the contract. The court admitted the said testimony and exhibit in evidence, and instructed the jury that it was not admitted for the purpose of showing a rescission or modification of the contract, but as evidence to aid them in deciding whether or not a contract had been entered into. This is assigned as error. The correspondence between the parties shows that a contract was entered into. It is true that not all of its terms were definite, and not all of the proposals of the plaintiff in error were accepted, but there was a meeting of their minds upon some of them. By his first letter the plaintiff in error offers to haul freight from the Summit to Lake Bennett for the season commencing January 15, to April 15, 1899, or until the roads should break up in the spring, at the rate of 4½ cents per pound, and offers to guaranty to put on sufficient teams to haul 100 tons a month or more. The

reply of the defendants in error to this proposition accepts the rate of $4\frac{1}{2}$ cents per pound from the Summit to Lake Bennett, but states that the defendants in error cannot agree to furnish any particular amount in a specified time, for the reason that the elements were beyond their control, and there was the possibility of delay of their steamers in reaching Skaguay. They added, "We do agree, however, to treat you fairly by dividing the freight between you and other parties in proportion to their carrying capacity," which, in their opinion, would give him "25 or 30 tons a day"; and they concluded with the words, "I consider the above a fair proposition and await your acceptance." The plaintiff in error answered by writing: "I have considered your proposition to give me a rate of $4\frac{1}{2}$ cents per lb. and hereby accept the same." Now, it is true that this contract does not bind the defendants in error to furnish the plaintiff in error any specified amount of freight. It does, however, bind them to give to him a proportion of the freight pro rata with the other carriers according to carrying capacity, which they estimated at 25 or 30 tons a day. From this covenant it was possible to make certain the proportion of freight which they promised to furnish him. There was a breach of this contract, by the admission of the defendants in error. Their witness testified that the plaintiff in error went to Alaska with his teams, outfit, and horses, and that freight was refused him solely on the ground that competition with a rival company had made it necessary to reduce the rates which had been agreed upon. It was for the court to say whether the correspondence constituted a contract, and, under the pleadings, we think it was prejudicial error to permit the jury to take into consideration the defendants' Exhibit No. 2 as throwing light upon the question whether a contract had been entered into. That instrument purports to be a written agreement to accept a lower rate than $4\frac{1}{2}$ cents per pound, and to be signed by the plaintiff in error some two months after the contract had been made.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with these views.

ARTHUR v. BARON DE HIRSCH FUND.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 66.

1. CONTRACTS—BROKERS—PURCHASE OF REAL ESTATE—IMPLIED TERMS.

Defendant, in order to aid the poorer class of Hebrews in settling in the country, executed a written contract with plaintiff by which it agreed to loan plaintiff a certain sum to be used in the erection of houses on land belonging to plaintiff in the country, on which plaintiff agreed to give a mortgage to secure the loan. It was further stipulated that plaintiff should sell the houses to such purchasers as defendant should name, provided the purchaser would assume the payment of the mortgage to defendant, pay 10 per cent. of the price in cash, and execute a second mortgage to the plaintiff for the balance. Plaintiff was entitled to fix the prices for the houses and the terms of payment, and left free, unless the purchasers complied with such conditions, to sell to whom he chose. *Held* that, since the contract in terms did not obligate defendant

to furnish purchasers or require that the purchasers named by it should comply with plaintiff's conditions, and the contract being otherwise beneficial to plaintiff, an agreement by defendant to furnish such purchasers would not be implied.

3. SAME—WRITTEN CONTRACT—PRIOR NEGOTIATIONS—EVIDENCE.

Where the contract between two parties is reduced to writing, evidence of prior negotiations between them is inadmissible in an action thereon, except for the purpose of aiding the court to interpret the instrument.

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

Henry G. Ward, for plaintiff in error.

Geo. W. Wickersham, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error, who was the plaintiff in the court below, sued to recover damages for breach by the defendant of an alleged contract on the part of the defendant to furnish purchasers for certain houses which the plaintiff agreed to erect. The trial judge directed a verdict for the defendant at the close of the plaintiff's evidence, upon the ground that the plaintiff had failed to establish the contract alleged. This ruling was based upon the interpretation of a written contract between the parties executed August 15, 1899.

The plaintiff is a contractor and builder. The defendant is a charitable corporation organized for the purpose of aiding poor Hebrews to better their condition.

The subject of the contract was first introduced to the defendant by C. Benton Dix, a broker, who, in June, 1899, advertised in the New York papers that he would give inducements to factories to locate at a certain place. In response to this advertisement, the manager of the defendant called and informed him that the defendant was interested in getting the poorer class of Hebrews who live in crowded tenement districts to move into the country, and that he knew of certain factories which he thought could be induced to establish themselves in the country, mentioning, among others, the name of Max Ernst, a clothing manufacturer. Dix thereupon went to see Ernst, and Ernst concluded to go with defendant's manager and president to New Orange, N. J., and look over property there. This visit and subsequent negotiations between Dix and Ernst resulted in the making of a contract on July 18, 1899, between Ernst and the New Orange Industrial Association, a corporation which owned land at New Orange, whereby that association agreed to give Ernst a factory in New Orange for a term of years free of rent in consideration of his establishing his operations there and having at least 250 persons at work in said factory on or before January 1, 1900, and of his agreement to employ in said factory building an average of 250 people for a period of five years from said date. In the summer of 1898 the plaintiff had built, under employment by the New Orange Industrial Association, 40 houses at New Orange, and later—in December, 1898—he had purchased from the said association 310 other lots of ground at the price of \$325 per lot. To enable

him to sell these houses readily, it was desirable that persons should be induced to come to New Orange and settle. In view of the contract with Ernst, it was necessary to provide houses at New Orange for the 250 people whom he was to employ there, and, as the Baron de Hirsch Fund was interested in getting the poorer Hebrews—who would be employed at such place—to move from the crowded districts of New York into the rural districts, it proposed to assist in causing the houses to be built. Dix thereupon introduced defendant's officers to the plaintiff Arthur, and that introduction resulted in the agreement embodied in the contract dated August 15, 1899. By this contract the plaintiff agreed:

"(1) To erect one hundred houses in New Orange upon certain designated lots owned by him on or before February 1, 1900.

"(2) To furnish defendant with the policy of the Land Title & Trust Company of Philadelphia, insuring defendant against any loss by reason of any mechanic's lien or material claim filed against the premises by reason of plaintiff's failure to build the houses in accordance with the plans and specifications and within the time specified, and also the title policy of the New Jersey Title & Abstract Company of Jersey City.

"(3) Prior to December 1, 1899, to have fifty houses ready for occupancy, and prior to February 1, 1900, the remaining fifty.

"(4) To pay a certain penalty in case of failure to complete the houses within the time specified."

The defendant agreed:

"(1) To loan plaintiff \$80,280 to be expended in the erection of the said houses, taking plaintiff's bond and mortgage for said sum simultaneously with the execution of the contract, payable on or before February 1, 1900, with interest at two per cent. per annum until advances were made, and at four per cent. per annum from the date of advance.

"(2) To deposit the entire sum of \$80,280 with the Land Title & Trust Company of Philadelphia upon receiving its policy of insurance as aforesaid, which sum, together with the further amount of \$30,000, which was to be deposited or secured by plaintiff to the trust company, should constitute a fund out of which said company should pay the cost of the lands and buildings as the buildings progressed.

"(3) On the completion of the buildings—there being no liens, etc., against the same—to surrender the said bond and mortgage and accept in lieu thereof individual bonds secured by mortgages upon the one hundred, several lots made and executed by the owner at that time of said premises, to be for the amount of sixty per cent. of the value of the said premises, respectively, including the lots and buildings, to bear interest at the rate of four per cent. per annum and to be in the form specified; provided plaintiff should furnish title policies with each individual mortgage."

It was mutually agreed:

"(1) That ten per cent. of the amount deposited by the defendant should be retained by the Land Title & Trust Company until the buildings were fully completed, to be held as indemnity to meet any penalties assumed or incurred, or until the value of the houses should be appraised, and that any excess over sixty per cent. of such appraised value should be returned to the defendant."

Then followed the paragraphs which are more directly related to the present controversy, as follows:

"IX. It is understood and agreed that as each house is sold the party of the first part agrees to execute and deliver a good and sufficient deed for same, subject to the mortgage made as aforesaid to the party of the second part, to such person or persons as the party of the second part shall name,

provided such purchaser assumes the payment of said bond and mortgage and pays ten per cent. of the purchase price of the house and lot in cash, and also executes to the said party of the first part a second bond and mortgage for the balance of the purchase price, with interest at five per cent. per annum.

"X. The party of the first part further agrees as soon as each house is completed, provided the party of the second part shall not name the grantee to whom the said premises shall be conveyed, that he will let or lease for the party of the second part any one of the houses in group A at the rate of eight dollars per month, in group B at the rate of ten dollars per month, and in group C at the rate of twelve and $\frac{50}{100}$ dollars per month, said rents to be payable in advance on the first day of every month.

"XI. Inasmuch as certain persons whom the party of the second part proposes to name as purchasers or occupants of the said houses desire to move to New Orange prior to the completion of the said houses, the party of the first part hereby agrees to let or lease to any person so named by the party of the second part any one of the houses now built owned by the said party of the first part and not rented, at the same monthly rental as above set out, said houses, however, to be only rented to said tenants until the houses to be erected in accordance with this agreement are ready for occupancy."

The plaintiff completed the houses within the specified time, and they were approved by the defendant as conforming to the contract, were by agreement valued at \$133,800, and the defendant advanced to the plaintiff 60 per cent. of that amount, being \$80,280 on first mortgage. The scheme of inducing employes to purchase the houses fell through, and upon completion of the houses the defendants did not provide purchasers for them. Thereupon, after notice to the defendant, the plaintiff advertised and sold the houses at public sale, bidding them in himself for a trifling sum.

It is contended for the plaintiff in error that the effect of the three paragraphs is to raise by implication the contract alleged by the complaint; that, if not implied, it was established by the extrinsic evidence offered by the plaintiff and received upon the trial; and that the trial judge erred in ruling to the contrary.

The contract which the parties reduced to writing was an elaborate recapitulation of the obligations assumed by them respectively. By its terms, among other things, the plaintiff undertook to sell to such purchasers as the defendant should name, provided the purchaser should assume the payment of the first mortgage to the defendant, pay 10 per cent. of the purchase price in cash, and execute a bond and second mortgage for the balance; and the plaintiff was free, unless the purchasers named complied with these conditions, to sell to whom he chose. The contract was silent as to the terms of purchase as between plaintiff and purchasers, and left the prices of the houses and the terms of payment optional with the plaintiff. The defendant did not in terms undertake to furnish any purchasers, nor that any of the purchasers it might name should comply with these conditions. The contention is that, because the plaintiff promised to sell to such person or persons as the defendant should name, an obligation is necessarily implied on the part of the defendant to so name purchasers; or, in effect, to procure them. This contention would be more persuasive if the contract had secured no benefits to the plaintiff in the absence of such an obligation, and if it had enabled the defendant to enforce the plaintiff's covenant to sell to the

purchasers named by the defendant. The general rule applicable to the question to be determined is expressed in *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 288, 19 L. Ed. 349, as follows:

"Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule, unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect."

There are many cases in which contracts have been construed to impose an obligation not expressed upon one of the parties, when, in its absence, there would have been no consideration for the undertaking on the part of the other party; but those cases in which particular contracts have been held to imply such an obligation do not greatly aid the present inquiry. "It is a cardinal principle that every agreement or covenant must be interpreted according to its peculiar terms, and so as to carry out the intent of the parties; and it follows that the ruling upon and the interpretation of one agreement will seldom aid in the construction of another, except as it may illustrate some general rule of interpretation applicable to both." *Booth v. Cleveland Mill Co.*, 74 N. Y. 21.

Undoubtedly, the parties to the present contract contemplated and expected that the defendant would find purchasers for the houses, and knew that the failure or refusal of the defendant to do so would deprive the plaintiff of some of its anticipated benefits; but that fact, and the consideration that, although the plaintiff covenanted to sell to purchasers named by the defendant, the defendant did not covenant to find purchasers, are not enough, in view of the other provisions by which substantial benefits were secured to the plaintiff to raise the implied promise.

"When it is apparent that the parties had the subject in question in mind, and either has withheld an express promise in regard to it, one will not be implied." *Zorkowski v. Astor*, 156 N. Y. 393, 50 N. E. 983. That the parties contemplated that the defendant might not find purchasers is plain, because the contract provides that, if the defendant does not name the grantee "as soon as the house is finished," the plaintiff is to let or lease every one of the houses at specified monthly rentals, no term of lease being fixed. It is true this provision contemplates that the houses are to be leased to tenants to be secured by the defendant, but nevertheless it denotes their understanding that the defendant might not secure purchasers, and in that case that the plaintiff, while under an obligation to accept the tenants, should not be required to accept them for any definite period. This provision is quite inconsistent with the theory that the parties understood or intended that the defendant should be bound to produce purchasers.

The agreement sought to be implied is, in effect, one that the defendant would purchase the houses. If this was the understanding of the parties, why was this most important covenant omitted? And if it is to be implied, how does it happen that the contract contained no provision obligating the plaintiff to sell, but left it within the power of the plaintiff to exact terms to which no purchaser might be

willing to accede? Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound. The contract seems to have been carefully framed so as to give the defendant the privilege of finding purchasers or tenants for the houses without obligating it to do so, and at the same time to permit the plaintiff to burden the privilege with conditions which would reduce it to a nominal one. Both parties manifestly intended as to these matters to trust to the good faith of the other. The contract seems to have been carefully framed to meet the contingencies that the defendant might not be able to find purchasers, or, if it should find them, that the purchasers might not be acceptable to the plaintiff.

The evidence introduced by the plaintiff in respect to the negotiations between the parties prior to the contract and the statements made therein by the defendant was not admissible, except so far as it tended to aid the court in the interpretation of the instrument. Except for this purpose, it was inadmissible, as tending to insert a new provision in a contract between the parties which they had reduced to writing, and which it must be assumed embodied the final expression of their intentions.

We find no error in the rulings complained of, and the judgment is affirmed.

On Rehearing.

(April 16, 1903.)

PER CURIAM. We have carefully considered the petition for a reargument and the briefs accompanying it, but our former conclusions remain unchanged. This is not an action to reform the agreement between the parties, but proceeds upon the theory that an implied obligation is to be read into the agreement in substance to the effect that the defendant would purchase (through purchasers to be found by it) the houses which the plaintiff was to build. Our conclusion that such an obligation is not to be implied was reached in part upon the consideration that the agreement did not obligate the plaintiff to sell to such purchasers, because it left him at liberty to fix his own terms, and thus optionally to defeat the sale. If there was an understanding between the parties as to the price and terms, it was not incorporated into the agreement, which must be assumed to embody the final understanding of the parties. While the agreement is to be read in the light of such extrinsic facts as are competent in aid of its correct interpretation, its terms cannot be supplemented by evidence of a prior parol agreement. We recognize the hardship which has resulted to the plaintiff from the failure to sell the houses, but this was one of the contingencies for which the contract did not provide.

The application for a reargument is denied.

McNAMARA et al. v. HOME LAND & CATTLE CO.

(Circuit Court of Appeals, Seventh Circuit. January 16, 1903.)

No. 915.

1. DECREE—MATTERS CONCLUDED—DISMISSAL OF, BILL FOR SPECIFIC PERFORMANCE.

A decree dismissing a bill for the specific performance of a contract for the sale of chattels, on the ground that under the facts shown a bill in equity for specific performance would not lie as matter of law, is not an adjudication of the rights of the parties under the contract.

2. CONTRACTS—CONSTRUCTION—SALE OF CATTLE.

Plaintiff contracted to sell to defendants its herd of cattle on the range, "consisting of 30,000 head more or less," and marked with plaintiff's brands, at a uniform price per head. The contract provided that at least 9,000 should be beef cattle, and that plaintiff should pay defendants \$20 per head for each and every head less than that number delivered. Delivery was to be made from time to time during the season, not later than November 1st. October 22d the parties met to close up the season's deliveries, and at that time plaintiff had on hand to deliver about 450 head, none of which were beef cattle. It had previously delivered about 16,000, about 7,200 of which were beef cattle, and these constituted practically all of plaintiff's herd. Defendants claimed the right to withhold the sum of \$20 per head for the shortage in beef cattle, while plaintiff demanded payment in full at the contract price for all delivered, and refused to make further deliveries otherwise. *Held*, that the contract was for the sale of the herd, and not of any specific number of cattle; that the agreement for delivery of 9,000 beef cattle required that number, irrespective of the whole number of the herd, and also contemplated that they should be a part of the herd sold; that, it being evident at the time of the final delivery that the herd did not contain such number, defendants were justified in refusing to make payment in full for the deliveries made, and were entitled, in an action against them for the contract price, to set off the damages sustained by them by reason of the shortage.

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

This action was originally brought by defendant in error, a corporation organized and existing under the laws of the State of Missouri, against the plaintiffs in error, citizens and residents of the State of Montana, in the Superior Court of Cook County, Illinois, and was removed by plaintiffs in error to the Circuit Court below. The action was to recover damages for the breach of the following contract:

"This agreement, made and entered into this 27th day of May, A. D. 1897, at Chicago, County of Cook and State of Illinois, by and between the Home Land and Cattle Company, a corporation existing under the laws of the State of Missouri, by its President, Wm. F. Niedringhaus (hereafter called the party of the first part) and McNamara & Marlow of Big Sandy, Montana, (hereafter called the parties of the second part) witnesseth:

That said Party of the first part, for and in consideration of the sum of One Dollar and other valuable considerations, hereby agrees to sell to said Second Parties all of their herd of stock cattle, including steers, said herd consisting of Thirty Thousand head (30,000), more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows, to wit:

'Z' on right hip.

'N-N' on left hip and side.

and any other brands owned by said First Party.

The terms and conditions of said agreement to sell, are as follows:

First. Said cattle are to be gathered by said first party and counted out to said second parties at the Stock Yards at Nashua or Oswego, Montana, on

the line of the Great Northern Railway, during the regular round-up season of 1897, no cattle to be tendered or accepted later than November 1st, 1897; all stock cattle in said herd to be accepted by said second parties whenever tendered prior to November 1st, 1897, in not less than train load lots; all steers from three years old and up, and all spayed heifers and dry cows to be delivered and counted at same points when marketable for beef, in the opinion of said parties of the second part.

Second. All calves of the season of 1897, to be delivered without count or charge to said second parties, whether branded or unbranded.

Third. No lumpy jawed cattle to be counted in deliveries.

Fourth. Should the two parties to this contract, at the close of deliveries for 1897, fail to agree upon a price at which said Second parties shall purchase the brands owned by said first party, together with all cattle bearing same, said first party agrees, during the round-up season of 1898 (prior to November 1st, 1898), to again gather all of the remainder of said herd that it can find with diligent work and deliver the same to said parties of the second part, at the same places and in the same manner and at the same price as provided for the season of 1897.

Fifth. The price to be paid by said parties of the second part for said cattle, is the sum of Twenty-Five Dollars (\$25.00) per head for each and every head delivered as above provided, payable upon the delivery of said cattle.

Sixth. Said first party hereby acknowledges the receipt of the sum of Fifty Thousand (\$50,000.00) as a first payment on said cattle, which sum is to be deducted, \$25,000.00 from the first deliveries made under this contract, and \$25,000.00 from deliveries not later than September 15th, 1897.

Seventh. Said second parties hereby bind themselves to accept and pay for said cattle at the price stated, when the same are tendered to them, under the terms of this Contract.

Eighth. Said first party hereby agrees to deposit with Messrs. Rosenbaum Bros. & Co. of Chicago, Ill., the written and acknowledged consent to this sale of all parties holding liens or mortgages of any kind against the cattle or property embraced in this Contract, upon the payment of the Fifty Thousand Dollars (\$50,000.00) stated as a first payment above.

Ninth. Said first party hereby guarantees to deliver to said second parties during the season of 1897, not less than Nine Thousand head (9,000) of steers, of the ages of three years old and up, and spayed heifers of the ages of four years and up. Should they fail so to do, they hereby agree to pay to said second parties the sum of Twenty Dollars (\$20.00) in cash for each and every head less than Nine Thousand (9,000) head of such cattle so delivered.

Tenth. At the end of the round-up season of 1897, the parties of the second part agree to purchase of party of the first part, Five Hundred (500) head of saddle and work horses at the price of Twenty Dollars (\$20.00) per head, said horses to be selected by parties of the second part from entire herd of 700 head of party of first part, and to be serviceable and sound horses; work and saddle horses to be selected in proportion.

This Agreement is to be binding upon the heirs, successors and assigns of both the parties hereto.

Witness our Hands and Seals this 27th day of May, A. D. 1897.

(Signed) Home Land & Cattle Company,
By Wm. F. Niedringhaus, [Seal]
President.
(Signed) McNamara & Marlow. [Seal]

Witness:

(Signed) Charles Haas.
(Signed) Geo. W. Niedringhaus."

Plaintiffs in error pleaded non-assumpsit and set-off. One plea of set-off was for a breach of clause 9 relating to the guaranty of defendant in error to deliver, during the season of 1897, not less than nine thousand head of steers of the ages of three years and up, and spayed heifers of the ages of four years and up. Another set-off was for breach of clause four wherein defendant in error agreed, during the round-up season of 1898, prior to November 1, 1898, to gather all the remainder of the herd undelivered in 1897, that defendant in error could find with diligent work, and deliver to

plaintiffs in error at the same places and same prices as provided for the season of 1897. Another plea of set-off was upon breach of defendant in errors' undertaking that the herd consisted of "thirty thousand head more or less", the plea averring that the herd consisted, at the time, of not to exceed sixteen thousand head.

At the conclusion of the testimony, on motion of defendant in error, a verdict was entered by direction of the Court, for \$36,956.30, upon which, less a remittitur of \$100.00, judgment was entered. To the order of the Court on the motion to direct a verdict, an exception was preserved, and to set aside the judgment thus entered, the writ of error is prosecuted.

The further facts are stated in the opinion.

John S. Miller, for plaintiffs in error.

William Brace and F. C. Sharp, 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 contract, as a whole, contemplated a sale by the defendant in error to plaintiffs in error of its herd of stock cattle, including beef cattle, then ranging in Valley, Dawson and Custer Counties, Montana, and bearing a certain described brand. The contract mentioned the number as "thirty thousand more or less", but this was descriptive merely; the subject of barter was the herd of cattle, and, in the absence of deceit or fraud, no action would lie, merely because the number was less than the descriptive number mentioned in the contract.

The contract contained a guaranty that of this herd, at least nine thousand should be beef cattle and should be delivered during the season of 1897. The guaranty was of the highest consequence, for, though the beef cattle were much more valuable than the run of cattle in the herd, the contract price was uniform. But the guaranty was not one of ratio. It is not met and fulfilled by a tender of nine beef cattle out of every thirty of the cattle of the herd offered. It contemplated nine thousand beef cattle to be delivered during the season of 1897, irrespective of what should turn out to be the whole number of the herd, or of the beef cattle in the herd. Upon the matter of actual ratio the parties each took their chances.

In our opinion, the contract required that the nine thousand beef cattle should be a part of the herd. Manifestly, such was the mind of the parties. It was this particular herd that was in mind when the parties came to an agreement. It is probable—at least conceivable—that the herd had been looked over before the agreement, and the agreement made in view of such inspection. To allow the vendor to supply beef cattle from outside, might result in the tender of cattle inferior to those in the herd. It would result, certainly, in disturbing the actual ratio, providing the herd contained thirty thousand head of which only nine thousand were beef cattle; and it was on this basis, and this basis alone, that the parties contracted.

In this state of the contract, as we have interpreted it, the parties, near the close of 1897, (October 22, 1897) met at Oswego, Montana, to close up the transaction for the season of 1897. Already about sixteen thousand of the cattle had been shipped. Of these, including

those tendered on that day, seven thousand one hundred and thirty five were beef cattle; leaving a shortage of one thousand, eight hundred and sixty-five head under the beef cattle guaranty clause. Accepting the contract as fulfilled up to this date, there remained thus due defendant in error, including strays afterwards brought in, and the five hundred horses mentioned in the contract, \$47,575.00. But if there were to be deducted \$20.00 per head for the number of beef cattle undelivered, the balance would be \$9,675.00. Here the parties split. The plaintiffs in error tendered the latter sum; the defendant in error stood for payment in full. Thereupon plaintiffs in error refused payment beyond the tender, filed their bill in the state court of Montana to have the contract specifically performed, and obtained the appointment of a receiver who took possession of the remaining cattle—about four hundred and fifty-seven in all. This receivership suit was subsequently removed to the United States Circuit Court for the District of Montana. The bill in the suit set forth the contract as already stated; its partial performance by both parties; its breach by the vendor, defendant in error, in refusing to deliver fully, the nine thousand head of beef cattle; and the vendor's insolvency. The answer of defendant in error denied these averments; alleged its willingness to perform; and charged that the first breach of contract was committed by the vendees, in refusing to make full payment. The suit eventuated, in the Circuit Court, in a decree ordering specific performance, as to four hundred and fifty-seven head of beef cattle, by delivering the same to the defendants in furtherance of the terms of the contract. On appeal to the Circuit Court of Appeals for the 9th Circuit (49 C. C. A. 642, 111 Fed. 822), this decree was, however, reversed, and the cause remanded with instructions to dismiss the bill.

The record in that case is now pleaded as an adjudication adverse to the defenses invoked by the plaintiffs in error, in the cause under consideration. We cannot concur in this view. Whether we look at the record of that cause, with or without the aid of the printed opinion of the Circuit Court of Appeals, we are convinced, that nothing was ever determined between the parties, save that under the facts and circumstances found by the Circuit Court, a bill in equity would not, as a matter of law, lie for the specific performance of the contract. Only under special circumstances will equity enter upon a specific performance of a contract respecting chattels, and those circumstances were absent from the cause as presented to the courts of the 9th Circuit. Indisputably, these are the grounds upon which the decree of the Circuit Court of the District of Montana was reversed, and such reversal does not, therefore, embody an adjudication of the facts of the cause.

Upon the trial of the case under consideration, in the Circuit Court for the Northern District of Illinois, plaintiffs in error offered evidence in support of their alleged set-off, tending to show that they would suffer damages. The damages claimed were measured, in the evidence offered, by the contract liquidation of \$20.00 per head, and by the difference between the contract price and the value of beef cattle at the time the cattle ought, under the contract, to have been delivered. This evidence was rejected, on the theory that plaintiffs

in error, having committed the first breach, cannot set off their damages in an action to recover the contract price; the argument being that the defendant in error had until November 1st to supply the deficiency, and could, if it saw fit, have obtained such supply from outside the herd.

This was, in our judgment, an erroneous application of the law. As already indicated, it would not have been within the right of the defendant in error to supply the missing beef cattle from outside the herd. The evidence submitted tended decidedly to show, that on the date when the difference between the parties was sprung, the parties had substantially reached the end of the round-up season of 1897. It was plain then, as it has since appeared, that the beef cattle called for in the contract were not in the herd. The vendees would not, under such circumstances, be required to pay the full price, and await the expiration of the eight or ten remaining days to have verified, by mere lapse of time, what both parties knew would be the certain outcome. The view taken by the Court, considering the whole situation, was an erroneous view of the respective rights of the parties.

The Court should have admitted the evidence tendered upon this plea of set-off, as well as the evidence tendered upon the issue raised by the alleged failure of defendant in error to gather up and deliver the cattle remaining after the round-up of 1897; and for the Court's error in that respect, and in directing a verdict for the defendant in error, the judgment below must be reversed with instructions to grant a new trial.

CONRADER et al. v. COHEN.

(Circuit Court of Appeals, Third Circuit. April 16, 1903.)

1. BANKRUPTCY—PARTNERSHIP CREDITORS—RIGHT TO SHARE IN INDIVIDUAL ESTATE.

Partnership creditors are entitled to share ratably with individual creditors in the individual assets of a bankrupt, where there is no partnership estate and no solvent partner.

Appeal from the District Court of the United States for the Western District of Pennsylvania, in Bankruptcy.

J. R. Brotherton, for appellants.

Henry A. Fish, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. This case is to be considered not simply with reference to the terms of the question formally certified by the referee in bankruptcy to the District Judge, but upon all the facts shown by the record. The facts so appearing are these: Prior to September, 1895, W. A. Jenkins and Charles A. Conrader did

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 563.

business as partners under the firm name of Jenkins & Conrader, and contracted firm debts, which are unpaid, and have been proved here. In the month of September, 1895, the entire property of the firm was sold upon execution by the sheriff of Erie county, Pa., and the partnership and each of the individual partners became insolvent. There was no evidence as to the present financial condition of W. A. Jenkins, or that he was other than insolvent. After his insolvency had occurred, in September, 1895, he left the state, and never returned. His present residence was not shown. Charles A. Conrader, after September, 1895, entered into the hotel business, incurred debts, and on December 10, 1900, was adjudged a bankrupt. From the sale by the trustee in bankruptcy of Conrader's individual property, namely, his retail liquor license and his lease, the fund here in controversy was realized. The District Court (118 Fed. 676), affirming the action of the referee in bankruptcy, decreed that in the distribution of the fund in the hands of the trustee in bankruptcy the creditors of the firm of Jenkins & Conrader were entitled to share pro rata with the individual creditors of Conrader, the bankrupt. Whether this ruling was right is the question before us.

It will be perceived that a single fund only—derived from the separate estate of the bankrupt, Conrader—was before the court for distribution; that all the property of the firm of Jenkins & Conrader had been sold upon execution in the year 1895, and passed to the sheriff's vendee; that the partnership is not in bankruptcy; that there are no firm assets; and that there is no solvent partner. The insolvency of Jenkins in 1895 having been shown, that condition will be presumed to have continued, in the absence of any evidence to the contrary. If his financial condition changed, it was for the contesting individual creditors to show it. Upon the facts here appearing, why should not the firm creditors participate in the fund before the court? It is the only fund available to any of the creditors. Now, it is well settled that each partner is debtor to the creditors of the firm. In equity, as at law, partnership debts are treated as several, as well as joint. Upon principle, we think the District Court was right in admitting the partnership creditors to participate pro rata with the individual creditors in this fund.

We find abundant authority to sustain the decision of the court below. In *United States v. Lewis*, 13 N. B. R. 33, Fed. Cas. No. 15,595, it was held by Mr. Justice Strong and Circuit Judge McKennan that the rule that the joint estate must be applied to pay joint debts, and the separate estate to pay the separate debts, is only applicable where the joint estate, as well as the separate estate, is before the court for distribution; and in the same case upon appeal (*Lewis v. United States*, 92 U. S. 618, 623, 23 L. Ed. 513) the Supreme Court, speaking by Mr. Justice Swayne, said, "A court of equity will not entertain the question of marshaling assets unless both funds are within the jurisdiction and control of the court." In the case in hand two funds do not exist. The established English doctrine is thus stated in *Lindley on Partnership* (2d Am. Ed.) p. 731; *Id.* (6th Ed.) § 749:

"If in the case of a bankrupt firm there is no joint estate, the joint creditors are entitled to rank as separate creditors against the separate estates of the individual partners. So, if one partner only is bankrupt, the creditors of the firm are entitled to rank as separate creditors against the separate estate of the bankrupt, if there is no joint estate and if there is no solvent ostensible partner—at all events, none in this country."

The like doctrine is set forth in Story on Partnership, § 380. That where there are no partnership assets and no solvent partner, the firm creditors share in the separate estate of the bankrupt partner *pari passu* with the individual creditors, was the recognized rule under the bankrupt act of 1867 (14 Stat. 517); *In re Downing*, 7 Fed. Cas. No. 4,044; *In re Knight*, 14 Fed. Cas. No. 7,880; *In re Pease*, 13 N. B. R. 168, Fed. Cas. No. 10,881. Here we cannot do better than quote what was said by Circuit Judge Dillon in *Re Downing*, *supra*:

"Section 36 of the bankruptcy act only comes into operation when there are firm assets, and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshaled according to the equity rule; firm creditors to have priority as respects the joint assets, and individual creditors as respects the separate assets of their debtor. This construction of the bankruptcy act has the merit of producing that equality which it is the leading and manifest purpose of the act to secure, and, in effect, reaches the result which the English chancellors have felt bound by equitable principles to adopt, viz., that where there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share *pari passu* in the estate of the bankrupt partner."

We discover no material difference between the provisions of the bankruptcy act of 1867 and those of the act of 1898 touching the question under consideration. In this regard, section 36, of the former act (14 Stat. 534) and subdivisions "d," "f," and "g" of section 5 of the latter act (30 Stat. 547, 548 [U. S. Comp. St. 1901, p. 3424]), are in substantial agreement. The learned District Judge, we think, rightly decided that the firm creditors should share *pro rata* with the individual creditors in the fund here for distribution. In so holding, he reached a result not only just in itself, but sustained by the great weight of authority, as it seems to us. Accordingly the decree of the District Court is affirmed.

SUTCLIFF v. SELIGMAN et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 52.

1. SHIPPING—CONSTRUCTION OF CHARTER PARTY—DEVIATION FROM AUTHORIZED USE.

A steam launch was demised for two weeks, by a written charter party, to be used "for a coaching launch for the University and Freshmen crews of Columbia College, on the Hudson river." The owner had refused to charter the launch to the same charterer for use on the Harlem river. On the tenth day of the charter the launch was sent through to the Harlem for a boat, and, owing to the breaking of a bridge, was compelled to return by way of East river; and when she reached a point in Hell Gate she was disabled by the breaking of a pin which connected the eccentric with the shaft of the engine, and the master was obliged to engage a tug to take her in. The owners of the tug libeled the launch,

and obtained an award for salvage; the charterer refusing to defend after notice of the claim. It was admitted that the locality where the accident occurred was more dangerous to navigate than the Hudson, and that, owing to the tide and currents there, the launch could not be taken home with sweeps, as was ordinarily done on the Hudson in case of a breakdown. The regular engineer being absent, a special man for the trip was employed, who was unfamiliar with the locality and the boat, and was unable to find the tools to make temporary repairs, which might have been done. *Held* that, in view of the circumstances under which the charter was made, the limitation therein to the Hudson river was a material part of the agreement, and the departure from the locality specified constituted a deviation from the charter party, and the charterer liable as an insurer for the damages resulting therefrom, which included, under the facts shown, not only the cost of repairs, but the amount of the decree and costs and proper disbursements in the salvage suit.

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

For opinion of District Court, see 110 Fed. 560.

Nelson Zabriskie, for appellant.

Geo. D. Seligman, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. This cause comes here upon appeal from a decree of the United States District Court for the Southern District of New York, which dismissed the libel.

The libelant, being the owner of the steam launch *Sinbad*, let it to the Columbia College Union by a written charter party dated April 28, 1896. Said charter party provided that the launch should be used "for a coaching launch for the University and Freshmen crews of Columbia College, on the Hudson river, for a period of two weeks from April 28, 1896, for the sum of \$150"; that "the said launch is in good condition"; and that the union would take out a policy of insurance for the benefit of the charterer, and "agrees to return the said launch, at the end of the term aforesaid, in as good condition as at the time of the execution of this agreement, damage by usual wear and tear excepted." Upon the execution of the charter the launch was delivered to the union, and used daily by it for coaching purposes on the Hudson river until May 8th. On said day the master, under instructions from the union, took the *Sinbad* to the old boathouse on the Harlem river, in order to bring from there a boat to the new boathouse on the Hudson river. When he reached Spuyten Duyvil Bridge on the return trip, he found the bridge broken down, and he was therefore obliged to turn about and go through the East river and around the Battery. When he reached a point in Hell Gate opposite the Astoria Ferry slip, the engines became disabled; and the master, being unable to bring the launch to shore, had her towed back to the moorings at the Atlantic Basin, from which she had been taken when originally chartered.

The learned District Judge held that:

"The trip to the former boathouse at 125th street and Harlem river, in order to procure the small boat and oars needed for coaching purposes, was

so germane and incidental to the express purpose of the charter as to constitute no violation of its general provision."

We should not question the correctness of this ruling if it were not for certain special conditions connected with this particular undertaking, and circumstances attendant upon this accident. The question of deviation is one which must be determined by ascertaining, in the light of all the surrounding facts, in how far the exact terms of the charter party were considered material by the parties.

Respondent's witness Twigg, the master of the launch, and who was in command at the time of the accident, admits that Hell Gate is a dangerous place, by reason of slack water and conflicting currents, and that navigation there is more difficult than in the location covered by the charter. Cummins, the engineer employed by respondent for this special trip, had never run this launch alone before, had never navigated her on the East river, and had never navigated any boat in the waters where the breakdown occurred.

The evidence of libellant's husband is as follows:

"Q. In entering into the written charter party in suit on behalf of your wife, were you influenced at all by the fact that the coaching of the Columbia College crews was to be upon the Hudson, rather than upon any other river? A. In the original charter for two months it was specified that the boat was to be used solely on the Hudson river. I refused to charter for the Harlem river at all. Q. Whom did you refuse? A. Mr. Conover. Q. Did he ask you for a charter for the Harlem? A. He told me that he wished to charter the boat. He came to my house in 40th street in answer to the advertisement in the paper; told me that he wished to charter the boat for the Harlem river. I told him I refused to charter on the Harlem river. He went away, and came back a few days later and told me that it wouldn't be necessary to use the boat on the Harlem—that the new boathouse would be completed and ready for occupancy—and would I charter for the Hudson river. I told him 'Yes.'"

This testimony is not denied. Mr. Conover stated that he had no recollection in regard to the matter, one way or the other.

The policy of insurance taken out for the benefit of the libellant contained the following clause:

"Warranted by the assured to be employed as a coaching boat in the vicinity of Columbia College Union Boat Club, 116th street, North river."

In view of these special circumstances, we are constrained to hold that the limitation to the Hudson river was a material part of the agreement; that the departure from the locality specified in the charter party, and the use of the launch in a locality confessedly more dangerous, involving, as will hereafter appear, far more serious consequences than would otherwise have followed, constituted a deviation from said charter party, and rendered the respondent liable as an insurer for damages resulting therefrom. The preponderance of evidence supports the finding of the District Judge that the breakdown of the launch must have soon occurred on the Hudson river. The charter party would, however, have expired in four days more; and none of the damages herein complained of would have necessarily or probably resulted if the regular engineer had been in charge, or if the launch had been in the stipulated locality. It appears that the accident was

due to the breaking of a small pin which connected the eccentric of the engine with the shaft. While this break disabled the engines so that it could go neither backwards nor forwards, it was not otherwise, in itself, a serious matter, as it could have been replaced in a few minutes, either on the launch, with proper tools, or in a machine shop, or a new pin could have been made and inserted at a cost of \$4. The evidence tends to show that it had broken twice before, and had been repaired by means of a setscrew. Respondent's master testified that "they carried extra pins—three or four extra pins—and had some way of taking the pin out and replacing it," by way of temporary repair, until the boat could be taken to a repair shop. On this occasion, however, the newly employed engineer was not familiar with the boat, and the suitable tools to make repairs could not be found. The master testified that he ordinarily used sweeps on the Hudson to get home with in case of the breakdowns, which were liable to occur at any time while coaching. But in this location such sweeps were unavailable. The master testified as follows:

"We got our sweeps out then and started to row the boat to a landing, and then we tried for a while, and the tide was running stronger, and I couldn't make the cove, so I hailed the tugboat."

The master was therefore obliged to secure the services of a tow—the Theresa—to take the launch to King's shop, where repairs on her had previously been made. The owners of the Theresa claimed salvage for this service, filed a libel therefor, seized the Sinbad, and obtained an award of \$30. Respondent was notified of said claim, but refused to defend.

The libelant herein now claims damages as follows:

Counsel fees	\$300 00
Final decree, salvage	30 00
Final decree, costs	227 50
Clerk's and marshal's fees on bonding boat.....	79 00
Witnesses' fees paid	25 00
Repairs to boat	75 00
Loss of anchors and chain	25 00
Loss of charter for the season from date of filing libel, June 3, 1896, until time repairs were finished, about July 4, 1896, 30 days, at \$5 per day	150 00
	<hr/> \$911 50

The only affirmative testimony of the reasonableness of the counsel fees is that of libelant's husband, to the effect that he had two counsel, that he knows he paid them something, and that he believed the \$300 claimed in the libel for counsel fees and "expenses necessarily incurred in defending libel" is "a correct statement of the amount of charges for counsel fees made." Even if counsel fees are recoverable in this action, the evidence is insufficient, and the charge is disallowed.

The amount of the final decree, \$30, is allowed.

It is difficult to understand upon what theory costs of \$227.50 were incurred and taxed and allowed on such a trifling claim, but, as libelant has testified that they were thus taxed and were paid by her, they must be allowed herein.

The item of \$79, clerk's and marshal's fees on bonding boat, is disallowed. The evidence shows that the libelants in said case notified the libelant herein that they would not seize the launch if she would leave her in the Atlantic Club Basin, and that in spite of this notice she caused her to be removed to New Jersey in order to escape process. Furthermore, after the seizure of the boat by the marshal, the libelant herein made no attempt to get a surety company bond, and spent 20 days in getting a bondsman.

The item of \$25 for witness fees is allowed. It appears that this expense was actually incurred, and was necessary in order to procure expert testimony.

The charge of \$75 is for repairs to the boat and engine. Inasmuch as it is admitted that there was no actual damage done to the launch, except the breaking of the pin, nothing should be allowed for alleged repairs to the boat. The evidence already discussed shows that while the broken pin could have been repaired for a small sum, so as to enable the launch to run (the charter would have expired in four days), such repairs would have been temporary only, and that, in order to put the engine in as good condition as when chartered, it was necessary to take out the valve and gear, drill out the pin, and reset the valves, and that \$25 is a reasonable charge therefor. Only this charge of \$25 is allowed for repairs.

Of the item of \$25 for loss of anchor and chain, \$20, the value of the anchor, is allowed. There was no chain on the launch when she was chartered. She was provided with a cable, which was returned. An anchor was furnished, and was not returned, but was left by respondent at its boathouse on the morning of the breakdown, and either remained there, or was taken to Poughkeepsie and lost.

The facts in regard to the item of \$150 claimed for loss of charter are as follows: On June 13th one Hubbe offered to charter the launch for the season at the rate of \$150 a month. The offer was afterwards withdrawn on the ground that the delay to accept it until July 1st had broken the deal. Libelant claims that the attachment of the launch was the cause of the delay. But the seizure of the launch, which was made on June 3d, was solely due to libelant's fault in removing it from the Atlantic Basin. There was also unreasonable delay in procuring a bond, and it further appears that libelant was guilty of unreasonable delay in having the necessary repairs made. Instead of minimizing the losses due to respondents' breach of charter, libelant appears to have attempted to aggravate them. In these circumstances, the loss of charter was not one of the proximate results of the accident, and the claim for damages therefor is disallowed.

The other items of damages claimed on the hearing have been abandoned.

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

WILLIAM H. BEARD DREDGING CO. v. HUGHES et al.

(Circuit Court of Appeals, Second Circuit. March 6, 1903.)

No. 61.

1. SHIPPING—DAMAGES FOR BREACH OF CHARTER—SALE OF VESSEL BEFORE EXPIRATION OF TERM.

Respondents hired from libelant, for a stated term, at a stipulated rental per day, certain named vessels, consisting of a dredge and attendant scows, composing a dredging plant. Before the expiration of the term, respondents returned the vessels, without notice; and some days later, and before the expiration of the term, libelant sold the dredge. *Held*, that it could not recover the contract rental for the plant after the date of such sale, which placed it out of its power either to perform the contract thereafter, or to reduce the damages for its breach, as it was bound to do, by otherwise using or leasing the plant, if that could be done in the exercise of reasonable diligence.

2. SAME—INJURY OF CHARTERED VESSEL—LIABILITY.

A charterer is liable for an injury to a scow resulting from the negligence of a tug hired by him to tow the same.

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

This cause comes here upon appeal by both sides from a decree awarding \$4,445.49 damages to libelant upon breach of a contract of hiring. The facts appear in the opinion.

L. D. Smith, for libelant.

Chas. M. Haugh, for respondents.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The libelant, a dredging company, hired to defendant's firm, Hughes Bros. & Bangs, a dredging outfit, which is described in the letter signed by libelant, and setting forth the terms of the contract as follows:

"The combination dredge Sampson with crew of eight men and equipment for dredging at New Haven, Conn. also three scows No. 1 X 572 yards, No. 2 X 643 yards and No. 3 X 644 yards."

The rent stipulated was \$150 a day, "time to begin when the plant commences work at New Haven, minimum time to be three months." The other details of the contract are not material to the questions raised on this appeal. The plant was delivered to the respondents under the contract on March 18, 1901. They used it for some weeks, and on May 2, 1901, without notice to libelant, the whole plant—dredge equipment and scows—were returned by respondents to libelant at the Erie Basin, New York Harbor. Respondents paid the hire down to the date of this return, and concede that they broke their contract of hiring, and are liable for the damages properly assessable for such breach. On May 6th libelant sent them a letter, protesting against the breach of contract, and making a tender and offer to fulfil. On May 16th libelant sold the dredge Sampson to one Dady for \$20,000. While the plant was in use at New Haven, scow No. 2 was found to be leaking so fast that, apparently with the assent of both parties, she was returned to libelant, and another scow substituted in her place, which new scow remained with the

rest of the plant until the entire outfit was returned. On April 5th, scow No. 3, while in charge of the tug Hogan, which had been hired by Hughes Bros. to do what towing might be required, was run upon some rock near the entrance of New Haven Harbor, and badly damaged.

The libel was filed to recover the hire of the entire plant (\$150 a day) from the time of the last payment by Hughes Bros. to the 18th of June, the cost of repairing scow No. 2, and also the cost of repairing scow No. 3. The District Judge (113 Fed. 680) held that the evidence failed to show negligent handling of No. 2, and that respondents were not liable for damages sustained by her, but that the injuries sustained by No. 3 were caused by negligent towage, and that the hirer was responsible therefor. He further held that there could be no recovery for damages, in the nature of hire, after the dredge was sold, and expressed the opinion that the libelant should have a "decree, with an order of reference." This interlocutory decree is not found in the record. From a recital in the decree appealed from, it would appear that the cause was referred to a commissioner to take testimony, ascertain the amount due for charter moneys and for damages to scow No. 3, and report thereon. Neither his report, nor the proofs taken before him, are contained in the record, and the final decree gives only the "aggregate of charter moneys and damages" as \$4,445.49. How much of this sum is for damages to the scow, and how much for charter hire, we are unable to determine, except by inferences drawn from the assignments of error and from statements in the brief.

The libelant appealed from the refusal to allow damages for scow No. 2, and from refusal to allow charter monies from and including May 16 to and including June 18, 1901. The respondents appealed only as to allowance of damages for injuries to scow No. 3.

What rule was followed by the commissioner in fixing the damages for breach of contract to hire—whether he took the entire per diem down to May 15th, or reduced it by any allowance for what libelant might have obtained by using the plant so as to reduce damages (*Johnson v. Meeker*, 96 N. Y. 96, 48 Am. Rep. 609)—is not clear upon the proof. Evidently the respondents were of the opinion that all proper allowances in their favor had been made, since they do not assign error in the assessment of damages. The libelant contends that it should receive the full charter hire down to the expiration of the full three months. The measure of damages for breach of a contract such as this is well settled. It is the full rent stipulated to be paid, reduced by such sums as the owner has actually received by the use of the returned property, or could have received, had he been reasonably diligent to put it to use. For it is his duty to do what he reasonably can to reduce the loss in this way. The difficulty with the case at bar is that we have nothing before us from which we can determine what amount of money might have been secured by a reasonable effort to rent the property to some one else. It is quite likely that such proof was not made because the libelant had made it impossible to procure it. The plant which respondent hired was a precisely described whole, made up of specified parts,

to wit, dredge, scows, equipment, and men. Moreover, the particular dredge was itself specified—"the combination dredge Sampson." Libelant would not have fulfilled its contract by sending to New Haven a plant with some other dredge, unless both parties agreed to the substitution, as they did when No. 2 was found to be leaky. When libelant sold the dredge, he destroyed the corpus of the contract. He was no longer in a position to return it to Hughes Bros., had that firm decided to reduce their loss by putting it to use again for the rest of the time contracted for. He was no longer able to reduce the amount of damages by hiring the plant to others. Upon the record as it stands, the court is without the data upon which to assess damages for breach of contract in accordance with the rule, and therefore will not disturb the finding of the District Court in that particular.

As to the claim for damages to scow No. 2, the proof did not warrant a recovery. All that appears is that on March 29th or 30th, after a return from sea, she was leaking so badly that she was put out of commission; but she had been leaking before—making so much water that during the time she was in use they could not load her to her full capacity. For aught that appears, it may well be that her seams opened more than usual under the strain of work for which she was not fit. Certainly no negligent act of any one put in charge of her by Hughes Bros. is shown, and the evidence as to the condition as to seaworthiness of the scow when she was turned over to them is not especially persuasive. All that appears is that the president was aboard the scow the day she left, when she was lying in still water at her berth and unloaded, and thought her to be sound and stanch. No one who had observed her behavior in use before delivery was called to testify to her seaworthiness.

As to scow No. 3, the respondents admit that she was injured by striking a rock while in tow of a tug of the New Haven Steamboat Company. We have no explanation of the occurrence from the master or from any one on board the tug, and, so far as the record shows, the circumstances indicate negligent navigation on the part of the tug. The tug was hired by Hughes Bros. to tow the scow, and the case is not to be distinguished from *Gannon v. Consolidated Ice Co.*, 33 C. C. A. 662, 91 Fed. 539.

The decree of the District Court is affirmed, but, as both parties appealed, the affirmance is without interest or costs.

FAUST v. CITY OF CLEVELAND.

(Circuit Court of Appeals, Sixth Circuit. April 15, 1903.)

No. 1,100.

1. NAVIGABLE WATERS—SUPERVISION BY CITY—OHIO STATUTE.

Rev. St. Ohio 1892, § 2640, providing that the councils of cities shall have the care, supervision, and control of "all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair," does not impose the duty upon a city of keeping a navigable river within its

limits free from obstructions; such river not being a "highway," within the meaning of that word as used in the statute.

2. SAME—INJURY FROM OBSTRUCTION—LIABILITY OF CITY.

A municipal corporation cannot be held liable for an injury to a vessel arising from an obstruction in a navigable stream within its limits unless the duty to keep the stream free from such obstructions is positively imposed on the corporation by statute. Such duty is one which rests primarily upon Congress and the state, and is of a governmental character, performance of which cannot be coerced by an individual; and the fact that the corporation has voluntarily assumed to exercise supervision over the stream does not bind it to continue the same, or render it liable for a marine disaster resulting from its failure to do so.

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

This is a libel in personam against the city of Cleveland, a municipal corporation of the state of Ohio. The libellant is the owner of the steam tug *Crown Prince*, which came into collision with a snag or other submerged obstruction in that part of the navigable river Cuyahoga, lying within the corporate limits of the municipality, and constituting a part of the harbor, and was sunk and totally lost as a consequence. It is averred that the municipality was under a duty to keep the harbor or river within its limits free from such obstructions, and that it had for a long time prior to the loss of the libellant's vessel exercised control and supervision over the river where the disaster complained of happened. It is also averred that the municipality had notice of this particular obstruction, and time to remove same, before the collision complained of. The libel contains the usual averments as to the equipment and negligence of the *Crown Prince*. The respondent excepted upon the ground that it was under no legal duty to keep the river clear, and was not legally responsible for the loss of the libellant's tug. The exception was sustained, and the libel dismissed. Libellant has appealed.

Benjamin A. Gage, for appellee.

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

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

There is no averment that the city either caused or contributed to the creation of the obstruction in the river. If, therefore, it is liable to the libellant, it is because it was under some positive duty to remove the submerged object when notice was received of its existence. The argument for libellant is that the river within the limits of the city is a "highway," within the meaning of section 2640, Rev. St. Ohio 1892, defining the duties of Ohio municipalities. It is as follows:

"The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

That the river is a highway for the passage of vessels engaged in foreign and interstate commerce, as well as domestic traffic, is true; but that that part of the river Cuyahoga which happens to be within the corporate limits of the city of Cleveland is one of the highways in the sense that its streets and alleys and roads are so as to charge it with the duty of keeping it safe for navigation by removing ob-

structions is not properly to be inferred from the section cited. The word "highway" is a very broad term, and may, as a generic word, include every possible thoroughfare. Thus, as noticed by the court below, a railroad is a highway; and, if the word as used in this Ohio statute is to be regarded as used in its broadest sense, the railroads within the city would likewise fall within the care of the city—a result quite absurd, as all must confess. Plainly, the word "highway" is to be understood as applying to such highways as customarily fall within the care and supervision of cities and towns, and the words following, "streets, avenues, alleys, sidewalks, public grounds and bridges," must be taken as limiting the meaning of "highways." The learned trial judge properly placed this interpretation upon the statute, saying:

"I think we should properly read into the statute the words 'such as,' after 'highways'; the designations following being explanatory of the term 'highway.'"

Neither do the other sections of the Ohio Revised Statutes, concerning the control of the shores and banks of lakes and rivers, and providing for the appointment of harbor masters for the purpose of regulating navigation within the city, impose the duty of regulating the depth of water or removing obstructions.

The river Cuyahoga is a navigable river, and, as such, is subject to the control of Congress, and to its regulations and general supervision. But the interest of the state in its own domestic commerce is such that the regulation of Congress is not necessarily exclusive of all control or authority by the state. It has therefore been held that legislation by the state for the purpose of aiding commerce by the improvement of such streams by providing for the deepening of the channel or the removal of obstructions does not encroach upon the power of Congress, if not in conflict with any system for their improvement provided by the Congress. *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. In the case cited above, a law of Alabama which provided for the deepening of the harbor of Mobile at the expense of the county of Mobile was held valid; the court regarding the state as having authority to impose the duty of improving and caring for such a navigable body of water within the state upon one of its municipal corporations within whose limits the harbor lay. But this duty of providing for the safe navigation of rivers is a duty which rests upon the United States and upon the state. It is not a duty which can be enforced by an individual. It belongs, plainly, to the sphere of the governmental duties of imperfect obligation. The federal government or the state government may voluntarily assume it, or the latter may impose it upon one of its municipalities to the extent that such waters are within the municipal limits. That no such duty is imposed by common law is plain. In *Seaman v. Mayor of New York*, 80 N. Y. 239, 36 Am. Rep. 612, and *Coonley v. City of Albany*, 132 N. Y. 145, 30 N. E. 382, it was held that, while a river is a highway for the passage of vessels, that portion of it which happens to be embraced within the boundaries of a city is not one of its highways, so as to burden it with the duty of removing obstructions and keeping it safe for navigation.

Liability to respond in damages to any one sustaining injury through neglect to comply with a statute affirmatively imposing the duty to keep a navigable river clear of obstructions within the limits of the municipality may be conceded, by analogy to the liability ordinarily resulting from neglect to keep a street or road in repair when the duty is imposed by a statute or the charter of the city. The case of *Winpenny v. City of Philadelphia*, 65 Pa. 135, is an instance of liability under a statute which affirmatively required the city to keep the river within its limits free from obstruction. But the Supreme Court of Pennsylvania placed the liability upon the plain and unmistakable terms of the statute; declaring very emphatically that no liability would exist, but for the unmistakable language of the statute. But when so unusual a responsibility is sought to be imposed upon a municipal corporation, there ought to be a very plain expression of the will of the state that the duty of maintaining the river free from obstruction should be assumed by the municipality.

In *Coonley v. City of Albany*, 132 N. Y. 145, 151, 30 N. E. 382, 383, the court, speaking by Parker, J., said:

"It seems to be clear, however, that in order to charge the municipality with the duty and burden of improvements primarily existing in the general and state governments, which they can perform, or not, as the wisdom of Congress or the Legislature may suggest—a determination which could not be directed or interfered with by the courts at the instance of the complaining party—it must appear from the act alleged to contain the requirements that it was the intention of the Legislature to place upon the municipality the burden of doing all that the state should have done, and more than it could be required to do."

It follows from the view we have expressed that liability can only result from neglect of a duty plainly imposed, and that the mere voluntary acts of the city in removing obstructions from the river created no obligation to continue such acts. Being voluntary, the city was free to desist when it saw fit, and no one has the right to maintain any action for failing to do that which it was under no legal obligation to do. But it is said that, even if the city was under no legal obligation to keep the river clear of obstruction, the fact that the city had theretofore "exercised supervision and control over the said river at the place of disaster, and within its corporate limits, through its public works department," created a liability to any one injured through its negligence in the execution of the supervision thus voluntarily assumed. In support of this, appellant cites *Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed. 416; *Manchester v. Ericsson*, 105 U. S. 347, 26 L. Ed. 1099; *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418; and other cases to same import. The cases cited are all cases in which it is held that if a public municipality treat a place as a street by laying it off as such, or by working upon it, or by doing other acts showing an intent to hold it out as a public street, it will not be permitted to deny liability to one injured by negligence in repair of such a place. Now, in the class of cases referred to, there was imposed by statute upon the city the power or the duty of opening and maintaining public streets. The liability to one injured by the failure to keep the street in repair arises at common law out of the breach of the duty so imposed. *Cardington v. Fredericks'*

Adm'r, 46 Ohio St. 442, 21 N. E. 766; *Cleveland v. King*, 132 U. S. 295, 302, 10 Sup. Ct. 90, 33 L. Ed. 334; *Barnes v. Dist. of Columbia*, 91 U. S. 540, 547, 23 L. Ed. 440; *City of Circleville v. Sohn*, 59 Ohio St. 285, 52 N. E. 788. The duty to keep streets and other like highways in repair and free from obstruction being imposed by law, the city is estopped to deny that a particular way or thoroughfare is a street, within the scope and sphere of its control, if in point of fact it has dealt with it as a street. The bearing of this class of cases upon the question at bar is slight. Here no general duty of keeping rivers or other navigable waterways is imposed by law. The duty to care for such thoroughfares rests upon the Congress and state, and is a duty of a governmental character, which cannot be coerced by an individual. If assumed by either, no one has a right to demand or expect a continuance of such supervision. The general principle is that, in order to charge a municipal corporation with negligence in the performance of a public work, the neglect must be in respect of some duty or authority imposed or conferred by law. *Mayor of Albany v. Cunliff*, 2 N. Y. 165. The distinction between liability for negligence in respect of a matter beyond the scope of the duty of the municipality, and neglect in respect of a matter altogether within the general sphere of duties imposed, is touched upon in *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418, where the case of *Albany v. Cunliff* is distinguished. We know of no principle of maritime law by which a municipality is responsible for the navigable character of the waterways within its limits, or by which, if it voluntarily assumes to exercise control and supervision over such navigable waters, it must ever afterward continue such supervision, under penalty of liability for every marine disaster attributable to neglect of such supervision. To hold the city, appeal must be made to the common law, rather than to rules in respect of maritime torts. We fail to see any conflict between the rules of liability under the maritime law and those administered under the common law. We see, therefore, no applicability of the case of *Workman v. The City of New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, where a plain liability under the maritime law was sought to be evaded by refuge in the local law.

Judgment affirmed.

PENNSYLVANIA CO. v. SCOFIELD.

(Circuit Court of Appeals, Sixth Circuit. April 17, 1903.)

No. 1,140.

1. CARRIERS—EXPULSION OF PASSENGER—LOSS OF TIME—DAMAGE—EVIDENCE.
Proof, in a passenger's action for wrongful expulsion from a train, that he was a lawyer of prominence, that his time was of value, and that he lost one day, there being no proof as to what the value of his time was, is insufficient to warrant permitting the jury to award damages for loss of time.

¶ 1. See Carriers, vol. 9, Cent. Dig. § 1485.

2. SAME—EXPENSE OF LITIGATION.

There being no testimony showing that plaintiff had incurred any expense, or how much time he had spent, in the litigation, it was error to allow the jury to award compensation therefor.

3. SAME—DISPLAY OF FORCE.

Evidence that the conductor, in the presence of other passengers, compelled plaintiff to leave the train, and took him by the shoulder to remove him, was sufficient to permit an award of damages in view of plaintiff's having been compelled "by superior force, or threat of superior force," to comply with the conductor's order.

4. SAME—LAW OF THE CASE—ARGUMENT DISREGARDING—INSTRUCTIONS.

Where, on a former appeal, the court decided that it was not contributory negligence for an expelled passenger to have omitted paying his fare, and in argument at a retrial counsel urged such claim of contributory negligence, it was proper for the court to say: "It has been argued before you, and for that reason I allude to it, that the plaintiff was guilty of contributory negligence in omitting to pay his fare. I say that is not the law."

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

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

SEVERENS, Circuit Judge. This case is now here for the second time. On the former occasion the judgment was reversed, and the cause remanded for a new trial. 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224. For a statement of the case and the matters determined, reference may be had to our former opinion, there reported. The action was for the wrongful expulsion of the plaintiff from the railway car of the defendant, the Pennsylvania Company, in which the plaintiff had taken passage over that part of the company's road running from Pittsburg, Pa., to Crestline, Ohio. The action was retried before the court and a jury, and the result was a verdict and judgment for the plaintiff for the sum of \$1,125. Certain rulings of the court during the trial, relating principally to the measure of damages, were excepted to, and errors are assigned thereon.

I. The plaintiff sought to recover, among other things, for his loss of time, which was one day, occasioned by his being put off the train. Evidence was given that he was a lawyer of prominence, and that his time was of value. But no evidence was given as to the extent of its value or his earnings at that time by the day, year, or for any period, or any other data other than as above stated, from which the value of his time could be estimated. Upon this subject the court charged the jury that in inquiring into the damages they might (to use the language employed) "consider what would be a fair compensation for one day's time of the plaintiff, taking into consideration that he was a lawyer, having such a practice as you may find he had from the testimony—such general practice. You may assume from the evidence that the plaintiff—it is shown by the plaintiff, and undisputed, that he was a lawyer of some prominence—that his time was of some value." The defendant excepted to this instruction upon the ground that there was no testimony offered by the plaintiff as

to the damages sustained by him on account of the loss of one day's time.

We think the jury ought not to have been allowed to award damages to the plaintiff for the loss of time without some evidence to assist or guide them in estimating the value of it, showing either what was his income from his profession, or what a lawyer of his capacity and standing might reasonably be expected to earn. It is quite true the jury would not be bound to follow in the very footsteps of witnesses upon this subject, and might correct the evidence by their own judgment in reaching a conclusion. It was so held in *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028. Juries generally have this right, and there is nothing peculiar in a case like this. But that is quite a different thing from leaving the jury without any guide whatever to enter a field of inquiry where approximation, at least, is necessary to any just result. The consequence of such a course would leave the jury without any restraint by the court, or any means for correcting any extravagance they might fall into.

From the necessity of the case, there are certain elements of damage the extent of which cannot be measured by proof, such as pain of mind or body. But such things are recognized as grounds for recovery in damages, and all that can be done is to prove the facts, and leave the jury to fix the sum they will award by the exercise of a sound discretion. It is a rude way of administering justice, but it is deemed better to pursue it than to afford no remedy at all. But there is no such necessity when the damages are susceptible of proof, and it is contrary to right reason and sound policy to extend the practice in the former cases to those where the necessity for it does not exist. And we think this view is in accord with the decided weight of authority. *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26; *Britton v. Street R. Co. of Grand Rapids*, 90 Mich. 164, 51 N. W. 276; *Winter v. Central Iowa R. Co.*, 74 Iowa, 448, 38 N. W. 154; *International, etc., R. Co. v. Simcock*, 81 Tex. 503, 17 S. W. 47; 5 *Encycl. of Pl. & Pr.*, 780, 781, where many like cases are cited.

There are some cases which seem to countenance the view that the jury should be deemed to be competent to form their own opinion upon a question of value in matters of common knowledge; and that, if they are allowed to act upon it in the end, and are not bound by the testimony of witnesses, it should not be indispensable that the jury should have such testimony. But we think the law and the practice has been settled the other way, and upon the better reasons.

2. It is also assigned as error that the court charged the jury, in respect to the matter of damages, as follows: "You may also, in making up a verdict for the plaintiff, if you come to that point in my instructions, consider what is a fair and reasonable amount to be awarded as compensation for time and expense in the litigation that procures a recovery;" the plaintiff having offered no testimony to show that he had incurred any expense, or how much time he had spent in the litigation. It was not questioned that such damages are recoverable, but only that there was no proof by which to measure them. For the reasons already stated in determining a like question, we think there was error in permitting the jury to award

such damages without proof of the expenses incurred, and the length and value of the time spent in the litigation.

3. There was evidence tending to show that on the occasion in question the conductor, in the presence of other passengers, compelled the plaintiff to leave the train, notwithstanding his refusal, and took him by the shoulder to remove him from his seat and out of the car. The plaintiff claimed that the indignity thus put upon him was a fact which the jury should take into account in fixing the amount of damages; and in reference to that subject, the court charged the jury as follows:

"In awarding these damages, you are to consider the time, place, and surroundings of the circumstances complained of by the plaintiff; that it was public; that he was in assertion of a right; that he was denied that right in public against his protest, and by superior force, or the threat of superior force, made to do otherwise than he esteemed it to be his right to do. When I say 'threatened by superior force,' I do not mean a force that the conductor alone might have exerted, but the use of some force under circumstances that made such force sufficient."

The objection which counsel for plaintiff in error raises to this instruction is that there was no such display of force in expelling the plaintiff as to justify an allowance of damages therefor. But it is clear that there was sufficient evidence to present the question of fact for the jury as to whether the conductor ejected the plaintiff with or without a display of force or indignity toward him. There is no substantial objection to the charge, and the assignment of error thereon is overruled.

4. Another alleged error is assigned upon the charge of the judge to the jury wherein he said:

"It has been argued before you, and for that reason I allude to it, that the plaintiff was guilty of contributory negligence in omitting to pay his fare. I say that is not the law."

In this the judge was governed by the judgment of this court announced upon the former hearing, and properly directed the jury in accordance therewith. It would seem that the counsel sought to maintain before the jury a proposition which had been disaffirmed by this court on the former writ of error. The assignment of error here is supported by an argument which failed to convince us on the former occasion, and it cannot be listened to now. This assignment of error is overruled.

For the errors found and noted above in permitting the recovery of damages without proof of the amount thereof, the judgment must be reversed, and a new trial ordered.

WOOD et al. v. NIAGARA FALLS PAPER CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 57.

1. CONTRACTS—TIME—FAILURE TO COMPLETE—LIQUIDATED DAMAGES—ACTUAL DAMAGES—EVIDENCE.

A contract for the purchase of machinery to be erected on defendant's premises provided that in case the turbines were not completed by October 1, 1896, plaintiffs would pay defendant, as liquidated damages, \$100 per day for each day beyond that time both turbines should remain uncompleted, and \$50 for each day either one should remain uncompleted. *Held*, that such stipulated damages could not be construed as a penalty, and hence plaintiffs could not defeat or reduce the recovery thereof by showing that defendant sustained no actual loss by the delay.

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

Henry G. Ward, for plaintiffs in error.

Chas. P. Howland, for defendant in error.

Before WALLACE and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiffs in the court below to review a judgment for the defendant entered upon the verdict of a jury. The action was brought to recover the balance of the purchase price of two turbines, with shafts, bearings, and wheels, erected by the plaintiffs on the premises of the defendant pursuant to a contract which, among other things, provided that in case the erection of the turbines was not completed by October 1, 1896, the plaintiffs would pay the defendant, as liquidated damages, \$100 per day for each day beyond that time both should remain uncompleted, and \$50 for each day either one should remain uncompleted. The defense to the action was that one of the turbines was not completed until November 9, 1896, and the other was not until November 13, 1896, whereby the plaintiffs became liable to pay the defendant damages which at the stipulated sum were in excess of the unpaid purchase price.

The defendant, at the time the contract for the turbines was made, was engaged in making additions to its manufacturing plant and installing new machinery, and the turbines were designed to double the power of its mill. Because of the unreadiness of the turbines, the defendant was unable to operate or test its new plant and machinery. It was conceded that one of the wheels was not completed until November 9, and the other until November 13, 1896. By the verdict the defendant was allowed to recover \$50 a day for every day each turbine remained uncompleted after the 1st of October.

Error is assigned of the rulings of the trial judge in excluding evidence tending to show that the defendant suffered no appreciable damage because of the delay in the completion of the turbines.

We think that the defendant was entitled to recover the damages fixed by the contract, without making proof of any actual loss sustained by it through the failure of the plaintiffs to complete the tur-

bines, and that the plaintiffs could not defeat or reduce the recovery by evidence showing that the defendant sustained no actual loss, and that the trial judge would have been justified in excluding any evidence offered by the plaintiffs to show that the defendant did not sustain any actual loss.

It is not disputed that in view of the subject-matter and nature of the agreement, and the difficulty of estimating the exact damages likely to be sustained by the defendant in the event of a breach by the plaintiffs, it was competent for the parties to agree upon a fixed sum as liquidated damages for a breach; nor is it disputed that by the contract they did so agree. It is urged, however, that when it is made to appear in an action for the breach that no actual damages have arisen, notwithstanding the parties have agreed upon stipulated damages, the party in default is entitled to be relieved. That proposition is not sanctioned by the weight of authority. On the contrary, according to authority which is controlling upon this court, the law is that the naming of a stipulated sum in such a contract, to be paid for the nonperformance of a covenant, is conclusive upon the parties in the absence of fraud or mutual mistake, and evidence aliunde in respect to the damages actually arising from the breach cannot be received.

Courts lean against the forfeitures, and towards construing such stipulations as penalties, instead of liquidated damages, when the amount on the face of the contract is out of all proportion to the possible loss. "The question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties—whether bona fide to fix the damages, or to stipulate the payment of an arbitrary sum as a penalty by way of security." *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 672, 22 Sup. Ct. 240, 252, 46 L. Ed. 366. In this case the Supreme Court explicitly disapproved the doctrine, asserted in some of the adjudged cases (*Chicago Wrecking Co. v. United States*, 45 C. C. A. 343, 106 Fed. 385, 53 L. R. A. 122; *Gay Manufacturing Co. v. Camp*, 13 C. C. A. 137, 65 Fed. 794, 25 U. S. App. 134), that, where actual damages can be assessed from testimony, the court can disregard any stipulation fixing the amount, and require proof of the damages sustained. The authorities are exhaustively reviewed in this decision, and any further citation is unnecessary.

The plaintiffs in error, to sustain their contention, cite *McCann v. City of Albany*, 158 N. Y. 634, 53 N. E. 673. That was a case in which the contract referred to the sum payable upon breach both as a "forfeit" and as "liquidated damages"; and the decision was placed upon the ground that, as it did not appear that there were any actual damages, the named sum was to be regarded as a penalty. In the present contract there was no room for construing the stipulated sum as a penalty.

The judgment is affirmed.

AMES et al. v. FARRELLY.**(Circuit Court of Appeals, Ninth Circuit. February 2, 1903.)**

No. 860.

1. REVIEW ON ERROR—VARIANCE—WAIVER OF OBJECTION.

The objection that defendants were sued as individuals, whereas the evidence showed that the contract sued on was made by a mining partnership composed of defendants and another who was not joined, is one which the defendants could waive; and, where it was not made or ruled on in the trial court, it cannot be raised for the first time in the appellate court.

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

J. C. Campbell, W. H. Metson, R. W. Campbell, Ira D. Orton, and Campbell, Metson & Campbell, for plaintiffs in error.

William T. Love, Bruce Knott, and Albert H. Elliot, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. One Joseph Henry was the owner of an undivided one-half interest in three mining claims in the Kougrock mining district, Alaska, known as claim No. 14 on Harris creek, No. 5 on Dahl creek, and No. 9 on Quartz creek. The other one-half interest was owned jointly by the plaintiffs in error, but the legal title thereto stood in the name of D. J. Horgan. In the mining season of 1901 the defendant in error and Frank Petrick performed work and labor on these claims at the instance of Henry at the agreed wages of \$10 per day, and later at \$6 per day. Henry agreed with them to pay for his half of the work so done by conveying to them a one-fourth interest in the Harris creek claim, and he informed them that F. H. Ames would pay for the other half. For one-half of the work so done on the three claims, the defendant in error, on behalf of himself and as assignee of Petrick and others, brought an action in a justice court to recover \$997; alleging in his complaint that the work was done at the instance of the plaintiffs in error. He obtained a judgment for \$762 and costs. The plaintiffs in error took an appeal to the District Court, where the cause was tried before the court without a jury. The court made findings of fact and rendered a judgment in favor of the defendant in error for \$1,014.90 and costs. Plaintiffs in error now seek to review that judgment.

The assignments of error challenge the findings of the District Court as to the work done on the Harris Creek claim on the ground that there is no evidence that the plaintiffs in error contracted for said work or became responsible therefor. In brief, it is the contention of the plaintiffs in error that, notwithstanding the proof of their liability for work done on the Dahl Creek and the Quartz Creek claims, there is no evidence that they ever authorized the employment of men to work on the Harris Creek claim. The plaintiffs in error and Henry were the owners of three claims. The work on

the Harris Creek claim was the work first done in the season. About the 1st of August, Ames, one of the plaintiffs in error, sent into the mining district one Satler to represent him as his agent. When Satler arrived, the men were taken away from the Harris Creek claim, and were put to work on the other two claims. There is evidence to sustain the verdict of a jury—therefore evidence sufficient to sustain the finding of the court—that the plaintiffs in error had, together with Henry, contracted for all the work done on all the claims. Horgan, one of the plaintiffs in error, testified that before the mining season began it had been arranged between the plaintiffs in error and Henry that work should be done to develop the claims during that season, and that Henry represented the plaintiff in error in the development. There was no evidence to contradict that testimony.

It is contended that judgment was erroneously entered, under the pleadings, for one-half of Petrick's account for work done on the Harris Creek claim. The total work of Farrelly and Petrick on that claim amounted to \$510 each. It is argued that each received half payment of their claim by the conveyance from Henry, and that, as to the unpaid half of Petrick's claim, it is neither alleged nor proven that it was assigned to Farrelly. Petrick, however, testified that he and Farrelly were partners, and that he consented to the bill which was made out in Farrelly's name for the full amount due them both. He could not be heard now to assert a claim against the plaintiffs in error, and the plaintiffs in error cannot complain so long as the judgment discharges their liability as to both Petrick and Farrelly. They made no objection to the introduction of the evidence on the ground that Petrick had made no assignment to Farrelly.

It is contended on the argument that it was error to enter judgment against the plaintiffs in error for the work done on the Dahl Creek and Quartz Creek claims, for the reason that the complaint alleged that the work was done under contract with the plaintiffs in error as individuals, whereas the evidence showed that it was done under a mining partnership composed of the plaintiffs in error and Henry. This point is made for the first time in this court. There was no objection taken either in the justice court or in the District Court upon the ground of the nonjoinder of Henry as party defendant in the action, and no objection was interposed to any of the evidence upon the ground of its variance from the pleadings. This court, it is true, will, under its rule 12 (3 Sup. Ct. ix), take notice of a plain error not assigned, but the question before us is whether the trial court erred in its rulings. That court was not asked to make any ruling upon the points which are now suggested, and, as to the rulings that were made, we find no error in any of them. The objection that their copartner was not joined as party defendant was one that the plaintiffs in error could waive, and they waived it. Civ. Code Alaska, §§ 50, 61, 62.

We think this a proper case for the application of section 2 of rule 30, and damages of 10 per cent., in addition to interest, will be awarded upon the amount of the judgment, which judgment we affirm.

KENTUCKY NAT. BANK v. CARLEY.

(Circuit Court of Appeals, Third Circuit. April 17, 1903.)

No. 35.

1. BANKRUPTCY—OBJECTIONS TO DISCHARGE—AMENDMENT—LACHES.

May 11, 1901, a creditor filed objections to a bankrupt's discharge, alleging a concealment of the bankrupt's equity growing out of certain transactions in stocks. May 10th another creditor filed objections, and thereafter united with the first creditor's attorneys in a joint motion for the reference of the specifications of both. In September the second creditor announced its case closed. In November it sought to have a witness called with whom the stock transactions were had. On July 10, 1902, the trustee sold the bankrupt's equity. In December, 1902, the second creditor prayed leave to amend its objections, so as to include the concealment of the equity. *Held*, that the refusal of leave to amend was a proper exercise of discretion; the petition being barred by laches.

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

Wm. Marshall Bullitt, for appellant.

Wm. J. Linihan, for appellee.

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

BUFFINGTON, District Judge. This is a petition for review of the action of the District Court for the District of New Jersey, sitting in bankruptcy. On November 17, 1900, Francis D. Carley was adjudged bankrupt, and on February 1, 1901, presented his petition for discharge. On May 10, 1901, the present petitioner, the Kentucky National Bank, and on May 11, 1901, one George D. Patton, filed separate specifications of objections to Carley's discharge. The Patton objections in substance alleged the bankrupt had had large transactions in stocks of the Panhandle Railroad under an agreement with one W. K. Vanderbilt, and that a large part of said stocks became and were the property of the bankrupt, who had not accounted for them to the estate. The appellant did not specify this stock transaction in its objections, but on May 15, 1901, by its attorneys, it united with Patton's attorneys in a single joint motion to the court, whereby the specifications of both were referred to the referee as a special master to take and report proofs. Numerous hearings were had in pursuance of said joint reference, and in September, 1901, the Kentucky National Bank announced its case closed. On July 10, 1902, the trustee in bankruptcy sold at auction under directions of the court the equity of the bankrupt in the foregoing alleged stock transactions. In December, 1902, 19 months after its objections to discharge had been filed, and 15 months after its case had been closed, the Kentucky National Bank presented its petition, alleging more in detail but in substance the same transaction in Panhandle stock embodied in the Patton objections, filed May 11, 1901, and prayed leave to amend its objections to discharge by specifying the same. After hearing, the District Judge refused to allow such

additional specifications to be filed, because the matter urged was known to petitioner before its case was closed.

By its own admission in its petition to the court below the bank had express knowledge of the transaction in November, 1901, when it sought to have Vanderbilt called for examination. But the petitioner might well be charged with knowledge at an earlier day, when, on May 15, 1901, its counsel joined in a joint motion with Patton's to refer both sets of specifications as above noted. Presumptively, the appellant had notice of all steps taken in this proceeding, to which it had become a party. Notice of this alleged transaction was spread on the record in the Patton objections. If the appellant did not then learn of it, its failure to do so is chargeable to its own neglect. When it joined in a motion for a reference, it must be deemed chargeable with what it moved to refer; and, apart from presumptions, it is simply incredible that, in the litigation of its own specifications that followed, its counsel did not advise themselves of the objections made and litigated by its fellow objecting creditor. Laches is justly chargeable where there are circumstances which should have induced inquiry and an effort to obtain knowledge. But, accepting the latest date, November, 1901, as the one when petitioner admits knowledge, its failure to seek relief until December, 1902, in itself affords warrant for the court's refusal of its petition. Its action therein was, in view of the facts, a proper exercise of judicial discretion.

The order of the District Court is affirmed.

ADAMS v. SHIRK et al.*

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

No. 885.

1. BILL OF EXCEPTIONS—AMENDMENT AT SUBSEQUENT TERM.

A bill of exceptions cannot be amended at a term subsequent to that at which it was filed, in order to correct an omission due to the party's own neglect or oversight.

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

Wm. Burry, for plaintiff in error.

Frederic Ullmann, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. Defendants in error, as lessors in a 99-year ground lease, recovered judgment against Adams, plaintiff in error, for rent, and for taxes and insurance premiums paid by them. The court directed the verdict. In the charge the jury were explicitly

*Rehearing denied April 14, 1903.

¶ 1. See Exceptions, Bill of, vol. 21, Cent. Dig. § 110.

instructed to include in their verdict \$9,504.42 for insurance premiums paid by defendants in error. The correctness of that instruction is the only question presented and urged in argument. Other questions between these parties were considered in *Adams v. Shirk* (C. C. A.) 117 Fed. 801.

Adams contends that, because the insurance was taken out and the premiums paid by defendants in error after Adams had assigned all his interest in the lease and in the buildings to a third party, the insurance on the buildings, to be valid, should have been written in the name of such third party as owner, and not in the name of Adams, and that, although Adams was bound to pay rent, taxes, and insurance premiums, whether he had assigned or not, he could not be held to the payment of premiums for invalid insurance.

The original bill of exceptions fails to present the question in the form in which Adams states it. The bill does not show in whose name, as owner of the buildings, the insurance was written.

After this situation was brought to the attention of Adams by the brief of defendants in error in answer to Adams's brief in support of the present writ, Adams procured in the court below an amendment to the bill of exceptions, showing that the insurance was written in the name of Adams as owner. The judgment was entered and the original bill of exceptions was signed and filed during the December term, 1901. The petition to amend was filed and the order allowing the amendment was entered during the July term, 1902. The omission in the original bill occurred through the neglect or oversight of Adams, the party presenting it for allowance. On October 8, 1902, a supplemental record, containing the amendment to the bill of exceptions, was filed in this court in pursuance of a stipulation of the parties that it might be filed without prejudice to the right of defendants in error at the time of the hearing to submit a motion to strike it from the files. Such a motion was duly submitted, and is sharply pressed.

The practice and rules of the state court do not apply to bills of exceptions in the federal court. In *re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508. "Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be." *Michigan Insurance Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162. The exceptions to the general rule that a bill of exceptions cannot be allowed or amended at a subsequent term do not extend to errors and omissions caused by the neglect of the party whose duty it was to prepare and submit a proper bill. *Western Dredging & Improvement Co. v. Heldmaier*, 53 C. C. A. 625, 116 Fed. 179. The motion is sustained.

But the question remains whether, under the evidence, the court erred in directing the jury to include in their verdict the insurance premiums paid by defendants in error. By the terms of the lease, it was Adams's duty to take out the insurance and pay the premiums. In case he omitted to do so, defendants in error had the right. The evidence fails to show that Adams had not taken out and paid for the

required amount of insurance, and that such insurance was not in force at the time defendants in error caused the policies in question to be written.

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

RUPP v. WHEELING & L. E. R. CO.

(Circuit Court of Appeals, Sixth Circuit. April 15, 1903.)

No. 1,153.

1. REMOVAL OF CAUSES — JOINT DEFENDANTS — SEPARABLE CONTROVERSY — CITIZENSHIP—RECEIVERS.

Where in an action for injuries a joint liability was alleged against a railroad company and receivers thereof, who had been appointed by the United States Circuit Court, and the citizenship of the railroad company was the same as that of the plaintiff, there was no separable controversy, and the receivers were not entitled to remove the cause to the federal courts, either alone or with the railway company.

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

O. S. Brumback, for plaintiff in error.

C. A. Seiders, for defendant in error.

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

SEVERENS, Circuit Judge. This suit was brought in the court of common pleas for Lucas county, Ohio, by Rupp, the plaintiff in error, against the railway company and its receivers, above named, to recover damages for an injury alleged to have been sustained by him in consequence of the negligence of the defendants in delivering a car loaded with tin at the warehouse of the employers of the plaintiff, situated upon a spur track leading from the railway company's station out and along side of said warehouse. The petition sought a joint recovery against the railway company and the receivers upon the allegations of negligent acts of the company and the receivers, all of which concurred in causing the injury. It alleged that the company carelessly and negligently constructed the spur track so as to be greatly inclined at the place where the car was placed in front of and opposite the doorway of the warehouse, and that the receivers negligently left the car on the spur track without sufficient blocking, and without the brakes being properly set to prevent the car from being started and running down the incline when it should be subjected to the jars and motions incident to unloading, and that the plaintiff, while attempting to unload the car, was injured by its starting away and running down the incline.

On January 27, 1899, the receivers filed a petition and bond for removal, the petition alleging that they had been appointed such by the Circuit Court of the United States for the Western District of Ohio,

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

and were acting under that appointment, and operating the company's railroad at the time when the accident happened; wherefore, they said, the suit was one involving a separable controversy, and was one arising under the laws of the United States. Upon the filing of this petition the record was removed into the Circuit Court of the United States. The railway company and the receivers filed separate demurrers to the petition, and both demurrers were overruled. The defendants then filed separate answers, and the cause came on for trial by the court and a jury. Upon the offer of evidence in support of the petition objection was made by defendants that the petition did not state a cause of action, and that the evidence should, therefore, not be received. The court, being then of the opinion that the objection was well taken upon the ground assigned, sustained the objection, dismissed the suit, and discharged the jury. The plaintiff thereupon sued out a writ of error, and the case was brought here. When the case came on for argument, the question of the validity of the removal and of the jurisdiction of the court below was presented.

All the parties were citizens of Ohio. A joint liability of the railway company and the receivers being alleged and claimed, there was no separable controversy. If the receivers had been the only defendants, they might have removed the case if the plaintiff made no objection. *Baggs v. Martin*, 179 U. S. 206, 21 Sup. Ct. 109, 45 L. Ed. 155. But the railway company being a joint defendant with them, and of the same citizenship as the plaintiff, the receivers could not remove the case, either alone or with the railway company.

In every substantial particular the case is like that of *Central Ohio R. Co. v. Mahoney*, 114 Fed. 732, 52 C. C. A. 364, recently decided by this court, wherein, for the same reasons, we were compelled to hold that the court below did not acquire jurisdiction by the proceedings for removal. Upon the authority of that case the judgment of the Circuit Court will be reversed, and the cause remanded to that court, with directions to remand it to the state court from which it was removed; and the receivers, who removed the cause, will pay the costs of both courts.

SUN PRINTING & PUBLISHING ASS'N v. EDWARDS.

(Circuit Court of Appeals, Second Circuit. March 12, 1903.)

No. 108.

1. COURT OF APPEALS—JURISDICTION OF LOWER COURT—POWER TO REVIEW.

As Act March 3, 1891, § 6, 26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 549], fixing the jurisdiction of the Circuit Court of Appeals, gives it no power to review questions as to the jurisdiction of the court below, the question whether diversity of citizenship exists, so as to vest jurisdiction in the Circuit Court, cannot be passed upon by the Court of Appeals.

2. SAME—DISPOSITION OF CAUSE.

On error to the Circuit Court from the Circuit Court of Appeals, a question as to the jurisdiction of the Circuit Court will be certified to the Supreme Court, and meanwhile other questions will be reserved.

¶ 1. Review by Circuit Courts of Appeals of jurisdiction of Circuit Courts, see note to *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 48 C. C. A. 351.

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

Writ of error by defendant to review a judgment in favor of plaintiff upon a verdict in an action to recover for breach of contract.

Franklin Bartlett, for plaintiff in error.

Thos. F. Bayard, for defendant in error.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. The proposition contended for by defendant, viz., that, upon the pleadings and proofs, there was not shown such diversity of citizenship as would give the Circuit Court jurisdiction, seems to be in accord with the decisions; but the sixth section of the act of March 3, 1891, 26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 549], has not given this court appellate jurisdiction to review questions as to the jurisdiction of the court below, and we therefore may not decide such questions. The correct practice when an appeal or writ of error brings up before this court constitutional or jurisdictional questions involved with other questions is pointed out in *U. S. v. Lee Yen Tai*, 113 Fed. 465, 51 C. C. A. 299.

The jurisdictional question will be certified to the Supreme Court, and meanwhile the other questions will be reserved.

ADRIANCE, PLATT & CO. v. NATIONAL HARROW CO. et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 59.

1. INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENTS.

The owner of a patent is acting within his rights in notifying infringers of his claims, and threatening them with litigation if they continue to disregard them; nor does he transcend his rights when, a claimed infringer being a manufacturer, he sends such notices to the manufacturer's customers, if he does so in good faith, believing his claims to be valid, and in an honest effort to protect them from invasion. But the sending of such notices in bad faith, and without any intention of bringing the suits threatened, but solely to injure the manufacturer's business, constitutes a fraudulent invasion of property rights against which it is the duty of a court of equity to grant relief by injunction.

2. SAME—GOOD FAITH—EVIDENCE.

Whether circulars and letters sent by the owner of a patent to the customers of a manufacturer of an article claimed to infringe, warning them of infringement and threatening suit, are sent in good faith and for legitimate purposes, can seldom be determined from their contents alone, and, like all questions of intent, must generally be determined by the extrinsic facts. When the manufacturer is financially responsible, and his infringement readily provable, and where the patent owner is financially able, and one who makes it his sole business to grant licenses, which places him under a duty to protect his licensees, the bringing of an infringement action against the manufacturer would seem to be the imperative proceeding; and if he delays, and attempts to effect by threats what he could compel by law, a strong inference of bad faith arises, which becomes irresistible if he refuses to bring suit for any considerable time when the alleged infringement is open, notorious, defiant, and extensive.

1. SAME—EVIDENCE CONSIDERED.

Complainant was a manufacturer of a spring-tooth harrow under a patent. Defendant was the owner of a number of patents covering such implements, and its business was the granting of licenses thereunder. It claimed complainant's harrow to be an infringement of a number of its patents, and requested complainant to take licenses thereunder. Complainant sent one of its harrows for examination, claiming that it did not infringe, and, after interviews, refused to take a license, and requested defendant to bring suit to test the question of infringement. This defendant refused to do, but commenced and continued to send circulars and letters to complainant's customers threatening suits, stating in effect that complainant would not protect them, and advising them to buy of its licensees, a list of whom were sent. After suit brought by complainant to enjoin the sending of such circulars and letters, defendant for the first time commenced suits on one of its patents against several customers of complainant, which it subsequently dismissed. *Held*, that such facts were sufficient to sustain the charge that defendant was acting in bad faith for the purpose of destroying complainant's business and coercing it into becoming a licensee of defendant, and entitled complainant to an injunction.

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

For opinion below, see III Fed. 637.

S. D. Bensley, for appellant.

H. M. Lane, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is an action in equity to restrain the defendant from the publication of circulars and letters asserting the violation by the complainant of the defendant's rights under letters patent, and threatening the complainant's customers with suits. The court below dismissed the bill.

The facts bring it within the principle of the decision of the Circuit Court of Appeals for the Third Circuit in a suit brought in the District of New Jersey against the present defendant. The doctrine there declared is well settled by the authorities, and the opinion in that case contains a sufficient citation of them without further reference. *A. B. Farquhar Co. v. The National Harrow Company*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755.

The complainant is a manufacturing corporation having its place of business at Poughkeepsie in this state, and in January, 1897, commenced manufacturing spring-tooth harrows, known as the "Buckeye Harrow," built conformably to the patent of Henry J. Case, an application for which was then pending, and which was subsequently issued to the complainant as assignee. The defendant is a New Jersey corporation, doing business at Utica in this state, which has acquired title to a great number of patents for improvements relating to spring-tooth harrows. It is not a manufacturer of harrows, but makes it its business to grant licenses upon royalties to manufacturers. Its licenses provide a uniform scale of prices for harrows and harrow parts, and bind the licensees not to sell their machines at any deduction or allow any rebate. During the season of 1897 the complainant sold about 700 harrows; in the season of 1898

it sold about 2,000 harrows; and its business promised much larger sales in the coming season. Before its harrows were put in the market in 1897, it was informed by the defendant that they were claimed to be an infringement of some of the defendant's patents. Correspondence and interviews ensued. The complainant forwarded one of its harrows to the defendant for examination. The defendant continued to assert the charge of infringement, and sought to induce the complainant to take a license. The complainant insisted that its harrows were not an infringement, and requested the defendant to bring suit and have the question settled. To this suggestion the defendant refused to accede, and replied in substance that it proposed to prevent the complainant from building harrows in its own way. Thereupon the defendant commenced sending out circular letters to the complainant's customers throughout the state, the New England states, Pennsylvania, New Jersey, Michigan, and other states. This circular contained a picture of the complainant's harrow, with the description: "The 'Buckeye' manufactured by Adriance, Platt & Company, Poughkeepsie, N. Y., and claimed by us to be made in infringement of our patents." The circular cautioned dealers not to buy any spring-tooth harrows not bearing the defendant's license label, stating: "We have yet to find a harrow of recent and modern construction that does not embody one or more of our patents." The circular also contained this statement: "We regret that we are obliged to hold the dealers responsible, but this cannot be avoided, as in many cases the manufacturers would not be able to settle our claims." These circulars were followed by letters to the same persons, and of the same purport. Extracts from some of them may be given by way of illustration. The following is an excerpt from one:

"We have from time to time written you and mailed you circulars regarding your handling the Adriance, Platt & Company spring-tooth harrows, which are claimed to infringe our patents. * * * We are in duty bound to protect our licensees, their customers, and ourselves, and shall sue all dealers who persist, after our repeated warnings, in handling infringing goods. We are constantly bringing suits wherever these dealers are found. This we shall continue to do till our rights are fully respected."

The following is an extract from another:

"It is claimed by this company that it is impossible to construct a modern spring-tooth harrow, such as can be sold at the present time, without infringing several of the numerous patents owned by us. We do not deem it necessary to give you further warning notice than this at this time."

The learned judge of the court below was of the opinion that the defendant was acting within its rights, and that the letters and circulars were legitimate notices to infringers of these rights. In his opinion he states:

"There is not a false statement of fact to be found in the circular quoted above, or in any of the other circulars or letters in evidence. Necessarily, the claim of infringement is based upon opinion, but it is an opinion which a perfectly sincere and honest man might entertain. Certainly it cannot be said that the opinion was without justification, malicious, and false."

Undoubtedly the owner of a patent is acting within his rights in notifying infringers of his claims, and threatening them with litiga-

tion if they continue to disregard them; nor does he transcend his rights when, the infringer being a manufacturer, he sends such notices to the manufacturer's customers, if he does so in good faith, believing his claims to be valid, and in an honest effort to protect them from invasion. The question whether the patent owner is acting in good faith in advertising his claims to the manufacturer's customers by circulars or letters can seldom be determined from the contents of the communication alone, and, like all questions of intent, must generally be determined by the extrinsic facts. It is always easy to frame such circulars in guarded terms, which will not commit the sender to any definite libelous charges, omitting specific statements of fact, and substituting statements of opinion; and when they are sent for an illegitimate purpose they are likely to be so framed.

When the manufacturer is financially responsible, is accessible, and his infringements readily provable, and when the patent owner is financially able, and is one who makes it his sole business to grant licenses, and is under a duty to his licensees to prosecute extensive infringers, the sending of such circulars to customers would seem to be merely a preliminary or cumulative measure, and the bringing of an infringement action the paramount and imperative proceeding. As, ordinarily, the patent owner would be prompt and zealous to assert his claims, if he halts and purposely procrastinates, and attempts to effect by threats and manifestoes that which he can compel by the strong hand of the law, a strong inference arises that he has not any real confidence in his pretensions. This inference becomes irresistible if he refuses to bring suit during a considerable period of time when the alleged infringement is open, notorious, and defiant, and so extensive as to threaten destruction to his alleged exclusive rights. The indicia of bad faith are persuasive in the present case. It is impossible to read the communications warning the complainant's customers against selling its harrows, with which the defendant seems to have flooded the country, without being led to believe that they were inspired by a purpose to intimidate the complainant's customers, and coerce the complainant, by injuring its business, into becoming a licensee of the defendant. In view of its failure to bring an infringement action, under circumstances which made an action practically compulsory, the defendant cannot shelter itself behind the theory that its circulars and letters were merely legitimate notices of its rights. We are satisfied that they were sent, not for the purposes of self-protection, but in execution of the defendant's threat to stop the complainant from building harrows by other means than legal remedies.

Until the present action was brought, the defendant contented itself with warnings and threats to the complainant's customers, and made no attempt to prosecute an infringement suit. The publicity of the complainant's suit neutralized these threats, and the defendant brought several actions against customers of the complainant. Out of its numerous patents it selected one, presumably the least infirm, as the basis of its attack upon the complainant's alleged infringing harrow. Those suits, after the proofs were taken, came to

an end by the voluntary dismissal of the bill. The inglorious conclusion of these suits may afford an explanation of the defendant's reasons for preferring to attack the complainant by the circulars and letters rather than in a court of justice.

We conclude that complainant was entitled to an injunction and an accounting. The decree is accordingly reversed, with costs, and with instructions to the court below to decree accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CATSKILL ILLUMINATING
& POWER CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 8.

1. PATENTS—ANTICIPATION—ELECTRICAL MOTORS.

The Tesla patents, Nos. 511,559 and 511,560; the former covering a certain method, and the latter certain means, of operating electrical motors by means of alternating currents from a single original source, known as the "split phase" system, *held void* for anticipation by the printed publication at Milan in an Italian journal on April 22, 1888, of a report of a lecture by Prof. Galileo Ferraris, fully describing such system; complainant's evidence being insufficient to sustain the burden of proof resting upon it to show that Tesla's invention was prior to such date.

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

For opinion below, see 110 Fed. 377.

Chas. A. Brown and Wm. K. Kenyon, for appellant.

Thos. B. Kerr and Parker W. Page, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Appeal by defendant in the court below from its decree on bill alleging infringement of complainant's patents Nos. 511,559 and 511,560, granted to Nikola Tesla on December 26, 1893. The court below sustained both patents, and found infringement of both claims of patent No. 511,559 and of the first claim of patent No. 511,560. Inasmuch as we have reached a conclusion adverse to the complainant upon the question of priority of invention, the other issues will not be discussed.

The claims of patent No. 511,559 are as follows:

"(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits, and retarding the phases of the current in one circuit to a greater or less extent than in the other.

"(2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth."

The first claim of No. 511,560 is as follows:

"(1) The combination with a source of alternating currents and a circuit from the same of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase, and an armature within the influence of said energizing circuits."

The claims of the former patent cover a certain method and of the latter certain means of operating electrical motors by means of alternating currents from a single original source. This system is known as the "split phase" system. Nikola Tesla, the patentee herein, was the inventor of what is known as the "polyphase system" of transmission of power, and had covered by his earlier patents, Nos. 381,968, 382,279, and 382,280, said system when operated by means of currents of varying phase from independent lines or circuits. The applications for these earlier patents were filed during the fall and winter of 1887 and the winter and spring of 1888, the final fees were mailed on April 8, 1888, and said patents issued May 1, 1888. Up to April 8th, Tesla had not intimated to his solicitor that his broad invention of the rotary field motor could be practiced by any means which did not involve the use of two independent circuits from the generator to the motor. The applications for the patents in suit were filed December 8, 1888. By the method and means therein described Tesla dispensed with one of the line circuits, and was able to run the motor by means of alternating currents from a single original source. This was accomplished, as appears from the foregoing claims, by means which so retarded the phases of the current in all circuits, or so varied the relative resistance of the motor circuits, as to maintain the necessary difference of phase in the currents. Such utilization of a single original source by thus splitting a single current into two currents was an improvement of great practical value. But on April 22, 1888, there had been published at Milan, in an Italian journal, a report of a lecture by Prof. Galileo Ferraris, in which the system covered by the patents in suit was fully described. This printed publication is such a disclosure of the subject-matter of the patents in suit that, if prior thereto, it would constitute an anticipation.

To support the burden thus cast upon it of proving to the satisfaction of the court that the supposed inventions in suit were made prior to April 22, 1888, complainant has introduced a photograph and the evidence of two witnesses, Messrs. Brown and Page. One of said witnesses has testified that said photograph represented a motor which was in Tesla's shop in the fall of 1887, and in which the difference in phase was secured by the introduction in one of the circuits of a coil having self-induction. There is nothing in the photograph, however, to indicate the means by which said motor was operated, nor whether it was adapted to receive a single or double current from the generator. Its construction is at least as suggestive of use in connection with the earlier polyphase as with the later split phase patents. We are therefore confined to a consideration of the testimony of said two witnesses.

Mr. Brown furnished capital to Tesla to make his experiments at the date here in question, and afterwards sold his interest in the Tesla inventions to this complainant. On May 25, 1900, he testified that in

1887 Tesla disclosed to him certain inventions made by him relating to split phase alternating current motors, and showed him such motors in operation in his shop in Liberty street (in 1887), and that the shop was afterwards moved and destroyed by fire, and he thought all the motors were destroyed in said fire. He further stated that he had had no experience with alternating currents beyond that which he had had through his connection with Tesla. He failed to identify the date of the disclosure, or to account for the loss of said motors, further than as hereinbefore shown, and complicated his vague general description of said apparatus by contradictory statements as to the specific means used in their operation. But apart from all this, he failed to so describe the said apparatus that this court can determine whether they did in fact embody in structure and practical operation the specific form of apparatus used by the defendant. Such evidence, under the familiar rule, called either for corroboration or for some explanation why corroboration was impossible. The complainant failed to comply with said rule. It failed to show that Tesla alone constructed said motors, or to produce any one employed in said shop in 1887 who might have seen said motors, or taken part in their construction, or to account for their absence. It failed to put Tesla himself, a resident of New York, on the stand, to show to the court the precise nature of the inventions disclosed and practiced by him in 1887. Farther than this, other uncontradicted testimony strongly tends to show that the witness must have been mistaken as to the date of this disclosure and of the operation of said motors. It appears that in 1888 Tesla spent nearly two weeks at the factory of the Mather Electric Company, explaining his new alternating current motor inventions, with a view to interesting said company in their development and manufacture; that one of the objections made to their operation was the fact that they required a special generator and extra wires, but that Tesla did not then claim that he had made any invention whereby two currents of different phase could be derived from a single source. Again, complainant's other witness to the date of invention, Page, who was Tesla's attorney, and who, during 1887 and 1888, prepared the Tesla applications for the polyphase and other patents, including those here in suit, testified that up to a few days after April 8, 1888, "Mr. Tesla had never intimated in any way to me that his invention of the rotary field motor could be practiced by any means which did not involve the use of two independent circuits from the generator to the motor." We are forced to the conclusion that Brown, testifying at this distance of 13 years, must have had in mind the year 1888, during which year also, as he testifies, he saw said motors in said shop.

We are brought, then, to a consideration of the testimony of said Page, the witness chiefly relied on to carry the date of invention back of April 22, 1888. The material parts of his testimony are as follows, namely, that, having been employed as aforesaid, Tesla "explained that he had other ideas about the operation of these motors, and thereupon disclosed to me his scheme for operating the motors by connecting them with single circuits"; that "when he first described the scheme of patent 555,190 (application filed May 15, 1888), Mr. Tesla

also described to me the plan of operating these motors which involves the splitting of a circuit, * * * upon which patent 511,560, which is one of the patents in suit, is based"; and "that I understood fully from his description, not only the principal and essential features of the inventions involved in the patents in suit, but also another plan which he had at that time developed for effecting the same result by making the poles of a motor of different magnetic susceptibility * * * the subject of an application filed October 20, 1888, and which became patent No. 524,426." It further appeared on the hearing in this court that Mr. Page filed three other Tesla applications on April 23, 24, and 28, 1888, respectively, and which issued in October, 1888, as patents Nos. 390,414, 390,820, and 390,721, respectively. Neither these patents nor Nos. 555,190 and 524,426 are in suit herein. Some of the patents cover modifications of the polyphase system, others of the split phase invention. The applications which resulted in the patents in suit were not filed until December 8, 1888. As to the character and date of said disclosures, the witness further testified as follows: "I cannot say, from present recollection, how many of the specific arrangements for producing artificially the necessary differences of phase which are described in the two patents in suit Mr. Tesla described to me in the early part of April, 1888, but my recollection is clear to the fact that between April 8 and April 18, 1888, on which latter date I entered a charge in my diary for services in this particular matter." The diary was not produced. The witness stated: "I had occasion several years ago to look up the facts in connection with the matter about which I have just testified, and at that time I had this book in my possession;" that he then used it in giving certain testimony; that he had since searched for it, but had been unable to find it; and that his present testimony was based upon his recollection of the matter, and upon the records of previous testimony given on this point.

This evidence is clear, direct and persuasive as to a disclosure by Tesla of various schemes for operating motors on the split phase principle. But it falls far short of the requirement in such a case. "The burden which rested upon the defendant in the first instance has been transferred to the complainant, and it must furnish the court with convincing proof that the anticipation has been anticipated." *Westinghouse Electric & Manufacturing Company v. Saranac Lake Electric Light Company* (C. C.) 108 Fed. 221, 222. *Clark Thread Company v. Willimantic Linen Company*, 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521. It is to be noted that this testimony relates to events which occurred 12 years before; that the only means which the witness had for refreshing his recollection is the lost diary. The witness could not be expected to have any independent recollection as to what was covered by the charge, entered four days before the date of the anticipating publication, for "services in this particular matter," nor whether the date and character of said charge was correctly entered. The evidence fails to show the specific character of said disclosure, whether it covered the constructions herein held to be infringed, or some of the other constructions embraced in the patents in suit, or in said other patents not in suit on which the witness was then en-

gaged. Nor does it appear with satisfactory definiteness that the disclosure was a sufficiently full and complete disclosure of the particular claims involved herein, or, if so, which were thus disclosed. The witness does not state what Tesla said to him. Apparently, all that he learned from Tesla was the "principal and essential features of the inventions involved in the patents in suit." The fact that the applications for the patents in suit were not filed until December 8, 1888, while said applications for other specific phases of said invention were filed on May 15th and October 20th, tends to support the claim that the "particular services" were rendered in regard to said earlier specific inventions, and that Tesla did not perfect and complete the inventions in suit until a later date. In these circumstances it was incumbent upon complainant to furnish additional evidence in order to remove these uncertainties, or to account for its failure so to do. No attempt was made, however, to further fix the date or character of Page's services, either by the books of his firm, the bills rendered, the testimony of his partners or of his Washington associates, with both of whom he consulted, or by the date of the trip taken to Washington in regard to the matter, or by the testimony of Tesla himself. Complainant has failed to comply with the fundamental rule that the best evidence of which the case is in itself susceptible must be produced. In these circumstances we are constrained to hold that invention by Tesla prior to April 22, 1888, has not been proved.

The decree is reversed, with costs, and with instructions to the court below to dismiss the bill, with costs.

SANDER v. ROSE et al.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1903.)

No. 1,760.

1. PATENTS—INFRINGEMENT—IMPROVERS.

When two inventors have each adopted the substantial features or elements of an earlier invention making, respectively, but slight changes in or improvements upon the earlier device, each will be limited to his own specific form of device; and, if there are differences therein, neither device will be held to be an infringement of the other. In all such cases the general words of a claim, especially where the claim contains words of reference to a more particular description of the thing patented, which is contained in the specification, will be held to cover only the structure or the device so particularly described.

2. SAME—DISK HARROWS.

The Rose patent, No. 416,346, for a disk harrow having a series of scrapers attached to a pivoted frame, controlled by the operator, by which the earth may be scraped from the concave side of the disks, is, at most, only for an improvement upon the harrow of the Corbin patent of 1877, No. 197,545, and the claims must be limited strictly to the construction shown and claimed. As so limited, it is not infringed by the device of the Lindgren patent, No. 645,818, which also adopts the substantial features of the Corbin invention, but differs in details of construction from that of Rose.

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

Thomas A. Banning (Ephraim Banning, on the brief), for appellant. Charles K. Offield and Charles C. Linthicum (Henry S. Towle, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for the infringement of letters patent No. 416,346, issued to Henry M. Rose, for an improvement in disk harrows, on December 3, 1889. Julius Sander, the defendant below, who is the appellant in this court, sold harrows that were manufactured in accordance with the specifications of letters patent No. 645,818, issued to A. Lindgren on March 20, 1900, for an improvement in disk harrows. Drawings or cuts representing the two kinds of disk harrows which are thus brought in conflict will be found on the opposite and succeeding pages. Referring to the Rose drawing, it will be observed that the rotary cutting disks, E, E, are mounted in the ordinary way, so as to revolve on an axle as the harrow is drawn over the ground. Each disk is provided with a scraper, C, which is a thin, elastic strip of steel, with a scraper edge that comes in contact with the concave side of the rotating disks, to which earth is apt to adhere when the ground is wet. The scrapers are attached to the bar, D, which is hinged to the frame of the harrow, one beam whereof, marked U, is disclosed in the drawing. By turning the hinged bar, D, by means of suitable mechanism for that purpose which is under the control of the driver, the scrapers are made to travel along the concave surface of the disks and remove the dirt which adheres thereto. The bar, D, has a longitudinal or endwise motion, to some extent, as the scrapers move from the axle outwardly toward the rim of the disks, and a coiled spring, marked d^s in the drawing, presses the bar in the reverse direction back into place as the scraper points or blades return toward the axle. Several of the claims in the Rose patent are said to have been infringed by the appellant, but we only quote two—the first and the sixth—which will serve to illustrate what the patentee claims to have been his invention.

"(1) The combination with the disks, E, of the scrapers carried by a pivoted movable frame, and movable by the oscillation of said frame along said disks toward and from the periphery, substantially as set forth. * * *

"(6) The combination with a disk or series of disks, E, of a scraper carrier or support, and a scraper, or series of scrapers, whose free or scraping end, when at rest, is at or near the center of said disks, and which free end is adapted to be moved over and scrape the surface of the disks on a line crosswise to or at an angle with said scraper, substantially as set forth."

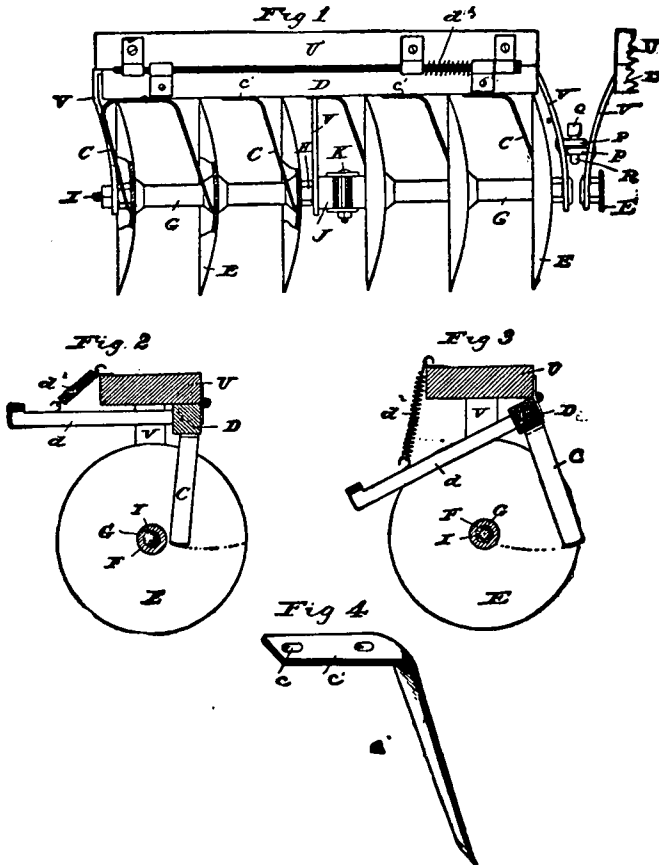
Turning next to the Lindgren drawing, the following method of construction will be observed. From the beam of the harrow frame, indicated by the figure 1, two horizontal bars, 2, placed end to end, are suspended, each of which bars sustains a gang of concave cutting disks that revolve on an axle in the ordinary way. Bolted to these bars, 2, are brackets, 4, shown in figure 3 of the drawing, supporting a rocking bar which carries scrapers, one for each disk. This bar may be so rocked by suitable mechanism under the control of the driver as to cause the scrapers thereto attached to travel along the concave surface of the respective disks, and remove the earth therefrom as it

accumulates. The rocking bars, to which the scrapers are attached, have no longitudinal motion, but the end of each scraper is inserted in the socket of a holder (illustrated in figure 4 of the drawing), in which socket is a coiled spring, 13, that holds the scraper blade against the concave surface of the disk as the scraper travels outwardly or in-

H. M. ROSE.
DISK HARROW.

No. 416,348.

Patented Dec. 3, 1889.



wardly along said disk. By this arrangement each scraper has a lateral motion independent of all others.

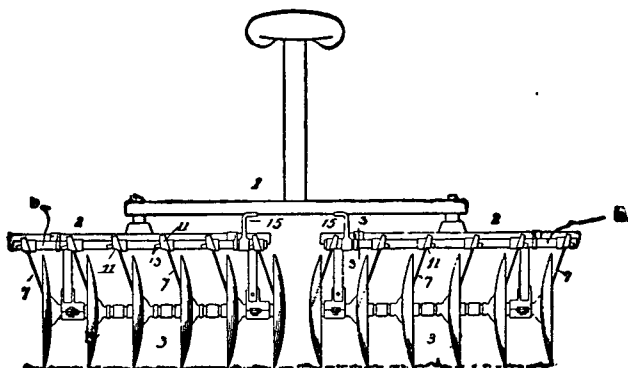
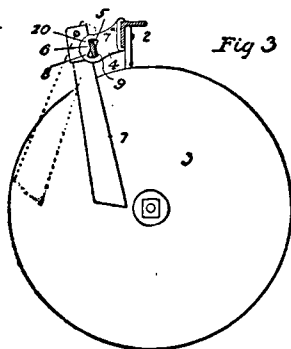
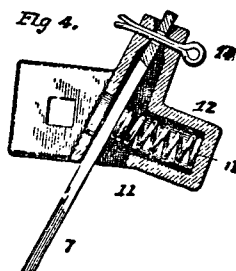
The prototype of both of the disk harrows above described is found, we think, in a patent issued to J. S. Corbin on May 14, 1877, being patent No. 197,545. This was likewise a patent for an improvement in wheel or disk harrows, and certain drawings thereof, which are deemed sufficient to illustrate the method of construction, will be

found on the opposite page. It will be observed that in the Corbin harrow a rocking bar, carrying scraper blades, is attached to a beam, E, which beam, in turn, is supported by the frame of the harrow, and that by means of the handle or crank, I, the rocking bar can be turned

No. 645,818,

A. LINDGREN.
DISK HARROW
Application filed Dec. 14, 1900

Patented Mar. 20, 1900.

Fig. 1.*Fig 3**Fig 4.*

by the driver, and the scraper blades made to travel along the concave surfaces of the disks, both inwardly, toward the axle, and thence outwardly. The scraper blades of this harrow are clearly shown in figure 2 of the drawings, which is a rear elevation of one gang of scrapers. We find in this harrow of Corbin rotating disks in combina-

tion with scrapers carried by a movable bar or frame, which, when turned, moves the scrapers along the concave surface of the disks to and from the axle on which they turn on a line crosswise the surface, so as to remove the dirt therefrom.

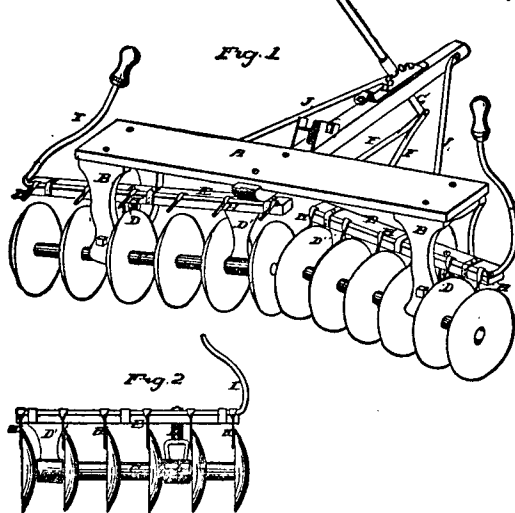
When the Corbin and the Rose harrows are compared, it becomes manifest, we think, that if Rose made an improvement in disk harrows which discloses patentable novelty, and rises to the dignity of an invention, the claims of his patent cannot, in any event, be construed broadly, but must be limited strictly to those details of construction that are described in his specification, as otherwise his patent cannot be sustained as a valid grant. When the Rose patent was issued, a disk harrow was a well-known agricultural implement, then in common use. The patentee only aimed to provide a scraping attachment for such harrows, whereby the concave surfaces of the disks

J. S. CORBIN.

Wheel-Harrow.

No. 197,545.

Patented Nov. 27, 1877.



could be cleaned readily by the driver while the harrow was in motion. He says in his specification:

"The invention relates especially to the devices for scraping the disks, and freeing them from the earth which they gather in use; the object being to render the scrapers more efficient and convenient of operation."

But Corbin had already suggested how this end could be accomplished, by suspending scraper blades from a rocking bar or hinged frame so that by turning the rocker or the frame the scrapers would travel across the concave surfaces of the disks. The differences between the Corbin and Rose harrows, so far as the scraping apparatus is concerned, are not striking. Rose adopted the substantial or principal elements of the Corbin device, namely, the movable frame or scraper carrier attached to the frame of the harrow, and the scraper

blades so depending therefrom as to come in contact with the concave surfaces of the disks. Rose may have changed the form of the scraper blades to some extent; and he appears to have constructed the hinged frame, D, which carries the scrapers, so as to permit the frame to have a lateral or endwise motion, which was possibly beneficial. He also provided a coiled spring, d³, to return the swinging frame to its place. In other respects he made no substantial improvement in the scraping attachment or device to which his patent relates. We are of opinion, therefore, that if his patent is upheld it must be limited to these details of construction.

In the Lindgren harrow, which is claimed to be an infringement, and which likewise adopts the substantial features of the Corbin device, the rocking arm has no lateral or endwise motion; at least, it has no such motion so far as the patent discloses, except such as it may eventually acquire by long continued use or wear; but each scraper is so set in its individual socket as to have a lateral motion, independent of all the other blades, and independent of the rocking beam. This feature, we think, differentiates the Lindgren harrow from the Rose harrow, and exempts it from the charge of infringement, for, when two inventors have each adopted the substantial features or elements of an earlier invention, making respectively but slight changes in or improvements upon the earlier device, each will be limited to his own specific form of device; and, if there are differences therein, neither device will be held to be an infringement of the other. In all such cases the general words of a claim, especially where the claim contains words of reference to a more particular description of the thing patented, which is contained in the specification, will be held to cover only the structure or the device so particularly described. *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; *Railway Co. v. Sayles*, 97 U. S. 554, 556, 557, 24 L. Ed. 1053; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 45 C. C. A. 544, 561, 106 Fed. 693, 710; *Brill v. St. Louis Car Co.*, 33 C. C. A. 213, 216, 90 Fed. 666, 669.

Entertaining these views—that the appellant's harrow, made in accordance with the specification of the Lindgren patent, cannot, in any event, be regarded as an infringement of the Rose patent—it follows that the decree of the lower court must be reversed, and the bill of complaint dismissed. It is so ordered.

FARRELL et al. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO.

(Circuit Court, D. Montana. January 31, 1903.)

No. 642.

1. PATENTS—INVENTION—PROCESS FOR REDUCTION OF COPPER.

The Manhes patent, No. 470,644, for the process of reducing commercial or pig copper from copper matte, and a converter for applying such process, which consists essentially in burning out the impurities in copper matte by means of radial jets of atmospheric air injected into the molten mass under pressure while it is in the converter, is void for lack of invention as to both claims, being the same process and essentially the same converter invented and patented by Bessemer, and used in the making of steel from pig iron, applied to a different but analogous subject, without any change in the manner of operation, or producing any result which is substantially distinct in its nature.

In Equity.

George A. Clarke and H. A. Seymour, for complainants.

Forbis & Evans and Elmer P. Howe, for defendant.

KNOWLES, District Judge. This is an action brought by Farrell and Migeon to recover damages and an accounting and an injunction for the alleged infringement of a certain patent granted by the United States to one Pierre Manhes, the same being No. 470,644, and dated March 8, 1892. The patent has two claims, and they are as follows:

"I claim as my invention: (1) The process of reducing commercial or pig copper from copper matte, consisting in charging the matte in a molten state into a converter, forcing radial jets of air uniformly and continuously through the charge of molten matte, and causing the heat produced by the combustion of the sulphur and iron in the matte to separate the foreign substance from the metallic copper contained therein, allowing the metallic copper as it is separated from the matte to settle below the action of the air jets, and removing the chilled metallic copper as it forms around and obstructs the inner ends of the tuyères, and thereby insure the maintenance of a continuous and practically uniform distribution of air throughout the molten matte, and continuing the operation until the metallic copper contained in the charge has been separated therefrom, and then removing the copper from converter, substantially as set forth. (2) A converter for reducing commercial or pig copper from copper matte, having a wind-belt encircling the converter above its bottom, a series of tuyères extending through the lining of the converter and communicating at their outer ends with the wind-belt, and removable stoppers located in the outer walls of the wind-belt and in alignment with each one of said tuyères, whereby a drift bar may be inserted successively through said tuyères to remove obstructions from their inner ends, substantially as set forth."

The complainants claim that both the process above described and the converter used are new and novel; that said Pierre Manhes was the original, first, and sole inventor thereof, and that the same was not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and which was not in public use or on sale in this country for more than two years prior to his application for letters patent of the United States.

The defendant in its answer denies that said Pierre Manhes was the original, first, and sole inventor of the alleged new and useful improve-

ment in the process for reducing commercial or pig copper from copper matte, and of said alleged new and useful improvement in converters for copper ores, as set forth and described in said letters patent; also denies that said alleged improvements were not known or used by others in this country before the supposed invention thereof by said Manhes; also further denies that said alleged improvements were not patented or described in printed publications in this or any foreign country before the supposed invention and discovery thereof by the said Manhes, as alleged in the bill of complaint; also further denies that said alleged improvements were not in public use or on sale in this country for more than two years prior to the application for said letters patent of the United States therefor; denies infringement; avers a failure of the patentee and the complainants to comply with the requirements of section 4900 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3388] in respect to the marking of their converters in the manner and form as therein prescribed; avers anticipation by prior patents; also avers public use for two years or more; expiration of the patent in suit by reason of the provisions of section 4887 of the Revised Statutes; also sets up the defense of laches. The general replication was filed to this answer, and the record is now before the court.

The first question presented is, was the process specified in Manhes's patent a new and useful one? As stated in the patent, the process claimed to be new and useful consists: (1) In charging matte in a molten state into a converter; (2) forcing radial jets of air uniformly and continuously through the charge of molten matte; (3) allowing copper, as it is separated from the matte, to settle below the action of the air jets; (4) removing the chilled metallic copper as it forms around and obstructs the inner ends of the tuyères; (5) continuing the operation until the metallic copper contained in the charge has been separated therefrom; (6) and then removing the copper from the converter, substantially as set forth.

In the United States patent No. 16,082, granted to Henry Bessemer, November 11, 1856, and entitled "Improvements in the Manufacture of Iron and Steel," the following statement is made:

"My invention consists in the decarbonization or partial decarbonization and refinement of the crude iron which is obtained in a fluid state from the blast furnaces in which the iron ore is usually smelted, or the decarbonization and refinement of crude pig iron or finery iron, by first smelting the pigs of crude iron or the plates of finery iron in any suitable furnace, so as to obtain fluid metal for the purpose of being treated by my improved means, and which consists, first, in running the fluid iron into a close or nearly close vessel or chamber, formed by preference of iron, and lined with fire bricks or other slow conductor of heat. When the chamber or vessel is about filled, I blow or force into and among the fluid metal numerous small jets of atmospheric air in a cold or in a previously heated state, or I use any other gaseous fluid or matter containing or capable of evolving sufficient oxygen to cause the combustion of the carbon contained in the iron, and thereby to keep up the required temperature during the process. The size or number of the jets or tuyère pipes by which the air or other gaseous matters are conducted into the molten metal should be proportioned to the quantity of fluid metal operated upon at a time, and may also vary with the condition or quality of the metal.
* * * When using foundry iron of the quality known as No. 2, I run one ton of it into the converting vessel, in which it rises to a height of about one

foot above the orifices of the tuyère pipes. I then force into the fluid metal atmospheric air, in its natural or unheated state, under a pressure of about ten pounds per square inch, and I employ from six to twelve tuyère pipes for the distribution of the air, the united area of the tuyères being equal to two square inches."

In this patent Bessemer also states:

"I have also found that a single outlet in each tuyère block will answer well in practice, as represented in end elevation at Fig. 11, and in longitudinal section at Fig. 12, where a single parallel passage, y, leads direct from the pipe, u, into the metal, as these passages sometimes get obstructed. I fit a screw-plug, q, at the back of the elbow of the pipe, u, which plug may be removed if required, while the apparatus is in use, and a steel rod introduced at the aperture, which should be thrust entirely through the tuyère block, and any accidental accumulation of matter will thus be removed."

In the United States patent No. 49,052, granted to Bessemer, July 25, 1865, and in the United States Patent No. 51,398, granted to Bessemer, December 5, 1865, the process of converting pig iron into steel by the pneumatic process, the injection of atmospheric air into the molten mass in the converter is especially described and referred to. In the United States patent No. 33,446, granted to Nystrom, October 8, 1881, there is a reference to, and a description of, the pneumatic process. In the British patent No. 1,131, granted to Hollway, March 21, 1878, the pneumatic process is fully referred to and described. This process seems from that time on to have acquired a special and distinctive name or term in the nomenclature of the art, to wit, "Bessemerizing"; and, so far as I can gather the definition of the term, its accepted meaning in the metallurgical art is the refining of crude or impure metals by burning out such impurities, in connection with atmospheric air, hot or cold, injected under pressure into a converter or other suitable vessel. Mr. Hollway specifically refers to a Bessemer converter, and also uses the term "Bessemerizing." In a part of his specifications set out in his patent he says:

"In carrying out my object I employ a furnace, which might be a modification of the Bessemer converter. * * * I drive in air at or near the bottom of the furnace, and by increasing or decreasing the quantity I regulate the temperature of the operations."

In his French patent No. 135,782, granted to Pierre Manhes, May 29, 1880, he says:

"This process is based upon chemical reactions of the same kind as those which take place in the treatment of iron smelting by the Bessemer process, and though the operation can be carried on in a furnace of any kind, such as I employ by preference the Bessemer converter as is used in the metallurgy of iron. * * *"

The patent in this case is for a process for the direct treatment of the minerals of copper and coppery materials. The process as described is similar to the process for converting iron into steel under the Bessemer patent of 1856. In the last part of his said French patent Manhes says:

"My process characterized by the suppression of all previous roasting of the sulphurous minerals, and by the facility of the operation upon all coppery materials, sulphurous copper, is then essentially based on the combustion and oxidation of the sulphur and iron by the forced passage of a blast of cold air, or better warmed, and under sufficient pressure to traverse through the

mass of copper in fusion, either in a Bessemer converter or in any other analogous apparatus or convenient furnace. * * *

In his first certificate of addition to this patent under the French law, dated 31st May, 1880, Manhes says:

"I have said in the description of my principal patent that the operation making the object of my invention can be made in a furnace or apparatus whatever appropriate, but of preference in the Bessemer converter. This apparatus is in effect that in which the operation succeeds the best, and where it is most easily performed. I intend, then, to reserve especially the employment of the Bessemer converter, fixed, or better oscillating, as a new application, which is one of the principal characteristics of my invention."

In his third certificate of addition to his French patent above named, under date of 9th February, 1881, Manhes again expresses his preference for Bessemer converters in which to perform his process, and makes this statement:

"To measure that which effects the production of the copper metallurgy, this metal, in virtue of its density, gains the bottom of the apparatus and assembles itself there. But if, in the converter employed for the metallurgy of iron, the blast passes out from the bottom of the apparatus by vertical tuyères, it is necessary at the last of the operation to traverse the metallic copper, which, containing no more combustibles, solidifies itself by the coldness in contact with the blast, and which latter brings about the obstruction of the tuyères. * * * It can be varied in its details, but it consists simply to leave above the level of the orifices of the tuyères a fire space where the metallic copper assembles itself, in the measure that it produces itself, and where it is in shelter from the contact of the cold blast, the capacity of that space coming always to be level, and even to that which must be occupied by the metallic copper at the last of the operation. Ordinarily, to carry out that design I replace the vertical tuyères, which open out at the bottom of the ordinary Bessemer converter, by horizontal tuyères placed all around the converter, and opening out into the interior at the desired height above the bottom of the apparatus." (The above is the translation from the original French patent as it appears in the record.)

Manhes' Russian patent of 1886 is, in effect, the same as his German patent of 1881.

It would seem very clear that Manhes used the same process in converting copper matte into commercial or pig copper that Bessemer many years before had used in the conversion of molten iron into steel; and the question fairly arises as to whether this is what is denominated a new invention, or is it simply using an old, well-known process for a new use.

The next claim in the Manhes patent is that of an alleged improvement in converters. Looking at the patent for converters, I find that all of the claims of Manhes as to this alleged improvement have been anticipated and exist in other converters, and have so existed long prior to the alleged improvement of Manhes. In the description of the Bessemer converter of 1856, as hereinbefore given, it is provided that the tuyères may be punched while the apparatus is in use, for the purpose of removing accidental accumulations of matter at the inner ends of the tuyères, and that this may be accomplished by the introduction of a steel rod by thrusting the same through the tuyères. In the Bessemer patent of December 5, 1865, I find a pear-shaped converter with a subsidence chamber and side-blown tuyères. The ninth claim of this patent is as follows: "A converting vessel provided with

a line of tuyères placed through the sides of the vessel, substantially as and for the purposes set forth." In the British patent granted to Parry, April 25, 1865, I find a side-blown converter. In the French patent granted to Petin & Gaudet, December 18, 1862, I find there is described a mode of opening tuyères which have become choked up. In this a metal bar or spindle is thrust into and through them for the removal of the obstructions at their inner ends, without causing the work to stop.

It has been common and almost universal in the construction of blast furnaces to provide them with tuyères so arranged and located as to facilitate and permit the ready removal of any accidental obstructions which may have become attached to the inner ends of the tuyères, and this was effected by means of iron or steel bars thrust through them. A very familiar and significant instance of this is to be found in the British patent granted to Brewer, January 2, 1882, in which the following language is used:

"The object of this invention is to remove obstructions from the nose of the tuyère or air passages in blast furnaces. It is well known that one of the difficulties metallurgists and others have to contend with in the use of blast furnaces is the tendency of the metal or ores under treatment to clog around and ultimately close the openings in the nose of the tuyère or air passages. This is especially felt in the treatment of copper ores and pyrites in furnaces where the air is passed through the molten metal, and it is specially although not wholly for the purpose of removing or remedying this difficulty that this invention is designed. The invention consists in providing a rod or poker for each air passage in the tuyère, long enough to pass quite through such passage, and push away any obstructions that may have gathered in or in front of its nose. * * *

Again:

"Having thus described the nature of this invention and the manner of performing same, I would have it understood that the application of this invention is not confined to any particular kind of construction of blast furnace, nor to any particular means of giving motion to the contrivance, nor to its application for any particular process; but I claim, first, the construction of blast furnaces with a poker or rod for each air channel through which the blast passes, such poker or rod being sufficiently long to pass quite through, and push away any obstructions that may have gathered in or in front of such passages. * * *

The only difference between this mode of removing obstructions from tuyères consists, possibly, in a contrivance for thrusting a poker or rod through all of the tuyères at once and the thrusting of one poker or rod through one tuyère at a time; the object being, in both cases, to remove obstructions at or on the nose of the tuyère.

The question as to the patentable novelty of the second claim of the patent in suit was examined into and passed upon by Mr. B. R. Catlin, an examiner in the Patent Office, in the following language: "It is universal practice in the art of melting ores to clear the tuyères by inserting bars or rods in the manner described by applicant." This language is not controverted in the further proceedings for obtaining the patent in suit. It would seem that the Patent Office claimed that the principal invention of Manhes was the driving into the molten mass of the chilled copper which had accumulated at the inner ends of the tuyères. It is stated in the final ruling of the examiners, and the

wording of the patent sustains them, that the poker or steel bar used for this purpose was no part of the Manhes invention. I find, therefore, that the knocking off or removal of obstructions from the inner end or nose of a tuyère, by means of a drift bar, was usual in the smelting of metals and ores.

The question then arises also in relation to this second claim, as to whether it is not an old appliance devoted to a new or analogous use or operation. In the case of *Pennsylvania R. R. Co. v. Locomotive Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222, the Supreme Court, by Justice Gray, says:

"It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated."

In the opinion in this case a decision of the Court of Queen's Bench is cited, in which it was held—

"That the finishing of yarns of wool or hair by a process previously applied to yarns of cotton and linen, by subjecting them, while distended and kept separate, to the action of rotary beaters or burnishers, by which they could be burnished or polished on all sides, was not the subject of a patent, because, as Lord Campbell said, in order to sustain a patent for the application of an old process to a new purpose there must be some invention of the manner in which the old process is applied. Here there is no novelty in the mode of application, but merely the application of a known process by a known means to another substance."

Again, it was said, quoting from an English case: "The application of a well-known tool to work previously untried materials or to produce new forms is not the subject of a patent."

In *Dreyfus v. Searle*, 124 U. S. 64, 8 Sup. Ct. 392, 31 L. Ed. 352, it was held by the Supreme Court that a patent for an apparatus for aging wines was not valid because it had been before used in the same way for heating another liquid.

In *Crescent Brewing Co. v. Gottfried*, 128 U. S. 169, 9 Sup. Ct. 87, 32 L. Ed. 390, it is said by the Supreme Court that in reference to both the *Cochrane* and *Slate* patents and the *Pewterers* blast apparatus the patentees have at most merely applied an old apparatus to a new use without any change of its constituent elements, or of its mode of operation, and this was held not to be the subject of a patent.

In *Smith v. Nichols*, 21 Wall. 118, 22 L. Ed. 566, it is said:

"A patentable invention is a mental result. It must be new, and should be of practical utility. Everything within the domain of the conception belongs to him who conceives it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. * * * But a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. * * *

This view was affirmed in *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267. Other decisions could be cited to the same effect.

The great step of the alleged invention of Manhes is the removal or burning out of the impurities contained in copper matte by means of radial jets of atmospheric air injected into the molten mass under pressure. This is the same process confessedly invented by Bessemer and patented by him in the United States in 1856 and 1865. The only difference in the two processes adopted, the first by Bessemer and the other by Manhes, is that the impurities in the molten pig iron are so eliminated as to make steel, and the other is the elimination of the impurities contained in copper matte and the production of commercial or pig copper. If this is not applying an old and well-known process to a new use, I am unable to comprehend the matter.

The charging of the molten material into a converter, as will be seen, is a part of the Bessemer process. The only difference between the two operations consists in the one being molten pig iron and the other molten copper matte.

The third step in the so-called Manhes process is clearly illustrated in the drawings accompanying the Bessemer United States patent No. 51,398, granted December 5, 1865, in which a drawing of the converter shows the existence of a subsidence chamber, or, at least, substantially develops and clearly conveys such idea.

The fourth step in the so-called Manhes process is identical with the step set forth in the Bessemer United States patent No. 16,082, granted November 11, 1856. It was stated in the argument of this case that this matter was old and forgotten, and not put into practical use in the Bessemer converter. It is very evident, however, that Manhes was well acquainted with the Bessemer and other patents for converters.

The fifth step in the Manhes process is identical with the Bessemer process for producing steel, in that the operation is continued until the finished product is obtained.

The sixth step in the process described in the patent in suit is the same as in the Bessemer process.

There is some claim that the removable plug in the Bessemer converter is a screw plug, while the other is a friction plug. It cannot be seriously claimed that there is much, if any, difference in this; one is an equivalent for the other.

There was some claim that the knocking off of the chilled copper from the inner ends or noses of the tuyères is the essential and novel step in the process. It would seem that this is merely a mechanical operation, and not a part of a process. As a mechanical appliance it was old and well known in the smelting art, long before the alleged invention of Manhes, to punch tuyères by means of drift bars for the removal of obstructions at the inner ends or noses thereof.

For the reasons hereinbefore given, I hold that both claims of the patent in suit are invalid.

I am supported in my views by a recent decision delivered by Judge Wallace in the United States Circuit Court for the Second Judicial Circuit and Southern District of New York, in the case of *Franklin Farrell et al. v. The United Verde Copper Co.*, 121 Fed. 551, in which

the validity of the patent in suit was also drawn in question, and in that case held to be void for the want of novelty. A copy of the opinion of the court in *Franklin Farrell et al. v. The United Verde Copper Company* was received by me after this opinion was written.

Having passed upon the merits and the validity of the claims of the patent, and held the same to be invalid, I do not deem it necessary to pass upon the other defenses interposed by the defendant herein.

The complainants' bill is dismissed, with costs.

Ex parte REAVES.

(Circuit Court, M. D. Alabama. February 16, 1903.)

1. NAVY—ENLISTMENT OF MINORS WITHOUT PARENTS' CONSENT—RIGHTS OF PARENT.

Rev. St. § 1419, as amended by Act May 12, 1879, c. 5, 21 Stat. 3, and Act Feb. 23, 1881, c. 73, § 2, 21 Stat. 338 [U. S. Comp. St. 1901, p. 1007], which provides that "minors between the age of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians," declares a public policy, and the enlistment of a minor under the age of 18 without the consent of his father is void from the beginning as against the father, and gives the minor no status in the naval service which can be asserted by the United States to deprive the father of the custody and control of his son after he has regained the same, or which renders the son punishable by court-martial for desertion in peaceably leaving his ship and returning to his father with the latter's approval.

2. SAME—RIGHT TO MINOR'S CUSTODY—HABEAS CORPUS.

In such case, where the minor has been taken from the lawful custody of his father, to which he had returned, by the naval authorities on the charge of desertion, the writ of habeas corpus is the proper proceeding to determine his status and the right to his custody, the validity of the enlistment, as against the father, being a matter which the civil courts alone have jurisdiction to determine; and a judgment awarding him to the custody of his father is conclusive upon the government, and fixes the status of the prisoner as that of a civilian not amenable to military law.

3. SAME—CONSTRUCTION OF STATUTE.

Act March 3, 1893, c. 212, 27 Stat. 715 [U. S. Comp. St. 1901, p. 1006], which makes a fraudulent enlistment and the receipt of any pay or allowance thereunder an offense against naval discipline punishable by court martial, does not give a minor under the age of 18, who is enlisted without the consent of his parent, in violation of Rev. St. § 1419 [U. S. Comp. St. 1901, p. 1007], a naval status which defeats the right of his parent to avoid the enlistment, because the minor has received pay or allowances without the parent's knowledge, since the drawing of allowances is the immediate and inevitable effect of every enlistment, and such a construction of the act would be to nullify the prohibition of such enlistments.

Habeas Corpus.

Petition for habeas corpus by P. A. Reaves to regain the custody of his minor son, who was held by the chief of police of the city of Montgomery, Ala., on the charge of being a deserter from the navy. The minor, who resided in the city of Montgomery, Ala., with his father, left home and went to Meridian, Miss., where he enlisted in the navy. He was then, and still is,

¶ 1. See *Army and Navy*, vol. 4, Cent. Dig. §§ 46, 48, 82.

under the age of 18 years, but procured his enlistment by falsely representing to the recruiting officer that he was over 18 years of age. After deserting his ship, he returned home, and was in the custody of his father, who had put him to work, and he was so employed when arrested by the chief of police. The other facts are fully stated in the opinion.

Gordon Macdonald, for petitioner.
W. S. Reese, U. S. Atty.

JONES, District Judge. The statutes (U. S. Comp. St. 1901, pp. 1007, 1008) regarding enlistments in the navy concern three classes of minors: First, those who cannot be enlisted at all; second, those who "shall not be enlisted" without the consent of the parent or guardian; third, those who may, perhaps, enlist of their own volition, regardless of the consent of parent or guardian.

Where minors "who shall not be enlisted" in the army or navy, without the consent of parent or guardian, nevertheless enlist without consent, the inferior courts of the United States and the highest courts of the states, before it was settled they could not interfere on habeas corpus, have accorded variant legal consequences to such enlistments: First, the enlistment is absolutely void, and the minor as well as the parent may so treat it; second, it is void as to the parent or guardian only, and good as to the minor; third, the enlistment is voidable only, and not void, as to the parent or guardian; fourth, notwithstanding the parent's disaffirmance, a military or naval status is impressed upon the minor until the enlistment is annulled by military or civil authority, and leaving the service before discharge, with intention not to return, though with the approval of the parent, constitutes the offense of desertion, for which the minor may be detained from the parent, and punished, though otherwise entitled to discharge.

For nearly a century this conflict of opinion among judges of eminence and courts of the highest authority has vexed our jurisprudence. The Supreme Court has decided that the enlistment of a minor, when the statute permits him to serve with the consent of the parent, is good as to the minor, although enlisted without the parent's consent, and that the parent alone can assail the enlistment. It has not determined whether the enlistment is void, or merely voidable, as against the nonassenting parent; and, if voidable merely, whether, when avoided, it is to be treated as void from its inception.

The maintenance of the authority of the parental relation is of infinite concern to society. Government did not create the relation, for it existed in a state of nature. The law merely recognizes the relation, and regulates its reciprocal rights and duties. The general government has no jurisdiction to interfere with the domestic relation as such. Congress may, however, in the exercise of its power to declare war, raise armies, provide and maintain a navy, displace or subordinate the rights flowing from the parental relation to whatever extent it deems necessary. When Congress legislates under these powers, the parent's existing right, and the state laws protecting and defining it, are displaced or suspended no further than the intention is manifested in the statute. *Commonwealth v. Downes*, 24 Pick. 230. If, after giving such statutes a fair and reasonable construction in

the light of their purpose, doubt arises as to the effect of prohibitions upon enlistments, made in furtherance of the parental right, that doubt must be resolved in favor of the parent. *Silver v. Ladd*, 7 Wall. 219, 19 L. Ed. 138; *Ex parte Plowman*, 53 Ala. 440; *Bechtel v. U. S.*, 101 U. S. 597, 25 L. Ed. 1019; *Commonwealth v. Harrison*, 11 Mass. 70.

Looking to the law of the state of which the petitioner and his minor child are citizens, we see that the rights of the parent are greatly venerated and valued. The law secures to the parent the right to keep the minor at home, to have the comfort of his society, the aid of his labor, and the duty and pleasure of training him. The will of the parent is made the law for the child, and for all who deal with him. The minor has no power, directly or indirectly, to undermine the right of parental control and custody.

Turning from the state laws to the statutes of the United States, which must control the decision here, we find no intention to displace the rights secured to the parent, under the state law, to the custody and control of any minor under 18 years of age. Congress has followed the policy of the state by declaring that such minors "shall not be enlisted" without the consent of the parent or guardian, and, to make the prohibition more effective, subjects the recruiting officer, the government's representative, to such penalty as a court-martial may inflict for a knowing violation of the law in this regard.

Why does the law authorize enlistments in certain cases, unless it be to create a military or naval status thereby? Why does it forbid enlistments in certain cases, unless it intended no military or naval status should be created thereby? *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; 27 L. J. Ch. 72. Congress well knew, if a military status were impressed upon the minor, it would interrupt the parental relation and the rights flowing therefrom. The command is emphatic that certain minors "shall not be enlisted" without the parent's consent. Can it be doubted that the command was given to prevent the minor's acquiring any military status whatever against his parent when he enlisted without the parent's consent? "A thing which is in the intention of the makers of the statute is as much in the statute as if it were in the letter." *Eyston v. Studd*, 2 Plowden, 465; *Holmes v. Carley*, 31 N. Y. 290; *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278. Congress deemed such enlistments pernicious and hostile to the public weal, and peremptorily forbade them. The law having impressed that character upon the transaction, it can have no other character in the courts. As said in *United States v. The Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007: "When the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." Upon reason and authority, the enlistment here involved is contrary to public policy, and absolutely void as to the father. *In re Chapman* (C. C.) 37 Fed. 330, 2 L. R. A. 332; *Bank of U. S. v. Owens*, 2 Pet. 527, 7 L. Ed. 508; *Kennett v. Chambers*, 14 How. 38, 14 L. Ed. 316; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; *Birkett v. Chatterton*, 13 R. I. 299, 43 Am. Rep. 30. The same consequences

do not result in favor of the minor, because the statute discloses a contrary intent so far as he is concerned. It does not forbid his service as such, or regard it as vicious or improper in itself. The prohibition is imposed solely for the protection of the parent's rights. The minor, in the eye of the statute is not harmed by violation of that right. The minor, therefore, may not invoke the violation of the prohibition; while the parent, for whose benefit the prohibition is imposed, may treat the transaction as absolutely void as to him, and wholly ineffective between him and the government. *Brooklyn Life Insurance Company v. Bledsoe*, 52 Ala. 551; *Spring Company v. Knowlton*, 103 U. S. 59, 26 L. Ed. 347.

It is a maxim of the law that no power can be exercised indirectly which cannot be lawfully exercised directly, and whether or not the exercise of the power is lawful must be tested and determined "by its ordinary and natural effect" upon the right against which the exercise of the power is directed. *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347. If the minor by doing a wrongful act as against the father, and the government by doing a further wrong to the father, in attempting to enforce an enlistment made in violation of his wishes, can impress upon the minor, in behalf of the government, as against the father, a status which suspends for any period of time the parent's right to the custody and control of his minor child, it results inevitably that the joint wrong of the minor and the government forfeits, in favor of the government, the wrongdoer, as against the innocent and nonassenting father, rights the statute intended to preserve and safeguard for the father. If this is not doing by indirection what cannot be done directly, it is impossible to present an illustration which would violate the maxim. *Magdalen College Case*, *Coke's Reports*, vol. 11, page 66; *Wells v. People*, 71 Ill. 532.

In the absence of draft or conscription, there can be no military or naval status unless it is voluntarily assumed. There must be legal consent, express or implied. The minor, against the wishes of his parent, is forbidden to consent. The minor cannot volunteer, in the eye of the law, against the father's wishes. The father's will is the only will the minor can have. When this minor entered the navy against the father's will, his service, as against the father, in the legal sense, was just as involuntary and unlawful as if the minor had been kidnapped—taken into the service against his own will. Assuredly, it will not be contended that a minor who has been kidnapped into the navy, in time of peace, thereby acquires a naval status, for a breach of the discipline of which there can arise a right of detention which can defeat the father's paramount right to the custody and control of his child.

When persons enter into a transaction offensive to public policy, the law, with a few exceptions not here material, leaves them where it finds them. So far as it has been executed, the law will not undo it, and, so far as it is executory, the law will not lend its aid to enforce it. No right growing out of any condition resulting from an illegal transaction will be enforced, if to make out that right the party asserting it must lean upon the illegal agreement. How can the govern-

ment show the offense here, unless it can show against the father a valid enlistment? Here the father was not a party to the illegal enlistment, and the law puts the guilty and innocent upon different planes. When an illegal transaction creates a status prejudicial to the rights of an innocent third person, the courts are always swift to set aside the status, and will promptly rip up the transaction from beginning to end, if necessary, to unravel his rights. In what plight do these well-settled principles of law leave the demand of the United States to retain the minor, as against the father, on the claim that the minor still has a subsisting status as an enlisted man, growing out of the forbidden enlistment? When the United States comes into court to assert its rights, it stands as any other suitor, and can no more take advantage of its own wrong than any other party in a court of justice.

In seeking to detain the minor, directly or indirectly, under this enlistment, which the law denounces as to the father, because the father did not consent to it, the government, the party committing the wrong, is seeking the aid of the court to enforce an illegal contract, or a status growing out of it, against an innocent third person, in favor of the government, the wrongdoer. But for the illegal enlistment, the father is clearly entitled to the custody of his child. If the court denies the father the privileges of the writ, it inevitably enforces against the father an enlistment which the statute, on grounds of public policy, made utterly void as to him. No right to the custody of a human being can grow out of an agreement, or a status of service, which is contrary to public policy. *Sommersett's Case*, 20 Howell's State Trials, pp. 1-79. The privileges of the writ can never be defeated, except by a restraint under a right which the law recognizes and will enforce against the party seeking the writ.

No transaction offensive to public policy can be ratified, or given effect in any way, by any power other than the author of the law, unless the lawmaking power, the creator of the prohibition and the policy, delegates its own dispensing power over them to some other body or agency; and even then the consequences of the prohibition and policy are not withdrawn or subverted until that body or agency does the things required to be done to take the sting of the prohibition out of the forbidden act. The terms and purposes of the statute here necessarily delegate the dispensing power in this matter to the parent. The statute outlaws this enlistment, as to the father, the very moment it is made. The enlistment remains all the while an outlaw as to the father, unless by some affirmative, approving, act he rescues it from the sentence of condemnation which the law pronounces upon it in advance. The statute merely leaves to the parent an election to make a lawful status from an initial act which, if left alone, the law declares shall be wholly vicious and ineffective. The mere giving of this power of election to the parent does not take the forbidden enlistment out of the domain of *malum prohibitum* as to the father. So long as he refrains from exercising the power to approve, the law disapproves the enlistment, and keeps in force the sentence of condemnation it had already pronounced. If the parent elects to exercise the right to affirm, the enlistment becomes valid as to him *ab initio*. If he refrains from exercising his right of election, the forbidden enlistment remains

void as to him *ab initio*. Here the parent never assented, and the enlistment, therefore, remained all the while, as to him, under the condemnation of the law, and the consequences invariably pronounced upon transactions violative of public policy. There never having been a time here when the enlistment was not a nullity as to the father, there has been no interval of time upon which the government could fasten a right as against the father, and thus build the foundation for impressing a status upon the minor, which would give the government the right to detain him from the custody and control of the parent. The status created by the forbidden enlistment, under the provisions of this statute, is "voidable" as to the father only in the popular sense that an affirmative act of approval may be done by him which, when done, and not until then, will destroy the status inexorably stamped by the law upon the enlistment, in the absence of any intervention by the parent to relieve it. The enlistment is not "voidable" as to the father in the legal sense of the term as ordinarily used, as where some act of the wronged party, and not the force of the law, determines the character of the transaction.

There are many fatal elements of weakness in the government's contention. It construes the statute as though it read: "Enlistments of minors made without the consent of the parent are, nevertheless, valid, to all intents and purposes, until the parent secures a discharge by civil or military authority; which discharge will not be granted if, meanwhile, the minor has not behaved well in the service, upon which the minor is forbidden to enter at all, without consent, until he has been punished." It pushes aside the prohibition, tramples down its purpose, and denies it any power to protect the parental right of custody and control in its full integrity. It repudiates the universally accepted principle of law that an illegal act done by one person without authority, and prejudicial to the rights of an innocent stranger, especially when that act is offensive to public policy, is void from its inception, as between the innocent party and the wrongdoer, after it has been avoided by the person who has the right to treat it as voidable. It subjects the rights the law gives the father to a status which the law forbids the minor to create, and enforces that illegal status created in violation of the father's rights, in favor of one who is forbidden to deal with the minor, so as to destroy the father's rights.

It is evident that the right of the parent, both by state and federal law, exists and remains unimpaired until it has been, in some lawful way, taken from the parent. Where does the government get the right to forfeit the parent's existing right to the custody of the minor, and for what? The parent has committed no offense. No act of his, therefore, has forfeited his right in the child. The minor has committed no offense against the naval laws by enlisting. His enlistment is not an offense punishable under that law. Until the enlistment is complete, the civilian does not become a soldier or sailor. The enlistment, if an offense, is therefore the offense of a civilian. Under our Constitution, he cannot be punished by court-martial, after he becomes a soldier or sailor, for an offense committed by him while a civilian. Moreover, there is no statute which makes this minor amenable to the criminal laws for getting himself enlisted without the parent's consent

It is said the minor deserted. He cannot be held to be a deserter, as against the parent, unless he had a status, as against the parent, which made it unlawful for the minor to return to the parent, or for the parent to regain possession of the minor and detain him, in repudiation of a status which the law declared he should not acquire as against the parent, unless the parent's consent created that status. Upon what foundation, then, can be rested the right of punishment in the government, as against the father, in the exercise of which it can postpone or destroy the parent's present right to the custody and control of the minor enlisted without the parent's consent? The enlistment statute, giving to it the most narrow construction, intended at least to arm the parent with the right to destroy the naval status of the minor at will. As the existence of that status is a condition precedent to the right of naval custody or control, it follows, upon its destruction, all further right to proceed with any prosecution for naval offenses committed during the existence of the status is taken away as effectually and completely as the repeal of a statute, creating a penal offense, strips a court of the right to proceed further, in the absence of any saving clause in the repealing act.

It is inevitable, then, in order to work out the government's power to suspend the parent's right to the custody of the minor, that the recruit must be treated as a species of offending thing, which, by reason of the use to which it is put, is the lawful subject of prize and capture. True, the father has a species of property in the minor, but the enlistment law was intended to prevent the minor's doing anything, in dealings with naval authorities, which could affect this property right of the parent. Ordinarily, it will not be contended that the use by one person of the property of an innocent owner without his consent, for a purpose not harmful in itself, or forbidden by law—the property not being in itself a nuisance or harmful—and its employment in a transaction to which the owner was neither a party or privy, can forfeit the innocent owner's right to the custody of such property, even temporarily, in favor of a wrongdoer, who makes such unauthorized use of the property without the owner's consent or knowledge. To allow the government to defeat the father's right to the service and custody of the minor amounts to declaring a forfeiture of the father's rights, when that consequence does not, and cannot, result as punishment on conviction for any crime committed by the father, or of any forfeiture declared by law of the father's right to the custody of the minor because the minor unlawfully entered the service, or upon any other foundation than the creation of a status for the minor which the law forbids to be created as against the father. This certainly would not be due process of law. The enlistment statutes are far from clothing the minor who enlists against the parent's wishes with a status, as against the father, of an offending thing, the rights in which can be forfeited by a proceeding in rem, like a ship whose crew, without the knowledge or consent of the owner, undertake piratical aggressions on the high seas, in consequence of which the rights of the owner are forfeited. Even in that case, the forfeiture results only from the offense the ship committed, and the positive provisions of the statute commanding judgment to that effect. In that

instance, however, the owner has trusted his property to those whose acts bring down the forfeiture upon his rights in it.

Only two decisions of the Supreme Court have been cited which shed any direct light on the question. In *re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; In *re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. They were decided on the same day, Mr. Justice Brewer delivering the opinion in each. Grimley was over age, and deceived the enlisting officer. There was no statute directly prohibiting the enlistment, or under a penalty, and no "inherent vice" in his service. The statute concerning the enlistment was directory rather than prohibitory. The limitation as to age was for the benefit of the government. No one's rights were involved except Grimley's and those of the government. He was *sui juris*, and could waive his own rights. His enlistment was irregular only in that he had passed the age limit, and deceived the officer as to that fact. The Supreme Court held he was estopped to take advantage of his own wrong, and the government, the wronged party, had waived its objections. Under these circumstances, the court held that Grimley acquired a valid military status, notwithstanding the limitation as to his age. The court, discussing the statute, asks: "Who can take advantage of Grimley's lack of qualification?" and answers: "Obviously, only the party for whose benefit it was inserted." The party there was the government, and it waived the lack of qualification. Concerning the acquisition of a military status, the court remarked:

"Of course, these considerations do not apply where there is idioecy, insanity, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations; but where the party is *sui juris*, without any disability to enter into the new relations, the rule generally applies."

Certainly a minor is not *sui juris*. Certainly under this statute, he is not without "any disability" to "enter into the new relations" as against the father. The government may waive the minor's age, so far as that enters into his qualification. But nothing it can do can create the father's consent. Without that consent, there is an absolute "disability" to "enter into new relations" so as to build up rights in the government as against the father.

In *Morrissey's Case*, the court again answers the question: "Who can take advantage of the lack of qualification?" Speaking of a statute forbidding the enlistment of minors in the army without the parent's consent, the court said:

"This provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of the parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court, and secure the restoration of the minor to his or her control; but it gives no privilege to the minor."

Morrissey enlisted under age, and his mother did not consent. She took no steps whatever to assert her rights, and did not sue out the writ of habeas corpus, which was asked by *Morrissey* himself after he had been convicted of desertion, and was undergoing punishment. The court in that connection, remarked: "His mother not interfering, he was bound to remain in the service, and, the parent not insist-

ing on her rights, the fact that he had a mother living at the time is therefore immaterial." It was not decided in that case that any military status would have remained if the parent had interfered, or that the enlistment, whatever its character as to the minor, does not become void ab initio when the parent interferes. The doctrine in that case is declared in view of the fact that the parent had never interfered. All that the case and the argument in support of it maintains is that the minor, so far as he was concerned, acquired a military status which, as against him, was good until there was interference by one who had a right to his custody and control. There was "inherent vice" in the eye of the law in the service of the minor in this case, as against the father. It was culpable in the eyes of the law, as to him, because it lacked consent. The father's consent to the minor's service is a condition precedent to the enforcement of any naval status against the parent. Without that consent, the minor was of the class forbidden to serve, under the very terms of the law, as emphatically as any other minor who is forbidden to serve, and cannot acquire any military status; for he was debarred, as against the father, from entering into the "new relation." As said in *People v. Warden*, 100 N. Y. 20, 2 N. E. 870, "This requirement is therefore made the condition of a valid enlistment." The right not to consent is a weapon the law furnishes the parent to destroy the government's claim. It gives the right to take off the uniform, and all its wearing imports. The father here is the wronged party, and the government the wrongdoer. The father can "take advantage of the lack of qualification." As against him, the government could not waive it, or create any right against him by trying to waive it. The language of the opinion, "the mother not interfering, he was bound to remain in the service," inevitably implies, if the parent had interfered, the minor would not be "bound to remain." If he would not be "bound to remain," leaving the service was not desertion. The interference of the father puts an end to the service, as to the father, and destroys the only status which could authorize the naval authority to detain the body of the minor from the custody of the parent.

Finally, it is urged that the privileges of the writ should not be awarded here until the minor has been punished for desertion, because it would militate against the maintenance of discipline in the navy. Winthrop, in his admirable work on *Military Law and Precedents*, vol. 2, p. 849, speaking of this matter, says:

"In such an instance, the claims of the private individual—the parents—are deemed to be subordinated to the interest of the public in the due administration of justice and maintenance of military discipline, and the minor soldier is therefore required to abide and undergo the legitimate consequences of his own wrong before any petition for his discharge from his contract can be entertained."

Is it only the claim of a private individual which is here involved? Is not the right of every parent to the custody of his minor child, secured and protected by the common law and statutes of the state, and enforced in the statutes of the United States, involved in the rights of the private individual now before the court? The principle involved affects the rights of millions of parents in this land. The matter is

one of the highest public concern, in comparison with which the insignificance of the individual or his inconvenience sinks out of sight. Who determines what is to "the interest of the public"? What are the sources to which we must resort to ascertain what is public policy, and what it requires? Assuredly, only the will of the people, as declared in the law of the land. The enlistment statute declares what is "the interest of the public" in this instance. It is emphatic that the public interest requires that the minor "shall not be enlisted" without the parent's consent.

Awarding the privileges of the writ, if the father has any rights in this matter, is mandatory and compulsory, and not of grace. If the right claimed is well founded, the court, on every consideration of law and justice, must take the law as it finds it, and shut its eyes to the consequences of fearlessly enforcing it. If, however, awarding the privileges of the writ here were discretionary, it would be the bounden duty of the court to give heed to the vital importance of maintaining discipline in the millions of homes in this land, as well as the effect upon discipline in the navy. If the influence and control of fathers and mothers can be successfully set at naught by the government, because of unlawful dealings with their minor children, in the teeth of solemn prohibitions of Congress, a spectacle will be presented to the youth of the country destructive of respect for authority in the home, which is so essential to the formation of character and fitting the youth for future service to the country, whether as civilians or soldiers. "Such a state of things," as said by Chief Justice Shaw in *Commonwealth v. Downes*, 24 Pick. 230, "would lead to a state of society very much like anarchy." The cultivation of civic virtues, and the discipline of restraint and respect for authority, can nowhere be better taught than around the hearthstone. It is the nursery from which must come the training which fits a free people for self-government, without which their institutions are weak, regardless of the strength of their armies or navies. In view of these considerations, which at every period in the history of our country seem to have controlled the legislation regarding the enlistment of minors, it is difficult to defend the theory, in the teeth of this statute, that, where invasion of the parental right was involved, Congress intended to deny its full enforcement, because of the collateral disturbing consequence that it might, to some extent, affect discipline among enlisted men in the army or navy.

The bad effects upon the army and navy of enforcing the statute in the spirit in which Congress intended, and which are the real grounds of the decisions which maintain a contrary doctrine, are largely overdrawn. It is not infrequently asked, is a minor, circumstanced as this one was, to be permitted to imperil the army or navy by abandoning his colors or deserting the ship in time of battle, or going over to the enemy and betraying the secrets of his commanders, without being amenable to military punishment for such grave offenses? Such crimes cannot be committed in time of peace, when there is no theater of hostilities, no battle, no enemy. In time of war such offenses could and would be punished under the forty-sixth and sixty-third articles of war [U. S. Comp. St. 1901, pp. 952, 957]. One of

these articles provides that "all retainers to the camp and all persons serving in the army of the United States in the field, though not enlisted soldiers, are subject to orders according to the rules and discipline of war." The other subjects to court-martial "whosoever" gives intelligence, etc. It is now the settled construction that under these articles a person in the field with the army, whether in the service in the civil or military capacity, or merely lurking in its lines, can be lawfully tried and punished in time of war for such offenses by military tribunals. There are appropriate articles as to the navy which authorize the punishment by naval tribunals of any one so circumstanced who, in time of war, commits any of the crimes to which reference has been made. If the minor, especially after the parent's dissent, had no status as an enlisted man, under the circumstances governing this case, he was, nevertheless, a civilian, and still amenable to law. The army and navy are often brought into contact with citizens who infringe upon their rights. In time of peace, wrongs committed by civilians must be redressed by the civil courts. The minor, as any other citizen in camp or on a vessel, in time of peace, is amenable to punishment in the civil courts, both of the state and of the United States, for any wrongs to person or property, if his conduct constitutes a breach of the civil or criminal laws of either.

It is quite true that ordinarily the criminal courts will take a minor from the custody of the parent to punish him for crime. In such cases, the relation of parent and child, or the minority of the offender, if he has reached the age at which he is capable of forming a criminal intent, in no way forms an element of the crime, or the jurisdiction of any court to try him for it. We do not impugn the principle in the least in insisting that here, by reason of infancy and the want of the parent's consent, the minor could not acquire the status against the parent's wishes, which is an indispensable element of the offense of desertion, and the continued existence of which is a condition precedent to the jurisdiction of a naval tribunal to detain and try the minor for it.

The offense of desertion, for which the minor was held in custody by the chief of police, consisted in peaceably leaving the service. True, the minor could not disaffirm the enlistment of his own volition; but he left and came back to the father, who ratified and approved the act of leaving, and made the act as effectually his own as if he had ordered the minor to leave. The minor was back where the law said he belonged. The parent had a right to get the custody and control of the minor, at least peaceably, wherever he found him, and the father had the superior right against any claim growing out of the enlistment, made without the father's consent. Blackstone says it may "frequently happen that a man's wife, children, or servants would be concealed and carried out of his reach, if he have no speedier remedy than the ordinary process of the law. If, therefore, he can so contrive as to gain possession of his property, without force or terror, the law favors and will justify the proceeding." Here, the father's recaption of the minor was complete and peaceful. It was this peaceful and lawful possession by the father which was disturbed when the minor was taken from his custody by the chief of police.

The naval status of the minor is none the less destroyed, in contemplation of law, as against the father, because the government, refusing to recognize the destruction of the status, and insisting upon it, regains the custody of the minor, and thus forces the father to appeal to the civil courts to adjudicate and enforce his rights. Such adjudications do not create the destruction of the enlistment. The law, and if not the law alone, the father's act combined with it, annihilates the status. The judgment of the court merely recognizes and enforces the existing right. If, in this instance, the judgment could be held to create the right, yet, being in furtherance of justice against a wrongdoer, it must relate back to the beginning of the illegal transaction. Surely the government is the wrongdoer when it insists upon the enlistment in spite of the parent's dissent.

The statute under which this writ is issued is peremptory that, within five days after the return of the writ, the court must summarily hear and adjudge the controversy, unless the party petitioning requests a longer time, and thereupon "dispose of the party" as law and justice require. The writ of habeas corpus is the proper proceeding to determine the status of this minor and the present right to his custody. The petitioner and the minor are before the court, and so is the United States. A judgment discharging the prisoner and awarding him to the custody of the father will fix the status of the minor growing out of the enlistment, and estop the government from disputing that status upon any fact existing at the time of the hearing. *Freeman on Judgments*, 324; *U. S. v. Chung Shee* (D. C.) 71 Fed. 277; *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; *People v. Mercein*, 3 Hill, 399, 38 Am. Dec. 644; *McConologue's Case*, 107 Mass. 170.

The judgment the court feels bound to render is that the enlistment, at least after the father's disaffirmance, is void as to the father ab initio, and that the minor must be discharged from naval control, and his custody awarded to his parent. That judgment will put the prisoner, by operation of law, out of the service as effectually as a formal discharge by the Navy Department, and impress the civilian status upon the minor at this time. If, therefore, it be conceded, under the circumstances of this case, that the minor had a naval status as against the parent, and during its existence committed a naval offense for which he could have been punished by a naval tribunal prior to his discharge from the service, the discharge effected by operation of law, by the judgment in this proceeding, constitutes the minor a mere civilian, whom no military tribunal in time of peace has any authority to try for any offense. Constitution of the United States, 5th and 6th Amendments; *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Winthrop's Military Law and Precedents*, vol. 1, pp. 144, 145. Holding these views, the court would abdicate its duty if it withheld judgment in order to defeat the father's rights, and leave the minor to the custody of a naval tribunal which now has no jurisdiction to try him.

Again, a court-martial has no authority to pass upon the validity of this enlistment so far as the father is concerned, or to determine whether or not the father is entitled to the custody of this minor. It has no authority to discharge from the service, whatever may be the

facts, except as a penalty on conviction for a naval crime. If it found that the minor had no naval status, it could decline to proceed for want of jurisdiction over him; but it could not go beyond this, and determine who was entitled to his custody. It could not even order his release from custody, which can only be done by the authority which convened the court, or higher authority. Having no jurisdiction over the father or his rights, the father could not resort to court-martial to determine his right to the custody of the minor, and no judgment the naval court could render could enforce or defeat the father's rights. The father has the unquestioned right to try these matters before a civil tribunal, which, having all the parties before it, can conclude and settle his rights in that regard, without forcing him to go, it may be, to a distant place, at some future time, to determine the matter, after the military authorities have dealt with the minor. The assembling of a court-martial cannot put this right of the father in abeyance.

This case differs from *Ex parte Miller*, 52 C. C. A. 472, 114 Fed. 839, in several material aspects. In *Miller's Case*, the parent had never regained custody of the minor, and formal charges and specifications had been preferred. The prisoner there was in the custody of the military authorities, and a court-martial had been ordered to try him for desertion and fraudulent enlistment. Here no formal charges with specifications have been preferred. No naval court has been organized for the trial of the prisoner, who was taken from the custody of the father, and detained by the chief of police, under authority of the Secretary of the Navy, to hold him as a deserter. The court, in *Miller's Case*, evidently attached force to the consideration that the parent in that case had taken "no steps to avoid the enlistment before the soldier's arrest for desertion." In this case it affirmatively appears that the minor disappeared, and was gone for a long time from home, without the parent's knowing his whereabouts, or why he left, and the enlistment was actually discovered only on his return to his father, when the minor was almost immediately arrested by the chief of police, and the father immediately sued out this writ. There are authorities, the soundness of which is disputed by other cases, that a civil court will discharge a prisoner held in civil custody, though at the instance of military authorities, where formal charges and specifications have not been preferred, and a court-martial has not been organized to try him, in cases like this; when the civil court would not interfere, in a like case, if such charges and specifications had been preferred, and the prisoner were held by the military authorities awaiting trial before a court-martial to be convened for that purpose. The Court of Appeals, in *Miller's Case*, say: "The question to be decided is whether the court-martial has jurisdiction to try the prisoner on the charges preferred against him."

It seems to this court a case is presented in which, to quote the language of the Supreme Court of Pennsylvania in *Commonwealth v. Fox*, 7 Pa. 339, "We must take the law as we find it, and regard the claim which the law of God, of nature, of the state, and of the United States gives the father to the services of his child." The judgment is

that the prisoner is illegally detained by the chief of police, and should be awarded to the custody and control of his father. Counsel for petitioner may prepare the proper order.

After the foregoing opinion was read, the District Attorney, in open court, made known that on the 12th of February, 1903, since the submission of the case on demurrer, the Secretary of the Navy had preferred formal charges against the minor for desertion and fraudulent enlistment, which have been duly served upon the minor. The parties in open court agreed that the new matter be treated as having been embodied in the return, and the petitioner again interposed his demurrer. As the return is made to the writ, and not to the petition, and by a public officer who has no interest in the ultimate custody, and is not presumed to have any knowledge of the facts which determine it, and the only duty enjoined on him by the statute is "to certify the true cause of the detention," it seems doubtful on principle, though held in some cases, whether, on demurrer to the return, it is to be taken as an admission of the truth of the statements of the petition. As the parties have agreed that the facts set forth in the petition are true, the court has treated the return as an admission on demurrer of the averments of the petition, without inquiring whether that would be the proper ruling in the absence of the agreement. *Storti v. Massachusetts*, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120.

The military or naval offense which Congress creates under the act of March 3, 1893, c. 212, 27 Stat. 715 [U. S. Comp. St. 1901, p. 1006], consists, not in the evil enlistment, but in the receiving of pay and allowances after so enlisting. Congress was not ignorant of what everybody else knew, that the drawing of subsistence in kind, or commuted, is the immediate and inevitable result of every enlistment, whether the recruit be a minor or *sui juris*. It also knew that a minor could not ordinarily be enlisted, against the wishes of the parent, unless the minor made false representations, deceiving the recruiting officer, and that an enlistment thus effected would be fraudulent.

The statute under which these charges are made makes no regulation whatever of enlistments. It does not in any manner affect the matter. It leaves the existing laws absolutely untouched. There is no express repeal of them. By every known rule of construction, then, the act prohibiting the enlistment of minors, and the evils it had in view to suppress, must be considered along with the act of 1893 in determining whether any new or different status was intended to be impressed upon the minor, as against the right of the nonassenting parent, because the minor received pay or allowances after his enlistment.

Taking the two acts together, as we must, it is not possible by any legitimate construction to put Congress in the attitude of having the purpose, in its legislation on these subjects, to forbid the enlistment of minors, and thus prevent their acquiring a naval status which would forfeit the right of the nonassenting parent to their custody, and yet harboring at the same time, if the minor added to filial insubordination in enlisting the offense afterwards of receiving rations, the discordant purpose to impress upon the minor, *eo instante*, a legal naval

or military status, against the nonassenting parent, to forfeit the parent's otherwise unimpeachable right to the custody and control of the minor, which Congress, by its prohibition, intended to save to the parent. *Rodgers v. The United States*, 185 U. S. 89, 22 Sup. Ct. 582, 46 L. Ed. 816. Under such a construction, a father arriving at the recruiting station an hour after his disobedient boy had, without his consent, enlisted and drawn rations, could not reclaim the custody of the minor as of right; for in that hour the boy, in that view of the law, has effectually enlisted himself, in the service, upon which he had no right to enter at all against the parent's consent. To construe the law as giving a military status at any time to the minor enlisting without consent, as against the father, would annihilate the purposes and intention of the prohibition. It would convert the act of 1893 into a mere cover for evading the prohibition, and destroying the parent's right to the custody and control of minors, and effectually enlist them, on their own volition, against the wishes of parent or guardian. The law never permits a construction of legislation which authorizes evasions of its policy. *Magdalen College Case*, *Coke's Reports*, vol. 11, p. 66; *Bank of U. S. v. Owens*, 2 Pet. 527, 7 L. Ed. 508. The offense here is the inevitable consequence of the illegal enlistment, and is not a collateral offense, as other breaches of discipline might be. If the enlistment is void, or merely voidable, at the option of the parent, the offense charged, which is the direct and inevitable consequence, may also be avoided. If the offense may be avoided, the right to punish, which is but a consequence of the offense, necessarily falls within the avoidance of the enlistment.

The fair and just interpretation of the statute is that the minor does not, against the father, acquire any better military or naval status, by receiving pay and allowances, than he did by the enlistment made against the parent's consent. The operation of the act of 1893, so far as it has any effect in determining the status of persons receiving pay and allowances, is necessarily confined to cases of enlistment where the recruits are *sui juris*, or have no parent or guardian, or whose parent or guardians have consented to the enlistment, or participated in the fraud by which it was effected. The order made this morning, awarding the custody of the prisoner to the father, will not, therefore, be disturbed.

UNITED STATES v. ROSENTHAL et al. (three cases).

(Circuit Court, S. D. New York. March 17, 1903.)

1. GRAND JURY—PROCEDURE—APPEARANCE OF GOVERNMENT COUNSEL.

The Attorney General, the Solicitor General, nor any officer of the Department of Justice, is authorized by sections 359, 367, or other provision of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 207, 209], to conduct, or to aid in the conduct of, proceedings before a grand jury, nor has a special assistant to the Attorney General such power.

2. SAME—DEPARTMENT OF JUSTICE.

A special assistant to the Attorney General is not an officer of the Department of Justice, within the meaning of such sections.

8. SAME—QUASHING INDICTMENT.

A special assistant to the Attorney General, appointed to investigate and report concerning alleged fraudulent importations of Japanese silks at the port of New York, and to prepare and conduct such civil and criminal proceedings as may result therefrom, is not authorized by law to conduct, or to aid the conduct of, proceedings before a federal grand jury, and indictments based upon such proceedings so conducted should be quashed upon motion.

4. SAME—ASSISTANT ATTORNEY GENERAL—COMPENSATION.

The Merchants' Association of the City of New York assured the Attorney General that, if necessary, it would furnish funds to compensate the special assistant who should be appointed for such purpose. This arrangement was inter alios, and did not disqualify the appointee, who became an employé of the United States, to whom alone he could look for compensation, and for whom he performed his duty with fidelity and probity.

(Syllabus by the Court.)

Henry L. Burnett, U. S. Atty., and W. Wickham Smith, Special Asst. Atty. Gen.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer and Frank H. Platt, of counsel), for defendants Rosenthal and Cohn.

Judson G. Wells, for defendant Browne.

THOMAS, District Judge. On January 9, 1902, the Attorney General issued to W. Wickham Smith, the following commission:

"Sir: You are hereby appointed a Special Assistant to the Attorney General to investigate and report concerning alleged fraudulent importations of Japanese silks at the port of New York and to prepare and conduct such civil and criminal proceedings as may result therefrom.

"Your compensation will be determined by the Attorney General on the completion of your services. This appointment is made subject to any change which may be made by the Department.

"Execute the customary oath of office and forward the same to this Department."

In the previous December the Merchants' Association of the City of New York asked Mr. Smith, after examination, to determine whether there was reasonable ground for reopening a former inquiry concerning such importations. Mr. Smith, after an interview with Mr. Wakeman, appraiser, reported that there should be a thorough investigation, and suggested that the proper federal officer should designate "some competent and suitable person familiar with customs law to make a thorough investigation of this matter, and that the person so designated shall be permitted to have access to all official documents relating to the subject on file in any office or department of the government." Thereupon the Merchants' Association, by letter, conveyed Mr. Smith's suggestions to the President, with whom, as well as with the Attorney General, two officers of the association later conferred. Thereupon Mr. Dresser, the president of the association, and Mr. Mead, its secretary, or one of them, informed Mr. Smith "that the Attorney General was in favor of an investigation, but had suggested to them that the appropriation out of which he obtained funds for the employment of special counsel

† 3. See Indictment and Information, vol. 27, Cent. Dig. § 484.

was exhausted, and that he had at that time no money available for the purpose; that they had thereupon stated to the Attorney General that, if he thought the matter was one requiring investigation, and would appoint some competent and suitable officer for that purpose, they would be responsible for his fees in case the Attorney General was unable to pay him; * * * that they had not suggested to the Attorney General the appointment of any particular person for this purpose," but that Mr. Smith's name had been suggested by one of the Attorney General's assistants, and also by the Secretary of the Treasury. There is no reason for doubting the accuracy of this statement as it appears by Mr. Smith's affidavit, nor is it important that the Merchants' Association, in its official organ or otherwise, appropriated the credit for his selection. Mr. Smith was neither a member of its board, nor was he ever its general counsel, although he states that on two or three different occasions since 1897 "they have consulted or retained me in special matters relating to the revenue laws, and they paid me for my services. The last work I performed for the Merchants' Association was in the spring of the year 1900, and they paid me by a check dated March 13, 1900, and I have never since been retained in any matter by them, nor received any money from them. I did not enter into any contract or arrangement with the Merchants' Association of New York with regard to my services in these silk fraud cases. Whatever arrangement they made was with the Attorney General of the United States, before I was even invited to take part in the cases. I have never asked the Merchants' Association, or any of its officers, for any compensation in these cases, or for any stipulation or undertaking as to the payment of compensation. They have never offered me any compensation. I have never received a dollar for the services already performed, which extend over a period of a year, either from that association or from anybody else, and have not even been reimbursed for amounts actually laid out by me for traveling and other expenses. I have never even received any communication, formal or informal, oral or written, with reference to compensation for my services in these cases from the Merchants' Association since the conversation already narrated, when they reported to me their interview with the Attorney General. * * * There has never been a time from the execution of this commission until the present moment when I have ever considered myself as the attorney for the Merchants' Association. There has never been a time when they have in any way assumed to me to be my employers or clients. I have never at any time consulted them as to any course that I should pursue. I have never at any time communicated to them (except so far as I have communicated it to the general public) the details of the results of my investigation. I have not seen the president of the Merchants' Association a half a dozen times during the past twelve months, and its secretary perhaps as often. There is absolutely no foundation whatever for the assertion or insinuation that I have ever at any time represented them in this matter, or that they have asked me to represent them, or have sought in any way to influence my conduct or ascertain my plans."

The evidence produced upon these motions fully sustains the statement made by Mr. Smith. The association undoubtedly expects to pay for his services, and will probably do so, pursuant to its promise to the Attorney General. It is natural that Mr. Smith should recognize these probabilities, and with candor express himself accordingly, if there were occasion. But he was in no wise responsible for the arrangement. It placed him under no obligation to the Merchants' Association, inasmuch as the government alone retained him, and is liable to make proper compensation for his authorized services. His relation to the matter is highly honorable, and independent, as becomes an attorney of this court, employed by the United States as its sworn official.

The next question is, what authority did the appointment vest in Mr. Smith? After receiving the appointment and duly qualifying, Mr. Smith pursued vigorously and fairly the investigation of the alleged offenses, and with the sanction and co-operation of the District Attorney appeared before the grand jury, and chiefly conducted the proceedings that resulted in the indictments, whose validity is now accused on account of Mr. Smith's action with reference to them. Should the indictments be quashed? A survey of the powers of the District Attorney and the Attorney General and his authorized officers and assistants is necessary. The Revised Statutes provide: "There shall be appointed in each district * * * a person learned in the law, to act as attorney for the United States in such district" (section 767 [U. S. Comp. St. 1901, p. 599]); and "it shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States" (section 771 [U. S. Comp. St. 1901, p. 601]). But the Attorney General is the head of the Department of Justice (section 346 [U. S. Comp. St. 1901, p. 202]), the legal adviser of the President (section 354 [U. S. Comp. St. 1901, p. 206]), and to him the officers of the other departments of the government may resort for legal advice (section 356 [U. S. Comp. St. 1901, p. 206]). During almost a century of the government the Attorney General was, as he remains, a member of the Cabinet, the law officer to the President and the Executive Departments, and in 1861 he was given supervisory powers respecting the officers connected with the courts throughout the federal domain; but his own participation in litigation was confined to the conduct of cases in the Supreme Court (Act Sept. 24, 1789, c. 20, § 35; 1 Stat. 92), until it was extended to the Court of Claims (Act June 25, 1868, c. 71, § 5; 15 Stat. 75). To understand the legislation of 1870, to which attention will soon be called, this original conception of what the Attorney General was, and what he and his officers were empowered to do, is important. So far as local judicial procedure in the various districts was concerned, they had no power to represent the government. In that regard the District Attorney had exclusive authority. The wide difference in the powers of district attorneys and the Attorney General was stated, in 1868, in the Confiscation Cases, 7 Wall. 457, 19 L. Ed. 196, where Mr. Justice Clifford said:

"Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the District Attorney, and even after they are entered in court they are so far under his control that he may enter a nolle prosequi at any time before the jury is impaneled for the trial of the case, except in cases where it is otherwise provided in some act of Congress. * * * Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the District Attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office."

Here the inability of the Attorney General or other official to represent the United States in criminal prosecutions was recognized and pronounced, and the words "public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney," embodied a fundamental policy of the government. This decision was rendered in December, 1868, and in 1870 Congress enacted a provision, which in 1875 appeared in the Revised Statutes as section 369 [U. S. Comp. St. 1901, p. 207]:

"Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court (Act Sept. 24, 1789, c. 20, § 35; 1 Stat. 92), and suits in the Court of Claims in which the United States is interested (Act June 25, 1868, c. 71, § 5; 15 Stat. 75), and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so (Act June 22, 1870, c. 150, § 5; 16 Stat. 162)."

But is this ability given to the Attorney General and his officers to "conduct and argue any case in any court" in derogation of the exclusive power of the District Attorney to initiate proceedings before the grand jury? In *Counselman v. Hitchcock*, 142 U. S. 547, 563, 12 Sup. Ct. 195, 35 L. Ed. 1110, it was held that a proceeding before a grand jury was a "criminal case" within the meaning of the constitutional provision that a person shall not be "compelled in any criminal case to be a witness against himself." But the intention, scope, and protection contemplated by the constitutional provision governed the conclusion, rather than the technical meaning of the word. The word "case" usually conveys the idea of a controversy or issue already before the court, and not a preliminary proceeding before a magistrate, commissioner, or grand jury. It is with difficulty believed that it was the intention of Congress to endow the highest law officer of the United States and the Solicitor General and the officers of the Department of Justice with power to "conduct and argue" a case before a grand jury. It is probable that the intention was to settle the right of these officers to "conduct and argue" cases "in any court," as they had been permitted to do in the Supreme Court and the Court of Claims, and to leave "public prosecutions, until they come before the court to which they are returnable, * * * within the exclusive direction of the District Attorney," as theretofore declared. But, unless this section give the power, there is no law that enables, unless it be that of June 22,

1870 (chapter 150, § 5; 16 Stat. 162), which was in 1875 embodied in section 367, Rev. St. [U. S. Comp. St. 1901, p. 209], as follows:

"The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any state or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any state, or to attend to any other interest of the United States."

But this provision, enacted at the same time as section 359, was to enable the Attorney General to send the Solicitor General or other officer of the Department of Justice to any state or district to attend to any interests of the United States "in any suit pending" in a federal or state court. It should be observed that by section 359 the Attorney General and such officers may not "conduct and argue any case" in a state court. Section 367 gives that power. After the definite exclusion of the Attorney General from prosecutions before they were returnable, as stated in the Confiscation Cases, it is improbable that Congress, if it intended to confer that power by the acts of 1870 and 1875 (section 367), should have spoken definitely of a "suit pending." Of course, those words exclude proceedings before a grand jury, and indicate attentive and jealous regard for the primary policy of limiting the conduct of matters before grand juries to the local officers. It is urged that the final clause, "or to attend to any other interest of the United States," in section 367, was intended to permit the officers named to appear before the grand jury. But a section that in its earlier clause so precisely limits the power to "any suit pending" would hardly end by including a proceeding which is not a "suit pending," but an investigation initiatory of such suit. Considering the recognized committal of proceedings before grand juries to the exclusive conduct of district attorneys, and that in augmenting the power of the Attorney General and officers there are used words whose obvious meaning would exclude them from proceedings before grand juries, it may be concluded that Congress, by the last clause now appearing in section 367, did not intend to confer that power. This view is strengthened by the consideration that by a section of the same act in 1870 (chapter 150, § 17; 16 Stat. 164), now section 366, Rev. St. [U. S. Comp. St. 1901, p. 209], there is a recognition of the Attorney General's power, not elsewhere stated, to appoint a "special assistant to the Attorney General," "to assist in the trial of any case." Here again is a careful limitation that would exclude the power to conduct proceedings before the grand jury. Such persistent use of terms cannot be deemed inaccurate or accidental.

But a special assistant to the Attorney General is not an "officer" within the meaning of sections 359 or 367. Officers in the Department of Justice are enumerated in sections 348 and 349 [U. S. Comp. St. 1901, pp. 202, 203], and may be appointed only by the President, by and with the advice and consent of the Senate; and section 350 [U. S. Comp. St. 1901, p. 204], provides:

"The officers named in the preceding section shall exercise their functions under the supervision and control of the head of the Department of Justice."

The power of the Attorney General to direct the services of such officers is the subject of sections 358, 359, 360, 361 [U. S. Comp. St. 1901, p. 207], and, finally, 367. Surely, a special assistant to the Attorney General is not such officer.

But by what authority is a special assistant to the Attorney General appointed? Counsel refer only to section 366 as mentioning a "special assistant to the Attorney General":

"Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law."

This section simply recognizes the contemplated special retainer of an attorney or counselor "to assist in the trial of any case in which the government is interested," and directs concerning his commission, oath, and liabilities. If this section enable the Attorney General to appoint a special assistant to the Attorney General, it limits the appointee's power "to assist in the trial of any case." Of course, the trial of a case would not include proceedings before the grand jury. Section 365 [U. S. Comp. St. 1901, p. 209] provides:

"No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or department of the government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the District Attorneys."

This section indicates that attorneys cannot be designated for service to the government "except in cases specially provided by law." Assuming that the Attorney General may employ and commission a special assistant to himself "to assist in the trial of any case," what special provision of law authorizes his employment for any other purpose, or more explicitly for the purpose of conducting proceedings before a grand jury? The government should, if the power exist, be able to point to it. Section 366 alone is indicated, and that section definitely excludes the appointee from the grand jury. But the government refers to section 363 [U. S. Comp. St. 1901, p. 208] for the necessary authority:

"The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings."

This section provides for the appointment of an attorney to assist a district attorney, and, if this section be read in connection with section 366, the assistance contemplated is "in the trial of any case." Moreover, under section 366, a commission should issue to the appointee under section 363 as an assistant to the District Attorney,

if such be the nature of his appointment. In the case at bar Mr. Smith is appointed as a special assistant to the Attorney General, but it is urged that this title is not inconsistent with his appointment under section 363. It is not understood that under a statute providing for "assistant attorneys" to assist the District Attorney a person may be appointed under the style of a "special assistant to the Attorney General." Such person is appointed obviously to assist the Attorney General, and not to assist the District Attorney. By what logic can it be enforced that the assistant to the Attorney General may be endowed with a power denied to the chief officer himself? Powers that are nonexistent cannot be delegated by a superior to an inferior. A principal conveys to his agent what he has, and not what is denied him, and what he has not.

But neither the instrument of appointment nor any extrinsic fact suggests that Mr. Smith was appointed to assist the District Attorney, or to have any official relation to him. His power was intended to be concurrent with, or supplementary to, that of the District Attorney. He was appointed, without any official reference to the District Attorney, to be an assistant to the Attorney General, and to take charge of civil and criminal proceedings respecting a certain class of importations at the port of New York. Nothing, either in the form or contents of the instrument of appointment, or the history that preceded it, indicates that the appointment was under section 363. The appointee is in precise terms made an assistant to the Attorney General, and in no way related to the District Attorney, either as an associate or subordinate. To hold that the appointment was made under section 363 would be a misrepresentation of both the facts and the law.

The government urges that Mr. Smith was a *de facto* officer, and that the defendants cannot raise the objection that he was not an officer *de jure* entitled to conduct the proceedings. The difficulty is that the office which Mr. Smith assumed to fill did not authorize his presence before the grand jury. Had he gained unwarranted possession of the office of a district attorney, and as such conducted proceedings before the grand jury, he would have been a *de facto* district attorney. But he was *de jure* a special assistant to the Attorney General, and as such assumed to conduct the proceedings. This did not make him a district attorney *de facto*. He was not serving under any false title, nor had he usurped anybody's office. He was assuming, as an officer recognized by the law, to exercise powers conferred upon another officer. When there is a legal office, the title of the person actually filling it cannot be disputed in many instances by persons falling under the control of the *de facto* officer. Those defendants may not dispute that Mr. Smith was a special assistant to the Attorney General, but may assert that he, as such, was not authorized to conduct proceedings before the grand jury. If the marshal, as such, assumed to conduct proceedings before a grand jury, it would not transform him into a *de facto* district attorney. Persons tried in a legal court may not challenge the right of a person who assumes to act as judge, but, to render such officer's proceedings valid, he must assume to be the judge, and act as such.

But what harm was done to the defendants? There is no evidence of any harm from actual misconduct, for Mr. Smith has requisite capacity and irreproachable character, which was illustrated in the conduct of these proceedings. But is the act per se harmful? In *United States v. Reed*, 2 Blatchf. 435, 456, Fed. Cas. No. 16,134, Judge Nelson passed upon the validity of an indictment based upon a proceeding where the son and clerk of the district attorney was present before the grand jury "to aid in bringing out the testimony." The learned judge said:

"The only point that can arise on this branch of the case is whether the person admitted to the grand jury was guilty of any improper conduct while there which operated unduly on the minds of the jurors."

The refusal to set aside the indictments was based upon the ground that it was the uniform practice in the court for the clerk and assistant of the District Attorney "to attend the grand jury, and assist in investigating the accusations presented before it." So, in *State v. Brewster*, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444, the indictment was sustained although a stenographer recorded the proceedings of the grand jury.

The further case in this circuit is that of *United States v. Farrington*, 5 Fed. 343, where the indictment was quashed by the District Court. It is stated in the opinion that the indictments were not prepared by the law officers of the government, but an attorney who was presumed to represent creditors of the banks, the embezzlement of whose money was the basis of the charge. This attorney had instituted proceedings before a commissioner against certain of the defendants, and appeared as a witness before the grand jury, with a number of bank books, with various exhibits, originals and copies, and read from these such selections as he chose, as well as from the minutes of testimony taken by the commissioner, and his own testimony was interspersed with comments upon the force and effect of the testimony, entries, and exhibits in the nature of argument, which was, in the language of the District Attorney, "animated, spirited, and excited." The District Attorney advised the jury that certain of the evidence offered by the attorney was incompetent. The learned judge said:

"This summary of the proceedings before the grand jury is sufficient to indicate that they were such as to seriously endanger, if not to preclude, an intelligent and fair consideration of the charges preferred against the accused."

And again:

"It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the District Attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it."

The motions to quash the indictments were granted upon the grounds suggested by the quotations from the opinion, but did not

proceed upon the ground that an unauthorized person had appeared before the grand jury in the capacity of public prosecutor. Indeed, it is doubtful whether he so appeared. He entered the jury room under the guise of a witness, abused his function as a witness, and seized the opportunity to make comments that did not pertain to his character as a witness. The case would seem to have very little bearing upon the question now at bar, but is of much importance with reference to the misconduct of any person before a grand jury and the duty of the court respecting the same.

In *United States v. Kilpatrick* (D. C.) 16 Fed. 765, 774, Mr. Bowman, an examiner of the Department of Justice, was before the grand jury, and the court found:

"That Mr. Bowman was introduced to the grand jury by the District Attorney or his assistant; that he remained in the room during the examination of many of the witnesses; that, at the request of some member of that body, he assisted them in their investigations by explaining accounts while the witnesses were on examination, and he asked some questions; that he directed the inquiries of the grand jury, at the request of some member, by telling them what certain witnesses would testify before they were introduced into the room; that he did not regard himself as a prosecutor, but simply a witness, at the command of the jury, and in duty bound to obey them; and that he left the room before any ballot was taken."

The presiding judge stated that such examiner

"Certainly cannot enter the grand jury room, and assist that body in their investigations. The District Attorney exercises that privilege only by the express permission of the court, and I am inclined to the opinion that the court could not legally confer such high authority upon an examiner of the Department of Justice."

The indictment was quashed apparently on account of the presence of Mr. Bowman before the grand jury, and also on account of illegal evidence given by him. The views of the learned judge concerning the right of even the District Attorney to appear before the grand jury without the consent of the court are very pronounced, and are emphasized as regards the unauthorized action of the examiner. It should be observed that Mr. Bowman was a mere witness, and unduly interfered with the investigation.

In *United States v. Edgerton*, 80 Fed. 374, the District Court decided that, where an expert witness remained in the jury room while another witness was being examined, and put questions to him, the indictment should be quashed. The opinion states:

"It is beyond question that no person, other than a witness undergoing examination, and the attorneys for the government, can be present during the sessions of the grand jury. The rule is inherent in the grand jury system with all the force of a statutory enactment. The cases where bailiffs and stenographers have on occasions been temporarily present in the grand jury room are only apparent exceptions. The rule, in its spirit and purpose, admits of no exception. In the present case it is suggested that the only testimony heard while the expert Flynn was present related to the production of certain books of account, touching which the expert interrogated the witness who was testifying as to his possession of such books or other documents, and this could not have prejudiced the defendant. The court cannot know that this suggestion represents the fact. The case as presented is one which an expert was not only present in the grand jury room while a witness was testifying, but took part in the investigation by interrogating the witness. The court cannot inquire as to the effect of this con-

duct. There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in *Lewis v. Commissioners*, 74 N. C. 194, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury?"

Upon the grounds stated, and other grounds, the indictments were quashed. The rule stated in the *Edgerton Case* would condemn the present indictments.

It has been decided often that an attorney may aid the District Attorney upon the trial of an indictment (*State v. Bartlett*, 55 Me. 200, 226 [the objection was "that he does and is to receive pecuniary reward from some parties for such services"]; *Burkhard v. State*, 18 Tex. App. 599; *Commonwealth v. Knapp*, 10 Pick. 478, 20 Am. Dec. 534), even when he receives his compensation from private sources (*Gardiner v. State* [N. J. Sup.] 26 Atl. 30; *Keyes v. State* [Ind. Sup.] 23 N. E. 1097; *State v. Helm* [Iowa] 61 N. W. 246; *State v. Fitzgerald*, 49 Iowa, 260, 31 Am. Rep. 148; *Benningfield v. Commonwealth* [Ky.] 17 S. W. 271; *United States v. Hanway*, 2 Wall. Jr. 139, Fed. Cas. No. 15,299; *Lawrence v. State*, 50 Wis. 507, 7 N. W. 343). Decisions to the contrary are *Biemel v. State*, 71 Wis. 444, 37 N. W. 244; *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027; *Sneed v. People*, 38 Mich. 248. So it has been concluded that a person other than the District Attorney could, without invalidating the indictment, take part in the proceedings before the grand jury. *Bennett v. State*, 62 Ark. 520, 36 S. W. 947; *State v. Justus*, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470 (in this case the objection was not raised on the trial, and this omission influenced the decision on appeal, but the appearance was condemned as "highly improper"); *State v. Whitney*, 7 Or. 385; *State v. Fertig* (Iowa) 67 N. W. 87 (there was failure to show that the attorney was not acting as an authorized deputy of the county attorney pursuant to the statute). Decisions to the contrary are *People v. Scannell*, 36 Misc. Rep. 40, 72 N. Y. Supp. 449; *State v. Addison*, 2 S. C. 356; *Durr v. State*, 53 Miss. 425 (the objection was overruled, as it was held that it should be raised by plea); and the indictment was sustained even when the attorney received his compensation from private sources (*Wilson v. State* [Tex. Cr. App.] 51 S. W. 916). But there was a different ruling in *Wilson v. State*, 70 Miss. 595, 13 South. 225, 35 Am. St. Rep. 664; *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; *Commonwealth v. Gibbs*, 4 Gray, 146. None of the cases entirely meets the present facts. Here a federal officer was armed with a commission sufficiently broad in its terms to enable him to initiate and conduct proceedings before the grand jury respecting all fraudulent importations of Japanese silks at the port of New York. The District Attorney credited his apparent authority, and co-operated with him, and thereupon the special assistant to the Attorney General became in fact the chief officer in the conduct of the investigation before the grand jury, presumably doing, as regards the presentation of facts and the giving of legal advice, what the District Attorney could do, pursuant to the rules obtaining in

this district. To the extent stated, the functions of the District Attorney passed from the officer from whom the law exacted the duty to the special assistant to the Attorney General, who had no power to perform it. Section 1025 of the Revised Statutes [U. S. Comp. St. 1901, p. 720] providing that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant"—has been held to be applicable to improper or irregular action of persons before the grand jury. *United States v. Molloy* (C. C.) 31 Fed. 19, 23; *United States v. Terry* (D. C.) 39 Fed. 355, 361.

It may be within the discretion or power of the court to sustain an indictment based upon an investigation before the grand jury in which an attorney or person other than the District Attorney has participated, yet the most eminent discretion may fail in a wise disposition of such improprieties, and should be exercised to sustain indictments sparingly and with extreme caution. Whatever harm, aside from that flowing from actual misconduct, that may attend such circumstance, is here present, and additional presumption of harm arises from the fact that the District Attorney, as to a general, and perhaps a large, class of offenders, surrendered practically his powers and duties to an entirely distinct federal officer, who not only had no power to perform such duties, but to whom the power for 100 years had been denied by the settled policy of the government, distinctly enunciated by the Supreme Court of the United States. The question is not narrowed to the mere appearance of an unauthorized person in the grand jury room for a limited participation in the proceedings, but is enlarged to a comprehensive transfer of authority from the local law officer of the community to the central law officers of the government, in whom such authority has never been reposed. This exceptional departure from the statutory allotment of power should not be disregarded, although there has been no purpose to transcend the terms and spirit of the statute, and no direct evil consequence can be detected in this particular instance. There is vice in the vicissitude itself whereby the unauthorized prosecutor virtually supersedes the authorized prosecutor. The worth and efficiency of Mr. Smith's service is recognized, but no man's excellence justifies his substitution for the stated public official. Every citizen is amenable to the secret inquisition of the grand jury, and he may demand justly that his essential rights be guarded by the wholesome preservation of settled systems and policies, that give greater certainty to legal proceedings, and fix on the designated prosecuting officer of the locality inevitable accountability for what is done or omitted. The inconvenience of resubmitting the matter to the grand jury is temporary; the injustice of denying the defendants investigation pursuant to the law of the land would be perpetual. It is provident also that the present inattention to the statutory demarcation of duties be corrected at this early stage of the prosecution, lest, after possible years of litigation, when perchance the statute of limitations

shall have run against the actions, it should be decided that there was error in the initiation of the proceedings. The indictments are not faulty, save for the single reason that they are based upon proceedings in great part conducted without authority by the special assistant to the Attorney General, and on that sole ground the motions to quash are granted.

BANCROFT v. WICOMICO COUNTY COM'RS et al.

(Circuit Court, D. Maryland. March 21, 1903.)

1. RES JUDICATA—PERSONS CONCLUDED BY JUDGMENT—BONDHOLDERS OF RAILROAD COMPANY.

A question as to the liability of the property of a railroad company to taxation, determined in a suit to which the company was a party, is not res judicata as against a mortgage bondholder of the company, where no one claiming under the mortgage was a party.

2. TAXATION—STATUTORY EXEMPTION OF RAILROAD COMPANY—TRANSFER OF PROPERTY.

Code Pub. Gen. Laws Md. art. 23, §§ 187, 188, which provide that on the sale of any railroad under a mortgage the purchaser shall be authorized to form a corporation which shall "possess all the powers, rights, immunities and franchises" possessed or enjoyed by the corporation which owned the railroad previous to the sale, under its charter or any statute of the state, is broad enough to pass to the succeeding company an exemption from taxation for a term of years conferred upon the company previously owning the road by a special statute; the word "immunities," used in the statute, including an immunity from taxation, and being an apt word to expressly transfer such exemption, or, in effect, to grant the same exemption to the new corporation.

3. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT—EXEMPTION FROM TAXATION.

Where by the legislation of a state a railroad company is exempted from state, county, and municipal taxation for a term of years after it shall have completed its road, such grant creates a contract between the state and the company and those who subsequently become its creditors, which is impaired by the state, within the inhibition of the federal Constitution, by the taxing of the property of the company by local authorities under the general power conferred on them by the state.

4. TAXATION—STATUTORY EXEMPTION—CONSTRUCTION OF STATUTE.

A railroad company authorized by its charter to build a road between two terminal points over a certain route was by a special act of the Legislature granted an exemption from taxation on its property for a term of years from the date of the completion of such road. It was also authorized by the same act to build and acquire by purchase branch and other lines. *Held*, that the property exempted from taxation was limited to the road built under its charter, and such other property as was necessary for its operation.

In Equity. Suit to enjoin the levy and collection of taxes. On final hearing.

Nicholas P. Bond and Edward Duffy, for complainant.
James E. Ellegood, for defendants.

MORRIS, District Judge. This is a bill in equity filed by Samuel Bancroft, Jr., a citizen of Delaware, who is a holder of mortgage

¶ 3. See Constitutional Law, vol. 10, Cent. Dig. §§ 303, 408.

bonds issued by the Baltimore, Chesapeake, & Atlantic Railway Company, against the board of county commissioners of Wicomico county, Md., and the five citizens of Maryland who constitute that board. The object of the bill is to enjoin the defendants from levying and collecting taxes upon property of the Baltimore, Chesapeake & Atlantic Railway Company, which the plaintiff claims to be exempt by the law of Maryland from taxation, and the imposition and collection of which taxes, the plaintiff alleges, will impair the obligation of a contract between the state of Maryland and the Eastern Shore Railroad Company, arising out of the act of the General Assembly of Maryland of 1886, p. 209, c. 133, and to which the Baltimore, Chesapeake & Atlantic Railway Company, as the purchaser of said railroad, claims to be entitled under section 188 of article 23 of the Maryland Code of Public General Laws.

Questions of law similar to those raised by this bill of complaint were considered in a prior litigation between the Baltimore, Chesapeake & Atlantic Railway Company itself and the mayor and city council of Ocean City (89 Md. 89, 42 Atl. 922), and also in a case between the same railway company and the county commissioners of Wicomico county (93 Md. 113, 48 Atl. 853), and in those cases the Court of Appeals of Maryland decided adversely to the contention of the complainant in this case.

The questions with regard to the jurisdiction of this court were heretofore considered on a demurrer, and it was held that the diverse citizenship gave the court jurisdiction; that the allegations that the trustee under the mortgage was a nonresident of Maryland, and refused to proceed in this behalf, except upon conditions with which the complainant was unable to comply, were sufficient to give the complainant standing to file this bill. It was further held that the complainant, claiming under the mortgage, was not bound by the judgment against the railway company, to which no one claiming under the mortgage was a party, and the complainant was therefore not estopped as by res judicata. *Keokuk & Western R. R. v. Missouri*, 152 U. S. 301, 313, 314, 14 Sup. Ct. 592, 38 L. Ed. 450.

The present case is now submitted for final hearing upon bill, answer, and an agreed statement of facts.

The Baltimore & Eastern Shore Railroad Company was first duly incorporated under the general incorporation law of Maryland (Acts 1876, p. 385, c. 242), and afterwards its rights, privileges, franchises, and immunities were enlarged and confirmed by an act of the General Assembly of Maryland passed in 1886 (page 209, c. 133). The act of 1886, p. 209, c. 133, after reciting that the Baltimore & Eastern Shore Railroad Company had been incorporated under the general incorporation law for the purpose of building, equipping, maintaining, and working a railroad from the shores of Eastern Bay, in Talbot county, to the town of Salisbury, in Wicomico county, through Talbot, Caroline, Dorchester, and Wicomico counties, granted to the corporation the power to conduct and operate branch roads, to acquire pleasure resorts along its road, and to acquire wharves and steamboats; and by section 2 it was enacted:

"That said corporation shall have perpetual existence and its franchises, property, shares of capital stock and bonds shall be exempt from all state, county and municipal taxation for the term of thirty years from the date of completion of said road between the termini mentioned in its charter."

Additional sections granted to the Baltimore & Eastern Shore Railroad Company the power to lease or purchase and operate any railroad or railroads, either in or out of this state, for the purpose of carrying on their business, and any other railroad in this state was granted the right to lease or sell its railroad or other property to the Baltimore & Eastern Shore Railroad Company.

The Baltimore & Eastern Shore Railroad Company in 1890 purchased the Wicomico & Pocomoke Railroad—a road about 30 miles long, extending from Salisbury to Ocean City. On July 1, 1890, the Baltimore & Eastern Shore Railroad Company executed a mortgage deed of trust of all its property, and all its rights, franchises, and privileges, to secure an issue of bonds; and on July 2, 1892, in compliance with a covenant in the original mortgage, the Baltimore & Eastern Shore Railroad Company executed a supplementary mortgage deed of trust, whereby it conveyed, by way of further assurance and security, every right, franchise, and immunity and exemption from taxation granted it by the act of 1886. This mortgage was foreclosed in 1894, and all the mortgaged property, franchises, privileges, freedoms, immunities, and exemptions were sold. At the time the enlarged corporate powers and immunities were granted to the Baltimore & Eastern Shore Railroad Company by the act of 1886, and at the date of the execution of the mortgage of 1890 and the supplementary mortgage of 1892, and at the time of the foreclosure of the mortgages, and the sale of the property, franchises, immunities, and exemptions by virtue of the judicial decree foreclosing the mortgages, there were in operation and effect in Maryland sections 187 and 188 of article 23 of the Code of Public Laws of Maryland, as follows:

"Sec. 187. In case of the sale of any railroad situated wholly within this state, or partly within this state and partly within an adjoining state, or the District of Columbia, heretofore or hereafter made by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceedings, or pursuant to any power contained in said mortgage or deed of trust, the purchaser or purchasers thereof, or his or their survivor or survivors, representatives or assigns, may, together with their associates, if any, form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, or such portions thereof as may be situated within this state, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors.

"Sec. 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this state, or the laws of any other state in which any part of such railroad may have been situated, not inconsistent with the laws of this state."

Pursuant to the provisions of the foregoing sections of the Maryland Code, the purchaser and his associates duly filed the certificate forming the Baltimore, Chesapeake & Atlantic Railway Company. The complainant contends that the said Baltimore, Chesapeake & Atlantic

Railway Company, his mortgagor, is entitled to hold the property, franchises, and immunities so as aforesaid purchased at the said foreclosure sale, with the same immunity and freedom from taxation as the same were held by the Baltimore & Eastern Shore Railroad Company under the provisions of the act of 1886, p. 209, c. 133.

Until the decision of the Court of Appeals of Maryland in 1899, reported in 89 Md., p. 89, and the decision in 1901, reported in 93 Md., p. 113, there had been no decision in Maryland construing the effect of the act of 1886, or the effect of the provisions of the Maryland Code of Public General Laws, art. 23, §§ 187, 188, giving to the purchaser of a railroad in Maryland all the powers, rights, immunities, privileges, and franchises possessed by the corporation which owned or held such railroad before the sale under or by virtue of its charter, and any amendments thereto, or of other laws of the state, so that the Baltimore, Chesapeake & Atlantic Railway Company acquired whatever rights the foreclosure vested in the purchaser, and whatever rights it acquired under section 188 of article 23 of the Maryland Code, without notice of any meaning to be given that legislation, other than the natural meaning of the words, and the construction put upon them by previous decisions.

In *Chesapeake & Ohio Railroad Company v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121, it was held by the Supreme Court of the United States that the legislative grant by West Virginia to the Covington & Ohio Railroad Company, that "no taxation upon the property of said company shall be imposed by the state until the profits of the said company shall amount to ten per cent. on the capital stock of said company," imported by its language that the contract was personal to that corporation, and intended to benefit those who should subscribe to its stock, and that the property was exempt so long as it was the property of that corporation, and no other, and while it continued the property of that company, and no longer; the exemption to cease when the profits of that particular company should amount to 10 per cent. on the capital stock of that company, and not the capital stock of any other company. The Supreme Court further held that the exempting clause contained no words indicating, either expressly or by any implication, that this immunity was assignable. In that case, as in the present case, the property had passed from the original corporation under judicial sale, and there was a legislative enactment on the subject, the language of which was that "such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage by any works which the company may, after that time and before the sale, have constructed and all other property of which it may be possessed at the time of the sale, other than debts to it * * * upon such conveyance to the purchaser the said company shall ipso facto be dissolved," "and the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance or in any writing signed by them," etc. The corporation created by or in consequence of such sale and conveyance shall "succeed to all such franchises, rights, and privileges, and perform all such duties, as would

have been had or should have been performed by the first company but for such sale and conveyance," etc. With reference to this enactment the Supreme Court said (page 185, 114 U. S., and page 818, 5 Sup. Ct., 29 L. Ed. 121):

"The words used are, it will be observed, 'franchises, rights, and privileges, * * * as would have been had * * * by the first company, but for such sale,' etc. There is no express reference to a grant of any exemption or immunity. Nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption. As was said on this point in *Morgan v. Louisiana*, 93 U. S. 217-223 [23 L. Ed. 860]: 'Much confusion of thought has arisen in this case and in similar cases from attaching a vague and indefinite meaning to the term "franchises." It is often used as synonymous with "rights, privileges, and immunities," though of a personal and temporary character; so that, if one of these exists, it is loosely termed a "franchise," and is supposed to pass upon a transfer of the franchises to the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value—such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights and privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction.' "

The opinion then proceeds (page 186, 114 U. S., and page 818, 5 Sup. Ct., 29 L. Ed. 121):

"Here there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in the language itself, nor the context nor the subject-matter of the legislation, nor the situation and relation of the parties to be affected, which indicates that a grant of an exemption from taxation to a particular railroad corporation, or to a class of such, was in the contemplation of the Legislature."

In *Pickard v. East Tennessee, Virginia & Georgia Railroad Co.*, 130 U. S. 637, 9 Sup. Ct. 640, 32 L. Ed. 1051, it was also held by the Supreme Court that legislative immunity from taxation is a personal privilege, not transferable, and not to be extended beyond the immediate grantee unless otherwise so declared in express terms, and must appear in language so clear and unmistakable as to leave no doubt as to the purpose of the legislature.

In *Memphis Railroad Co. v. Commissioners*, 112 U. S. 609, 617, 5 Sup. Ct. 302, 28 L. Ed. 837, after citing a number of prior decisions to the same effect, the court said:

"The exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor."

By these and other cases dealing with the same subject-matter, it is clear that the exemption from taxation granted to the Baltimore & Eastern Shore Railroad Company could not be assigned by it so as to pass a continuing exemption to the purchaser under the foreclosure of the mortgage, and the claim of the purchaser in this case must rest solely upon the language of sections 187 and 188 of article 23

of the Maryland Code of Public General Laws. And the question now is whether section 188 does express a clear legislative intent that the purchaser shall obtain, as a new corporation, that exemption from taxation which the mortgagor company possessed and enjoyed. And this question narrows itself to the force and meaning to be given to the word "immunities," used in section 188. It is true that no case decided by the Supreme Court has yet passed upon that precise question, raised in precisely the same way in which it arises in this case; but the force and effect of the word "immunities" was carefully considered in *Louisville & Nashville Railroad Company v. Palmes* (1883) 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922. The Alabama & Florida Railroad Company was entitled by the law of Florida to tax exemption for its capital stock and property. By foreclosure sale the railroad, and all the rights, privileges, and franchises of that company, became vested in the Pensacola & Louisville Railroad Company, and to that company, by a special law, was granted the same tax exemption as the first company had. By a second foreclosure sale the title of the second company to the railroad was transferred to a third company, viz., the Pensacola Railroad Company, "together with all the franchises, rights, privileges, easements and immunities" of the second company, viz., the Pensacola & Louisville Company. By an act of Legislature the third company, viz., the Pensacola Railroad Company, had been empowered to acquire by purchase and assignment all the property, rights, franchises, privileges, and immunities of the Pensacola & Louisville Railroad Company, and upon completion of said purchase and assignment the said Pensacola Company was to be deemed, in law and equity, fully invested with and entitled to all the said property, rights, franchises, privileges, and immunities of said Pensacola & Louisville Railroad Company, as though the same were originally granted to or acquired by the said Pensacola Railroad. Commenting on the foregoing language of the act incorporating the Pensacola Railroad Company, and empowering it to acquire by purchase and assignment all the property, rights, franchises, privileges, and immunities of the Pensacola & Louisville Railroad Company, and to be fully invested with them—as fully as if originally granted to the Pensacola Railroad Company—the Supreme Court said:

"It is claimed that this language is broad enough to cover the assignment and transfer of the immunity from taxation granted to the Pensacola & Louisville Railroad by the eighteenth section of its charter. And we are of this opinion. The language is comprehensive and unequivocal, and the word 'immunity' is apt to describe the exemption claimed."

The opinion of the Supreme Court, however, then proceeds to dispose of the case on entirely different grounds, but not at all modifying the conclusion above stated.

In *Phoenix Insurance Company v. Tennessee* (1896) 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660, the force and effect of the word "immunity" in respect to an exemption from taxation was emphasized. In that case it appeared that the legislature of Tennessee incorporated the Bluff City Insurance Company, and enacted "that said company shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock subscribed which shall be in lieu of all other

taxes." Subsequently the Legislature incorporated the De Soto Insurance Company, and granted to it "all the rights, privileges and immunities of the Bluff City Insurance Company." Subsequently the Legislature also incorporated the Washington Fire & Marine Insurance Company (its name being afterwards changed to the Phoenix & Marine Insurance Company, the plaintiff), and granted to it all the rights and privileges (omitting the word "immunities") which had been theretofore granted to the De Soto Insurance Company. In passing upon the question whether the insurance company last incorporated, by the grant to it of all the rights and privileges of the De Soto Company, obtained the immunity from taxation which the De Soto Company enjoyed, the Supreme Court said:

"The words 'rights, privileges, and immunities,' when used in a statute of the kind under consideration, are certainly full and ample for the purpose of granting an exemption from the taxation contained in the first or original statute, and when, in granting to still another company certain rights, the word 'immunities' is dropped, its absence would seem and ought to have some special significance. In granting to the De Soto Company 'all the rights, privileges, and immunities' of the Bluff City Company, all words were used which could be regarded as necessary to carry the exemption from taxation possessed by the Bluff City Company, while in the next following grant—that of the charter of the plaintiff in error—the word 'immunities' is omitted. Is there any meaning to be attached to that omission? And if so, what? We think some meaning is to be attached to it. The word 'immunity' expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an immunity than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption."

In *Tennessee v. Whitworth* (1886) 117 U. S. 139, 6 Sup. Ct. 649, 29 L. Ed. 833, it was held that in a grant by the Legislature to a new railroad company of "all the rights, powers, and privileges" of an old company which possessed exemption from taxation, that exemption was granted to the new company, even without the word "immunity"; but the Supreme Court, in *Phoenix Insurance Co. v. Tennessee*, 161 U. S. 182, 16 Sup. Ct. 474, 40 L. Ed. 660, points out that this decision should be "confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word 'privilege,' it may be argued that, considering all the language used in those statutes, the intention of the Legislature to exempt from taxation may fairly well be made out."

From the foregoing citations, I think it must be deduced that when, in addition to the words "powers, rights, privileges, and franchises," there is added the word "immunities," in legislative grants to a new company of the same charter attributes which were enjoyed by an older corporation which possesses exemption from taxation, the word "immunities" includes immunity from taxation, and is the apt word used in legislation to express that particular exemption. If exemption from taxation can be granted by any general words, what could be stronger evidence of that intent than the language of section 188 of article 23 of the Maryland Code of Public General Laws?

"Sec. 188. Such corporation [that is to say, the new corporation formed by the purchaser of a railroad at a judicial sale] shall possess all the powers,

rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this state or the laws of any other state in which any part of such railroad may have been situated; not inconsistent with the laws of this state."

If the meaning of the word "immunity," when used by the Legislature, includes immunity from taxation, then it is not possible to doubt the meaning of section 188. Its force and effect do not depend at all upon the assignability of an exemption from taxation, and are not affected by the fact that it was an exemption personal to the Baltimore & Eastern Shore Railroad Company, for, although it may be spoken of as the continuing of a previous exemption, it is in fact a new legislative grant to a new corporation created to receive it. It is a grant in respect to certain real and personal property pointed out and designated by its having been owned previous to the sale by the original company. It is difficult to conceive what immunity in respect to this property could be meant, if not the immunity from taxation which the original company had possessed. It is not, however, an irrevocable grant, but, under the Constitution of Maryland, may be repealed or modified at the pleasure of the Legislature. The effect of sections 187 and 188 of the Maryland Code of Public General Laws is to say to those asked to loan money to help build a railroad, which the Legislature has thought sufficiently important to the development of the state to grant tax exemption to the corporation chartered to build it, "If you loan your money you shall have as an element of value in your security, if you are obliged to foreclose and sell the railroad, the same immunities which we have granted to the company which proposes to build the road, subject, however, to the right to take away or modify the exemption by a law of the state if any Legislature thinks the welfare of the state requires it." It seems to me the language fully satisfies the requirement laid down by the Supreme Court in *Pickard v. Tennessee, etc., R. Co.*, 130 U. S. 641, 9 Sup. Ct. 640, 32 L. Ed. 1051, that, to justify the conclusion that such exemption is granted, it must appear by language so clear and unmistakable as to leave no doubt of the purpose of the Legislature.

I have been constrained, after a painstaking consideration of this case, to the conclusion that under section 188 of article 23 of the Maryland Code of Public General Laws, fairly interpreted in the light of the decisions of the Supreme Court, the Baltimore, Chesapeake & Atlantic Railway Company, in respect to the property purchased under the foreclosure sale, and which was exempt while in the possession of the Baltimore and Eastern Shore Railroad Company, did have granted to it the exemption possessed by the original company, and that the exercising of the taxing power delegated by the state Legislature to the board of county commissioners, by imposing a tax on this property, is a legislative act impairing the obligation of the contract of exemption, and within the inhibition of the federal Constitution. I have arrived at this conclusion reluctantly, because, while it is the duty of the federal courts, in questions of this nature, to exercise their own independent judgment, they should be

slow to differ from the state court, and lean towards an agreement with it, if the question seems doubtful. *Folsom v. Township*, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Loeb v. Trustees of Columbia Tp.*, 179 U. S. 472-473, 21 Sup. Ct. 174, 45 L. Ed. 280.

It remains to consider what property is within a strict construction of the exemption. By section 188 of article 23, the immunity is declared to be the same which the original corporation enjoyed in respect to the railroad sold, and the real and personal property appertaining to the same. The three classes of property which were conveyed by the foreclosure sale, as stated in complainant's brief, are:

"First. Property formerly belonging to the Baltimore & Eastern Shore Railroad, and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

"Second. Property formerly owned by the Baltimore & Eastern Shore Railroad, and acquired by it under its purchase of the Wicomico & Pocomoke property.

"Third. Property at no time owned by the Baltimore & Eastern Shore Railroad, but acquired by the Baltimore, Chesapeake & Atlantic Railway Company subsequent to its organization. This class consists mainly of steamboats and wharf property."

In *Baltimore, Chesapeake & Atlantic Railway Co. v. Ocean City*, 89 Md. 89, 42 Atl. 922, the Court of Appeals of Maryland had before it the question whether the property purchased by the Baltimore & Eastern Shore Railroad Company, known as the Wicomico & Pocomoke Railroad, was within the exemption granted by the act of 1886, p. 209, c. 188, and the court said (89 Md. 97, 42 Atl. 922):

"The act of 1886 provided for the building and working of a railroad from the shores of Eastern Bay, in Talbot county, to Salisbury, in Wicomico county, passing through the counties of Talbot, Caroline, Dorchester, and Wicomico; and it is quite clear, we think, that it was only such property as is necessary for the operation of this road that the Legislature intended to except from state, county, and municipal taxation for the term of thirty years from the date of the completion of the road. It means the railroad and its property mentioned in the act, and none other."

This seems a fair construction of the act of 1886, p. 209, c. 133, considering the great strictness with which tax exemptions are construed. Therefore only the property of the first class above mentioned is exempt.

I will sign a decree for an injunction, in accordance with the views herein expressed.

OCEAN S. S. CO. v. ÆTNA INS. CO.

(District Court, S. D. Georgia. E. D. March 18; 1903.)

1. MARINE INSURANCE—CONSTRUCTION OF POLICY—PROOF OF USAGE.

Parol evidence of usage is not admissible to affect the construction of a policy of marine insurance where the contract is expressed in terms which are clear and plain, unless it is shown that the words used have, by usage, acquired a special and peculiar meaning different from their ordinary meaning.

2. SAME—REINSURANCE.

Libellant, a marine carrier, was accustomed to issue to shippers "insured bills of lading," which bound it as an insurer of the cargo cov-

ered thereby, and against the risks so assumed it took out a marine policy with respondent, which contained the provision that "this insurance is hereby understood and agreed to be in effect a reinsurance of the risks which are or may at any time be assumed by the assured, and the assurers agree to pay the assured in full all claims for such losses arising from perils enumerated in the policy as the assured may, in their judgment, settle for with the owners or other parties interested in the merchandise." A loss of cargo occurred from fire, which was one of the perils insured against, and, the contribution to be made by the insured bills of lading cargo having been determined in general average, libellant paid the same. *Held*, that by the plain terms of the policy respondent was liable for the full amount so paid to the extent of the amount named in the policy, which was one of reinsurance, and not of co-insurance such as would entitle respondent to prorate the loss with libellant; and that it was immaterial that the loss was only partial, both as to the entire cargo and the insured bill of lading cargo.

In Admiralty. Action on policy of marine insurance.

Henry C. Cunningham and T. Mayhew Cunningham, for libellant.
Samuel B. Adams and A. Pratt Adams, for respondent.

SPEER, District Judge. The Ocean Steamship Company of Savannah has brought a libel-in personam against the Ætna Insurance Company of Hartford, Conn. This is brought to enforce the apparent obligation of a policy of marine insurance. The contract covered all merchandise transported by the Ocean Steamship Company which that company or any of its transportation agencies or connections had insured or might insure. Among the casualties or misfortunes against which this policy provided indemnity were perils by fire, and while it was of force the cargo of the steamship City of Macon, operated and controlled by the Ocean Steamship Company, was damaged by fire, and an average loss incurred. It appears from the record that it was the policy of the Ocean Steamship Company, for the purpose of securing shipments, to issue "insured bills of lading" to its consignors of freight. That portion of the cargo of the steamer for which bills of lading of this character had been issued was of the value of \$96,498.25, and this sustained a direct damage from the fire and its consequences in the sum of \$58,323.26. In estimating the general average it was developed that the contribution which the "insured bills of lading cargo" must make was \$31,224.26. This sum was paid by the Ocean Steamship Company pursuant to its obligation to insure this portion of the cargo, an express obligation, it must be observed, which was imprinted on each bill of lading of this character. From the contingency of this loss the Ocean Steamship Company had secured insurance from the respondent in the amount of \$25,000, and, the latter refusing to pay this sum, the libel is brought to recover the amount *prima facie* appearing to be due. The respondent has paid \$5,000 of this sum, and therefore the amount actually in dispute is \$20,000.

The respondent resists the claim of libellant and makes the following contentions: The loss was not total, and the adjustment of average, therefore, necessarily implies proportionate contribution, and not an assessment upon one interest at the expense of another. For the libellant to insist, therefore, that the respondent must pay \$25,000 on

account of the general average of \$31,224.26, is, it is insisted, contrary to the principles of equity and maritime law. This, it is insisted, would oblige the defendant insurance company to pay a total loss, when actually there was a partial loss only of 25 per cent. of the cargo insured, and it is insisted that the libelant, by the payment of premiums on \$25,000 merely, really obtained insurance to the extent of over \$96,000. There is another urgent contention. A lengthy deposition of a Mr. Wallace, an official of the defendant company, who is an expert in such matters, is offered to show that the construction placed upon this policy by the respondent is in accordance with the usage and custom of underwriters generally. Objection is made to the competency of this evidence, it being insisted by libelant that the court is under obligation to construe the policy of insurance in accordance with its clear and unambiguous terms. This last contention, accordingly as it may be determined, seems controlling.

A great deal has been said in the argument with regard to the looseness and informality attending the construction of marine insurance policies, and the necessity of admitting testimony by parol to explain them. Much of this is traceable to a remark of Mr. Justice Buller made in 1791, in *Brough v. Whitmore*, 4 Term Reports, 206-210, viz., that such a policy "has at all times been considered in courts of law as an absurd, incoherent instrument, and it is founded on usage, and must be governed and construed by usage." This, it is insisted, is as true now as it was then. The respondent has not found it difficult to cite from the early volumes of the Supreme Court excerpts from opinions which seem to confirm this proposition. No less an authority than Chief Justice Marshall in *Yeaton v. Fry*, 5 Cranch, 345, 3 L. Ed. 117, observed:

"Policies of insurance are generally the most informal instruments which are brought into courts of justice, and there are no instruments which are more liberally construed in order to effect the real intention of the parties, if that intention can be clearly ascertained."

This deliverance of Chief Justice Marshall was made in 1809, or only 18 years after the animadversion of Mr. Justice Buller upon insurance policies. In the latter case our Supreme Court was dealing with a clause in a policy which insured for a certain specified sum the brig *Richard* "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk," against "all risks, blockaded ports and Hispaniola excepted." It will be conceded, we think, that the remark of the great chief justice was no aspersion upon the language of that policy. The same illustrious jurist made substantially the same utterance in the case of *Maryland Insurance Company v. Woods*, 6 Cranch, 45, 3 L. Ed. 143. The question there was whether in an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty upon the grounds of breach of blockade is not conclusive evidence of a violation of the warranty. The ambiguity there is conspicuous. A much more recent decision by the same court is believed to contain a more accurate description of the modern policy of marine insurance. This is found in the case of *General Mutual Insurance Company v. Sherwood*, 14

How. 362, 14 L. Ed. 452. After referring to the observations of Justice Buller, as reported by Chief Justice Marshall, the court, through Mr. Justice Curtis, declares that such a contract, "notwithstanding the number and variety of the interests which it embraces, and of the events by which it is affected, has been reduced to much certainty by the long practice of acute and well-informed men in commercial countries, by the decisions of courts in America and in England, and by able writers on the subject in this and other countries." Surely, it cannot now with propriety be contended that the vast business of insurance conducted in the main by trained minds of the keenest intelligence and broadest experience, with the enormous values therein invested, is now carried on by contracts as informal, as ambiguous and incoherent, as those which received, and no doubt deserved, the reprobation of the courts from whose decisions we have quoted. Such expressions, if found at all, will be rare in modern cases construing contracts of insurance. The proof of custom and usage was obviously valuable to the court, and therefore competent testimony where the meaning of the policies was obscure, and when the law was unsettled. But with this, as with other topics, the law is a progressive science. We find an extensive discussion of this precise question in *1 Arnould on Marine Insurance* (7th Ed.) par. 56. This edition of a valuable work originally written by Sir Joseph Arnould was published in 1901, and seems to have been carefully edited by Edward Louis De Hart and Ralph Iliff Simey, both of the Inner Temple, barristers at law. Referring to cases arising on sea policies which were indeterminate, ambiguous, or technical, the author observes:

"From the frequency, probably, of such cases as those just referred to in this branch of the law, a notion appears at one time to have prevailed (favoured unquestionably by certain reported expressions of the earlier judges) that sea policies were not amenable to the rules of construction generally applicable to all other mercantile contracts, but were to be interpreted so as to carry out the assumed intentions of the parties, even though repugnant to the terms in which their intentions purported to be expressed on the face of the instrument itself. This notion is now discarded as erroneous. Parol evidence, whether of usage or otherwise, can in no case be admitted to contradict or materially vary the plain and express terms of a sea policy."

A great many cases decided by judges of the highest rank and greatest renown are cited in this work in support of this conclusion. All agree that there is no room for the admission of parol evidence to construe a contract expressed in terms which are to be understood in their plain, ordinary, and popular sense. Where, however, by some known usage of trade, they have acquired a peculiar sense, distinct from the popular sense of the same words, or where the context evidently shows that they must be understood in some other special and peculiar sense, parol evidence of usage may be admitted. In this connection what seems a highly satisfactory statement of the rule is quoted from an opinion of Erle, C. J.:

"A contract of insurance is a commercial instrument, and is to be construed, like all others, so as to give effect to the intention of the parties, and that intention is to be gathered from the words of the instrument interpreted by the surrounding circumstances. If the words are clear, the proper effect is to be given to them; if the words are capable of more inter-

pretations than one, the judge, with the aid of the jury and of the surrounding circumstances, is to put the true construction upon the contract."

The rule is also stated in Angell on the Law of Insurance, par. 25:

"Although usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain. Thus, where a policy was made in the usual form upon a ship, her tackle, apparel, boats, etc., evidence of usage that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible."

There will be found, we think, no case, or expression by any text-writer of repute, which will justify the admission of oral testimony to explain or vary by proof of usage such determinate and precise language as that in the clause of this policy upon which the libellant relies. It reads as follows:

"This insurance is hereby understood and agreed to be in effect a reinsurance of the risks which are or may at any time be assumed by the assured, and the assurers agree to pay the assured in full all claims for such losses arising from perils enumerated in the policy as the assured may, in their judgment, settle for with the owners or other parties interested in the merchandise as aforesaid, subject only to the terms of average above set forth."

The exception refers to certain perishable classes of goods, which were not insured at all, and to other matters about which there is no dispute. It will be observed that the insurer by this explicit clause in the policy wholly relinquishes any right to interfere with proofs of loss, or with any other matter arising between the Ocean Steamship Company and its shippers. The latter company is given the broadest liberty to settle the original insurance in such manner as may seem best to it, and the respondent agrees to pay the loss thus settled "in full." This could never be true in a case of ordinary double insurance, where the insurers have a mutuality of interest, the right to resist recovery altogether, and after recovery to pro rata contribution.

There is no doubt that, if this policy is to be treated as original or primitive insurance of the cargo, it being in its nature a marine policy, the contention of respondents would be sustained. While apparently arbitrary, the rule is admirably stated in Hughes on Admiralty, par. 39, p. 83:

"The measure of recovery in case of partial loss is in one respect strikingly different from the measure of recovery in fire insurance. If a house is insured against fire for \$5,000, and the value of the house is \$10,000, and the loss is \$5,000, the insured recovers the full value of his policy. Under similar circumstances in marine insurance he only recovers such a proportion of the loss as the insured portion bears to the total value, it being considered that as to that part of the value which is not insured he is his own insurer, and must contribute to the loss to that extent. In arriving at these proportions the actual value of the subject insured is taken, except where there is an insured value fixed in the policy, in which case the insured value is taken."

This case, however, is on a policy of reinsurance. There is an express stipulation by which the underwriters agree to recoup the Ocean Steamship Company for all their losses "in full" to the extent of \$25,000. How is it possible to regard this as a pro rata liability? An engagement to pay in full cannot be satisfied by a payment pro rata. The words "in full" must be construed in their plain and ordinary

sense in connection with the stipulation in the first clause of the policy by which it is agreed to effect a reinsurance of the risks which are or may be at any time assumed by the assured.

What seems to the court the cardinal error into which respondent has fallen is that it treats reinsurance and co-insurance, or double insurance, as one and the same thing. Had the Ætna Insurance Company and the Ocean Steamship Company jointly insured this cargo in the first instance, or had the Ocean Steamship Company taken out other reinsurance in addition to that which it secured from the Ætna, then the doctrine of pro rata contribution for which the respondent contends would in either case seem fully applicable. But this was not done. We may presume that it was believed by the officers of the Ocean Steamship Company bad policy to incur a risk of total loss on their part in a sum so large which might result to their "insured bills of lading cargo" from the perils of the sea or from fire. To avoid this, the Ocean Steamship Company insured its risk, not for the full amount of that risk, but for \$25,000. The respondent was paid its usual premiums for a policy in that amount. The loss occurred. It meant a subtraction from the resources of the Ocean Steamship Company of more than \$31,000. How great the loss beyond this is a matter in which the Ætna is not concerned. It has been paid no premiums to insure the total value of the "insured bills of lading cargo." It has been paid for insuring the risk which the Ocean Steamship Company took, and for insuring that to the amount agreed upon, namely, \$25,000. It requires a refinement of subtlety and casuistry not usually present in the practical administration of law in contested cases to exonerate the insurance company from a payment of more than \$8,000 when it agreed to pay \$25,000, and which will require the Ocean Steamship Company to lose \$23,000, when it had taken the precaution to protect itself against a loss \$2,000 more than that sum.

This conclusion will, we think, be established by reference to principles stated by the most eminent text-writers and by incontestable authority. Says Angell on the Law of Fire Insurance, par. 88:

"A reinsurance, we have seen, differs very essentially from a double insurance. The latter occurs when several policies are effected for the benefit of the same person, and upon the same subject-matter, whereas the former is entered into by the insurer for his own protection."

An interesting discussion of this vital distinction may be found in the first volume (7th Ed.) of Arnould on the Law of Marine Insurance, already referred to. In paragraph 322 we find this statement:

"After an insurance has been made, the underwriter may, by the law and practice of all countries, have the whole amount at risk (or, as in France, the whole minus the premium) reinsured to him by some other underwriter. The object of this is to enable him to indemnify himself against the consequences of his own act whenever he finds he has undertaken a risk on imprudent terms, or bound himself to a greater amount than he may be able to discharge."

After commenting upon the large extent to which policies of this nature are now used, this writer continues:

"The contract of reinsurance is totally distinct from and unconnected with the original insurance. The original assured has no kind of claim against the reinsurer, or against any moneys paid by the reinsurer to the reassured.

The reassured remains solely liable on the original insurance and alone has any claim against the reinsurer." Paragraph 324.

The same author defines double insurance. This he states—

"Takes place when the assured makes two or more insurances on the same subject, the same risk, and the same interest. It is therefore a totally different thing from a reinsurance, which, as we have seen, is effected by the underwriter to secure himself from having to pay a loss."

This doctrine is otherwise expressed in Angell on the Law of Fire Insurance, par. 83:

"We have seen that a person by becoming an insurer of property thereby acquires an insurable interest in it, so that he may protect himself against the consequences of the risk he has been induced to assume by an insurance against it, which is termed a reinsurance."

Said Mr. Justice Sandford in *Hone et al., Receivers of the American Mutual Insurance Company, v. Mutual Safety Insurance Company*, 1 Sandf. 137:

"For more than two centuries, the contract of reinsurance has been well known, and its principles firmly established; and we have not met with a single treatise or decision which deviates from the uniform doctrine maintained on the point in question. * * * The contract of reinsurance is described as a contract of indemnity to the party obtaining it, and in all the modern treatises such indemnity is explicitly declared to be the whole sum reinsured."

It is, however, insisted by the proctors for respondent that this is not a total loss; that the loss was partial, and for that reason there should be contribution between the libellant, who originally insured the whole bill of lading cargo, and the respondent, who reinsured that risk in the sum of \$25,000. It is clear, however, that the loss the Ocean Steamship Company incurred on its risk was its share of the general average, which amounted to \$31,000. Obviously, while this was but a partial loss as to the entire cargo, and a partial loss also as to the bill of lading cargo, it was more than a total loss on the wholly distinct policy of reinsurance.

It is further insisted by the proctors for respondent that, since this is a case of marine insurance, the loss is determinable by the rule quoted from Hughes on Admiralty, *supra*. But, although marine insurance, it is a case of reinsurance, and, says Angell on the Law of Fire Insurance, par. 83: "In this particular [that is, reinsurance] no difference exists between marine and fire insurance. In neither case is it a wager, and in both cases the first insurer becomes entitled to a complete indemnity." This proposition is fully sustained by the cases cited by proctors for libellant in the argument and on the brief. *Hone v. Mutual Safety Insurance Co.*, 1 Sandf. 137, affirmed in 2 N. Y. 236; *Insurance Company v. Insurance Company*, 38 Ohio St. 11, 43 Am. Rep. 413. This was a case of marine insurance. *Merry v. Prince*, 2 Mass. 176. This was also a case of marine insurance, and the reinsurance was less than the original insurance. It was not questioned but that the first insurer might recover from the reinsurer the full amount of the loss. See, also, *Blackstone v. Alemannia Fire Insurance Co.*, 56 N. Y. 105; *Illinois Mutual Insurance Company v. Andes Insurance Company*, 67 Ill. 362, 16 Am. Rep. 620.

It has been even held that the party reassured is entitled to recover

not only the entire loss sustained by him, but also costs and expenses which he reasonably and necessarily incurred to protect himself from that loss, and to entitle him to a recovery against the reinsurers. *N. Y. St. Marine Insurance Co. v. Protection Insurance Company*, 18 Fed. Cas. 160, 1 Story, 158. See, also, *Hastie v. De Pyster*, 3 Caines, 191; *Herckenrath v. Amer. Mutual Insurance Co.*, 3 Barb. Ch. 63; 11 Am. & Eng. Ency. Law, p. 344; 1 Arnould on Marine Insurance (7th Ed.) § 324.

Then, since it appears that this was a fire loss, especially protected by the policy of reinsurance, and that the Ocean Steamship Company has been obliged to pay an amount of loss greater than that reinsured by the policy of the *Ætna Insurance Company* under review, the libellant is entitled to be fully indemnified to the amount stipulated in that policy, and a decree accordingly may be taken.

THE DORCHESTER.

THE THORNHILL.

(District Court, D. Maryland. July 2, 1902.)

1. COLLISION—EVIDENCE—TESTIMONY OF OPPOSING CREWS.

In collision cases, courts of admiralty incline to accept the statements of a crew as to the movements on their own vessel, rather than the statements coming from the crew of the other vessel.

2. SAME—STEAM VESSELS CROSSING—VIOLATION OF RULES.

The steamers *Dorchester* and *Thornhill* came into collision in Chesapeake Bay on a clear night. The *Dorchester* was going down the bay on a course E. of S. until she rounded a point on the west shore, when she would naturally change her course to one W. of S., on which she would meet the *Thornhill*, which was coming up on a course E. of N. The *Thornhill's* red light had been seen for some time on the *Dorchester's* starboard bow, but as the latter swung to starboard on passing the point she saw the *Thornhill's* green light, and changed her helm to hard starboard. Shortly after, the *Thornhill* gave a signal of one blast, and ported her helm; but after a little delay the *Dorchester* gave three blasts, and continued under starboard helm. At this time the vessels were quite close, and both reversed, but the collision followed. The evidence from the *Thornhill* showed that she did not change her course until she gave the signal and went to starboard; the *Dorchester* at that time being almost directly ahead, and showing both lights. *Held*, under the evidence, that the *Dorchester* had apparently gone too far in passing the point, and crossed the course of the *Thornhill*, which accounted for seeing her green light; that the *Dorchester* was at fault for violating article 19 of the international navigation rules, which required her to keep out of the way, having the other vessel on her starboard hand, and pilot rule 1, by which it was her duty, on changing from a crossing to a meeting course, to keep the course to starboard, and, further, in failing to signal on changing her course; that the *Thornhill* was not in fault, her pilot having the right to rely on observance of the rules by the other vessel.

In Admiralty. Libel and cross-libel for collision.

This is a case of collision in the nighttime, with clear weather, between two steamers in the Chesapeake Bay, at a point about a mile and a half E. by S. from Smith's Point light. Shortly before the collision the *Dorchester*

¶ 1. See Collision, vol. 10, Cent. Dig. § 270.

had been proceeding down the bay on a course S. by E. $\frac{3}{4}$ E., and the Thornhill coming up on a course N. by E.

The case stated in the libel filed by the owners of the Dorchester is as follows: At 2:45 a. m. May 3, 1902, the red light and bright masthead light of a steamship were seen about 2 miles off, 3 points on Dorchester's starboard bow, and helm of Dorchester was put to port and very soon thereafter hard aport, when vessels were nearly 2 miles apart. The Dorchester continued hard aport, when it was discovered that the red light was shut in, and the green light appeared, bearing slightly on Dorchester's starboard bow. Then Dorchester's helm was changed from hard aport to hard astarboard, to turn her head away from the other steamer. Then a signal of one blast was blown by the other steamer, although she was showing green light to Dorchester. It would have been dangerous to change Dorchester's helm. So in reply Dorchester blew three danger signals, indicating that she could not comply with the signal of one blast, and her engines were reversed full speed astern. The helm of the Dorchester was continued hard astarboard, and her engines full speed astern, while the other steamer opened up her red light, having blown another signal of one whistle, to which the Dorchester replied with three short ones. In a short time the two vessels came together; the stem of the Thornhill striking the Dorchester on the starboard bow about 20 feet forward of the forerigging, at the same time careening the Dorchester over, and by the force of the blow throwing her off from the other ship. Shortly afterwards the port bow of the Thornhill and the starboard bow of the Dorchester came in contact, but the force of the blow was comparatively light.

The case stated in the answer and cross-libel on behalf of the Thornhill is as follows: May 3, 1902, the Thornhill was proceeding at a moderate speed up the Chesapeake Bay, bound to Baltimore from New Caledonia with a cargo of ore; duly licensed Chesapeake Bay pilot, properly officered and manned, and lights properly burning. Her second officer was on the bridge with the pilot. Lookout on forecastle head. When Thornhill was $2\frac{1}{2}$ miles below Smith's Point light, at about 2:30 a. m., a steamer's white masthead light was observed between 1 and 2 points on Thornhill's port bow, and about 5 or 6 miles off. A few minutes later a green light was seen bearing a little closer on the port bow. The Thornhill continued her course and speed, and the other vessel continued to show her green light, which gradually drew ahead of the Thornhill, until suddenly, and without blowing any single blast signal of her whistle, the other vessel opened her red light, and showed both her side lights ahead of the Thornhill. The Thornhill's helm was at once put to port, and one short blast signal was blown on her whistle. As this signal was not answered by the other vessel, the Thornhill's helm was put hard aport. Very shortly thereafter the other vessel shut out her red light, showed her green light alone again on the Thornhill's port bow, and at the same time blew three short blasts on her whistle. The Thornhill immediately sounded a further single blast signal, reversed her engines, and sounded three blasts on her whistle. That owing to the wrongful maneuver of the other vessel in starboarding her helm, a collision had been rendered inevitable, and the vessels came together shortly afterwards: the bluff of the Dorchester's starboard bow striking the stem of the Thornhill with great force and doing great damage. The time of the collision was between 2:50 and 2:55 a. m.

Daniel H. Hayne and Robert H. Smith, for the Dorchester.

T. Wallis Blakistone and Convers & Kirlin, for the Thornhill.

MORRIS, District Judge (after stating the facts). When the steamers were 5 miles apart, the Dorchester was about 3 miles above Smith's Point light, and the Thornhill about 2 miles below, and in rounding the light both steamers would normally make a change of course of about a point and a half to westward. Before making the change the vessel going down would exhibit her green light to the vessel coming up, while the latter would exhibit her red light to the former. The speed of the Dorchester was about 13 miles an

hour, and the Thornhill's speed hardly more than half as much; at the most, not exceeding 8 miles an hour over the ground.

So far as I have been able to judge of the witnesses examined in court, nothing appeared to discredit any of them as intentionally testifying falsely. In considering their testimony and the allegations of the libels, it is necessary to endeavor to account for the conflict between the contention on behalf of the *Dorchester* that the *Thornhill* starboarded her helm and changed her course to westward, so as to shut in her red light and exhibit her green, and the testimony of those on the *Thornhill* that she never starboarded her helm at any time. This is a proper case for the application of the rule that courts of admiralty incline to accept the statements of a crew as to the movements on their own vessel, rather than the statements coming from the crew of the other vessel. I think that all the witnesses on both sides have more or less exaggerated the distances between the approaching vessels, and increased their bearings from each other, but otherwise I discover no reason for discrediting them; and I find that I am obliged to adopt the suggestion of the *Thornhill's* proctor that in making the turn the *Dorchester* overran and crossed the course of the *Thornhill*, and got to the eastward of that course. This would account for the green light of the *Thornhill* coming into view to those on the *Dorchester*, and her red light fading out; and it would account for both of the lights of the *Dorchester* coming into view to those on the *Thornhill*, as they testify they did.

Against the contention that the appearance of the *Thornhill's* green light was owing to her starboarding her helm, there is not only the testimony of all her witnesses who were in a position to know, but there is the fact that the *Thornhill* blew one whistle, heard by the *Dorchester*; indicating that she was porting her helm, and directing her course to the starboard. It is very obvious that the distance is not correctly given in the libel of the *Dorchester*, where it is stated that her helm was ported, and very soon hard aported, when the vessels were two miles apart, and continued hard aport; for a hard aport helm would have carried the *Dorchester* off eight points in going five or six times her length, whereas her witnesses say she went off only two or three points from her original course. I think it is obvious that when the *Dorchester's* helm was put hard aport the vessels were quite close together, and it is a very reasonable explanation of the facts testified to that she had continued her eastward course until she had run across the course of the *Thornhill*. This miscalculation may have resulted from the speed of the *Dorchester* being so much greater than that of the *Thornhill*, and the speed of the *Thornhill* being less than the usual speed of a steamer. The *Lepanto*, 1 C. C. A. 503, 50 Fed. 234-236, was a case quite similar in its facts, under which a similar mistake was made. In the locality in which she was, it would be the usual course of navigation for the *Dorchester*, when she had run out her S. by E. $\frac{3}{4}$ E. course far enough to the eastward to clear Smith's Point shoals, to port her helm and haul down on a S. by W. course. This, it would appear from the testimony of her navigator, was what she was proceeding to do. Having ported her helm with the *Thornhill's* red light still

in view, she would have passed the Thornhill port to port. What disturbed her navigator was, as I think appears, that he had gone so far to the eastward before porting that he brought the Thornhill's green light in view, and erroneously concluded that the Thornhill had starboarded and was about to cross his proposed course; and although the Thornhill blew a signal of one whistle, indicating it was not her intention to starboard, but to port her helm and to go in the opposite direction, the Dorchester had, upon seeing the green light, put her helm hard astarboard, and, when she got one whistle, deemed it too great a risk to change her helm again, and so continued hard astarboard, with the result that, although both vessels reversed their engines, they collided.

I think it apparent that the Dorchester was in fault. At the first she had the Thornhill on her starboard side, and was bound to keep out of the way, and to do it in such wise as not to embarrass and confuse the pilot of the other vessel. What she did, apparently, was, when directly ahead of the Thornhill, and quite close, she made two changes of course. First she ported, opened up her red light, and showed both her lights nearly directly ahead of the Thornhill, leading those on the Thornhill to infer that she was changing to starboard intending to pass the Thornhill on the port side, as she quite naturally might have been expected to do, and then she suddenly changed her helm from hard aport to hard astarboard. Moreover, as the vessels were approaching each other so as to involve risk of collision, and the Dorchester was changing her course from a crossing to a meeting course, it was her duty to have signaled. It is very evident that if the Dorchester, when she determined to pass the Thornhill port to port, had signaled, then all uncertainty about the maneuvers of both vessels would have been settled, and there never would have been any collision. When the Dorchester determined to change the situation from crossing to meeting, then pilot rule No. 1 declares it shall be the duty of each to pass to the port side of the other, and of this change of duty the Dorchester should have given notice by signaling. If the Dorchester's change of course was really made with reference to the Thornhill, it is difficult to understand why she did not signal, except upon the supposition that, from the appearance of the Thornhill's lights, they took her to be much farther off than she really was.

It is more difficult to determine whether the Thornhill was also in fault. The testimony of those on the Thornhill is substantially that the Thornhill kept her N. by E. course until the Dorchester opened her red light, and they saw both her side lights right ahead, or nearly so; that, seeing both lights, the Thornhill ported and blew one whistle; that the Dorchester did not answer at first, but she shut in her red and showed only her green again, and blew three whistles; that the Thornhill, having got quite a swing under her port helm, blew one whistle again, and in a few seconds her engines were reversed and she blew three blasts, and the Dorchester blew three blasts again. Some consideration in judging of the acts of the pilot of the Thornhill should be given, I think, to what he naturally and reasonably expected the Dorchester would do, which was, in fact,

the very thing which the navigator of the *Dorchester* testifies he did intend to do. It was to be expected that the *Dorchester*, when she reached a point abreast of Smith's Point Light, would haul down from a course E. of S. to a course W. of S., and in doing this she would pass the *Thornhill* on the westward or port side. Those on the *Thornhill* heard no signal, but they saw the *Dorchester*, when she had drawn nearly directly ahead, open her red light and exhibit both her side lights. This was an indication of the expected change of course. It was a change intended by the navigator of the *Dorchester*, and was made in pursuance of his intention to pass the *Thornhill* port to port, and because, as he testified, he thought it was his duty to port. The pilot of the *Thornhill* so understood and accepted it, and blew one blast to announce his acceptance, consent, and understanding; and in obedience to rule 1, and to assist in the maneuver, he put his helm to port. Just about this time the *Dorchester*, without any fault on the part of the *Thornhill*, so far as the proofs disclose, saw the *Thornhill's* green light, and ordered the *Dorchester's* helm hard astarboard. Why it was the navigator of the *Dorchester*, when he heard the one blast signal from the *Thornhill*, should have kept his helm hard astarboard, it is difficult to comprehend. He had just been under a hard aport helm, and his ship could not have got much swing to the eastward. And it is manifest, if the vessels were so close that the *Dorchester* could not change back to the westward, it would be still less possible for the *Thornhill*, which had been all along moving to the eastward. It being the duty of the *Dorchester* when she showed both her lights ahead of the *Thornhill* to pass to the port, and her navigator having so understood her duty, and intended to perform it, what was the duty of the *Thornhill*? Clearly, it was her duty to proceed upon the assumption that the *Dorchester* would do her duty and obey the rule, until it became reasonably certain that she would not do so. *The Delaware*, 161 U. S. 459-469, 16 Sup. Ct. 516, 40 L. Ed. 771; *The America* (C. C.) 37 Fed. 813; *The Victory*, 168 U. S. 412-426, 18 Sup. Ct. 149, 42 L. Ed. 519; *The Thingvalla* (D. C.) 42 Fed. 331-333; same case on appeal, 1 C. C. A. 87, 48 Fed. 765-768. The pilot of the *Thornhill* could not tell at what moment the *Dorchester* would obey the rule and return to her course to the westward, and he was justified in proceeding upon the presumption that she would so long as there was reasonable time and space for her to do so, or until she gave a signal indicating that she did not intend to. This she did by blowing three blasts, and thereupon the pilot of the *Thornhill* performed his duty by reversing his engines and blowing three blasts in reply. In such a situation, the evidence to establish fault on the part of the *Thornhill* should be clear and convincing. *The Victory*, 168 U. S. 410-423, 18 Sup. Ct. 149, 42 L. Ed. 519; *The North Star* (D. C.) 108 Fed. 444; *The Livingstone*, 51 C. C. A. 560, 113 Fed. 879-881.

It is urged that, if the *Thornhill* had kept her course, there would have been no collision, and that she is therefore in fault; but, when the *Dorchester* showed both her lights directly ahead of the *Thornhill*, the only reasonable inference was that she was changing her course in order to pass the *Thornhill* port to port, and the pilot of the *Thorn-*

hill acted upon that situation, which made rule 1 applicable, and made it his duty to port. When he heard the signal of three whistles from the Dorchester, he reversed his engines, and responded with three whistles. I see nothing in the testimony to show that he did not act with reasonable promptness and skill, and the character of the blow and of the injury tends to support the testimony that the Thornhill had very little headway at the time of the collision.

I hold that the Dorchester was solely in fault.

CITY OF DURHAM v. SOUTHERN RY. CO.

(Circuit Court, E. D. North Carolina. February 16, 1903.)

1. RAILROAD RIGHT OF WAY—ABANDONMENT—EFFECT OF CONVEYANCE.

If a conveyance by a railroad company of a portion of its right of way to another company be regarded as an abandonment of its easement, such abandonment can only be taken advantage of by the owner of the fee, and cannot avail a city which claims the land for public purposes through a dedication made by a lessee of the railroad company.

2. SAME—ADVERSE POSSESSION—OCCUPATION BY CITY.

Possession by a city of land constituting a part of the right of way of a railroad, under a dedication made by a lessee of the road, can give the city no rights as against the lessor after the lease has terminated, nor can it acquire any such rights by adverse possession in any case under Code N. C. § 150, which provides that no railroad company shall be barred by limitation of its title or right in any right of way by reason of its occupation by another.

In Equity.

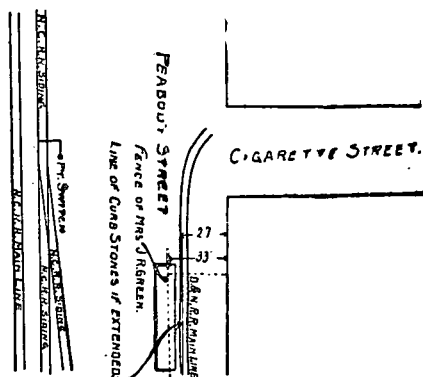
J. S. Manning, R. W. Winston, J. Crawford Biggs, and W. H. Day, for complainant.

Fab. H. Busbee, Charles A. Price, and W. A. Henderson, for defendant.

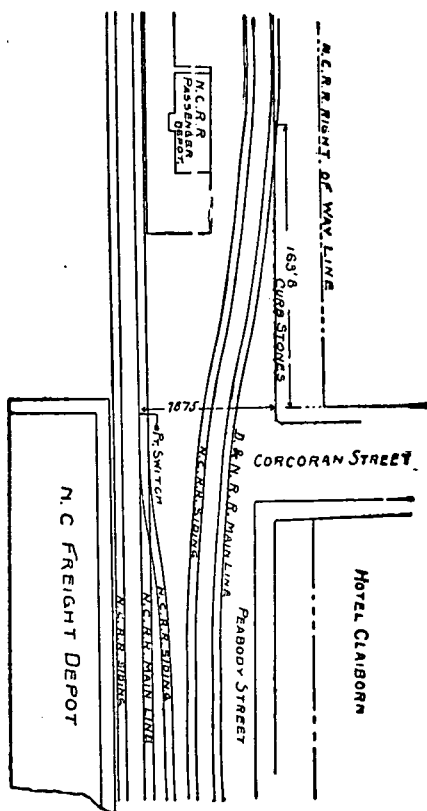
PURNELL, District Judge. Complainant commenced its action in the superior court of Durham county on July 11, 1899, and filed a complaint, which, after formal allegations of corporate existence, etc., alleges that it, the city of Durham, is the owner and entitled to the possession of a certain strip of land on the north side of the North Carolina Railroad, a part of what is designated and known as "Peabody Street" in the city of Durham, N. C. The form of the pleading is similar to an action of ejectment, but there is no objection to the form of the pleadings, nor was there any serious discussion in the argument as to such form, whether it is an action in ejectment, or plaintiff claiming possession in an action to remove cloud upon title or restrain a threatened trespass, etc., but all were incidentally discussed; technical objections being waived, and a disposition by all to present the real question at issue. Plaintiff claims to be rightfully in possession of the locus in quo, a strip of land on the north side of the right of way of the North Carolina Railroad Com-

¶ 1. Abandonment or forfeiture of railroad right of way, see note to Townsend v. Railroad Co., 42 C. C. A. 576.

pany, about 32 feet wide, and extending from Roxboro street to Cigarette street, now used by another railroad company as a right of way. This will be better understood from the plat hereto attached and exhibited.



IMMATERIAL PARTS OMITTED



The Southern Railway Company answered, and sets up several defenses. By stipulation of counsel records were admitted and used as evidence in lieu of depositions taken in the usual form, which cause, being set down for hearing, was argued. From the pleadings and records used, eliminating what is not regarded as essential, the following chronological statement of facts only is necessary to understand the contentions, though many others were referred to in the argument:

(1) In 1852 the North Carolina Railroad was chartered by act of the Legislature, and soon thereafter built. Exactly when the track on the land now Peabody street, in the city of Durham, was laid, or the right of way thereon acquired, does not appear, but probably about 1854. There was no city or town of Durham at that time, and the land now the right of way was woods, old field, or a road. There were no conveyances, condemnation proceedings, or other evidence of how this right of way was acquired, but it is stated to have been under section 29 of the charter (Act 1852), which reads as follows:

"That in the absence of any contract or contracts with said company, in relation to lands through which the said road or its branches may pass, signed by the owner thereof or by his agent, or any claimant or person in possession thereof which may be confirmed by the owner thereof, it shall be presumed that the land upon which the said road or any of its branches may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the said company by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same may be used for the purposes of said road, and no longer, unless the person or persons owning the said land at the time that part of the said road which may be on the said land was finished, or those claiming under him, her or them shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of the said road, which may be on said land was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply within two years next after the said part was finished, he, she or they shall be forever barred from recovering said land or having any assessment or compensation thereof: provided, nothing herein contained shall affect the rights of femes covert or infants until two years after the removal of their respective disabilities."

(2) In 1871, the North Carolina Railroad Company leased for a term of 30 years all its property, franchises, etc., to the Richmond & Danville Railroad Company, which lease was adjudged by the Supreme Court of the state to be valid.

(3) In 1889 complainant herein commenced an action in the superior court ("Chatham County Case") against the North Carolina Railroad Company and the Richmond & Danville Railroad Company for a purpose similar to the one at bar, in which suit a judgment was rendered in favor of the North Carolina Railroad Company against the city (the town of) Durham, and in favor of the city of Durham against the Richmond & Danville Railroad Company. The gist of this judgment was that the Richmond & Danville Railroad Company had dedicated the strip of land to the city of Durham and the public as a street, and an injunction was entered restraining the Richmond & Danville Railroad Company from trespassing thereon

with its tracks or otherwise. The jury having found the issues submitted in favor of the North Carolina Railroad Company, judgment was entered in its favor "that it go without day, and recover its costs," etc. This judgment was at fall term of Durham superior court, 1891, after the cause had by appeal been to the state Supreme Court. These judgments were based upon findings of fact by the jury upon issues submitted to them that the town (now the city) of Durham did not, in pursuance of the provisions of its charter, condemn for use as a street the strip of land known as "Peabody Street;" that the town (now city) of Durham and the public had not for 20 years prior to the beginning of the action (June 17, 1889) had the exclusive use and occupancy of said street with the knowledge and acquiescence of defendants (the North Carolina and Richmond & Danville Railroad Companies); that the Richmond & Danville Railroad Company had, but the North Carolina Railroad Company had not, dedicated to the plaintiff, the town (now the city) of Durham, and the public the land described in the complaint for the purposes of a street; that the Richmond & Danville Railroad Company was, after the commencement of the action, unlawfully invading the possession of the plaintiff, "the town (now city) of Durham."

(4) Pending this suit the Oxford & Clarksville Railroad Company commenced proceedings of condemnation under the provisions of the Code against the Richmond & Danville and North Carolina Railroad Companies; and while the injunction of the state court was in force restraining the Richmond & Danville Railroad Company from trespassing, etc. (pending these proceedings), others of like import were commenced by another railroad (the Durham & Northern), and by action of the municipal officers of the city of Durham permission was granted for it, the Durham & Northern Railroad Company, to lay and construct its tracks on the locus in quo, Peabody street, from Roxboro to Cigarette street, which tracks were laid; and to obtain a right of way on Peabody street over the right of way of these roads, one as lessor and the other as lessee. On the 29th of March, 1890, the North Carolina Railroad Company, for a consideration of \$5,000, executed a deed to the Oxford & Clarksville Railroad Company for the right of way sought to be condemned, and the Richmond & Danville Railroad Company, for a consideration of \$5, executed a deed of similar import.

(5) Afterwards the Oxford & Clarksville Railroad was sold, with all its franchises, etc., under a decree of court, and purchased by the Southern Railway Company, which sale was duly confirmed.

(6) In 1895, the North Carolina Railroad Company leased for a term of 99 years all its property, franchises, etc., to the Southern Railway Company, incorporated and organized under the laws of Virginia, which had previously acquired the rights, etc., under the lease to the Richmond & Danville Railroad Company (1871). This lease (1895) in its terms provides that the lease of 1871 shall terminate at 12 o'clock at midnight on September 11, 1895, but it has been held this lease of 1895 was an extension and renewal of the lease of 1871.

The statute law of North Carolina is ample for the purposes of

invoking the exercise of eminent domain in the condemnation of land for public streets by municipal authorities. There is not only no evidence of such proceedings ever having been taken by the complainant, but it is admitted in the argument that no such proceedings have ever been instituted. It appears by the judgment of the state courts (1891) that the city of Durham at that time was in possession of the locus in quo by a dedication made to it and the public by the Richmond & Danville Railroad, and under no other claim. This was a judgment by a court of competent jurisdiction, which judgment is binding not only on the parties to the suit, but on this court. The judgment provided that the city of Durham had no claim or possession of the locus in quo as against the North Carolina Railroad Company. The consideration of the case must, therefore, start from this point, and, unless the North Carolina Railroad Company has done some act since this judgment was entered, the city has no right to possession as against this corporation.

An examination of section 29 of the charter above cited does not justify the narrow construction contended for by counsel. While this court is not called upon to construe this section, except as germane to a decision of this case, a broader construction would seem to be a presumption to vest in the North Carolina Railroad Company not only an easement to terminate when the right of way ceased to be used, but a right to use that easement or right of way indefinitely. The section provides "it shall be presumed that after two years the space of 100 feet on each side of the center of said road has been granted to the said company by the owners thereof and the said company shall have good right and title thereto." But, conceding this was a mere grant, by operation of the statute, of a right of way as long as it shall be used by the railroad company as prescribed, and "no longer," no one could avail themselves of a reversion except the original owner or owners. It is contended that the deed from the North Carolina Railroad Company to the Durham & Northern Railroad (4) is an abandonment of this right of way by the North Carolina Railroad Company, and this seems to be the only evidence of an intention of an act on the part of this corporation since the judgment of the state court in 1891 which affects this right of way. This contention presents some interesting questions of law for which high authority is cited; among others, the opinion in *Newton v. Mfg. Ry. Co.* (C. C. A.) 115 Fed. 781, but that was a suit by the owner of the fee. It was under the laws of Ohio for land condemned for park purposes, and it was held that this was a limited easement, and on the abandonment of such easement the land reverts to the owner from whom it was granted, or his successor in title; and the gist of the opinion is that on the condemnation of the right of way for a railroad company across the park it was imposing upon the fee an additional easement or burden, for which the owner, and not a third party, is entitled to compensation. The authorities sustaining this position are ample, but the decision is not applicable to the case at bar. If the owners of the fee or their successors in title were making a claim, it would present an entirely different question from that here involved. Here the city

of Durham is attempting to stand in the shoes of the original owners or their successors in title, without evidence of a right to do so, refusing or neglecting to avail itself of ample provisions of law for condemnation proceedings, and attempting to make permanent as against the North Carolina Railroad Company by suit what it held by dedication, under the judgment of the state courts, by its lessee of the owner of the right of way, against whom the state court held it had no right of possession. The court is urged to decide whether the lease of 1895 was a new lease or an extension of the lease of 1871. This is not essential, and can have no bearing in the determination of the controversy in this suit. The complaint asked for an injunction against threatened "trespass" after the termination of the lease of 1871, to wit, 1901. Whether this lease—the 30-year lease of 1871—was extended by the lease of 1895, or whether it terminated on the execution of that lease, can make no difference. The rights acquired by third parties under the Richmond & Danville Railroad lessee would terminate with the end of that lease, and that lease has certainly now terminated by limitation. The Southern Railway Company is in possession of the property of the North Carolina Railroad, together with all its rights and franchises, under the lease of 1895, and by no other authority. The six years from September 11, 1895, to September 11, 1901, whether an extension of the old lease or a new lease, would not affect rights acquired by third parties under the former lease; but for all purposes the lease of 1871 is now dead, and the Richmond & Danville Railroad Company eliminated; rights acquired under it terminated, and new rights acquired. So, whatever dedication was made by the Richmond & Danville Railroad Company terminated with the lease, whether that was in 1895 or 1901. The North Carolina Railroad Company at one or the other of the dates (and it can make no difference) was revested with whatever title or claim or right it had in and to the property on the termination of the lease. The claim of the city of Durham being, as has been seen, under a dedication by the Richmond & Danville Railroad Company, and the injunction issued in the Chatham county suit, it was a limited possession, and in no way affected the rights of this corporation, the North Carolina Railroad Company. No statute of limitations would run during this period, nor would a plea of the statute be available. The possession was not adverse, but by virtue of the injunction and said limited dedication; and section 150 of the Code of North Carolina provides:

"No railroad, plank road, turnpike or canal company, shall be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which may have been condemned, or otherwise obtained for its use, as a right of way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever."

Discussing this section, the Supreme Court of North Carolina, through its chief justice, has said in *Railroad Co. v. McGaskill*, 94 N. C., at page 754:

"The statute does not require the occupation and direct use of every foot of the condemned area for building embankments and the like, but pre-

serves the property in the company so long as the road runs over the land and is operated by the company. A permissive use of it by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances would be a needless and uncalled for injury."

Great stress is laid on the deed from this corporation, the North Carolina Railroad Company, to the Oxford & Clarksville Railroad Company as evidence of an intention of abandonment of the right of way. As has been said, if this be true, it is a condition of which the owners of the fee alone can take advantage; and, if this be evidence of an intention of abandonment, it is equally true that the grant from the municipal officers of the city of Durham to the Durham & Northern Railroad Company to use Peabody street as a right of way is also evidence of an intention of abandonment of whatever easement for a street the said city might have had on this land. In short, it is a principle the application of which cuts both ways; and the North Carolina Railroad Company, having had a previous right of way over the land, would be in a better position to claim abandonment on the part of the city. Whether this deed be evidence of abandonment or not presents interesting legal questions, which this court does not feel called upon to decide. It is neither germane nor essential to a determination of the cause at bar, for, as before said, if it is evidence of an intention to abandon, the city of Durham is not in a position to take advantage of it, either by being the owner of the fee, condemnation proceedings, or in any other way. True, the city has expended funds in the improvement of Peabody street, possibly before and since the judgment of the state court in 1891; but it did so with full knowledge of its claim of possession and when the same would terminate.

The form of the action was admittedly defective in this as a court of chancery, but, as counsel have argued the case on its merits, it should be so decided, and is so considered without adverting to mere form or technical objections not raised or pressed on the hearing or by motion to reform the pleadings. There is no evidence of a threatened irreparable wrong, or the absence of an adequate legal remedy.

For the reasons hereinbefore stated, and others moving the court, it is considered, ordered, adjudged, and decreed that the bill, complaint as originally filed, and all proceedings subsequent thereto and thereunder be dismissed; that the injunction herein be vacated and dissolved; and the city of Durham pay the costs to be taxed by the clerk of this court. A final decree will be entered to this effect, and the case is held for the assessment of damages incurred by reason of the issuance of the injunction herein, and for no other purpose.

THE TROY.

(District Court, W. D. New York. June 25, 1902.)

1. SEAMEN—PERSONAL INJURIES—LIABILITY OF SHIP.

Libelant, a deck hand on a lake steamship, while paying out the bowline to make fast to a dock, had his leg caught in a kink of the hawser and crushed off by being drawn to the bitts before he could be rescued. He was acquainted with the work and with the surroundings, and another man was assigned to the work with him, which was shown to be the usual number on vessels having a steam windlass, as this one had. The evidence failed to sustain libelant's allegations as to insufficiency in the equipment of the vessel, the unsuitableness of the place where he was working, or any shortage of hands, and no negligence on the part of the owners or master appeared. *Held*, that on such facts the ship was not liable for the injury, whether it occurred from a risk incident to libelant's employment, and which was therefore assumed by him, or through the negligence of a fellow servant.

2. SAME—INJURY IN SERVICE—RIGHT TO CURE AT EXPENSE OF SHIP.

A seaman who is injured while in the service of the ship without fault on his part is entitled to be cured, so far as that is possible, at the expense of the ship; and in a suit by him in a court of admiralty to recover damages for the injury, in which it is determined that the ship is not liable, it is competent for the court, under a prayer for general relief, to award him compensation for the failure of the ship to furnish him proper support, medical attendance, nursing, and care while his wounds were healing, and for the additional suffering he endured for lack of such attendance and care.

In Admiralty. Action by seaman to recover damages for personal injury.

Alfred C. Scheu, Donald Bain, and Charles A. Dolson, for libelant.
George Clinton and Maurice C. Spratt, for respondent.

HAZEL, District Judge. This is a libel against the steamship Troy to recover damages for injuries sustained by libelant, an ordinary seaman, while in the employ of the libeled vessel on July 13, 1900. The vessel was then at Duluth, Minn. This was not the first trip of libelant on the steamer Troy as deck hand. He shipped in that capacity for one trip during the season of 1898. He was well acquainted with the manner of handling lines on board of lake propellers. He handled the bowlines of the Troy several times on the day preceding the injury, and was well acquainted with the surroundings in that part of the ship where the bowline was used. At the time of the accident he was in the performance of his duties, under the immediate orders of the mate. He was engaged in paying out a coil of rope to moor the vessel to the dock. While performing that duty he suffered a most unfortunate accident: he lost his leg in a most shocking manner. Libelant and another seaman, named Moxie, who was not produced as a witness by either party, had charge of the bowline in the forecastle. Suddenly libelant was caught in a bight or kink of the hawser handled by him, and by force of the line moving through the chock was violently drawn to the bitts. He cried out in alarm. The captain rapidly directed the use of an ax, but before assistance availed the swiftly moving line had crushed and torn off his leg above the knee. It is claimed for libelant that he is entitled to damages for the following reasons: First, in-

sufficient number of men to navigate the vessel; second, defective condition of the rope, known to the owners; third, approaching dock at too great rate of speed; fourth, improper and unsafe place to pay out the line. The proofs disclose that the Troy, commanded by Capt. Gillies, and a crew of 24 men, left the port of Buffalo for the port of Duluth on the 7th day of July, 1900. An extra cook and waiter were engaged on account of passengers on board. The complement of men who were charged with the navigation of the ship consisted of the captain, two mates, two wheelmen, four deck hands, two engineers, two firemen, two oilers, besides two cooks and a porter. The Troy is a large modern steel vessel of 5,400 tons, 402½ feet in length, 45½ feet beam, and 28 feet deep. She uses a modern steam windlass, and in making fast employs both bow and stern line. She shifted from one dock to another on the first day of her arrival at Duluth. Libelant handled the bowline. On July 13, 1900, at noon, she moved from the Union Pacific dock to slip 1, and then to slip 2, near by. To make the required maneuver she reversed at half speed under a proper helm for a distance sufficient to make a turn, and checked down preparatory to moving slowly under starboard wheel toward the dock. She used no excessive speed in approaching the dock. On account of the undertow the vessel was carried a short distance from her course, and to avoid colliding with docks and craft moored in slip 2 it became necessary to cast out a bowline to make her fast. The mate stood on the forecastle deck and gave directions through a speaking tube to the men in the forecastle below as to the manner of paying out the line. The preponderance of the evidence shows the speaking tube to have been in good condition. It extended from and through the forecastle deck down to within a few feet of where libelant was at work. Libelant testifies that at the time of the injury he alone handled the hawser, as the seaman who was detailed to aid him was inexperienced and of no assistance. The main theory upon which libelant rests is that the crew employed by the Troy was insufficient, and that to perform the work of paying out the line safely three seamen should have been assigned to that duty, one to pay out the line, another to straighten it, and the third to receive and interpret the directions of the officer in charge. The libelant testifies that the speaking tube failed to carry the sound of the mate's voice, and it was therefore necessary that his fellow deck hand should listen for orders at the port-hole. This, libelant claims, rendered the complement of men assigned to this hawser short-handed; the work being of unusual danger and hazard on account of the kinks and tangles in the line. The rope was uncoiled on the deck, and had become somewhat stiff and hard. The mate testified that on account of the vessel shifting as she did from dock to dock there was not enough intervening time to straighten out the line prior to the accident. This appears to be a reasonable explanation of its uncoiled and tangled condition. The testimony of respondent establishes that, in vessels fitted with a steam windlass such as was used by the Troy, two deck hands are customarily required in the exercise of proper care to manipulate the line used to make the vessel fast. The libelant states on this point that it always took two men to handle the rope, besides a man to pass the orders; sometimes

the watchmen gave a helping hand, sometimes others; that the deck hand Moxie assigned to help him did not help at all. He listened with head out of the porthole for orders of the mate, who stood on the fore-castle deck. Witness Andrews testifies that "two men could handle the line nicely,—two men in addition to a man taking orders at the porthole; three men handle it pretty nicely." Witness Miller, for libellant, says in using a five or six inch line three men are required to handle the forward line on such a ship as the Troy,—one to slacken off and make turns at the timberhead, another to take out kinks so as to keep the line clear, and a third to repeat the directions of the officer in charge. The evidence on the part of the respondent, however, fairly preponderates, and is to the effect that two deck hands are sufficient to handle the forward lines of the Troy, and that never more than that number was assigned for that purpose. Expert navigators testified that it is customary for lake vessels having no steam windlass to use three deck hands to handle lines, but where a steam winch is employed no such necessity apparently exists. Counsel for libellant with great zeal and earnestness contend that the crew was insufficient to properly navigate the ship, and that the proximate cause of the accident was failure to comply with section 4463, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3045] by which it is provided that "no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full crew sufficient at all times to manage the vessel, including the proper number of watchmen." It appears from the certificate of inspection of the local inspectors of steam vessels that the Troy was required to carry a crew of 22. The certificate states as follows: She "is required to carry a full complement of officers and crew, consisting of 1 master, 2 pilots, mates, 2 engineers, 2 watchmen and 22 crew." It is insisted that the literal requirement of the certificate is that the Troy should carry a crew of 22 in addition to those specifically mentioned. The evidence of the local inspector, however, shows that the certificate of inspection issued on August 3, 1899, was erroneous. The true import of the certificate requires a crew of 22, including the master, pilots, engineers, and workmen. The witness Pope testifies that the numerals "22" on the certificate is a mistake, and that it should have been "15." It is further insisted that inasmuch as the certificate of the local inspectors required that the ship should carry 37 life preservers, and, as she was permitted to carry 12 passengers, it is clearly established that the ship was short in the number of her crew. This contention, however, seems to be fully explained by the local inspector Pope, who testified that at the time of the inspection she carried more life preservers than was necessary. She carried more than was required for the crew and passengers. The provision of the statute is complied with when a steam vessel carrying passengers shall be provided with life preservers sufficient for passengers and crew. Therefore the number of life preservers carried by her can be given no weight in considering the question of sufficiency of crew. The number in the certificate shows the actual number found on inspection, and not the minimum required. I think the evidence justifies the finding that the crew was in all respects sufficient to manage the vessel. Assuming

the accuracy of libelant's claim in that regard, it is not clear that any alleged insufficiency of crew was the proximate cause of the accident. The rope, though uncoiled and tangled, was not defective in a legal sense. It was stanch and strong, and fully answered the requirement.

That the libelant, by his acceptance of employment, assumed the ordinary risks attendant on the employment, does not need a citation of authorities. No claim is here made that the owner of the ship failed to use reasonable care toward the selection and retention of competent men to navigate the *Troy*. The ship, therefore, must be held free from fault if the injury occurred because of the negligence of a fellow servant. It is presumed that the owners of the vessel used due diligence in the employment of its officers and crew. The burden of proof of incompetency of officers or crew, therefore, is upon libelant to satisfy the court that the owners of the vessel failed in that regard. *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212; *Railroad Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *The Lydia M. Deering* (D. C.) 97 Fed. 971. The proofs as a whole satisfy me that the vessel was properly equipped, and, as already stated, sufficiently manned. The crew was ample to insure that the work necessary to be done by libelant could be safely performed. The case is a sad one, and any existing equities should be resolved in favor of the libelant. It does not appear that the accident could have been prevented except by a more careful performance on his part of the duties imposed on the deck hand assigned to assist libelant. It is not entirely clear that the accident occurred through any act of a fellow servant. Doubtless the omission of Moxie to handle the line contributed to it.

It is contended that the failure of the mate to direct the line to be untwisted and coiled before using it, or that the failure of the watchman to properly perform his duties, may have produced it. If the accident may be ascribed to the negligence of either one of these men, it nevertheless was the negligence of a fellow servant. Under such circumstances there was no negligence which could be charged against the vessel, and render her owners liable or responsible for any injuries suffered. *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; *The Ida B. Cothell*, 10 C. C. A. 634, 62 Fed. 765; *The Egyptian Monarch* (D. C.) 36 Fed. 773; *The City of Alexandria* (D. C.) 17 Fed. 390; *The E. B. Ward, Jr.* (C. C.) 20 Fed. 702; *Carlson v. Association* (D. C.) 93 Fed. 468; *The Luckenbach* (D. C.) 53 Fed. 662; *Red River Line v. Smith*, 39 C. C. A. 620, 99 Fed. 520; *Same v. Cheatham*, 9 C. C. A. 124, 60 Fed. 517.

The place provided by the vessel in which to perform the work was not unsafe or improper for the performance of work of this character. The proofs show that it rained on the morning of the day of the accident. At noon it cleared, and by the ship's log it appears that at about the time when libelant was injured the sun was shining bright. This would seem not to require an electric light in the forecabin. Steam from the winch was not escaping in such quantities as to obscure libelant's sight. I conclude that it is not seriously pretended that the escape of steam from the windlass in the forecabin contributed to the accident.

The libelant, therefore, was injured in the service of the ship, without fault, as I think, on his part. As before stated, he attributed the injury to the inexperience of the deck hand engaged with him in a common undertaking, and to the failure of the ship to provide a sufficient crew, as well as a suitable place wherein to safely perform the work. Respondent alleges that libelant was injured solely on account of his carelessness and negligence in handling the line. It is not clear that he was careless, or that he did any act not prompted by faithful and expeditious discharge of duty in obedience of orders. Under these circumstances, I think that the libelant is entitled to be cured at the expense of the ship. Under direction of the captain of the Troy, shortly after the accident, he was removed to a hospital in Duluth, and there received medical attendance. He remained there for three and a half weeks, when he was brought by the steamship Troy to Buffalo, his place of residence. He then went to the house of a friend. Subsequently he went to the Marine Hospital in Buffalo, and remained there for three or four days, when he returned to the house of his friend, where he has resided ever since. The captain of the Troy testifies that after libelant left the ship at Buffalo he paid no further attention to the matter. Libelant incurred an expense of \$75 for medical attendance at Duluth. No further care or attention was given him by the ship or its officers. He has suffered excruciatingly, and I think his sufferings were somewhat aggravated by failure to receive adequate medical attendance and care after his return home and during the healing of the wound. Prior to the accident he was strong, healthy, and vigorous. In the service of the ship he became crippled and helpless. It would seem to be peculiarly fitting for the application here of the doctrine announced in many cases in admiralty, that a seaman who sustains injuries in the service of a ship shall be cured at the expense of the ship. This libel was filed to recover \$10,000 damages by reason of the injuries sustained, and in the prayer for relief libelant requests such other and further relief as to right and justice may appertain, and as the court may be competent to give. The power is inherent in the court to give such relief as the peculiar circumstances of the case require. *The Lizzie Frank* (D. C.) 31 Fed. 481. It has been frequently held that by the maritime law a seaman may be cured at the ship's expense, and is entitled to his wages to the end of his voyage, even though the accident was due to ordinary negligence of the seaman. Judge Brown, in *The City of Alexandria*, supra, announced the doctrine as applicable to a case where the injury was sustained by the negligence of a fellow servant. Other well-considered cases have followed the principle reaffirmed by *The City of Alexandria*. In *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292, it is held that a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance, and to a cure, so far as a cure is possible, at the expense of the ship. This the respondent has failed to do. Its duty to the libelant was not ended by placing him in a hospital at Duluth, nor by carrying him to his home port. The ship was bound to take charge of and care for him until his wounds were healed. In the case of *The Atlantic*, Abb. Adm. 451, Fed. Cas. No. 620, the liability of a ship to its seamen when

injured in the service of the ship is ably considered by Justice Betts. He says:

"The term 'cure' was probably employed originally in the sense of taking charge or care of the disabled seamen, and not in that of positive healing. * * * To cure would involve impossibilities. * * * Thus broken limbs or bodily debility, resulting from services in the ship, are very often the sailor's heritage for the residue of his life."

In *Brown v. Overton*, Fed. Cas. No. 2,024, Justice Sprague says:

"A seaman disabled in the service of the ship is to be cured at the expense of the ship. To this his right is as perfect as to food or wages. It is incumbent upon the master to furnish means of cure, and use all reasonable exertions for that purpose."

In that case the ship was found blameworthy for failing to put in at St. Helena for the care and relief of a seaman who fell from aloft and broke both his legs. The ship was on her way from Calcutta to Boston. When the ship arrived at Boston no one paid any attention to the disabled seaman except to send him food from on shore. A few days thereafter it was proposed by the master to send him to the Marine Hospital, but at his request he was carried to the Massachusetts Hospital. The court held that failure to afford him medical attendance was an act of negligence on the part of the captain. A competent surgeon should have been called immediately, and suitable nursing and lodging should have been provided at the expense of the ship, either at the Massachusetts Hospital or elsewhere. It is true that the facts in the cases just cited are not strictly parallel to those presented by the case at bar. It is apparent, however, upon their examination, that the principle involved, which enjoins strict care upon the vessel to provide care for the seaman until a cure is effected, is clearly enunciated, and that that principle may be aptly applied to the present case.

No evidence is given on behalf of libellant from which the court may infer how soon his wound was healed after his return to Buffalo, nor whether he still required medicine and medical attendance; neither has any proof been offered tending to show the amount incurred for living expenses during the process of healing. Nevertheless I think that in view of the circumstances the libellant should be allowed, beside \$75, expenses incurred for medical attendance at Duluth, the sum of \$600 to cover his living expenses during the reasonable period in which he might recover, as well as to receive some compensation for the suffering which he undoubtedly has endured by reason of his not having such care and attention as the circumstances and nature of his injury required. *The Eva B. Hall* (D. C.) 114 Fed. 755.

Let a decree be entered awarding libellant the sum of \$675, with costs.

EDWARD THOMPSON CO. v. AMERICAN LAWBOOK CO.

(Circuit Court, S. D. New York. February 10, 1903.)

1. INFRINGEMENT OF COPYRIGHT—RECRIMINATION—MATERIALITY OF EVIDENCE.

In a suit for infringement of copyright, evidence that complainant had itself appropriated the copyrighted matter of third persons is immaterial.

2. SAME—LEGAL ENCYCLOPÆDIAS—APPROPRIATION OF LISTS OF CASES—WHAT CONSTITUTES INFRINGEMENT.

While the use of lists of authorities cited in a legal encyclopædia, as a guide to original research, is legitimate, the reprinting in a rival publication of such lists, which have been compiled by original labor, is an infringement of copyright; and it is immaterial that the citations reproduced are scattered through text and notes of the piratical publication.

Motion for a preliminary injunction to restrain the further publication and sale of volumes 1 and 2 of defendant's Cyclopædia of Law and Procedure, or of so much thereof as may be found to be an infringement of one or other of two publications copyrighted by the complainant, and known as "American and English Encyclopædia of Law, Second Edition," a rewritten work, of which 19 volumes were published when this suit was brought, and "Encyclopædia of Pleading and Practice," 21 volumes of which had been published when this suit was begun.

Walter Large and Frank P. Prichard, for the motion.
Augustus T. Gurlitz, opposed.

LACOMBE, Circuit Judge. A large part of defendant's affidavits and exhibits is devoted to supporting the contention that much of the matter contained in complainant's copyrighted books has been taken from other copyrighted books, principally digests. So far as the copyrights of the books thus drawn upon are owned by others than defendant, such evidence is immaterial. If the owners do not object to such use of their digests, their acquiescence may be taken to import a license. As to the digests which belong to the defendant, it would seem that the contention now advanced might more properly be made in a direct proceeding against complainant's publications, where the issue would be squarely presented. The circumstance that no such suit appears to have been brought is persuasive to the conclusion that infringement by complainant is, to say the least, doubtful. Moreover, the present application does not charge any pirating of the text of complainant's books; and it seems, therefore, unnecessary to enter into an examination of that text.

It frequently happens, when applications are made for preliminary injunction, that there is much conflict as to the facts, and it is wiser to postpone decision of the questions presented until the conflicting statements of affiants can be sifted by cross-examination. In the case at bar the situation is different. Ascertainment of the fundamental facts rests mainly on a comparison of the publications themselves, and a careful examination of the record presented shows that there is practically no dispute as to the transactions upon which complainant now asks for injunctive relief. In such cases the prin-

ciples of law applicable to those transactions may be stated as well now as they could be on a final hearing, may be reviewed, and probably time and expense may be saved by an early decision.

The competing publications are well-known. Each consists of a series of monographs on various subjects, such as "Accord and Satisfaction," "Actions," "Admiralty," etc., arranged alphabetically, with cross-references. These are written by various subeditors, assisted by a clerical force which gathers data for their use in writing the articles. The method of preparing such a work is thus described in complainant's brief:

"There is first gathered from the digests the cases found under a particular head in the digests, and these are arranged on cards or slips with the digest paragraph, name of case, etc. These slips are then given to the editor who is to write an article on that particular subject. This editor sends for the original reports of the cases and reads them. In the course of the examination of the reports he finds references to very many cases cited in the opinions which do not appear in the digest paragraphs, either because they have been overlooked, or because they would naturally appear under some other head in the digests, or because they relate to collateral matters proper to be cited by an editor in his constructive work of writing an article, but not proper to be included in a digest of direct decisions. Very many of the cases thus found and examined by the editor—probably a majority of them—will be rejected by him as not cases which should be cited in connection with his argument. The actual additional cases collected by him, therefore, represent only a fraction of the number of cases examined and read. In the end he takes such of these additional cases as he proposes to use, together with such of the digest paragraphs as he thinks appropriate, and makes up his list of cases from which he proposes to write his article, and which he intends to cite therein or refer to in the footnotes. These cases he reads, and then proceeds, with the reports of the cases before him (or the abstracts which he has made therefrom), to write the article, in which article he inserts, either as citations or as footnotes, the cases he has thus gathered."

In preparing the articles in complainant's books, the editors naturally discovered from their study of the cases to which the digests had referred them, other authorities bearing on the subject in hand, which were not to be found in the digests under the same heading. Of those additional authorities thus obtained by original research, many were used in writing the articles, and were enumerated therein, either in text or notes. When defendant's editors began the preparation of their articles, they had before them, as their predecessors had, all the cases turned up under the appropriate head from the digests. In addition thereto, the defendant's clerical force examined the authorities cited in each of complainant's articles, and drew out from them all the citations of cases which appeared in complainant's article but did not appear in any of the digests. In the language of one of defendant's witnesses, these "bare citations of cases from corresponding articles found in complainant's encyclopædias were copied on cards of like color and size with those containing the excerpts from the digests," and furnished to the subeditor who was to write the article. Such of these authorities thus given him as he thought appropriate he used in writing his article, and repeated complainant's citation of them in text or notes. It is quite evident that a considerable amount of time and trouble was thus saved to defendant's editors by the use of what the original

researches of complainant's editors had made easily available. Complainant contends that this is an improper use of its original, copyrighted material.

Complainant, as one feature of its encyclopædia, selected, classified, and arranged the cases defining words and phrases under appropriate headings. Defendant has a like classification, to which, as a mere classification, complainant does not object. Apparently, this was a feature of its work to which complainant devoted much time, trouble, and expense. It caused to be examined, page by page, all the reports of decisions of the American, English, and Canadian courts, and had selected therefrom and classified and arranged the cases defining words and phrases. In this way it got together a very large number of such cases not to be found in the law dictionaries or digests under the title of the word defined. There is nothing in the record to show that defendant made a like page by page examination of all the reports for cases defining words and phrases. It gathered such cases from the digest and from the cases found in complainant's publication. It did not copy the text of complainant in giving a definition, but took the definition from the case itself. It did, however, give a list of all the cases it found defining words and phrases. The complainant's affidavits assert that, in its own articles dealing with subjects covered by articles in defendant's volumes 1 and 2, there are 724 of such cases, and that 293 of these had been previously cited only in the complainant's publications. The defendant's affidavits concede that 210 of the 724 cited by complainant are reproduced by it from complainant's books, and fail to show a citation of these 210 cases elsewhere. The inference is irresistible that to that extent defendant has appropriated the results of complainant's original research, and has published them as part of its own two volumes.

From the above statement of facts, it is apparent that defendant saved time, trouble, and expense by using the lists of cases under each article in complainant's work. Those lists contained many cases not to be found in prior published digests. To that extent complainant had, by original research, blazed the way through the wilderness of the reports, and marked out where timber for each particular article might be found. With complainant's work before him, a student, a practicing lawyer, or a writer could more quickly get in touch with the body of judicial deliverances on the particular subject he had in hand, than he could if he had only the digests and other available publications. It does not follow, though, that, when he availed himself of this short cut which complainant had laid out, he made any illegitimate use of complainant's work. The encyclopædia was designed, prepared, and published, in part, to give just such information to persons who might consult it, and one who bought it bought with it the right to use it as a ready reference to authorities bearing on the subject of his investigations. Had the defendant confined itself to such a use of the material which complainant had gathered by independent search outside of the digests, complainant would have no just cause of complaint. But defendant has gone further. In its own books—themselves designed, prepared,

and published, in part, to give information as to where authorities were to be found—it has reproduced the very lists of cases, notably those defining words and phrases, which complainant had got together by a laborious page by page examination of the reports, and now offers its books containing those lists in competition with complainant's. This is an illegitimate use of complainant's copyrighted books. Suppose that at the end of an article (e. g., the article on "Accord and Satisfaction") defendant had added a "list of all the cases defining the phrase 'accord and satisfaction' which are to be found in the digests and law dictionaries," and had then added this, "The following cases are not included in any digest or dictionary, but will be found to contain definitions of this phrase," and had then printed a list of the cases which complainant's original search had turned up from the reports, and which defendant had taken from complainant's books. There can be no doubt, under the authorities, that such a supplemental list would be condemned as piratical, and it would seem not to change the situation that the cases thus appropriated are scattered as citations through text and footnotes.

The only volumes attacked are Nos. 1 and 2. A different system of compilation has apparently since been put in practice. Complainant may take an injunction against their further publication and sale unless there be eliminated from them the material improperly appropriated. The precise form of the order for injunction will be settled on notice. When it is signed, its operation will be suspended until defendant shall have had a reasonable opportunity to review this decision on appeal. The case, despite the voluminous record, lies really within a narrow compass. The point of law is an interesting one, and is sharply presented, and a final decision upon it may save much future labor in the trial of the cause.

In re BRESLAUER.

(District Court, N. D. New York. April 6, 1903.)

1. BANKRUPTCY—FILING OF PETITION—EFFECT.

The filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction.

2. SAME—VOIDABLE JUDGMENT—LEVY AND SALE.

Under section 67f of the bankruptcy act of 1898, Act July 1, 1898, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450], which provides that a judgment against an insolvent obtained within four months of the filing of a petition in bankruptcy shall be deemed void, except as to bona fide purchasers, in case he is adjudged a bankrupt, a levy and sale under such a judgment are also rendered void by the adjudication.

3. SAME—ADVERSE CLAIM—DETERMINATION.

A bankruptcy court has power to determine whether a claim to money obtained from a sale of the bankrupt's property is an adverse claim existing at the time the petition was filed.

4. SAME—SURRENDER OF PROPERTY.

A bankruptcy court has jurisdiction to compel the surrender to the trustee of funds not held under an adverse claim.

5. SAME—FUNDS DERIVED FROM EXECUTION SALE.

A claim to money received to apply on a judgment obtained within four months preceding the filing of a petition in bankruptcy by the

debtor, and derived from a sale of the bankrupt's property made after the petition was filed, but before adjudication, the judgment creditor and the purchaser at the execution sale both having had notice of the pendency of the bankruptcy proceedings, is not an adverse claim existing at the time the petition was filed.

This is a motion for a rule or order directing and compelling A. D. Mather & Co.'s Bank, of Utica, N. Y., to turn over and pay to Edward H. Wells, as trustee of the property, etc., of Alphonse Breslauer, the above-named bankrupt, the sum of \$400, being the amount realized by the sheriff on the sale of a stock of goods belonging to said Breslauer, and which said sheriff paid over, less his fees and expenses, to said bank, and which sale and payment took place after the institution of proceedings in bankruptcy.

Grant & Wager, for the motion.

M. H. Sexton, opposed.

RAY, District Judge. On or about July 1, 1902, A. D. Mather & Co.'s Bank, of Utica, N. Y., in an action in the Supreme Court of said state, obtained and duly entered in the clerk's office of the county of Oneida, N. Y., a judgment against Alphonse Breslauer and Bertha Breslauer, his mother, for the sum of \$1,558.93. On the same day an execution on said judgment was duly issued, and placed in the hands of Lincoln E. Brownell, the sheriff of said county. This execution was placed in the hands of a deputy of said sheriff, who by virtue thereof immediately levied upon the stock of goods belonging to said Breslauer. On the 28th day of July, 1902, said sheriff received another execution against said Alphonse Breslauer in favor of one Ewald Fleitmann and others, the plaintiffs therein, for the sum of \$702.81. On the 31st day of July, 1902, at the request of M. H. Sexton, Esq., the attorney for said bank, said sheriff caused public notice of a sale of said stock of goods under and by virtue of such execution to be given as required by law, such sale to take place on the 7th day of August, 1902, at 10 o'clock in the forenoon, on the premises where such goods were at the time of the levy. At the request of the plaintiffs in the second execution, the sale was duly adjourned to August 11th, at 10 a. m., at the same place. The sheriff in his affidavit says that, by his deputy, he attended on the adjourn day, and, there being no objection to the sale and no request for a further adjournment, the said property was sold to one Myles J. Evans for the sum of \$400, he being the highest bidder, and that being the highest sum bid for the same. On the same day the sheriff, after deducting his fees and the expenses of the levy and sale, paid over the balance, \$336.87, to said bank, plaintiff in the first judgment and execution. On the 7th day of August, 1902, John H. Grant served on and delivered to said sheriff and to the said bank a notice, of which the following is a copy:

"To A. D. Mather & Co.'s Bank, and to Lincoln E. Brownell, Sheriff of Oneida County:

"Take notice that we are about to petition Alphonse Breslauer or B. Breslauer & Son into bankruptcy on the ground of their insolvency, and their having committed an act of bankruptcy in permitting A. D. Mather & Co.'s

Bank to obtain judgment and thus giving it a preference over their other creditors and forbid you applying any of said Breslauer's money or property to the payment of said judgment or debt of A. D. Mather & Co.'s Bank.

"Yours, etc.,

Fleitmann & Co."

"Dated Aug. 6, 1902."

The sheriff asserts that he received no other or further notice of these proceedings in bankruptcy. November 22, 1902, Bertha Breslauer, the other defendant in said judgment and execution, paid the balance of said judgment, and A. D. Mather & Co.'s Bank thereupon assigned said judgment to her. The money paid over by the sheriff to the bank was deposited by itself, and a certificate of deposit issued therefor in the name of the bank. The fund has thus been kept separate. As early as June, 1902, said bank knew or had reason to believe Breslauer was insolvent. Before the sale took place, the attorney for the sheriff knew the petition in bankruptcy herein had been filed. There is abundant evidence to show that the sale to Evans was collusive and fraudulent as between him and the bankrupt, and that he knew of the insolvency of Breslauer and the pendency of the proceedings and the injunction hereinafter mentioned. On the 8th day of August, 1902, a petition in involuntary bankruptcy was filed against the said Breslauer, and a subpoena issued, and, on the 9th day of August, John H. Grant, of Utica, N. Y., was duly appointed temporary receiver of the property of said Breslauer, and an order was made by Judge Thomas of this court enjoining and restraining the sheriff of Oneida county, N. Y., and all other persons, from selling or in any way transferring the property of said Alphonse Breslauer. On the 9th day of August, 1902, said Alphonse Breslauer made and filed in this court a voluntary petition in bankruptcy, and August 12, 1902, he was duly adjudged a bankrupt, and thereafter the voluntary and involuntary proceedings were consolidated. On or about September 12, 1902, William H. Comstock, the referee to whom such proceedings had been duly referred, and who had such matter in charge, made an order setting aside and vacating said sheriff's sale, which order has not been reversed, set aside, or appealed from. Thereafter, and before the commencement of this proceeding, said trustee, Edward H. Wells, who was duly appointed trustee of said bankrupt estate on the 27th day of August, 1902, and who had duly qualified, demanded of said A. D. Mather & Co.'s Bank the proceeds of said sheriff's sale of said property of said bankrupt, but said bank refused to pay same over. Thereafter this proceeding was instituted.

It is contended by the bank that this court has no power or jurisdiction to make an order compelling said bank to surrender and pay over said money. It has not been made a party to the proceeding by proving any claim. It has none to prove, it insists, having been paid in full in the manner and from the sources stated. The injunction order was not served on the sheriff prior to the sale and payment of the money derived therefrom to the said bank. The filing of the petitions in bankruptcy were a caveat to all the world, and in effect an attachment and injunction. *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 274, 46 L. Ed. 411, held:

"The bankruptcy court has power to compel the surrender of money or other assets of the bankrupt in his possession, or that of some one for him, on petition and rule to show cause. The filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction, and, on adjudication and qualification of trustee, the bankrupt's property is placed in the custody of the bankruptcy court, and title becomes vested in the trustee. By section 70 of the Bankruptcy Act, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], the trustees, upon their appointment and qualification, are vested by operation of law with the title of the bankrupt, as of the date when he was adjudged a bankrupt, in all his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of his creditors."

Bardes v. Hawarden Bank, 178 U. S. 524, 526, 20 Sup. Ct. 196, 1000, 44 L. Ed. 960.

Subdivision f of section 67 of the act of July 1, 1898, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450], provides as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It is evident that, on the adjudication in bankruptcy being made, the judgment of the A. D. Mather & Co.'s Bank became null and void, as did the levy and sale thereunder, and the property itself or its proceeds may be followed and reclaimed by the trustee, in whom the title thereto vested on the 12th day of August, 1902. The bank knew Breslauer was insolvent, and knew bankruptcy proceedings were about to be instituted, as did the sheriff. The purchaser at the sale, Evans, was not a bona fide purchaser for value, or one who acquired the property without notice or reasonable cause for inquiry. He had both actual notice and reasonable cause for inquiry, as the evidence shows. The same is true of the bank. The title to this money passed to the trustee on his appointment and qualification as of the day of adjudication. The only question is, has this court power and jurisdiction summarily in this proceeding to compel the bank to pay over the money received to apply on its judgment obtained within the four months preceding the filing of the petition, and derived from a sale of the bankrupt's property made after the petition was filed and subpoena issued, but before adjudication? That a subsequent adjudication in bankruptcy annuls all execution liens obtained within four months of filing the petition is plain. In *re Kenney* (D. C.) 97 Fed. 557; In *re Reichman* (D. C.) 91 Fed. 624; In *re Fellerath* (D. C.) 95 Fed. 121; In *re Rome Planing Mill* (D. C.) 96 Fed. 812;

In re Vaughan, Id. 560; In re Higgins (D. C.) 97 Fed. 775; In re Burrus, Id. 926.

The only question is, did the bank hold this property or money under an assertion of adverse title existing at the time the petition was filed. Or, more nearly in the language of the Supreme Court of the United States, does the bank now assert an adverse claim of title or ownership existing at the time the petition was filed? This court has power to ascertain and determine whether in this case the claim asserted by the bank is an adverse claim existing at the time the petition was filed. *Louisville Trust Co. v. Comingor*, 184 U. S. 25, 22 Sup. Ct. 296, 46 L. Ed. 416; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. At that time the bank had only a lien on the property by virtue of the levy under the execution issued on its judgment, and which judgment and lien would become void, as the bank knew, in case a petition in bankruptcy was filed and the defendant in the judgment and execution was adjudicated a bankrupt. Subdivision f, § 67, Act July 1, 1898, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. If not held, under such an adverse claim, this court has jurisdiction to make the order and compel payment over. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. It seems too plain for argument that the bank had no such claim at that time. The bank is not a bona fide purchaser for value who acquired this money without notice or reasonable cause for inquiry. In truth, there is no pretense, except in mere words, that the bank held this money or the property from which it was derived under an adverse claim at the time the petition was filed. Adverse claim, to defeat these proceedings, must be a holding of the property, at the time the petition is filed, under a bona fide claim of ownership, not a mere lien that falls the moment the debtor is adjudged a bankrupt. The material facts are undisputed, and the case of *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, would seem to dispose of the question involved. In that case the bankrupt, nine days before the filing of the petition against him, made a general assignment for the benefit of his creditors. After the filing of the petition, the assignee sold the property to one Bernheimer. This was before the adjudication in bankruptcy. Bernheimer, so far as appears, acted in good faith and paid full value. But he had knowledge of the pendency of the bankruptcy proceedings. He took no title as against the trustee.

That the trustee may recover this money is plain. *Levor v. Seiter*, 8 Am. Bankr. R. 459, 462, 74 N. Y. Supp. 499. Indeed, if a judgment creditor, having knowledge of the insolvency of the judgment debtor, and that bankruptcy proceedings are about to be instituted, and which are commenced before a sale, can sell the property levied on after petition filed and keep the proceeds, the law is pro tanto defeated. No plenary action is necessary or proper.

The motion must be granted as to the money paid to the bank. So ordered.

LUNDQUIST et al. v. GRAND TRUNK WESTERN RY. CO. et al.

(Circuit Court, N. D. Illinois, N. D. July 18, 1901.)

No. 25,304.

1. CARRIERS—DISCRIMINATION IN RATES—INTERSTATE COMMERCE ACT.

A railroad company is not required by the interstate commerce act to give the same car-load rates on interstate shipments to forwarding agents who solicit property for shipment from different owners, each having less than a car load, and combine it into car-load lots, that it makes on car-load shipments by a single owner; the charges in such case not being for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," so as to render the difference in the rates made an unlawful discrimination, under section 2 of the act (24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]).

In Equity. On motion for preliminary injunction.

Christopher M. Mitchell and Thomas A. Moran, for complainants.
Shope, Mathis, Zane & Weber, for defendants Grand Trunk Western Ry. Co., Great Eastern Line, and William N. Ross.

George W. Wall, for defendants Delaware & L. & W. Ry. Co. and W. N. Ross.

KOHLSAAT, District Judge. This matter comes on for hearing upon complainants' motion for a preliminary injunction upon bill and affidavits. Complainants are known as forwarding agents or intercepting carriers. They solicit the shipment of less than car-load lots of merchandise between Chicago and New York, combine these shipments into car loads, and have for the profits of their business the difference between the car-load and less than car-load rates of defendant railroad companies between those points. The bill sets forth the rule adopted by defendants with reference to the handling of mixed car loads of freight, designated as rule 10, and the note thereto, which reads as follows:

"Note: The foregoing rule will apply only on freight from one shipper or owner, and will not cover L. C. L. shipments of property from two or more shippers combined into car loads by forwarding agents claiming to act as shippers. The term 'forwarding agents' shall be construed to mean agents of the carriers, and also agents of the actual shippers of the property, or any party interested in the combination of L. C. L. shipments of articles from several shippers into car loads at points of origin."

The bill alleges that defendants have proceeded to enforce the above provision of the note to rule 10 against complainants, that the said action of defendants amounts to an illegal discrimination against complainants in favor of car-load shipments by the owner of all the goods contained in said car load, that such unlawful discrimination will work an irreparable injury to complainants' business unless an immediate injunction be issued, and that said discrimination is illegal, because in contravention of the interstate commerce act.

Under the common law, the discrimination alleged herein was permitted to common carriers, inasmuch as the latter were not under any obligation to treat all shippers alike. The carrier was only required to make reasonable carrying charges to all. That, then, is the present law, except in so far as it may have been modified by the interstate

commerce act, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]. The provisions of said act bearing upon the question at issue herein are as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"Sec. 2. That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155.]

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155.]

The provision of the act which bears directly upon the particular case now before me is fairly comprehended within the clause of section 2 which prohibits discrimination in charges for doing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Have defendants so discriminated against complainants? Is the service demanded by complainants a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions to those presented by the case of a single owner of freight offered for car-load shipment? The margin between the freight charged on a car-load shipment and that charged upon the same goods shipped in less than car-load lots is so considerable that the forwarding agent is enabled to offer to shippers controlling inducements to permit their goods to be shipped through the agency of such forwarding agents, and at the same time leave the latter a substantial balance as profits. Thus the railroad company is made to transport freight which would in ordinary course come to it at the less than car-load rates for a rate appreciably less than that paid by the actual owners to the forwarding agent, and the difference is absorbed by the latter. This condition of affairs, defendants claim, is unjust to them, and urge, among others, the following reasons: (1) That they are thereby placed in a position where they are liable to be imposed upon as to classification and rates; (2) that they are deprived of their less than car-load business to such an extent that it will eventually be entirely eliminated; (3) that they are thus compelled to enable the forwarding agent or intercepting carrier to do what they are by the interstate commerce act expressly forbidden to do (i. e., discriminate between shippers); (4) that they are exposed to the expense and annoyance of a multiplicity of suits by the various beneficial owners, without the

additional compensation provided for in their less than car-load rates.

I do not think the first point well taken. There can be no more difficulty in avoiding imposition where the shipper is a forwarding agent transporting in his name the goods of numerous owners, than where the shipper is the actual owner of the goods. As business is now conducted, a single owner may handle almost every variety of freight.

The second objection is entitled to consideration if the less than car-load rates as constituted are just and reasonable. There is nothing in this record establishing the contrary. For the purposes of this hearing, their reasonableness must be assumed. It would be a novel proposition to hold that defendants are required to furnish facilities for undermining their own business. It may well be that, if railroads were to handle nothing but car-load lots, they would find it necessary to materially change their rates. There is in this objection a strong appeal to one's sense of justice, but I do not deem it necessary to dispose of the case upon this ground.

The third objection is also entitled to consideration. The difference between the car-load and less than car-load rates placed at the disposal of the forwarding agent may easily be so manipulated by him as to defeat the spirit of the interstate commerce act. He is not subject to the provisions of that act. Manifestly, he may evade the very provisions of the act which he is claiming the defendants are defeating in this case. He can offer different rates to different shippers, with no other limit than business necessity. Not only this, but he can give his principals lower rates than those given by defendants to their less than car-load shippers. The logical outcome of such a condition would be, according to the inexorable rules of commerce, that defendants would be obliged either to do an injustice to their shippers of less than car-load lots, or reduce all their rates to a car-load basis. It seems to me that the two last-named objections go far toward the demonstration of the equity of defendants' position.

Coming now to the fourth objection, the plain proposition is this: Is the service demanded by complainants, all the circumstances and conditions considered, a like and contemporaneous service in the transportation of a like kind of traffic under similar circumstances and conditions to those offered by defendants to an owner of goods, as distinguished from a forwarding agent representing several owners? It must be admitted that the carrier is, in the case of numerous beneficial owners, subjected to an additional liability, which it is entitled to provide against by an increased rate. There is some uncertainty as to whether or not the carrier could, in cases like the one before the court, be held liable to the beneficial owner upon the contract of the forwarding agent, but there is no doubt but that it can be pursued in tort. It is, of course, impossible to determine the actual extent of the liability thus assumed; but it is appreciable, and quite sufficient, in my judgment, when taken with the foregoing, to differentiate it from the car-load service furnished to owners, as distinguished from forwarding agents representing different owners, and therefore the case at bar does not come within the terms of the interstate commerce act relied upon by complainants. In England this increased liability has been ignored in suits brought under the railway causes act. That act is much more

explicit in its terms than the interstate commerce act. The peculiar language of the former is that "all tolls shall be charged equal to all persons and after the same rate." But even were this not the case, it is not probable that our courts would feel bound to follow the English decisions. The conditions surrounding the operation and managements of railroads covering such a small territory as that of England are so different from those existing in this country, and the demands upon the carrier service are so divergent, that English decisions should not be allowed to control. The trend of the American decisions and the official utterances of the Interstate Commerce Commission all recognize the principle that the particular facts of each case must have great weight in the application of the provisions of the interstate commerce act.

Upon this view of the case, the complainants are compelled to justify their bill under the law as it stood before the passage of the interstate commerce act. This, as before stated, cannot be done, in view of the federal decisions—notably that in the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791.

This is a pioneer case upon the issue raised by complainants, and little aid can be obtained from authoritative sources; but, upon the whole case, considering all the conditions, I am clearly of the opinion that complainants' contention cannot be sustained, and that a preliminary injunction herein should be denied. In view of this conclusion, it becomes unnecessary to pass upon the other questions raised.

THE J. C. AMES.

(District Court, E. D. Wisconsin. March 26, 1903.)

1. COLLISION—STEAMER AND SAILING VESSEL—FAILURE TO MAINTAIN LOOKOUT.

As a steamer, with a tow, was approaching the east draw of a bridge from the north, in the nighttime, she saw both lights of the schooner Wyman heading for the same draw from the south, each vessel being about half a mile distant from the bridge. The steamer gave a signal of one blast, and headed for the west draw, but on coming nearer saw the lights of another steamer, which was approaching from the south, headed for that draw. Supposing it to be the Wyman, and that she had changed her course, the steamer gave a two-blast signal, and changed her course for the east draw, where she came in collision with the Wyman. No lookout was stationed on the steamer, but that duty rested on the officer serving as navigator. *Held*, in the absence of evidence showing contributory fault on the part of the Wyman, that the steamer was in fault for the collision, the facts being insufficient to exonerate her on the ground of inevitable accident.

2. SAME—CONTRIBUTORY FAULT—FAILURE OF SCHOONER TO SHOW TORCH.

The failure of a schooner navigating on the Great Lakes to show a torch to a steamer approaching in the nighttime, as required by rule 12 of the navigation rules (28 Stat. 645 [U. S. Comp. St. 1901, p. 2889]), is not a fault contributing to a collision with the steamer, where she was seen by the steamer and signaled when a mile distant, and thereafter kept her course, and the omission did not in any way tend to mislead or confuse the steamer.

In Admiralty. On libel filed by the owners of the schooner Charles E. Wyman for damages by collision.

† 2. Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.

The collision occurred in the east draw of the railroad bridge which spans Sturgeon Bay at the city of Sturgeon Bay, about 1:30 a. m., on a clear night, with all lights displayed. The Wyman was a three-mast schooner, and approached the bridge from the south, with the wind fair on her port quarter, and all sails set, except square sail and lower topsail. The steamer, 176 feet in length, had in tow a car ferry, 309 feet long and 44 feet beam, carrying 26 loaded cars, and approached from the north. When about one half mile from the bridge the master of the steamer says: "I saw his [the schooner's] red and green lights both looking right at me," and "coming through the east draw." The steamer blew a passing signal of one blast, indicating that the steamer would go to starboard and take the west draw, and so proceeded at moderate speed after clearing some shoals on her starboard hand. On opening up the west draw the steamer was confronted by both side lights of a schooner making for that draw, and the master supposed that the Wyman had thus changed her course. In that belief he gave a two-blast signal, indicating that the steamer would clear the way and take the east draw instead. This was attempted, resulting in tearing away the steamer's tow port and in collision with the schooner Wyman in the east draw. The testimony is not all concurrent as to the actual course of the Wyman in approaching the east draw, but it is manifest from the testimony as a whole that the light sighted from the steamer in the west draw was that of another schooner, the Jennie Weaver, which was closely following the Wyman on her port quarter. The Weaver proceeded so that the west draw was opened up and the lights of the steamer were sighted; then came about and dropped anchor in the bay, to avoid collision.

C. E. Kremer, for claimant.
M. C. Krause, for libelants.

SEAMAN, District Judge (after stating the facts). This libel is exceptional in collision cases for the absence of conflict in the testimony upon the substantial facts. No dispute arises that the course of the schooner was well directed for the east draw when observed from the steamer, nor that the steamer's course was duly taken thereupon for the west draw; and the testimony of the master of the steamer is notably clear and convincing that the steamer and tow were properly navigated through a difficult passage in that view. When minor differences in the testimony are explained, I am satisfied that the only issue involved is one of law—whether liability must be presumed from the facts thus established.

The approach of the schooner and her course were observed from the steamer in ample time to govern the course of the latter. Both masters and the men on steamer and ferry concur in placing the red and green lights of the schooner pointing for the east draw, and in their sight until closed out by the move of the steamer to starboard and by the bridge. While the two bridge tenders unite in the view that the schooner Wyman was heading for the west draw when close to the bridge, and suddenly came over to starboard into the east draw—and thus into collision when the steamer was driven to change her course from the west to the east draw—the testimony on the whole is convincing that they were mistaken, confusing the lights of the schooner Weaver with those of the Wyman. On behalf of the steamer fault is charged against the schooner (1) that she failed to show a torch; (2) failed to answer the steamer's passing signal of one blast; and (3) failed to keep her course after sighting the steamer. These

contentions, however, are without force, respectively, for the following reasons:

1. While it is true that no torch was shown, it is manifest that a torch could have served no useful purpose, and its absence in no sense contributed to the collision, as the approach and course of the schooner were both observed and recognized on the part of the steamer.

2. Response by a schooner to the passing signal of a steamer is not mentioned in the navigation rules, and the effort to prove a general custom to that effect in the waters of Sturgeon Bay and Canal was unsuccessful. Whether such requirement may not justly be implied is immaterial to the present controversy, because the master and men of the schooner testify that the passing signal was so answered by the schooner's patent foghorn, and their direct and credible testimony cannot be set aside by that on the part of the steamer that no response was heard.

3. The third contention rests upon the testimony on the part of the schooner that on coming around the bend, over half a mile south of the bridge, the masthead light of the steamer was observed approaching the open draw from the north, and, hearing what was supposed to be a two-blast passing signal from the steamer, the schooner was hauled up about half a point for the west draw. It appears, however, from the testimony on the part of the steamer, that no such signal was given therefrom; also that no such maneuver of the schooner for the west draw was observed. On the contrary, when first sighted from the steamer the red and green lights of the schooner were distinctly presented through the east draw. Thereupon the one-blast signal was given by the steamer, indicating that she would take the west draw, and the testimony concurs in showing that this was understood and obeyed by the schooner, then half a mile south of the bridge, and that her course was well pointed for the east draw. If her course was thus changed in response to the signal, which plainly indicated the starboard course of the steamer, it was not a fault, within the meaning of the rule; and surely such compliance is not open to complaint on behalf of the steamer.

I am of opinion that the navigation of the schooner Wyman was without fault, unless failure to show a torch violated rule 12 of the act of 1895 (28 Stat. 645, 3 U. S. Comp. St. 1901, p. 2889). Whether the rule intends and applies to the case in question is not material to this inquiry, as it is undisputed that the omission neither confused nor tended to confuse the course of the steamer; that its use would have furnished no aid, and its absence in no wise contributed to the collision. *The Robert Holland and Parana* (D. C.) 59 Fed. 200, 202, and cases cited. The course of the schooner for the east draw was unmistakably recognized by the steamer when each was a half mile from the bridge, and the proof is convincing that the schooner kept that course consistently, and that the collision in that draw was wholly due to the mistake on the part of the steamer in reversing out of the west draw on the supposition that the schooner had changed her course thereto—a mistake which cannot relieve from responsibility to the libelants, however excusable from the momentary view point of the

navigator of the steamer. The schooner Wyman was on her course through the east draw, entirely within her rights. The burden rested on the steamer to keep off that course, and as held in *The Nacoochee*, 137 U. S. 330, 338, 11 Sup. Ct. 122, 34 L. Ed. 687, the steamer "must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident." In other words, as stated by Judge Brown in *The City of Truro* (D. C.) 35 Fed. 317, 318: "When, upon the whole case, there is no decisive evidence of fault on the part of a sailing vessel, the steamer must answer for the collision, where no circumstances appear to show that the accident was inevitable." While the course of the schooner Weaver, following up the Wyman, with her lights confronting the steamer on the approach to the west draw, is quite inexplicable, it is equally inexplicable that her lights should not have been discovered at some stage by a lookout properly stationed on the steamer. The framework of the bridge, and the position of the Wyman, may have obstructed the view to some extent, but it is not apparent that a constant lookout would not have found her lights in time to avoid the danger. No lookout was provided or stationed on the steamer, but that duty rested upon the officer serving as navigator—in this instance, the master. The doctrine is well settled that the lookout required by the rules must be not only competent, but charged with no other duty while so serving, and that the officer navigating the steamer cannot at the same time serve as lookout. *The Ottawa*, 3 Wall. 268, 272, 273, 18 L. Ed. 165; 6 Rose's Notes U. S. Rep. 498; *The Hypodame*, 6 Wall. 216, 224, 18 L. Ed. 794. See, also, *The Propeller Genesee Chief*, 12 How. 443, 463, 13 L. Ed. 1058; *The Colorado*, 91 U. S. 692, 699, 23 L. Ed. 379. This master was well stationed on the bridge of his steamer, but was necessarily attending to the navigation of steamer and ferry by the shoals and to the west draw—much more difficult than the east draw, which was their customary passage. The fact that no fault appears in his navigation, aside from the want of a lookout, and that his course in reversing seemed the only one open when confronted by the lights of the Weaver, does not establish a case of inevitable accident, and the presumption which then arises against the steamer and in favor of the injured schooner is not rebutted.

The libel must be sustained, therefore, and decree will be entered accordingly, with reference to ascertain the damages.

In re PATTERSON.

(District Court, N. D. New York. April 14, 1903.)

1. BANKRUPTCY—DISCHARGE—OBJECTIONS.

Under Bankr. Act, § 14b (Act July 1, 1898, 30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), providing that a bankrupt shall not be entitled to his discharge if he has committed an offense punishable by imprisonment as provided by such act, and section 29b, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], declaring that a person shall be punished by imprisonment on conviction of having "knowingly and fraudulently" made a false oath in relation to any proceeding in bankruptcy, a speci-

fication in opposition to a bankrupt's discharge for making a false oath in the bankruptcy proceedings, which failed to allege that such oath was "knowingly and fraudulently made," was demurrable.

2. SAME—FRAUDULENT DISPOSITION OR CONCEALMENT OF PROPERTY.

Under Bankr. Act, § 14b (Act July 1, 1898, 30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), providing that a bankrupt's discharge shall be denied if he is guilty of an offense punishable by imprisonment as provided therein, or with fraudulent intent conceals his true financial condition, etc., and section 29b, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], providing that a person shall be punished by imprisonment on conviction of having "knowingly or fraudulently" concealed, while a bankrupt, or after discharge, any of his property, an objection to a bankrupt's discharge alleging that before the petition was filed the bankrupt fraudulently disposed of a part of his property, and in his petition concealed the fact, and that he had converted the proceeds of such disposition to his own use, was demurrable for failure to allege that he "knowingly and fraudulently" concealed property so conveyed while a bankrupt, which would have belonged to his estate in bankruptcy, and that such property was not thereafter surrendered.

3. SAME—FAILURE TO KEEP BOOKS.

Under Bankr. Act, § 14b (Act July 1, 1898, 30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), providing that a bankrupt's discharge shall be denied on proof of his failure to keep books of account or records from which his true condition might be ascertained, a specification in objections to a discharge, alleging that with a fraudulent intent to conceal the bankrupt's financial condition, and in contemplation of bankruptcy, he failed to keep any books of account or record from which his true condition might be ascertained, without further particulars, was sufficient.

This is a demurrer to the specifications of objections filed by Weidman & Co. to the discharge in bankruptcy of Edward T. Patterson, the above-named bankrupt.

J. H. Bain, for bankrupt.

Charles R. Patterson, for Weidman & Co.

RAY, District Judge. Weidman & Co. file specifications of objection to the discharge of the bankrupt in the words and figures following:

"Weidman & Co., of the city of Albany, state of New York, creditors and parties interested in the estate of the said Edward T. Patterson, bankrupt, do hereby oppose the granting to him of the discharge of his debts, and for the following grounds of such opposition do file the following specifications:

"1st. That the said Edward T. Patterson has committed an offense punishable as provided in the national bankruptcy law, in that he made a false oath to his petition in bankruptcy and also as a witness before the referee in bankruptcy, in this respect, to wit, he stated in said petition and as a witness before said referee that he had no property, real or personal, whereas it appears in the proceedings before said referee that he owned a horse of the value of \$175 or more, and that he still owns said horse, and that his title thereto has never been divested.

"2nd. That from about the 10th day of October, 1901, until about the 19th day of July, 1902, the said Patterson was in partnership with one Frank Lucas, under the firm name of Patterson & Lucas. That said firm was insolvent, and have been since the 1st day of Jan'y, 1902. That on or about the 1st day of August, 1902, the said Edward T. Patterson fraudulently transferred to his brother, George A. Patterson, all the tangible assets of said firm, of the value of upwards of \$438, to apply on or in payment of his individual debt or obligation to his said brother. That later, and within a

few days of filing his petition in bankruptcy, in November, 1902, the said Edward T. Patterson fraudulently assigned and transferred (in form) to his said brother accounts due the said firm of Patterson & Lucas, amounting to and of the value of \$638, upon which the said George A. Patterson advanced the sum of \$150 to the said Edward T. Patterson, for the express purpose of paying the individual expenses of the said Edward in his proceedings in this court whereby he might be discharged from his debts; and the said Edward, in his proceedings in this court made within a few days after this fraudulent disposition of the assets of said firm for his individual purposes, filed said petition knowingly and fraudulently suppressing and concealing therein the accounts of said firm, his conversion thereof to his individual purposes, and stating therein that said firm had no assets. That with the money thus obtained from the property of said firm the said Edward T. Patterson fraudulently applied the same upon his individual expenses in instituting and maintaining these proceedings.

"3rd. That the said Edward T. Patterson committed an offense, or series of offenses, punishable as provided by said bankruptcy law, in that he made false oaths before said referee in bankruptcy when sworn as a witness in said proceedings, as follows, to wit: He testified that he sold the tangible property of Patterson & Lucas to his brother George A. Patterson, for less than \$400; that it was about \$300; while the fact was that the consideration was \$438. He testified that \$200 was taken out of the purchase price of these assets to pay \$200 which he had borrowed of his said brother to purchase the interest of his partner, Lucas; while the fact was that he borrowed \$300 of his brother to purchase the interest of said Lucas, and that sum, instead of \$200, was deducted from the purchase price. He testified that he sold his horse; didn't remember whether the consideration was \$125 or \$175; that he received the full consideration; while the evidence shows that he did receive \$100, and \$75 was applied upon a debt of long standing. But the proof is there was no sale; that no title passed; that there was no delivery; that the transaction was merely the passing of words between the parties, with a view of cheating and defrauding the creditors of the bankrupt.

"4th. That with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, the said bankrupt has failed to keep any books of account or records from which his true condition might be ascertained, except only the books of account of the firm of Patterson & Lucas, which was dissolved about the 19th day of July, 1902.

"That all of the foregoing specifications are made upon information and belief."

Section 14b of the bankruptcy law (Act July 1, 1898, 30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), provides:

"(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

Section 29b of the same act, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], provides as follows:

"(b) A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any ma-

terial amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

It will be noted that the act is explicit in defining the offenses mentioned in subdivision "b" of section 29. The acts constituting the offenses against the law must have been "knowingly and fraudulently" done, and specification of objections that do not charge that the false oath in bankruptcy proceedings was knowingly and fraudulently made are not sufficient. *In re Pierce*, 4 Am. Bankr. Rep. 554, 103 Fed. 64; *In re Kaiser* (D. C.) 99 Fed. 689.

The first and third specifications of objection are clearly fatally defective in failing to allege that the alleged false oaths were knowingly and fraudulently taken or made, and the demurrer as to those specifications must be sustained.

As to the second specification of objection, the charge is that before the petition was filed the bankrupt fraudulently disposed of part of the property of a firm of which he was a member; that in his petition he concealed this fact and the fact he had converted the proceeds of such fraudulent disposition to his own use, especially to the payment of the expenses of this proceeding. There is no charge that he knowingly and fraudulently concealed while a bankrupt—that is, after the petition was filed—any of the property belonging to his estate in bankruptcy. If we assume that he concealed it before the petition was filed by so fraudulently disposing of it, there is no allegation that it was not surrendered thereafter. This specification is clearly insufficient, and as to it the demurrer must be sustained. See *Collier on Bankruptcy* (4th Ed.) p. 165.

As to the fourth specification of objection, the same is as clearly sufficient. In the language of the act it charges a failure to keep books of account, etc. It alleges a fact. No further particulars could be given. As to this, the fourth specification of objection, the demurrer is overruled.

But the objecting creditor, on payment of \$10, as a condition of granting the favor, to the opposing attorney, may file amended specifications of objection.

So ordered.

RAGSDALE et al. v. SOUTHERN RY. CO.

(Circuit Court, D. South Carolina. April 8, 1903.)

1. CUMULATIVE TESTIMONY—DISCRETION AS TO ADMISSION.

A fact being sufficiently proved in the opinion of the court, it is in its discretion to refuse to allow cumulative testimony.

2. RAILROADS—FIRES—DIRECTING VERDICT—EVIDENCE.

Evidence in an action against a railroad for the burning of a building near the track on the ground that the fire was communicated by a locomotive held insufficient to sustain a finding that the fire was so set, so that verdict was properly directed for defendant.

G. W. Ragsdale and John T. Seibels, for plaintiffs.

C. P. Sanders, for defendant.

SIMONTON, Circuit Judge. This case comes up upon a motion for a new trial. John K. Ragsdale was the occupant of a building on the track of the Southern Railway. In this building he had a stock of goods, not fully covered by insurance. The building was consumed by fire on the 7th of March, 1902, and its contents were destroyed. The insurance companies had paid their share of the loss, and this action was brought in the name of Mr. Ragsdale and these companies subrogated pro tanto to him to recover damages from the railway company. The ground of the action is that the fire was communicated from one of the trains of the railway company, and the action is based on section 2135, Civil Code of South Carolina. Issue having been joined, the cause was heard before a jury. After the jury was charged, they retired, remained some time in consultation, and could not agree. Coming into court and stating this, they were instructed to find for the defendant. This was the course pursued in *W. B. Grimes Company v. Malcolm*, and approved by the Circuit Court of Appeals, Eighth Circuit, in 7 C. C. A. 426, 58 Fed. 670.

The motion for the new trial is based on five grounds. The second and third go to errors in the charge to the jury. As the jury were instructed to find their verdict, they could not have been misled by errors in the general charge. Therefore these grounds will not be discussed.

The first ground of exception is that the trial judge should not have sustained, as he did, the objection of defendant's counsel to the introduction of testimony by a number of witnesses other than Hamilton, Hill, and the two Blairs as to additional fires in the vicinity of the station at Blairs shortly prior and subsequent to the fire in question set by defendant's locomotives. One fact which plaintiffs desired to show was that fire could be set, and in fact was set, from defendant's locomotives, on lands adjacent to the track. This testimony was competent, and objections to its introduction were overruled. They then produced four witnesses, each of whom proved that on several occasions, severally testified to by them, combustible material adjacent to the track had been set on fire by fires from the locomotives of this railway. They then offered other witnesses to the same effect. They were not permitted to testify. The fact, in the opinion of the trial judge, had been sufficiently proved, and cumulative testimony to the same point could only occasion a waste of time. This is within the discretion and control of the trial judge. It may be noted, by the way, that under the statute law of South Carolina (section 2860) in a bill of costs there should not be allowed a charge of more than three witnesses to prove one particular matter of fact.

The other grounds go to the propriety of instructing the jury to find for the defendant. The law on this point is settled by numerous decisions of the Supreme Court of the United States. "When the burden of proof is on the plaintiff [as it clearly was in this case], and the only direct testimony is contrary, the judge may properly direct the jury to find for the defendant." *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958. "It is no error for a judge to direct a jury to find an issue for one of the parties, when, if the jury found otherwise, it would have been his duty to set aside the verdict as unsupported by and in

hostility to the evidence." *Randall v. B. & O. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Montclair Tp. v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed. 436; *Elliott v. Chicago, etc., R. R.*, 150 U. S. 345, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Sipes v. Seymour*, 22 C. C. A. 90, 76 Fed. 116; *Franklin Brass Co. v. Phoenix Ins. Co.*, 13 C. C. A. 124, 65 Fed. 773.

To maintain their case, plaintiffs proved that the building which Mr. Ragsdale occupied was built close to and parallel with the track of the defendant, and within 8 or 10 feet of it; that it was of wood, was 60 feet long, and had been built some time before 1883; that previous to the 7th of March there had been no rain; that the wind was not high, and was blowing from the south up the track, whose direction was from north to south; that on that night between 10 and 11 o'clock the building had been destroyed by fire, and that shortly before the fire a train of the defendant's attached to a locomotive had passed the station near which the building was. These are undisputed facts proved. The inference which the plaintiffs sought to draw from these facts is that the fire was communicated from the locomotive. The fire was first discovered on the roof of the building, so, if it was communicated from a locomotive, it must have been by sparks. To sustain this inference it was shown that on several occasions anterior to and subsequent to this fire combustibles on the side of the track had been set on fire by passing locomotives; that on the night in question the train stopped at this station. Many witnesses spoke to this last fact. All but one of them were at the time of the supposed passing of the train either in bed, or in their houses, some distance from the track. These say that they heard the train stop. As they did not see it stop, their conclusion was a matter of opinion. The one witness (a colored man) says that he saw the train stop at the station. Neither he, however, nor any one else, saw any sparks flying at the time, although the night was perfectly clear. One of the witnesses for plaintiff, who was the agent at that station, testified that the through trains never stopped at the station unless under orders to take on or put off a car or to do work; but that on that night no car was put off or taken on, no orders to stop had been given, and no work whatever was done. On the other hand, three witnesses for the defendant—the conductor, engineer, and fireman—all testify that when the train, a through train, was approaching the station, it blew when about a mile off; that the steam was shut off at once, and, as it was on the down-grade, the train ran on by its own momentum, and never stopped; that the fire door was opened, and the draft was stopped, so that no sparks were or could be emitted; and that the spark arrester was in perfect condition. The locomotive was a coal burner. They further say that they had no car to put off, had no orders to stop, had no freight to deliver, and that there was no water tank at that station; that steam was not put on again until they were three-quarters of a mile below the station.

Here we have conjecture, probability, opinion, met by facts. Even if we give to the evidence of plaintiffs the force of presumption, "presumption must give way when in conflict with clear and distinct proof." *Fresh v. Gilson*, 16 Pet. 331, 10 L. Ed. 982; *Lincoln v. French*, 105

U. S. 614, 26 L. Ed. 1189. In this condition of things the trial judge conceived it to be his duty, if the jury had found for the plaintiffs, to set the verdict aside for want of sufficient evidence; and, this being so, he directed the verdict. *Gunther v. L., L. & Globe Ins. Co.*, 134 U. S. 110, 10 Sup. Ct. 448, 33 L. Ed. 857; *Cahill v. Chicago*, etc. R., 20 C. C. A. 184, 74 Fed. 285; *Delaware*, etc., *Rd. v. Converse*, 139 U. S. 472, 11 Sup. Ct. 569, 35 L. Ed. 213. In *Commissioners v. Clark*, 94 U. S. 284, 24 L. Ed. 59, the modern rule is stated to be:

"That before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge; not whether there is literally no evidence, but whether there is any upon which to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Relying upon these authorities, the jury were instructed to find for the defendant.

The motion for a new trial is refused.

PUBLIC CLEARING HOUSE v. COYNE, Postmaster.

(Circuit Court, N. D. Illinois, N. D. January 23, 1903.)

No. 26,538.

1. USE OF MAILS—FRAUD ORDERS—LOTTERY SCHEME.

Complainant was the fiscal agent of an organization called the "League of Equity," in which each member, on joining, paid an entrance fee, which went to complainant, and \$1 per month so long as he remained a member. Ten per cent. of this was also kept by complainant, and the remainder paid into a fund, which was held without investment until a time fixed, when it was divided equally between the members who had been such for five years, who thus received 90 per cent. of the money they had paid in and of that paid in by new and lapsed members. The amount received, if any, depended upon the chance of getting in new members. If none were obtained, no money would be paid to certain ones of the existing membership. *Held*, that the scheme was, in effect, a lottery, and one which must in the end amount to a legal fraud, and that the postmaster general was justified in issuing an order classifying it as fraudulent, in the exercise of the power given him by statute.

2. SAME—CONSTITUTIONALITY OF STATUTE.

Rev. St. § 3929, as amended by Act Sept. 19, 1890, c. 908, § 2, 26 Stat. 466 [U. S. Comp. St. 1901, p. 2686] and Rev. St. § 4041 [U. S. Comp. St. 1901, p. 2749], approved by Act March 2, 1895, c. 191, 28 Stat. 963 [U. S. Comp. St. 1901, p. 3178], giving the postmaster general the power, upon evidence satisfactory to him that any person or company is engaged in conducting a lottery or fraudulent scheme, to prohibit the delivery of registered letters or the payment of postal orders to such person or company, or his or its agents, are not unconstitutional, as an invasion of personal rights.

In Equity. On exceptions to master's report.

D. I. Sickelsteel, for plaintiff.

S. H. Bethea, for defendant.

¶ 1. Nonmailable matter relating to lotteries, see note to *Timmons v. United States*, 30 C. C. A. 90.

¶ 2. See Post Office, vol. 40, Cent. Dig. § 21.

KOHLSAAT, District Judge. The bill herein was filed to restrain the defendant from interfering with complainant's mail. An answer was filed, and the cause referred to the master. This hearing comes before the court on exceptions to the master's report.

The defendant, postmaster at Chicago, withholds complainant's mail under and by virtue of the so-called "fraud order" of the Postmaster General, issued in accordance with the provisions of section 3929 of the Statutes of the United States, 1890, c. 908, § 2, 26 Stat. 466 [U. S. Comp. St. 1901, p. 2686], and section 4041 of the same statute [U. S. Comp. St. 1901, p. 2749], approved March 2, 1895, c. 191, 28 Stat. 963 [U. S. Comp. St. 1901, p. 3178], entitled an act to amend certain sections of the Revised Statutes relating to lotteries and for other purposes, approved September 19, 1890.

Complainant is the fiscal agent of a co-operative organization known as the "League of Equity," the object of which seems to be to co-operate for the purpose of furnishing each other a substantial realization in accordance with a certain table, called the "ordinary causation and realization table." The plan seems to be somewhat as follows: Each member of the league is required to pay a \$3 initiation fee on joining and \$1 per month thereafter, so long as he remains a member of the league. This \$3 and 10 per cent. of the monthly payments are retained by complainant as its compensation for acting as such fiscal agent. The balance of the monthly payments is held by complainant without investment, until the realization period. This is fixed at the end of five years. The League of Equity was successor to a like organization known as the "League of Educators," which was successor to a like organization known as the "League of Eligibles." The membership of the League of Equity numbers about 5,000. After deducting the charges aforesaid, the balance is equally divided between the members who have been in the league five years, provided, however, that any member who brings in three new members in any one year is entitled to receive at the end of one year one-fifth of what he would be entitled to receive at the end of five years. This concession seems to be made in order to encourage missionary work in getting new members. The only source of increase upon the money paid in consists of the money paid by new members. Thus, if the present membership is 5,000, and during the next five years 5,000 more members shall be secured, the realization fund will consist of what the present membership has paid in, plus what the additional members have paid in, less 10 per cent. This would be equally divided among the original 5,000, while the new 5,000 would have to realize from the new members thereafter secured at the end of another five years. Thus the first 5,000 get nine-tenths of their own money back, and, in addition, nine-tenths of the funds paid in by the new members at the end of the five-year period. Should any of the members drop out, their money goes to those who remain. The first class feeds upon the second, the second upon the third, and so on to the collapse—a literal demonstration of the old saying, "The devil take the hindmost."

It seems strange that material can be found to keep such a scheme going, but it is in evidence that the predecessors of the League of

Equity, up to about November 1, 1902, had collected about \$137,390, and divided it. There is no claim that complainant had not acted fairly and honestly with the funds it has so handled. The evidence shows the contrary. The scheme is, in effect, a lottery. The master so finds. It has been widely and alluringly advertised by the complainant, and has captured a vast number of "get-rich-quick" people. An attempt has been made to compare it with the benevolent life insurance associations. The analogy cannot be sustained. In the latter case, aside from the sentiment which justifies a gift from all for the loss of the one, the realization is not dependent upon chance or lot, but upon the life of a man—upon the laws of nature. *U. S. v. McDonald* (D. C.) 59 Fed. 563. In the case at bar, as the master aptly expresses it, the only difference between this and the ordinary lottery is that in the ordinary lottery the amount of the prize is fixed in advance, and the prize drawers are determined by lot, whereas in this plan the prize drawers are determined in advance, and the amount of the prize by lot or chance.

The scheme also amounts in the end to a legal fraud, or so near to it that the Postmaster General, upon the evidence that the record shows was presented to him, had a right to issue the fraud order in question.

I am therefore of the opinion that the Postmaster General acted within the authority given him by the statutes cited, and that the exceptions to the master's report should be overruled. Nor do I consider the point as to the unconstitutionality of the said acts well taken. While the rights of all citizens under the postal laws should be sacredly protected, yet this cannot be done while at the same time the public is exposed to tempting schemes of fraud, brought to it by this great and beneficent governmental convenience. In a case like the one at bar the consonance of such a law with the spirit of the Constitution is very apparent.

The exceptions are overruled, the report of the master confirmed, and the bill dismissed for want of equity.

ATLAS REDUCTION CO. et al. v. NEW ZEALAND INS. CO. (four cases).

(Circuit Court D. Colorado. January 30, 1903.)

Nos. 4,340-4,343.

1. FIRE INSURANCE—CONDITIONS AGAINST INCUMBRANCE—WAIVER.

Where an insurance policy covering both real and personal property provided that none of its conditions should be waived unless the waiver was indorsed thereon or attached thereto, and also contained a clause that as to any personal property it should be void if the property became incumbered by a chattel mortgage, unless otherwise provided by an agreement indorsed thereon, such condition was not waived by an indorsement making the loss payable to two persons named, who were in fact mortgagees, as their interest might appear, but which did not contain any reference to the mortgage, nor show that the insurer had any knowledge of the existence of a mortgage upon the personal property.

At Law. On demurrer to complaint.

Daniel Prescott, for plaintiffs.

Sylvester G. Williams, for defendant.

HALLETT, District Judge (orally). No. 4,343, the Atlas Reduction Company, George B. Dodge, and Archie M. Stevenson against the New Zealand Insurance Company, is an action on a policy of insurance. The policy was dated August 31, 1901, and was for a term of one year. The policy contained a clause which reads as follows: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage." The property insured was in large part personal, as shown by the description in the complaint and in the policy. Following the date of the policy, and on September 30, 1901, the Atlas Reduction Company mortgaged the real estate covered by the policy, and also the personal property, to Dodge and Stevenson, two of the plaintiffs in the suit. These mortgages were separate instruments, one covering the real estate and the other the personal property. The averment in the complaint in that respect is as follows:

"That on the 30th day of September, 1901, the above-named plaintiff the Atlas Reduction Company was and continued to be indebted to the above-named plaintiffs George B. Dodge and Archie M. Stevenson in an aggregate sum of forty thousand dollars for moneys advanced and paid by said George B. Dodge and Archie M. Stevenson for and on account of said plaintiff the Atlas Reduction Company, and on or about said 30th day of September, 1901, said plaintiff the Atlas Reduction Company made, executed, and delivered to the said plaintiffs George B. Dodge and Archie M. Stevenson a certain indenture of mortgage upon the real property, buildings, and appurtenances above described, and also on the same day the said plaintiff the Atlas Reduction Company made, executed, and delivered to said George B. Dodge and Archie M. Stevenson a certain chattel mortgage upon the personal property above described, both of which said mortgages were thereafter duly filed for record in the office of the county clerk and ex officio recorder of said county of Boulder, in said state of Colorado."

In the seventh paragraph it is averred that the defendant, the New Zealand Insurance Company, on or about the same day procured an indorsement to be made upon the policy as follows:

"Denver, Colo., Sept. 30th, 1901.

"Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson, as their interests may appear.

"Bartels Brothers, Agents."

The question raised by demurrer is whether this indorsement is sufficient to show the assent of the insurance company to the chattel mortgage, and upon that I have reached the conclusion that the indorsement is not sufficient. Under all the authorities, and in terms, it is only a direction to pay the loss which may arise under the policy to Dodge and Stevenson, and does not affect in any way any of the stipulations and conditions contained in the policy of insurance. The indorsement which is required by the clause in relation to the property being incumbered by a chattel mortgage would not be effectual unless it expressly referred to the mortgage in terms, which

should show that the company had knowledge of the existence of the mortgage; and this indorsement does not at all conform to that. The form of the indorsement is one which is in use as to mortgages of real estate, and such mortgages are not forbidden in terms in the policy. It is only chattel mortgages which are expressly forbidden. The fact that the indorsement which was in fact made upon the policy is only a direction to pay any sum which might become due under the policy to Dodge and Stevenson, is sufficiently explained in *Bates v. The Equitable Insurance Company*, 10 Wall. 33, 19 L. Ed. 882. There are numerous other cases, but none other need be cited. This is the authority of the Supreme Court of the United States, which in this court controls all other authorities. That the writing made upon the policy must distinctly show knowledge of the insurance company as to the chattel mortgage is provided for in the first clause of the policy, which reads as follows:

"This policy is made subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The knowledge of the agent of the existence of the chattel mortgage will not avail. It must appear in the writing indorsed upon the policy that there was such knowledge, and that the terms of the policy were the subject of express waiver. So that it must be held from the complaint, and the mortgage as stated in it, that there is no right of action in respect to the loss which accrued from the destruction of the personal property. Whether there may be any right of action as to the real property is a question not now presented in this complaint. If the complaint shall be amended so as to show a demand for the value of the real property alone and the improvements which were upon the real property, as distinguished from the chattels, the question will then be presented whether the making of the chattel mortgage by a separate instrument would vitiate the transaction as to the mortgage upon the real property. Upon that point I express no opinion at this time. It is unnecessary to take up the subject until plaintiffs shall proceed as to the value of the real property destroyed alone.

There are four cases presenting the same state of facts in which the order will be made, Nos. 4,340 to 4,343. The demurrer is sustained, with leave to the plaintiff to amend within 30 days, as it may be advised.

THE JANE McCREA.

(District Court, D. Maine. April 4, 1903.)

No. 39.

1. Tug and Tow—Duty of Tug—Care to Guard Against Injury of Tow.

A vessel which undertakes a towage service is liable for reasonable care of the tow, and that reasonable care is measured by the dangers and hazards to which the tow is exposed, which it is the duty of the master of the tug to know and to guard against not only by giving proper instructions for the management of the tow, but by watching her, when in a dangerous locality, to see that his directions are obeyed.

2. SAME—Negligence—Liability for Injury of Tow.

The master of a steamer, having contracted to tow a schooner from her wharf, beyond the end of which her stern projected about one-third of her length, undertook to swing her around by the stern, there being a reef about a length astern of her, and directed the captain of the schooner to cast off all lines except the stern line, after which he started her backward, being himself in the pilot house, where he could not watch her movements. The captain of the schooner cast off all her lines, and she moved backward until she grounded upon the reef. *Held*, that both vessels were in fault, and that the tug was not exonerated from liability for a share of the damages, because, after they had started backward, her master was told by the master of the schooner, in reply to his inquiry, that there were no rocks ahead.

In Admiralty. Suit for negligent performance of towage service.

Thomas W. Vose, for libellant.

E. P. Spofford and Bird & Bradley, for claimant.

HALE, District Judge. This case has been clearly and ably presented by counsel. The issue is a very distinct one, and lies in a small compass. The testimony of the witnesses is fresh in the mind of the court, and I can have no doubt as to what the decision should be. I will therefore announce it at once from the bench.

William H. Coburn, master and owner of the schooner George W. Lewis, brings his libel in this case against the tugboat Jane McCrea, alleging negligence in towing service. That service was performed in the harbor of Stonington, at Deer Isle, on the morning of August 15, 1902. At the time the service was begun the schooner was lying at the westerly side of Candidge's Wharf, in Stonington, her stern projecting out by the end of the wharf about 20 feet. The schooner is 70 feet long and 19 feet beam. In a southerly direction, a little westerly of the wharf, and 90 feet from its southwest corner, is a ledge of irregular formation. To the westerly of the wharf, and about 40 feet distant, there are some large rocks on the shore, so that the towage service was to be performed in a place of considerable danger. The Jane McCrea, the libeled steamer, is not a regular tugboat, but is a lobster steamer, 40 feet long. The claimant, however, in his answer, admits that he was "employed by the master of the schooner to tow said schooner from said wharf into the harbor of said Stonington," and he admits that he received the ordinary pay for such towage service. So that we must hold that the steamer in this case is under the ordinary duties and liabilities of a tugboat. There is a sharp conflict of testimony in the case. The captain of the schooner, Lewis, asserts

that the captain of the tugboat made the suggestion to him (to which he agreed) that the best method was to cast off all lines except the bowline, or "bowspring," as it was termed by the witnesses, and to swing the schooner's stern away from the wharf to the westward, and then, casting off all lines, to take her out by the ledge stern first. In this, however, his testimony stands unsupported by any other witness. The captain of the towboat asserts, on the contrary, that the method he intended to use was to hold fast the stern line, and then, by backing on the stern line, to swing the stern of the schooner around the corner of the wharf, at the same time swinging the bow out to the westward, thus heading her directly out of the channel; that, in accordance with such suggestion, when he came alongside the schooner, he gave orders to her captain to cast off all lines except the stern line, and to hold that fast. In this he is corroborated by the engineer of the tug and the mate of the schooner. The preponderance of the evidence is so strongly in favor of the theory of the captain of the steamer that his purpose was to swing by keeping fast the stern line, and take the vessel out in the way he has described, that I find that his story of the transaction is in accordance with the truth. While there are many things pointing to the conclusion for which the learned counsel for the libellant contends, the preponderance of the evidence is distinctly the other way. And it seems to me that in the proper maneuvering of a vessel and tug in this dangerous place the tug would be likely to adopt the method which the claimant asserts was adopted. So that, holding, as I do, that a great preponderance of the evidence substantiates this view, the master of the schooner was in some fault in letting go the stern line when he let go the other lines. But, whatever his fault was in letting go the stern line contrary to the orders of the captain of the steamer, he was clearly in fault, after the vessel was going astern, in not calling attention to the fact at once after she began to go astern, and to the fact that she was going upon the rocks. It appears from the admissions of Capt. Coburn that after the vessel began to go astern he stated, in reply to a question from Capt. Eaton on the steamer that there were no rocks ahead. This tended to mislead the captain of the steamer. I find, therefore, that the captain of the schooner was in some fault, not only in casting off the stern line contrary to orders, but in his subsequent conduct in misleading the captain of the steamer while the vessels were going astern.

The next question which presents itself is, was, or not, the steamer in fault? What are the duties of a tug in charge of a tow? In *The Julia S. Bailey*, an unreported case in this court, Judge Webb comments upon the duties of the master of a tugboat in a dangerous place. Under this decision and under the well-settled law of the federal courts, the tug is liable for reasonable care of the vessel to be towed, and that reasonable care is measured by the dangers and hazards to which she is exposed and to which the vessel in tow is exposed. The court said:

"The captain of the towboat ought to have fully informed and warned the captain of the schooner of the danger, and the proper means to overcome it, and also he should not have trusted altogether to his previous in-

structions, but, as the dangerous part of the navigation was approached, he should have watched his tow."

In the case at bar the master of the tugboat had ordered the master of the schooner to hold his stern line, and had then ordered his engineer to go astern, but he was not then excused from watching his tow to see that his orders were carried out. He is under the great responsibility of watching his tow at every point during the towage service in so dangerous a place as this is testified to be. And, even though the captain of the schooner asserted to the captain of the steamer that there were no rocks, even this does not excuse the master of the tug from knowing the channel, and knowing whether there were dangers ahead. I hold the master of the towed vessel in fault for taking the part in the transaction which he did, but this does not excuse the master of the tugboat for his failure to know the channel and his failure to know whether his instructions had been carried out. In order to excuse himself, Capt. Eaton on the tug says he was in the pilot house at the wheel in an inclosed place, and could not watch the vessels; but it was his duty either to be able to watch the vessels from where he stood at the wheel, or to have a lookout on the deck to watch the towed vessel at every point. If he had been on the watch, he could have seen at once, when the beginning of the backward movement was made, whether the schooner was swinging or going astern; and when he found she was going astern, instead of swinging, he could have had time to avoid the injury, for, according to his testimony, it took some four or five minutes after the schooner started astern until she stranded.

I therefore hold the master of the tug in fault because he was undertaking to tow in a channel he did not know, and, further, after he had given instructions, because he assumed that the instructions would be carried out, and did not watch his tow. He did not exercise the reasonable care and prudence required in the towage service in a dangerous place. I therefore hold both parties in fault, and the result must be that the damages be divided with an order of reference to an assessor to determine the amount, the libellant to have full costs.

BANK OF TIMMONSVILLE v. FIDELITY & CASUALTY CO.

(Circuit Court, D. South Carolina. April 1, 1903.)

1. FIDELITY INSURANCE—COMPLAINT—IRRELEVANT ALLEGATION—OTHER INSURANCE.

The complaint in an action on a policy against loss by dishonesty of an employé to the extent of \$5,000, providing that, if there be other insurance, defendant should be liable for any loss only ratably, alleged a loss of over \$10,000, and that plaintiff had insurance against the loss to the extent of \$5,000 with another company, and on "demand of the plaintiff the full sum of \$5,000 was paid" by such other company. *Held*, that the allegation as to the other insurance was not irrelevant, but, to prevent influence on the jury, in place of the words "and on demand of the plaintiff the full sum of \$5,000 was paid" there should be substituted the words "which has been paid."

Mitchell & Smith, for plaintiff.

Geo. H. Moffett and J. P. K. Bryan, for defendant.

SIMONTON, Circuit Judge. This case comes up on motion to strike out the ninth paragraph of the complaint on the ground that the same is irrelevant. The case is by the Bank of Timmons ville against the Fidelity & Casualty Company. After stating the jurisdictional facts, the plaintiff alleges that the defendant, in consideration of a certain named premium paid by plaintiff, made the plaintiff its policy of insurance, whereby it promised that during the life of the policy it would make good to plaintiff any loss it sustained by reason of fraud or dishonesty of F. C. Lechner, its cashier, to the extent of the sum of \$5,000. It then states the continuous employment of the cashier from the date of the policy until the 18th of August, 1901, the renewal of the policy from time to time, the last renewal being from the 19th of March, 1901, to the 17th of March, 1902; that on the 18th of August, 1901, said cashier left plaintiff's employment, whereby it was immediately discovered that plaintiff has sustained a loss within the terms of the policy, through the cashier, of \$10,035.69, which fact was communicated to defendant by the plaintiff. The complaint further alleges that the plaintiff complied with all the conditions of the policy. Then comes the ninth paragraph, to which this motion is directed. That paragraph is in these words:

"(9) That the plaintiff had like concurrent insurance against the loss described with the American Surety Company, a corporation under the laws of New York, to the extent of \$5,000, and upon the demand of the plaintiff the full sum of \$5,000 was paid to it by the American Surety Company."

The policy was not attached to the complaint as an exhibit, but the defendant, under the eleventh rule of this court, demanded a copy of the policy, which demand has been complied with. The copy was furnished, and put on file, and is now a part of the record. One of the provisions of this policy is:

That if the employer shall, at the date of this policy, or any time thereafter, be guaranteed or hold any securities against loss covered hereby, the company shall only be liable to make good any such loss ratably, and in just proportion, taking into account the value of the security."

Is this ninth paragraph irrelevant? "An allegation," says Mr. Pomeroy in his work on Remedies, § 551, "is irrelevant when the issue formed by its denial can have no connection with nor effect upon the cause of action." In section 552 he adds that: "It is the universal rule of all Codes that the proper mode for objecting to any irrelevant allegation is by motion to strike out, and not by demurrer, nor by motion at the trial, to exclude the evidence." This is the rule in South Carolina. *Smith v. Smith*, 50 S. C. 67, 27 S. E. 545; *Dent v. Railroad Co.*, 61 S. C. 335, 39 S. E. 527. Is this allegation of the ninth paragraph irrelevant? An allegation or pleading is irrelevant when it has no connection with the issues involved. Test the ninth paragraph by this definition. The plaintiff is suing upon a contract of insurance, and seeks to hold the defendant liable thereon for the amount of damages described in the contract. Among the provisions of this contract is one limiting the liability of the insurer if there

be other insurance. Before a verdict for plaintiff can be reached upon this cause of action, it must appear whether there was other insurance against the same risk, and, if so, to what extent. As this is a fact wholly within the knowledge of the insured, it is incumbent upon the plaintiff to show it. For this reason the rule in fire insurance is thus stated:

"If the policy provides that the insurer shall not be liable for a greater proportion of the loss than the amount of the policy bears to the whole insurance on the property, the amount of other insurance, or the fact that there was none, must be stated." 11 Enc. Pl. & Pr. 415, 416.

The same principle applies to any bond of indemnity or insurance like this. See *Supreme Council, etc., v. Fidelity & Casualty Surety Co.*, 11 C. C. A. 96, 63 Fed. 48. If there be other indemnity, this fact must be stated. This being so, the statement made in the ninth paragraph bears directly upon the liability of the defendant. If, on the trial, the plaintiff is able to prove a loss not amounting to \$10,000, the verdict against the defendant must be measured by the amount already received from the American Surety Company. So it is an issue determining the amount of the verdict.

Whilst, however, the general allegation of this paragraph is not irrelevant, the mode in which it is stated is open to criticism. It not only states the fact, but it contains evidentiary matter qualifying it. The paragraph not only states the payment, but it adds, "Upon the demand of the plaintiff the full sum was paid." Although this statement has no probative force, still, put in this way, it is calculated to affect the minds of the jury. The complaint must be amended by striking out in the ninth paragraph the words: "And upon the demand of the plaintiff the full sum of \$5,000 was paid to it by the American Surety Company," and inserting the words, "which has been paid by the American Surety Company."

In re FLANDERS.

(District Court, D. Vermont. April 20, 1903.)

1. BANKRUPTCY—SUIT IN STATE COURT—STAY—DISCHARGE—EFFECT.

Bankr. Act, § 11a (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), provides that a suit on a claim from which a discharge would be a release, pending when a bankruptcy petition is filed, shall be stayed until after adjudication or dismissal thereof, and, if adjudication of bankruptcy is had, it may be further stayed 12 months, or, if within that time the bankrupt applies for a discharge, then until the question of discharge is determined. *Held*, that the stay of a suit for malpractice in a state court, ordered pending discharge, would not be continued after the discharge had been granted.

In Bankruptcy.

Thomas W. Moloney, for plaintiff.

Wilder L. Burnap, for bankrupt.

WHEELER, District Judge. In this case there has been a temporary stay of proceedings in a suit against the bankrupt for malpractice as a surgeon, in a state court, pending discharge. While the

motion for continuing the stay has been pending, a discharge has been granted. The motion is now to be disposed of.

By the terms of the bankrupt act, such a stay is to be granted only for the time during which the question of discharge may be open and pending. Section 11a (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]). If a discharge is denied, or the time for asking one is allowed to expire without application, there is no occasion for such a stay. The suit may proceed as if there had been no bankruptcy, except as the trustee may intervene to save property rights for the estate. As to personal rights and liabilities the bankrupt remains as before. If the discharge is granted, the right of action is brought under its effect according to the law; and the bankrupt becomes entitled to its protection, to be availed of by proper legal remedies. In re Rosenthal, 5 Am. Bankr. Rep. 799, 108 Fed. 368. A stay of proceedings in the suit by the court of bankruptcy, as such, is not such a proper remedy. A stay pending the discharge would have been as extensive as could be proper for a permanent stay, and it would have expired on the granting of the discharge. None larger should be continued. The motion to continue the stay must therefore be denied; and the temporary stay, which stands unlimited now, must be vacated. This should, however, be without any prejudice to the rights of the bankrupt under the discharge.

Motion to continue stay denied. Temporary stay vacated, without prejudice.

EL PASO REDUCTION CO. v. HARTFORD FIRE INS. CO.

(Circuit Court, E. D. Pennsylvania. April 7, 1903.)

No. 4.

1. FIRE POLICY—CANCELLATION—RETURN OF UNEARNED PORTION OF PREMIUM.

A fire policy declared that it might be canceled at any time by giving five days' notice, and then provided that, if canceled, the unearned portion of the premium should be returned on surrender of the policy. *Held*, that on canceling the policy the company was not required to return the unearned premium until the policy was surrendered.

2. SAME—FORFEITURE—SUSPENSION OF BUSINESS—PERMITS.

A fire policy covering a manufacturing establishment declared that, unless otherwise provided by agreement indorsed thereon, it should be void if the establishment ceased to be operated for more than 10 consecutive days. The establishment ceased to be operated April 20th, but permits were granted allowing this until July 20th. The fire occurred July 23d, operations not having been resumed. *Held*, that the policy was not in force.

R. Stuart Smith and Morgan & Lewis, for plaintiff.

Frank R. Shattuck, for defendant.

J. B. McPHERSON, District Judge (orally). I have considered this motion for a compulsory nonsuit, and, in my opinion, it must be granted. There may be two questions involved. The first question is whether or not the policy was canceled before the fire. The policy declares that it may be canceled at any time by the company by giving

five days' notice, and goes on to provide that, if the policy is canceled, the unearned portion of the premium shall be returned on surrender of the policy. The undisputed evidence in the case shows that this option of the company was actually exercised. I regard the letter written by their agents on this subject as the required notice of cancellation, and, as that letter reached the properly authorized agent of the plaintiff on the 17th at the latest, the policy became void on the 22d, the day before the fire. The fact that the unearned portion of the premium had not been returned at that time is, in my judgment, of no importance. The policy expressly provides that the unearned premium shall be returned "on surrender of the policy." I think these words mean exactly what they say. When the policy is surrendered, the unearned portion of the premium must be paid, but the company need not pay it before that time. The evident purpose of this provision is to compel the actual return of the written instrument, in order that it may not remain outstanding, to be a possible source of future trouble. But, whatever the purpose may have been, there is the plain contract, and it is my duty, as I think, to construe it according to its evident meaning.

If this is true, the case comes to an end at that point. But it is possible to take the view, and the plaintiff argues that it should be taken, that the correspondence between the parties was not an exercise of the option to cancel, but amounted simply to notice on the part of the company that they would exercise that option at some time in the future; in other words, was a mere declaration of intention to act hereafter on that subject. If that is true, cancellation would not have taken place. Then the second question arises upon another clause of the policy: "This policy, unless otherwise provided by agreement endorsed thereon, shall be void if the subject of insurance be a manufacturing establishment, and if it shall cease to be operated for more than ten consecutive days." This was a manufacturing establishment. It ceased to be operated some time in April, and the fire did not take place until the 23d of July. Of course, it had ceased to be operated for many more days than ten. But by proper permits of the company, attached to the policy, permission had been given to cease operations until the 20th day of July. Upon April 20th the first permit was issued: "Privilege is hereby granted to cease operations for one month from date." The effect of that was simply to extend the time of permitted idleness from ten days to one calendar month. In other words, instead of being allowed to have the plant idle for ten days, the plaintiff was allowed to have it idle for thirty days. The next permit extended the time for another month, until June 20th: "Permission to cease operations is hereby extended to June 20." Afterwards, permission was further extended to July 20th. The permission ceased upon that day, and the plaintiff's contention that the clause quoted gave a further period of ten days during which the plant might remain idle cannot be supported. Therefore, if the notice of cancellation was inoperative, it was the plain duty of the plaintiff to take steps to protect itself from the operation of the clause under consideration, and application should have been made for a further extension of permission. This was not done, and the reason is plain. At that time the plaintiff

regarded the notice of cancellation as effective, and therefore took no further steps under the policy.

A compulsory nonsuit will be entered.

In re STEAM VEHICLE CO. OF AMERICA.

(District Court, E. D. Pennsylvania. April 23, 1903.)

No. 1,382.

1. BANKRUPTCY—PREFERENCES.

To constitute a preference, actual value must have passed from the bankrupt to the creditor in some form. Mere fictitious book entries, although made through collusion between the creditor and the bankrupt for the purpose of deceiving others, but which were unsuccessful, and did not affect the rights of other creditors, do not constitute a preference, nor estop the creditor from denying the prima facie effect of such entries.

In Bankruptcy. On certificate of referee concerning disallowance of claim of the Corbin Banking Company.

Roland S. Morris, for Corbin Banking Co.

R. Stuart Smith, for trustee.

J. B. McPHERSON, District Judge. I am unable to agree with the learned referee's conclusion in this case. No doubt the claimant's agent and an officer of the bankrupt company were parties to a discreditable trick, by which it was sought to deceive the intending purchasers of the bankrupt's property into paying a larger sum than their contract really obliged them to pay; and, if the interest of these purchasers was now involved in the controversy, the questions for decision might be very different. But the intended purchase was never carried out, the purchasers were not in fact deceived, and the present controversy is among the creditors of the bankrupt company, none of whom (except, of course, the claimant) knew anything whatever about the entries made upon the books of the claimant. In this condition of affairs, I do not see upon what ground the banking company can be properly held to have received a preference which it should now surrender before sharing in the fund for distribution. The claimant is not estopped from denying the prima facie effect of the entries upon its books. The elements of estoppel are not present. Upon this point it is enough to say that the other creditors not only did not act to their own prejudice upon such entries, but they did not even know that the entries existed.

Neither, under the provisions of the bankrupt act, can the claimant be properly held to have received a preference. It never received a cent of money or any other consideration on account of the disputed items. No gain has come to it, and no loss has come to the bankrupt, because of what was done; and therefore, as it seems to me, it is impossible to hold that mere juggling with book entries amounts to payment. As I look at the matter, payment means at least that value has passed in some form or other; and the word does not properly embrace a fictitious transaction, such as this, where

no value was intended to pass, and where none was actually transferred. Reprehensible as the conduct under consideration was, and whatever its effect might be in other proceedings, it did not do the slightest harm to the other creditors, and did not take from them any part of the bankrupt's assets.

The exceptions to the report of the learned referee must be sustained, and the claim of the Corbin Banking Company admitted to share in the distribution of the fund.

In re HARTMAN.

(District Court, D. Massachusetts. April 11, 1903.)

No. 7,071.

1. **BANKRUPTCY—JURISDICTION—PREFERENCES.**

Section 8 of the Ray bill (Act Feb. 5, 1903, § 8; 32 Stat. 798), amending section 23b of the bankruptcy act of 1898 so as to give the bankruptcy court jurisdiction of suits for the recovery of certain preferences, is qualified by section 19 (32 Stat. 801), which provides that the provisions of the act shall not apply to pending bankruptcy cases.

2. **SAME—ADVERSE CLAIMANT.**

A party to whom it is claimed property of a bankrupt has been conveyed in bad faith is an adverse claimant, and cannot be proceeded against in the bankruptcy court without his consent.

In Bankruptcy.

Daniel B. Beard, receiver, pro se.

Philip Tworoger, for Frankenstein.

LOWELL, District Judge. This is a petition filed by the receiver, seeking the return of property alleged to belong to the bankrupt's estate, and now in the hands of one Frankenstein. The petition alleges that the bankrupt delivered some of his property to Frankenstein at a time when the former was insolvent, and the latter knew the fact; that the purchase by Frankenstein was not made in good faith, but with intent to delay, defraud, and hinder the bankrupt's creditors. The receiver's counsel further alleged, in argument, that the consideration paid the bankrupt by Frankenstein, if there was any, was quite inadequate. Frankenstein, on the other hand, alleged that he had acted in good faith. Frankenstein objected to the jurisdiction, and the referee overruled the objection. Thereupon Frankenstein sought a review by this court.

The petition in bankruptcy and the adjudication were both before the passage of the so-called Ray bill (Act Feb. 5, 1903; 32 Stat. 797), though the receiver's petition was filed after the passage thereof. Counsel for the receiver contended that the jurisdictional amendment made by section 8 of the Ray bill is not subject to the qualification of section 19; but it appears to me that the operation of the Ray bill is confined to cases in which the original petition in bankruptcy has been filed since the Ray act took effect, and that section 19 applies as well to matters connected with a petition in bankruptcy (e. g., preferences,

fees, grounds for refusing discharge, dividends, and jurisdiction) as to the petition itself and to the adjudication. See section 17, where the provisions for an index are made expressly applicable to petitions and discharges heretofore and hereafter filed. The contrary opinion expressed in *Collier on Bankruptcy* (4th Ed.) p. 533, seems to fly in the face of the plain language of the act.

Counsel for the receiver further contended that, apart from the Ray bill, this court has jurisdiction; but the claim of Frankenstein must be treated as an adverse claim, within the cases of *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Jaquith v. Rowley*, 23 Sup. Ct. 369, 47 L. Ed. —.

For these reasons, the judgment of the referee is reversed.

FOGARTY v. SOUTHERN PAC. CO. et al.

(Circuit Court S. D. California, S. D. March 16, 1903.)

1. REMOVAL OF CAUSES—GROUND FOR REMOVAL—WAIVER OF RIGHT TO REMOVE.

In an action in a state court against a citizen of the state and a citizen of another state the suit was dismissed as against the citizen of the state, but no notice of such dismissal was served on the other defendant, and thereafter, while ignorant of the dismissal, it requested a change in the time fixed for the trial of the case. *Held*, that it had not waived its rights to a removal.

2. SAME—TIME FOR REMOVAL—REASONABLE TIME.

The motion for removal having been granted 19 days from the dismissal will be held to have been made within a reasonable time after the right of removal arose, though it did not appear when the moving party learned of his right to remove, or when the petition for removal was filed.

Messrs. Sullivan & Sullivan and Theo. J. Roche, for plaintiffs.

W. H. Spencer, P. F. Dunne, C. E. Nougues, and Messrs. Flint & Barker, for defendant.

ROSS, Circuit Judge. This is a motion to remand the case to the state court, from which it was transferred. The action was brought against the defendant company, a corporation of the state of Kentucky, and one Nelson, a citizen of the state of California, alleging as ground of the action a joint injury by the defendants to the plaintiff. On the 7th day of February, 1903, the plaintiff having notified the defendant company that on that day he would move to set the case for trial, the plaintiff appeared, and moved the court to dismiss the action as against the defendant Nelson, which was then done by an order entered in the minutes, and the case thereupon set for March 9, 1903, for trial, the plaintiff demanding a jury. The defendant company was unrepresented on that occasion, and, so far as the record shows, was at no time notified of the dismissal of the action as against its codefendant, Nelson. Its attorney of record, on the 13th of February, 1903, made a verbal request of the representative of the plaintiff's attorneys for a change in the time fixed for the trial of the case, which suggestion was not acceded to by the attorneys for the plaintiff, and

thereafter the defendant company filed in the state court a petition and bond for the removal of the action to this court, which motion was granted by an order entered on the 26th day of February, 1903. The time of the presentation of the petition and bond for the removal is not made to appear in the record, nor does it appear when the defendant company first learned of the dismissal of the action as to Nelson, and its consequent right to remove the case to this court.

It is clear that prior to the dismissal of the case as against the defendant Nelson, no ground of removal existed. That right in the defendant company first arose upon the dismissal of the action as against its codefendant on the 7th day of February, 1903. No notice of such dismissal appears to have been given to the defendant company at any time, and the verbal request of its attorney for a change of the time set for the trial of the action in the state court was, so far as appears from the record, made in ignorance of the fact that the right of removal on the part of the defendant company then existed. That fact is of itself sufficient to show that the defendant company cannot be held to have waived its right in that respect by the verbal application of its attorney, even if, by such an application, unaccompanied to, it would otherwise be held bound. Nor, from the facts appearing, can it be properly held that the application for the removal of the action was not made by the defendant company within a reasonable time after its right of removal arose.

The motion is denied.

In re BIMBERG.

(District Court, S. D. New York. April 3, 1903.)

1. BANKRUPTCY—DISCHARGE—VACATION—PARTIES IN INTEREST—CREDITORS—FAILURE TO PROVE CLAIM.

That a creditor of a bankrupt failed to file or prove his claim within a year after the adjudication, and was thereby precluded by Bankr. Act, § 57n, Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444], from thereafter proving his claim, or sharing in any dividend which might be declared if the discharge was vacated, did not deprive him of the right to move to vacate such discharge, as a party in interest, within section 15, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], since, if the discharge were vacated, the creditor would be entitled to collect his claim from any property acquired by the bankrupt after bankruptcy.

2. SAME—JURISDICTION—AMENDMENT OF DECREES.

A court of bankruptcy has general power to amend its decrees in its discretion, and on its own motion to vacate a discharge, in the furtherance of justice, before the expiration of a year after it was granted.

Abraham G. Meyer, for creditor.

Herbert H. Maass, for bankrupt.

HOLT, District Judge. This is a motion to vacate a discharge. More than a year has passed since the adjudication. The creditor making the application to vacate the discharge has never proved his claim. A preliminary objection is made that he is not a party in interest, within the meaning of section 15 of the bankrupt act (Act

July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), authorizing such a motion "upon the application of parties in interest." It is asserted that the creditor, not having proved his claim, and being prohibited by section 57n, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444], from hereafter proving his claim, is not a party in interest, because he could not share in any dividend if the discharge were vacated. The language of section 57n is that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication." The authorities hold that this language is more than a limitation of time, and is an absolute prohibition. *Bray v. Cobb* (D. C.) 100 Fed. 272; *Re Shaffer* (D. C.) 104 Fed. 982; *Re Moebius* (D. C.) 116 Fed. 47; *Collier on Bank.* (4th Ed.) p. 394. The moving creditor, therefore, if the discharge were vacated, could not share in any dividend, but I think that that fact does not establish that he is not a party in interest. He has an interest in having the discharge vacated, for, if it is vacated, he can collect his claim from any property acquired by the bankrupt after the bankruptcy. Moreover, it is stated by counsel that in this case no claims were filed by any creditors. The bankrupt's schedules stated that he had no assets, and the creditors seem to have relied upon that statement. The ground of this motion is that he had assets when he went into bankruptcy, and has them still, but has concealed them. If this charge is true, and a trustee were appointed who collected the assets, as no creditors have proved claims, and the time has passed in which they can do so, the trustee would apparently be obliged to pay the money back to the bankrupt. The result, therefore, would apparently be that if the discharge were set aside the creditor could enforce his claim against the property concealed. Under the act of 1867 it was held that a creditor who had a provable debt, even if he had not proved it, could move to vacate a discharge. *Re Douglas* (D. C.) 11 Fed. 403. Moreover, a court of bankruptcy has generally power, like any other court, to amend its decrees, in its discretion, at any time, in the furtherance of justice, in the absence of any statutory prohibition. *Re Dupee*, 6 N. B. R. 89, Fed. Cas. No. 4,183. Undoubtedly a discharge cannot be vacated after a year has passed, but, before a year has passed, the court, on its own motion, in my opinion, could vacate a discharge, if justice required it.

My conclusion is that the preliminary objection should be overruled. If the bankrupt files affidavits putting in issue the facts stated in the moving papers, the matter will be referred to a referee as commissioner to take testimony and report. If no such affidavits are filed, the motion is granted.

CHAMPNEY v. HAAG.

(Circuit Court, E. D. Pennsylvania. March 18, 1903.)

No. 42.

1. COPYRIGHTS—REPRODUCTION OF PHOTOGRAPHS—INFRINGEMENT.

Where illustrations published by defendant, which were alleged to constitute an infringement of the copyright on plaintiff's painting, were reproductions of a copyrighted photograph of such painting, and not of the painting, such illustrations constituted an infringement of the copyright on the photographs only, and not on the copyright of plaintiff's painting.

Motion by Defendant for Judgment upon Reserved Point, Notwithstanding the Verdict.

Henry C. Quinby, for plaintiff.

Ira J. Williams, for defendant.

J. B. McPHERSON, District Judge. Upon more careful examination and consideration than was possible at the trial, I am satisfied that the evidence shows beyond question that the illustrations published by the defendant were reproductions of the photograph that had been copyrighted by Curtis & Cameron, and were not reproductions of the plaintiff's painting by any other hand or by any other process. If the photograph was copyrightable by reason of possessing artistic value that had been contributed to it by the photographers, the right of action for the publication complained of would belong to them, and not to the painter. No attempt was made at the trial of this suit to attack the photographers' copyright, and it was therefore necessary to regard it as at least prima facie valid. No doubt it was attacked in another suit brought by the photographers themselves, but that proceeding was still undetermined, no final judgment having been entered when the trial of this action took place. For these reasons, it seems to me that the verdict, which rests necessarily upon the finding that the illustrations in question were not copied from the photograph, has no foundation in the testimony, and that the plaintiff's case entirely failed of support. The defendant, I think, is entitled to judgment notwithstanding the verdict. To the entry of such judgment, an exception is granted to the plaintiff.

FERRENBACH v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1903.)

No. 1,768.

1. LIFE INSURANCE—ASSESSMENTS—TIME FOR PAYMENT.

An insurance certificate and the by-laws of the insurance association provided that proof of the mailing of a notice addressed to a member should be deemed and held to be conclusive proof "of due notice to said member" of an assessment. The certificate further provided that assessments should be payable "within thirty days from the date of each notice." *Held*, that the word "notice," as used in the latter clause, did not mean the printed paper mailed, but the information thereby conveyed to the insured, and that the 30 days were not to be computed from the date of the paper, nor the date on which it was mailed, but from the day on which it was, or should have been, received by the insured in due and regular course of mail.

Sanborn, Circuit Judge, dissenting.

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

C. B. Williams (R. P. Williams, on the brief), for plaintiff in error.
James C. Jones (William C. Jones, Lon O. Hocker, and George Burnham, Jr., on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought originally by Jacob Lambert against the Mutual Reserve Fund Life Association, a corporation organized under the laws of the state of New York. After the trial of the cause, and the rendition of a judgment therein in favor of the defendant, Jacob Lambert died, whereupon Thomas Ferrenbach, executor of his estate, was substituted as plaintiff in place of the deceased. The action was brought to recover premiums amounting to \$2,665.65 which Jacob Lambert paid during his lifetime to the defendant company as assessments or premiums upon a policy of insurance upon his life, which appears to have been issued by the defendant company to the deceased on April 5, 1883. The premiums, as they were assessed and demanded, were regularly paid by the insured from that time forward until May 3, 1899, when an assessment or premium on the policy that was levied by the defendant company March 15, 1899, was tendered to the company's agent at the city of St. Louis, Mo., where the deceased resided, but was declined by the agent unless the insured submitted to another medical examination before the company's medical examiner, which examination he declined to undergo, and could not undergo, in fact, because he had become diseased, and was at the time over 70 years old; having taken out the policy in question at the age of 56. The defendant company declined to accept the premium, amounting to \$77.50, that was tendered by the deceased on May 3, 1899, because, as the company asserted, it was overdue, and should have been paid not later than May 1, 1899. The deceased, on the other hand, insisted that he had the

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 1902, 1903.
121 F.—60

right to pay the premium known as "Mortuary Call 103" on May 3, 1899; and because it was refused, and because, following such refusal of the premium, the policy was declared null and void and forfeited by the defendant company, he counted upon such conduct on its part, in the first count of his complaint, as a breach of the contract of insurance, which entitled him to recover the premiums that had been paid since the issuance of the policy.

The case hinges on the question whether the premium that was tendered on May 3, 1899, was tendered in time to avoid a forfeiture, and the undisputed facts upon which the decision of that question depends are these: The policy of insurance which was issued to the insured, in its opening paragraph, contains the following clause:

"All mortuary assessments payable at the office of the association within thirty days from the date of each notice."

The certificate further provides that:

"A notice addressed to a member at his post-office address as appearing upon the books of the association, according to its usual course of business, shall be deemed a sufficient notice, and proof of mailing the same, according to the usual course of business of said association, shall be deemed sufficient proof of compliance herewith on the part of said association."

A similar provision to the last is found in the constitution and by-laws of the company, which further provide that:

"An affidavit of or proof of addressing and mailing the same according to the usual course of business of said association, shall be taken and deemed as evidence, and shall be, constitute, and be deemed and held to be conclusive proof of due notice to said member and every person accepting or acquiring any interest thereunder."

The notice of the assessment or premium in controversy, which was levied, as above stated, on March 15, 1899, contained a statement that it was payable "within thirty days from the date of this notice." A notice of mortuary call No. 103, in the usual form, and containing the statement aforesaid, was by the defendant company deposited in the mail at the city of New York on March 31, 1899, postage prepaid. In due course of mail it reached the city of St. Louis, Mo., where the deceased resided, on April 2, 1899; but, as that day fell on Sunday, it was not delivered to the deceased in due course of mail until the following Monday morning, April 3, 1899. The deceased handed this notice to an agent of his who had charge of his business affairs, with directions to pay the assessment. This agent on May 1, 1899, went to an office building in the city of St. Louis where the defendant had prior to that time, and up to March 22, 1899, maintained its office, with the money necessary to pay the assessment, but found that the defendant company had changed its location. On May 3d, learning to what place the defendant company had removed its office, he went to that place on May 3d, and tendered the full amount of the assessment, to wit, \$77.50; but the company's agent declined to accept the money, for the reasons stated heretofore, unless he would undergo another medical examination. Thereafter, as the plaintiff declined to undergo, and, on account of his physical condition, could not undergo, another medical examination, the company declared his policy, and all payments thereunder, forfeited.

It is contended in behalf of the defendant company, and that view was adopted by the lower court (resulting in a judgment in the defendant's favor), that the word "notice," as used in the certificate or policy and in the company's by-laws, means the printed paper by which knowledge of an assessment is communicated to the insured, and that the 30 days limited within which to make payments must be computed from the date given to or borne by that paper. On the other hand, the plaintiff contends that the word "notice" means knowledge or information communicated to the insured by means of the paper, and that the 30 days are to be computed from the time when, in due course of mail, such knowledge or notice comes to the insured. It is not claimed that, if the paper goes astray or is lost in the mail, the insured will not be affected with knowledge of the assessment until it arrives; but it is insisted that as the object is to give the insured knowledge of an assessment, and as the mere execution of a notice or the mere deposit of the same in the mail cannot impart knowledge, the agreement of the parties should be construed to be that the insured should be conclusively presumed to have knowledge of an assessment on such day as, in due course of mail, the notice of the assessment ought to come to hand, and that the 30-day period runs from that date. It will be observed, therefore, that, according to the company's theory, the premium in question was payable May 1, 1899, while, according to the plaintiff's theory, it was payable as late as May 3, 1899, because the notice arrived on April 3, 1899, and the computation, as he contends, should be made from that day, excluding April 3d, and including May 3d, according to the general rule for the computation of time.

The question presented is not novel, but has been decided by other courts. As early as the year 1887 it was held by the Court of Appeals for the state of Kentucky in *National Mutual Benefit Ass'n v. Miller*, 85 Ky. 88, 93, 2 S. W. 900, 901, that, where the charter of a mutual benefit society provided that "any member failing to pay his assessment within thirty days from the date of notice shall forfeit his membership, * * *" the time within which payment is to be made "is not to be computed from the actual date of the notice, or from the day it was mailed to the member, but, when sent by mail, from the time at which the notice would, in the regular course of mail, be received by the member." In the case of *United States Mutual Accident Ass'n of the City of New York v. Mueller*, 151 Ill. 254, 37 N. E. 882, 885, the Supreme Court of that state held, in the year 1894, that, although the by-laws of the order contained the provision that "payments are to be made * * * within thirty days from the date of the notice thereof," that meant from the date of the service of the notice, and not the date of the writing. And since this case was submitted our attention has been called to a very recent decision of the same court in the case of *Cronin v. Supreme Council Royal League*, 65 N. E. 323, wherein the same doctrine is reiterated, namely, that, where a by-law of a beneficial association provides that payment of assessments shall be made within 30 days of the date of the notice, a member is not in default until 30 days from the time notice is received. This rule of construction was also adopted and approved by

the Supreme Court of Minnesota in the year 1898 (*Bridges v. National Union*, 73 Minn. 486, 496, 76 N. W. 270, 409, 77 N. W. 411); that court saying:

"The 'date of the notice,' in cases of this kind, is not the date printed on the notice itself, but, when sent by mail, is the day of the date on which the notice is mailed, or is or should be received by the member in due and regular course of mail."

That court also held, following the general rule applicable to the construction of insurance policies, that, in placing a construction on such a provision, that construction should be adopted which is most favorable to the insured, and will avoid a forfeiture. Likewise, the Supreme Court of Louisiana, in the year 1871, in the case of *Wetmore v. Mutual Aid & Benevolent Life Ass'n*, 23 La. Ann. 770, held that where a provision of a policy issued by a benevolent association required members of the association to pay a small assessment within 30 days after the death of a member, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German, and one in French, for five consecutive days, the 30-day period did not commence to run until the last day of the five publications. Mr. Bacon, in his work on *Benefit Societies & Life Insurance* (section 382) also states the doctrine thus:

"Where the laws of the society require that the assessment shall be paid within a certain number of days 'from the date of the notice' thereof, the date will be construed to mean the day it is delivered or received, and not the date written in the notice, or the day it is mailed; and, in computing the number of days, the day on which the notice is received will be excluded."

The adjudications aforesaid are ample to sustain the plaintiff's contention that the premium in question was tendered in time to avoid a forfeiture, although not tendered until May 3, 1899; and we feel the more inclined to follow these adjudications, and adopt the construction of the phrase "thirty days from the date of each notice" which has been adopted for several years by so many courts of last resort, since it will obviate a forfeiture, which courts always strive to prevent. It is a well-settled rule that, where doubts arise as to the proper construction of clauses in insurance contracts, that view of them should be adopted which is most favorable to the insured. It is most reasonable that these decisions should be followed in the case in hand, since the insured had paid premiums for many years on the policy in question, and, by reason of his advanced age and bodily infirmities, could not obtain other insurance when the alleged forfeiture occurred. The conduct of the defendant company in attempting to rid itself of the risk in the manner and under the circumstances disclosed by this record cannot be viewed otherwise than with disfavor, and the construction which it seeks to have placed on its policy and its by-laws to accomplish that end is accordingly rejected as contrary to law and opposed to fair business dealings, especially as between an insurer and an insured.

It was not seriously urged on the argument by counsel for the defendant company that if the company wrongfully refused to receive the premium which was tendered to it on May 3, 1899, it was not liable to the plaintiff in some amount on account of such wrong-

ful conduct. It was practically admitted on the argument that, if it wrongfully refused to receive the premium in question, it was liable. We fully concur in that view, but for what amount a recovery may be had—whether it be the amount of the premiums, as sued for in the first count of the petition, or the face of the policy, the insured being now dead—we are not called upon at this time to decide. No such question was considered by the trial court, because it held that the policy and all premiums paid thereon were lawfully forfeited, and that the plaintiff could not recover. It so directed the jury, and the verdict was rendered in accordance with that direction. This instruction was erroneous, and ought not to have been given.

The judgment of the lower court is accordingly reversed, and the case is remanded to that court for a new trial.

SANBORN, Circuit Judge (dissenting). The sole purpose of the judicial construction of a contract is to ascertain the intention with which the parties made it. These parties agreed that the mortuary assessments were payable "within thirty days from the date of each notice," and the sole question in this case is whether they intended, not by this stipulation alone, but by the entire contract, to agree that the assessment of April 1, 1899, should be payable within 30 days from the date upon the printed notice of it, which was mailed to the assured under the agreement, or within 30 days from the time when, in the ordinary course of the mail, the assured would have received this printed notice. The court below was of the opinion that the parties to this contract intended to agree that the assessment should be payable within 30 days from the date upon the printed notice, and the following considerations lead me to concur in the view taken by that court:

1. All the stipulations and parts of a contract must be read and considered together, to ascertain the true intention of the parties to it. That intention cannot be perceived by looking at a single stipulation alone. All the terms of the agreement must be taken in their ordinary, plain, and popular sense. Their natural, obvious meaning must be preferred to any curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of shrewd counsel would suggest. *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; *McGlothter v. Provident Mutual Accident Ass'n*, 89 Fed. 685, 687, 32 C. C. A. 318, 322; *Delaware Ins. Co. v. Greer* (C. C. A.) 120 Fed. 916. The by-laws of the defendant were a part of the contract. They provide that "on the first week day of the months of February, April, June, August, October and December of each year" an assessment shall be made upon all the members of the insurance company, and that "a failure to pay the assessment within 30 days from the first week day of February, April, June, August, October and December shall forfeit his membership in this association with all rights thereunder and the certificate of membership shall be null and void." The first week day of April, 1899, was April 1st, and under

this provision of the by-laws the time to pay the assessment made on that day expired on May 1, 1899—exactly 30 days after the date printed upon the notice which was mailed to the assured.

The by-laws further provide that "a notice addressed to a member at his post-office address as appearing upon the books of the association shall be deemed a sufficient notice," and that "an affidavit of or proof of addressing and mailing the same according to the usual course of business of said association, shall be taken and deemed as evidence, and shall be, constitute, and be deemed and held to be conclusive proof of due notice." The certificate or policy reads that "a notice addressed to a member at his post-office address as appearing upon the books of the association, according to its usual course of business, shall be deemed a sufficient notice," and that "in consideration of the statements, representations * * * and of all mortuary assessments payable at the office of the association within thirty days from the date of each notice," the association receives the assured as a member.

It is undeniable that the "notice addressed to the member," prescribed in the by-laws and in the certificate, is the printed paper on which the information regarding the assessment is inscribed, and not the information which that notice contains. Why should the word "notice," in the clause "thirty days from the date of each notice," have a different signification? The natural inference and presumption is that the parties used this word in the same sense the third time they put it into the contract that they had used it before. Why should the simple and obvious meaning of the term "date of each notice" in the contract be discarded, and the words "the time when in the ordinary course of the mail the member ought to receive the notice mailed to him," or words of similar import, be substituted for it? The word "date" is a word customarily used to describe the designation of time inscribed upon a written or printed paper. The word "time" is a word customarily used to describe the hour or day of the receipt of information. The date of a letter or of a notice is not the time of its receipt, or of its probable receipt. Nor is the time of a letter, if such an expression could be properly used, or the time of a receipt of a letter or of a notice, the date of the letter or notice. The words "time" and "date" are not interchangeable. The expression "thirty days from the date of each notice" is plain and clear. Its signification is obvious. It does not even suggest the meaning 30 days from the time when, in the ordinary course of the mail, the member ought to receive the notice, and it seems to me that such an ingenious and far-fetched interpretation ought not to be imported into it. It is confidently insisted, without fear of successful contradiction, that the plain, obvious meaning of the clause that the mortuary assessments shall be "payable within thirty days from the date of each notice," and the only meaning that would occur to 99 out of 100 persons who should either carefully or casually read this entire contract, would be that the assessments were payable within 30 days after the date upon the printed notice that was, by the terms of the by-laws and certificate, to be addressed to the mem-

Nor does this view rest upon mere opinion. The undisputed evidence in this case presents a conclusive demonstration that this is the obvious and the only natural meaning of the clause. The insurance company perceived this meaning, understood that this was the signification of the clause, and acted upon that understanding. From the inception of the contract, in 1883, until the default, in 1899, it dated all its notices on the days on which the assessments were made, and it inserted in each of them a statement that the assessment to which it related was "to be paid within thirty days from the date of this notice." The assured never conceived that the clause had any other signification. He understood that it meant that the assessments must be paid within 30 days after the dates printed upon the paper notices he received. Upon that understanding, he paid all his assessments within that time, except the one in controversy. He believed that the last day for the payment of this last assessment was 30 days after the date upon the printed notice of it which he received, and, in accordance with that understanding, he attempted to pay it upon that day, but failed. Even after he had failed, it never occurred to him that this contract could have the recondite and curious signification that is now ascribed to it. On the other hand, when, on May 3, 1899, the insurance company refused to accept his tender, and notified him that it was too late, he understood that this statement was true, and conceded that he had failed to pay the assessment in the time stipulated by his contract. He made a written application on that day for reinstatement under the by-laws of the company, in which he recited that his membership and policy had expired by reason of his nonpayment of the assessment of April 1, 1899. When his counsel came to read and study this contract to prepare their cause of action, it was as plain to them as to the parties to the contract that the agreement meant that the assessment must be paid within 30 days after the date upon the printed notice, or on May 1, 1899, for they wrote to the insurance company, under date of May 24, 1899, that "on the 1st of this month the assessment or premium of Jacob Lambert on policy No. 11,337 was due and payable." They did not claim that the agreement had the meaning they now seek to give it, but they based their claim on Lambert's attempt to pay on May 1st, his tender on May 3d, and a waiver of compliance with the terms of the policy by the company. Nor had the new light yet dawned upon them when they filed their amended petition on June 23, 1900, upon which this case went to trial, for they made no claim in that pleading that this assessment was not required by the contract to be paid within 30 days after the date upon the printed notice, but, on the other hand, expressly averred "that the bimonthly payment, mortuary call, or assessment due on or before thirty days after the 1st day of April, 1899, was offered to be paid and tendered by said plaintiff to defendant through its agent in the city of St. Louis, Missouri." It was not until some time after the pleadings had been closed that the ingenuity and research of counsel discovered that this contract might have some other signification than the obvious meaning which it bears upon its face, and which the parties to it had always understood it to have.

Now, the real question in this case is, what did the parties to this

agreement intend when they made their contract? Upon what signification of this clause did their minds meet in 1883, when they executed it? It cannot be that they met upon a meaning so recondite and ingenious that it never occurred to either of them or to their counsel until after the pleadings in this case had been closed, more than 16 years after the agreement was made. It must be that they met upon the plain, ordinary, popular, and obvious sense of the words of the contract; upon the signification which the writings and acts of the parties conclusively show they adopted and acted upon for more than 16 years after the contract was signed; upon the meaning that the assessments were payable within 30 days after the date inscribed upon the printed notice addressed to the assured.

2. Where a contract is susceptible of two constructions—one which makes the different parts of it accordant, and another which makes them discordant—the former must be given, because it cannot be assumed that the parties intended to insert inconsistent provisions. *Miller v. Hannibal & St. J. R. Co.*, 90 N. Y. 430, 433, 43 Am. Rep. 179; *Barhydt v. Ellis*, 45 N. Y. 107, 110; *Burdon Sugar Refin. Co. v. Payne*, 167 U. S. 127, 142, 17 Sup. Ct. 754, 42 L. Ed. 105. By the terms of the by-law which has been quoted, the assessment of April 1, 1899, was payable on or before 30 days from the first week day of that month, and that time expired on May 1, 1899. The notice of this assessment addressed to the member under the by-laws and the certificate was dated on April 1, 1899. The construction that the clause in the certificate, "thirty days from the date of each notice," means 30 days from the date on the printed notice, which was adopted by the court below, makes this clause consistent with the express provisions of the by-laws, because the first week day in April was April 1st and the date of the notice was April 1, 1899. On the other hand, the interpretation given to it by the majority of this court brings this clause into unnecessary conflict with the by-laws, and makes the assessment payable at one time by the terms of the by-law, and at another by the terms of this clause of the certificate. Why should the obvious sense of the clause, which makes all the stipulations of the by-laws and certificate harmonious and certain, be discarded for the purpose of importing into the contract a curious and recondite meaning, which makes its stipulations contradictory and its meaning doubtful?

3. The meaning which the parties themselves adopted and understood to be the sense of their agreement is the actual contract of the parties, for this is the signification upon which the minds of the parties meet. In the interpretation of an agreement, a court ought not to depart from the signification which the parties themselves adopted and acted upon before any controversy arose. "If it leaves the parties to be governed by their understanding of their own language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice." *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 121, 128; *Housekeeper Pub. Co. v. Swift*, 38 C. C. A. 187, 193, 97 Fed. 290, 296; *Schofield v. Bank*, 38 C. C. A. 179, 182, 97 Fed. 282, 286; *Topliff v. Topliff*, 122 U. S. 121, 131, 7 Sup. Ct.

1057, 30 L. Ed. 1110; *Chicago v. Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594. The parties to this contract understood, acted, wrote, and pleaded for more than 16 years with the understanding that the clause in the certificate that mortuary assessments should be payable "within thirty days from the date of each notice" meant that they were payable within 30 days from the date printed on the paper notice addressed to the members under the by-laws and the certificate. Since this was the signification upon which their minds met when they made their agreement, and upon which they continued in unison until some time after the pleadings in this action were closed, this was the actual contract between them. The meaning of the parties to written agreements must be ascertained by the tenor of the entire writing, and not by looking at a part of it. *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415. The terms of an agreement are to be construed in the plain, obvious, and popular sense. *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 463, 14 Sup. Ct. 379, 38 L. Ed. 231. A construction which makes the stipulations of a contract harmonious must be, if possible, given the preference over one which makes them contradictory. *Miller v. Hannibal & St. J. R. Co.*, 90 N. Y. 433, 43 Am. Rep. 179. The sense in which the parties understood their contract when they made and were acting under it is the actual agreement between them, because it was upon that signification that the minds of the parties met. *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 128. Because, when the entire agreement is read and considered together, the obvious, popular sense and meaning of the clause, "within thirty days from the date of each notice," in this certificate, seems to me to be "within thirty days after the date upon each printed notice," while the meaning, "within thirty days from the time when, in the ordinary course of the mail, each printed notice ought to be received by the member," seems to be hidden, curious, and unsuggested by either a casual reading or an ordinary study of the clause, because the former interpretation makes all the provisions of the contract harmonious and consistent, while the latter makes them inconsistent and contradictory, and imports into the contract doubts and uncertainties which do not exist if its terms are given their ordinary and obvious meaning, and because the parties to the agreement themselves understood this clause in the former sense, made the contract, wrote, acted, and pleaded under it, with that understanding, for 16 years, so that this signification was the meaning, and the only meaning, upon which their minds actually met, the conclusion seems to me to be unavoidable that the court below was right in adopting this construction.

The opinion of the majority rests upon the decisions of state courts in *National Mutual Benefit Ass'n v. Miller*, 85 Ky. 88, 93, 2 S. W. 900; *U. S. Mutual Accident Ass'n v. Mueller*, 151 Ill. 254, 37 N. E. 882; *Cronin v. Supreme Council Royal League (Ill.)* 65 N. E. 323; *Bridges v. National Union*, 73 Minn. 486, 496, 76 N. W. 270, 409, 77 N. W. 411; and *Wetmore v. Mutual Aid & Benevolent Ass'n*, 23 La. Ann. 770; and a statement based upon these decisions in *Bacon on Benefit Societies & Life Insurance*, § 382. But even if these authorities were in point in the case in hand, they would be

persuasive, only, not authoritative; and the construction given to this agreement by the majority is so abhorrent to my mind, and seems to me to be so violative of the ordinary canons of construction, that nothing less than a decision of the Supreme Court, to which we are all bound to yield assent, would seem to me to make it my duty to surrender the free exercise of my reason and judgment upon this question. It is a question of general law. The decisions of state courts, though persuasive, are not controlling in the national courts upon such a question. When a controversy over the construction of their contract arises between citizens of different states, Congress has, in its wisdom, granted to them the right to a decision of that controversy by the national courts. The very purpose of this grant was to enable the parties to secure an original investigation of the questions which the controversy presents by a federal court, and to obtain its independent judgment upon them. When the judges of the national courts fail to form independent opinions and to exercise their own judgments upon such questions, and merely follow the decisions of the state courts, the grant of jurisdiction to the national courts will have ceased to accomplish the purpose for which it was enacted. *City of Ottumwa v. City Water Supply Co.* (C. C. A.) 119 Fed. 315, 325; *Casserleigh v. Wood*, Id. 308. When the parties to this action invoked the decision of this court upon the questions relating to the construction of their agreement, the acts of Congress gave them the right to its independent judgment and opinion, uncontrolled by the opinions of state courts, and uninfluenced by them, save as the reason, logic, and arguments they contain, and the deference always due to the opinions of judges learned in the law, may persuade. A careful reading of the opinions cited by the majority has failed to satisfy my mind that the interpretation of this contract adopted by the trial court was erroneous. There are at least two reasons why the authorities cited in the opinion of the majority are not persuasive. The first is that the controlling facts in the case at bar differ so essentially from the facts in those cases that, even if those decisions are right, they are inapplicable to the question which the court below was compelled to decide. Not one of the decisions in those cases was conditioned by either of two controlling facts which exist in this case, and which are in themselves determinative of the construction of this contract, to wit, the fact that the by-law which has been quoted contained an express stipulation that the assessment should be paid within 30 days from the first week day of April, which was exactly 30 days from the date upon the printed notice, thus clearly indicating that the meaning of the parties when they used the clause "within thirty days from the date of each notice" was within 30 days from the date upon each printed notice, and making any other construction a source of repugnancy between stipulations otherwise harmonious, and of doubt and uncertainty in a contract otherwise plain and consistent, and the fact that the parties to the agreement, when they made it, and for 16 years thereafter, understood that the meaning of this clause was that the assessments were payable within 30 days after the date upon each printed notice, and wrote, acted, and pleaded upon that understand-

ing. Another reason why the opinions in those cases are not persuasive is that they contain no reason, argument, or discussion which convinces that the natural meaning of this clause ought to be discarded, even in the absence of the two controlling facts which have just been mentioned. The decisions of the state courts upon that single question are not uniform. The Supreme Court of Maryland in *Yoe v. B. C. Howard M. A. Ass'n*, 63 Md. 86, holds that, under a clause similar to that under consideration here, the assessment was payable within 30 days after the date upon the printed notice.

In view of the obvious meaning of the plain terms of the contract, the express stipulation of the by-law, which is inconsistent with any other construction, and the proved understanding of the parties themselves, there seems to me to be no escape from the conclusion that the court below gave the proper interpretation to this contract when it held that under it the assessment was payable on or before 30 days after the date upon the printed notice which was addressed to the member in accordance with the terms of the by-laws and the certificate; and for this reason the judgment should, in my opinion, be affirmed.

There is another reason why it ought to be affirmed, even if the construction given to the clause of the contract under consideration by the majority is right. If the word "notice" in that clause means information, and not a paper notice, the assured received that information, according to the terms of his contract, on March 31, 1899. The 30 days thereafter expired on April 30, 1899, so that his tender of payment on May 3, 1899, was too late. The printed notice was mailed to the assured on March 31, 1899. The agreement of the parties was that a notice addressed to the assured at his post-office address should be deemed a sufficient notice, and that proof of addressing and mailing it should be conclusive proof of due notice. Under this agreement, the mailing is due notice or due information, and the notice is complete, or the information is given, when the paper notice is mailed. The parties had the right to agree that the mailing of the paper notice should be due notice or due information, and, as they did so agree, the mailing completed the notice. *Ross v. Hawkeye Ins. Co.*, 83 Iowa, 586, 588, 589, 50 N. W. 47; *Epstein v. Mut. Aid, etc., Ass'n*, 28 La. Ann. 938; *Survick v. Valley Mutual Life Ass'n (Va.)* 23 S. E. 223; *Reichenbach v. Ellerbe*, 115 Mo. 588, 596, 22 S. W. 573; *Hannum v. Waddill*, 135 Mo. 153, 159, 36 S. W. 616; *Forse v. Supreme Lodge Knights of Honor*, 41 Mo. App. 106, 116; *Borgraefe v. Knights of Honor*, 22 Mo. App. 127, 141; *Bacon on Benefit Societies and Life Insurance*, § 381.

NEW HAMPSHIRE SAV. BANK et al. v. RICHEY et al.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1903.)

No. 1,792.

1. CORPORATIONS—POWER TO DISPOSE OF PROPERTY—RIGHTS OF GENERAL CREDITORS.

A corporation, while solvent and a going concern, holds its property like an individual, free from any lien or trust in behalf of its general creditors, and may dispose of the same as it deems best, subject to the provisions of its charter and those other restraints upon the conveyance of property which the law imposes alike on corporations and individuals.

2. SAME—PAYMENT OF DIVIDENDS.

Dividends paid by a corporation to its stockholders are not subject to any lien or claim on behalf of its general creditors, in the absence of proof of insolvency at the time the payments were made, or of a fraudulent purpose.

3. EQUITY—MULTIFARIOUSNESS OF BILL.

A bill is multifarious which joins a cause of action against a corporation for the foreclosure of a mortgage and one against stockholders to recover dividends paid to them out of the income of the mortgaged property, upon which the mortgage was not a lien, and which could only be recovered on the ground that its distribution as dividends was wrongful and fraudulent; and its receipt by the stockholders constituted them constructive trustees for the benefit of corporate creditors.

4. CORPORATIONS—SUITS AGAINST STOCKHOLDERS—SIMPLE CONTRACT CREDITORS.

General creditors of a corporation can only proceed against its stockholders in a federal court of equity after they have exhausted their remedy against the corporation by reducing their claims to judgment.

5. SAME—NEBRASKA STATUTE.

Under the statute of Nebraska, as construed by the Supreme Court of the state, a creditor of a corporation can only maintain a suit against the stockholders after he has reduced his claim to judgment against the corporation and exhausted the corporate assets.

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

William Baird (John C. Wharton, on the brief), for appellants.

Byron Clark (C. A. Rawls, on the brief), for appellee Richey.

A. J. Beeson, Matthew Gering, and Jesse L. Root, for appellee city of Plattsmouth.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In this case it appears that Justus G. Richey, one of the appellees, was joined as a defendant in a bill of complaint against the Plattsmouth Gas & Electric Light Company and the city of Plattsmouth, which was filed by the New Hampshire Savings Bank and the New Hampshire Banking Company, with a view of foreclosing a mortgage on a gas and electric light plant located in the city of Plattsmouth, Neb. Richey demurred to the bill of complaint so far as relief was sought against himself. His demurrer was sustained, and a decree was entered directing a dismissal of the bill

¶ 4. Stockholders' liability to creditors in equity, see notes to *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.

See *Corporations*, vol. 12, Cent. Dig. § 1017.

as to him, whereupon the complainants above named, the New Hampshire companies, prosecuted an appeal, assigning as error that the lower court erred in sustaining the demurrer. As the present appeal raises the single question whether the bill contains sufficient allegations to warrant the court in granting the complainants any relief as against Richey, a general statement of the facts disclosed by the bill is all that is deemed necessary.

The mortgage under which the complainants below derive all their rights, and which they seek to have foreclosed, was executed by the Plattsmouth Gas & Electric Light Company, a corporation of Nebraska, on May 8, 1890, to secure bonds to the amount of \$30,000, bearing interest at the rate of 6 per cent. per annum, payable semi-annually. These bonds were sold to the appellants (the New Hampshire companies) who now own the entire issue. A default occurred in the payment of the interest on these bonds on June 1, 1901, which led to the institution of the present suit to foreclose the mortgage and obtain other relief against the mortgagor company and the city of Plattsmouth, the details of which need not be stated at the present time.

It seems that subsequent to the execution of the aforesaid mortgage, and on October 23, 1896, the Plattsmouth Gas & Electric Light Company leased its entire plant for the manufacture of gas and the production of electricity to the city of Plattsmouth, where the plant was located; doing so in pursuance of the provisions of a city ordinance. The property was so leased for a period of 4 years and 15 days, the term to begin November 1, 1896, and to end on November 15, 1900, at an annual rental of \$2,800, which was payable to the lessor company in monthly installments of \$233.33 each. In addition to the sum aforesaid, the city agreed to pay the interest on the outstanding bonds of the lessor company, amounting to \$1,800 per annum, until November 15, 1900, and also to pay all taxes which might thereafter be assessed against the property so leased to the city. The lease contained a further provision whereby the city was entitled to hold and operate the demised property from November 15, 1900, until June 1, 1910, if it desired to do so, on condition that it paid the interest on the outstanding bonds of the lessor company, amounting to \$1,800 per annum, during that period. It was further agreed that the city might terminate the lease on 60 days' notice at any time after November 15, 1900, or buy the property at any time after that date for the sum of \$1, by assuming and agreeing to pay the outstanding mortgage indebtedness of \$30,000; and that it should have the option to buy the property on the terms last stated, or to continue said lease on the terms heretofore mentioned from November 15, 1900, to June 1, 1910.

The bill of complaint contained other allegations to the following effect: That the lease in question was intended by the lessor company as an out and out sale of all of its property, assets, rights, and franchises to the city; that the sum of \$2,800 agreed to be paid yearly to the lessor company was not intended to be paid or received as rent; that the city, on the delivery of the lease, took possession of the demised property and all of the materials and supplies then on

hand, and thereafter continued to operate and use the same as its own; that the sum of \$11,333.33 had in fact been paid by the city to the lessor company in monthly installments of \$233.33 each, in accordance with the provisions of the lease; that the city had failed to pay certain taxes, amounting to about \$300, which were assessed against the demised property for the years 1897 and 1898; that by reason of the city's failure to keep the demised property in a good state of repair, and by reason of its failure to replenish tools, machinery, and materials as they were worn out or consumed, the demised property had become insufficient security for the bonded indebtedness, and that the mortgagor company had become insolvent, having no property whatever except such as was leased to the city and was in its possession.

The bill contained other allegations of the following character: that Justus G. Richey, C. D. Jones, and S. B. Hovey were officers and directors of the Plattsmouth Gas & Electric Light Company, and the sole owners of its capital stock; that Richey owned one-half of the stock of said company when the mortgage which the complainants seek to have foreclosed was executed; that he received from the Plattsmouth Gas & Electric Light Company one-half of the sum of \$11,333.33, which was paid by the city to that company in pursuance of the provisions of the aforesaid lease; that the laws of the state of Nebraska made it the duty of the Plattsmouth Gas & Electric Light Company to give notice annually in some newspaper published in the county of Cass, in the state of Nebraska, of the amount of all of its existing debts, which notice should have been signed by the president of the company and a majority of its directors; that this notice was not published pursuant to law, and that by reason of its nonpublication the stockholders of the company, under the laws of the state, became individually liable for the indebtedness due to the complainants in proportion to the amount of stock by them respectively held; and that the defendant Richey was likewise liable for one-half of the sum of \$11,333.33, which he had received from the aforesaid company. In view of the premises the complainants prayed for a decree of foreclosure, and for certain other relief against the city of Plattsmouth, Neb., and, in addition thereto, they demanded a personal judgment against Richey to the full extent of his liability in both of the respects heretofore explained.

The complainants rely for a recovery against the defendant Richey mainly upon the allegation contained in their bill that he received from the Plattsmouth Gas & Electric Light Company one-half of the sum of \$11,333.33, which was paid to that company by the city as rent for the demised property during the term beginning November 1, 1896, and ending November 15, 1900. In support of this contention it is insisted that the rents received by the lessor company constituted a trust fund, which could only be applied lawfully to the payment of corporate debts; and that, inasmuch as the fund was distributed among stockholders in the form of a dividend, it may be followed into their hands, and recovered from them by the mortgage bondholders. The complainants do not assert that the lien of their mortgage extended to and embraced the rents which they seek to recover from

the stockholders, nor would such a claim be tenable if it was made, since the mortgage under which they claim contained an express provision "that until default should be made in payment of principal or interest of said bonds, and until default should continue for a period of sixty days, said Gas & Electric Light Company should be suffered and permitted to possess, manage, operate and enjoy [the mortgaged property], * * * and take and use the income, rents, and profits thereof in the same manner and with the same effect as if said mortgage had not been made." All of the rents in question were received by the mortgagor company before there had been any default in the payment of interest on the mortgage indebtedness. It is obvious, therefore, that the lien of the mortgage did not extend to these rents, and that the clause in the mortgage to which reference has been made estops the complainants from claiming the rents on the ground that they have a specific lien thereon by virtue of the provisions of that instrument. They are compelled, therefore, to rely, for a recovery of the rents, on the sole ground that the mortgagor company held all of its property and assets in trust for the benefit of its creditors; that they have an equitable title thereto; and that the mortgagor company could make no distribution thereof among its stockholders, no matter what degree of good faith it may have exercised, until all of its debts had been paid.

We are unable to concur in that view of the law. It is now well settled that no such relation as that of trustee and cestui que trust exists between a corporation and its general creditors. So long as a corporation is solvent, and remains in control of its property and assets, it may deal therewith and dispose of the same like an individual, subject only to such limitations upon its powers as may have been imposed by its charter. The general creditors of a corporation are not, like the beneficiaries in a trust, the equitable owners of the corporate property, nor have they any greater interest therein than the creditors of natural persons have in the property of their debtors. Creditors of both kinds are entitled to insist that their debtors shall not make a voluntary or otherwise fraudulent conveyance of their property; but beyond this, in the absence of an express lien created by contract, they have no interest, legal or equitable, in their debtor's property, or right to control that free disposition of the same which is incident to ownership. It is true that when a corporation becomes insolvent such an event places its property from that time forward in such a condition of quasi trust that it must be applied first to the payment of its corporate debts before there can be any distribution among stockholders; but, as was remarked by the Supreme Court in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 383, 14 Sup. Ct. 127, 130, 37 L. Ed. 1113, the trust which arises in case of insolvency "is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditors or stockholders." Some general expressions of the following purport are to be found in the books, which have been called to our attention, namely, that the "assets of a corporation are a trust fund for the payment of its debts upon which creditors have an equitable lien both as against the

stockholders and all transferees except those purchasing in good faith and for value." *Cole v. Millerton Iron Co.*, 133 N. Y. 164, 168, 30 N. E. 847, 848, 28 Am. St. Rep. 615. But since the subject in hand has been more carefully examined, the later decisions are to the effect already stated that the assets of a corporation are in no proper sense a trust fund for the benefit of creditors; that a corporation, while solvent and a going concern, holds its property like an individual, free from the touch of its general creditors, and may dispose of the same as it deems best, subject to the provisions of its charter and those other restraints upon the conveyance of property which the law imposes alike upon corporations and individuals. *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; *McDonald, Rec'r, v. Williams*, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022; *Wabash, St. L. & Pac. Ry. Co. v. Ham*, 114 U. S. 587, 594, 5 Sup. Ct. 1081, 29 L. Ed. 235; *Graham v. Railroad Company*, 102 U. S. 148, 26 L. Ed. 106.

Now, aside from all other considerations, there is no specific allegation contained in complainants' bill that when the rents in question were received by the mortgagor company, and paid over to its stockholders, it was at that time insolvent. The allegation on that point is that when the bill was filed, to wit, in October, 1901, the mortgagor company had then become insolvent because during the period of its tenancy the city of Plattsmouth had failed to supply new tools and machinery in place of such tools and machinery, forming a part of the mortgaged plant, as had been worn out by use. The bill does not show that the mortgagor company was insolvent when the lease was executed and the rents were distributed, but, for aught that appears, it had as much property at that time as it ever had, and fully as much as it possessed when the complainants' mortgage was executed and the bonds in suit were purchased. In view of the fact that the bill fails to disclose a state of insolvency when the rents were distributed in the form of a dividend among stockholders, and in view of the fact that it likewise fails to disclose any want of good faith or a fraudulent purpose on the part of the gas and electric light company in making such distribution, we conclude that it does not appear that when the rents were paid over to the stockholders they had become impressed with a trust in favor of these complainants, or that they passed into the hands of the stockholders cumbered with any lien in their favor. This view of the case is not sustained by any appropriate allegations of fact contained in the bill, and the claim to a decree on that ground must accordingly be overruled.

It must be further borne in mind that this action, so far as the stockholders are concerned, is a suit to enforce a constructive trust, and this cause of action has been joined with one against the mortgagor company and the city of Plattsmouth to obtain the foreclosure of a mortgage. The very gist of the complaint, so far as the stockholders are concerned, is that the payment of these rents to them was a wrongful and fraudulent act on the part of the company, and that the receipt of the same by the stockholders constitutes them trustees of the sums so received for the benefit of corporate creditors. The causes of action which have thus been joined in the same bill

and in a single count, the one against the company and the city to foreclose a mortgage, and the one against the stockholders to establish and enforce a constructive trust, are so essentially different, the one arising out of contract and the other sounding in tort, that they ought not to have been joined in the same complaint. The two causes of action, besides being essentially different, do not present any common question to be litigated; nor will the evidence which is necessary to sustain one cause of action have any relevancy to the other. It is true that courts of equity exercise a large discretion in determining when a bill is multifarious, and that they will usually be influenced, to a considerable extent, in deciding such questions, by considerations of convenience. But, in view of the fact that the two causes of action are essentially different, and require different proof, and present no common question for litigation, we are of the opinion that within the authorities the bill is subject to the charge of multifariousness, and that the demurrer thereto might well have been sustained on that ground. *Security Savings & Loan Ass'n v. Buchanan*, 14 C. C. A. 97, 66 Fed. 799; *Ziegler v. Lake Street El. R. Co.*, 22 C. C. A. 465, 76 Fed. 662; *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 55; *Leslie v. Leslie* (C. C.) 84 Fed. 70. Moreover, as these complainants, by virtue of their mortgage, acquired no express lien on the rents which they seek to recover from the stockholders, and as they have no equitable title thereto in virtue of the trust theory heretofore outlined, and can only recover the rents, if at all, on the ground that the distribution thereof among shareholders was, under the circumstances, a fraudulent act on the part of the corporation, such as renders the stockholders accountable to general creditors for what they have respectively received, it follows, we think, that under the doctrine enunciated in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, such general creditors, including the complainants, can only proceed in equity against the stockholders after they have exhausted their remedy at law; that is to say, after they have reduced their demand to a judgment either in a court of law or by decree in a court of equity. It was held in that case that simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity to obtain the seizure of their debtor's property and its application to the payment of their debts, and that this rule is not affected by the fact that a statute of the state in which the property is situated and in which the suit is brought authorizes such a proceeding in the courts of the state. When the bill in this case was filed, the complainants had not reduced their demand to a judgment. For all of the reasons aforesaid, we conclude that the lower court was right in holding that no decree could be rendered against the defendant Richey on account of the rents which he had received from the mortgagor company.

In this court counsel for the appellants do not seem to rely with much confidence on their demand for a judgment against Richey based on the ground that the gas and electric light company failed to publish a notice annually of all existing debts, as it was directed to

do by section 136, c. 16, Comp. St. Neb., for the year 1889, which appears to have been the statute on the subject that was in force when the mortgage indebtedness was contracted. They concede, apparently, that certain decisions of the Supreme Court of the state of Nebraska in cases arising under this statute render their right to recover against Richey, because the notice in question was not published, exceedingly doubtful; and little was said on this subject in the course of the oral argument, and little is said in the briefs. The statute that was in force when the mortgage indebtedness was contracted declared, in substance, that, if the notice in question was not given, "all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing and for all that shall be contracted before such notice is given." This act, as it seems, was repealed on April 6, 1891, by another act, which required the same kind of a publication to be made, but declared that, if it was not made, then "all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing and for all that shall be contracted before such notice is given, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation and in addition thereto the amount of capital stock owned by such individuals." Laws 1891, p. 198, c. 13. This latter act was declared to be applicable to "any case now pending or hereafter brought in any court in this state." In a case decided by the Supreme Court of Nebraska on June 6, 1894—*Globe Publishing Co. et al. v. State Bank of Nebraska*, 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854—it appears to have been held that the creditors of a corporation have no right of action against the stockholders thereof, by virtue of the aforesaid statutes, until they have reduced their claims to a judgment against the corporation, nor until an execution has been issued thereon, and returned wholly unsatisfied. This conclusion appears to have been reached upon a consideration of section 4, art. 11b, of the Constitution of Nebraska, which provides that "in all cases of claims against corporations * * * the exact amount justly due shall be first ascertained and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription and the liability for the unpaid subscription shall follow the stock." The court said that the word "ascertained," as used in the Constitution, meant "judicially ascertained," and that to "judicially ascertain" the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount. The court accordingly held that, before a stockholder could be proceeded against under the aforesaid statutes, the creditor must reduce his demand to a judgment, and exhaust the corporate property. In a later case, decided by the same court on April 21, 1898—*Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874—the doctrine aforesaid was reaffirmed, and it was further held that the Constitution of the state (section 4, article 11b, aforesaid) not only determines what the liability of a stockholder in a corporation for the corporate debts thereof shall be, but limits his liability, and that it is not within the power of the Legislature to extend it. While

this latter decision does not expressly decide that the statutes aforesaid are unconstitutional in that they impose on stockholders a larger liability for corporate debts than the Constitution of the state permits, yet it may be fairly inferred therefrom that such is the fact, and such the effect of the local decisions.

It is unnecessary, we think, to consider the second ground upon which a judgment is demanded against the defendant Richey at greater length. It seems clear that under the local decisions, which, in a matter of this sort, are binding upon this court, the liability which the complainants seek to impose on the defendant Richey because the requisite notice of all existing liabilities was not published cannot be enforced in this proceeding, because the complainants have not as yet reduced their demands to judgment and exhausted the corporate assets. Upon the whole we conclude that the judgment below was for the right party, and that it should be affirmed. It is so ordered.

CITY OF DETROIT v. GRUMMOND.

(Circuit Court of Appeals, Sixth Circuit. March 19, 1903.)

No. 1,135.

1. REVIEW ON ERROR—QUESTIONS NOT MADE IN TRIAL COURT—WAIVER.

The failure of a defendant to file an affidavit denying the execution of the contract sued on, as required by a rule of the courts of Michigan and of the Circuit Court of the United States in that state, to put plaintiff upon his proof, cannot be urged in the appellate court to exclude consideration of the question of the due execution of the contract, where the objection was not made in the trial court, which, under the construction placed upon the rule by the courts of the state, might have permitted the filing of the affidavit at any time before the close of the trial.

2. MUNICIPAL CORPORATIONS—CONTRACTS—EVIDENCE OF RATIFICATION.

Where a city was sought to be held on a written contract for the hiring of a vessel to be used for hospital purposes, purporting to have been made on its behalf, but which was not authorized by anything appearing on its records, on the ground that the contract had been ratified by the acceptance and use of the vessel and the payment of the rental therefor, but the delivery of the vessel and payment of rental took place prior to the execution of the contract, evidence was admissible to show the previous passage of a resolution by the board of health, acting under authority given by the city council, accepting a proposition made by one of its members for the hiring of a vessel then owned by him, but subsequently transferred to plaintiff (the contract made by such resolution being void under the city charter), it being a question for the jury whether the alleged acts of ratification had reference to the contract with plaintiff sued on, or to the prior void contract.

3. ERROR—REVIEW—FACTS APPEARING FROM BILL OF EXCEPTIONS.

When the evidence shown by a bill of exceptions points distinctly to a definite result, although the bill does not purport to contain all the evidence, if the defendant in error purposes to deny the inference to be drawn from it he should see that enough is stated at least to show that there was other evidence on the point which might affect the conclusion.

4. CONTRACT FOR PROCURING INSURANCE—CONSTRUCTION.

Under a contract by which the hirer of a vessel agreed to "pay the insurance" thereon for a certain sum, the duty of procuring the insurance devolved upon the owner, who would then have recourse upon the hirer for the amount of the premium.

5. INSURANCE — CONTRACT INSURING MOORED VESSEL AGAINST FIRE—LAW GOVERNING.

A contract for the insurance against fire of a vessel while lying moored and in use as a hospital is not maritime, and the measure of liability for a loss by fire which partially destroyed the vessel is not governed by the rules of marine insurance, but by those of fire insurance, and is limited to the amount which the value of the property was depreciated by the fire, not exceeding the sum insured for. The entire sum would not be recoverable merely because it would cost more to repair the vessel than she would be worth when repaired.

6. CONTRACT FOR HIRING OF VESSEL—CONSTRUCTION.

Under a provision of a contract for the hiring of a vessel to be moored and used for a hospital, binding the city, which was the hirer, to pay a stipulated sum as the value of the vessel in case she should be "lost or destroyed" by the fault of the hirer, the city did not become bound to pay for the vessel because of a damage by fire through the negligence of its servants, not amounting to a total loss or destruction of the vessel.

7. SAME.

A stipulation, in a contract for the hiring of a vessel for a specified time, binding the hirer to return her in as good condition as when taken, reasonable use, wear, and tear excepted, does not entitle the owner to refuse to accept the vessel when tendered back, and to recover her value, because of a breach of such stipulation, but only to recover the damages arising from the breach.

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

This is a suit brought by the defendant in error against the city of Detroit upon a contract alleged to have been made between the parties November 30, 1892, for the hiring by the city of the steamboat Milton D. Ward of the plaintiff in the suit for the term of two years from the 14th day of September, 1892, for the purpose of being used by the city as a hospital in which persons suspected of bringing germs of cholera from abroad could be isolated and cared for.

It appears from the record that on August 30, 1892, the health officer of the city, apprehending an epidemic of cholera, presented to the common council a communication upon that subject, wherein he referred to the danger from immigrants, and said that he found "that the only hope of keeping the city is in having a quarantine hospital built on a scow which we can keep in the stream." This was "referred to the committee on ways and means and health and the city counsellor." On September 2d, the committee having reported and recommended prompt action, the common council passed the following resolution: "Resolved, that the board of health and health officer be and are hereby empowered and directed to adopt such measures and plans as, in their judgment, are wise and expedient to prevent the introduction and spread of cholera into the city, and that any and all expenses necessary to carry into effect such plans and regulations as they may adopt is hereby authorized." On September 13th the health officer reported to the common council the steps which had been taken by him and the board of health at special sessions held on September 6th, 7th, and 8th, in which he said, among other things, that, although scows had been offered, it would take time to fit them up, and they lacked a steam boiler, and that the committee turned their attention to some boats; and he further stated that "at another special meeting held in the mayor's office, Controller Black stated that a boat could be procured for \$5,000 for two years, the board to pay insurance on \$12,000. The party selling the boat would caulk her up and put her in shape. In case the city wished to buy the boat, \$7,000, without the engine, was the price. That Controller Black moved the proposition be accepted, which was seconded and carried. The board passed a resolution that the controller and health officer be a committee to look after the expenditures," etc. This report was referred to the committee on ways and means, who reported that, as the common council had granted full power to meet all

emergencies to the board of health, the committee did not see that any further action was necessary, which report was adopted by the common council.

While these proceedings were taking place, Stephen B. Grummond was the owner of the steamer Milton D. Ward, and he was a member of the board of health, participating in its proceedings. On the 14th of September, 1892, he gave a bill of sale of the steamer to U. Grant Grummond, his son, who is the plaintiff in this action. The record does not clearly show at what time possession of the steamer was given to the city, but apparently it was as early as the 14th of September, 1892.

On the trial the defendant in the court below read in evidence from the record of the board of health the following entry: "Mayor's Office, September 8, 1892, at 2 o'clock p. m. Adjourned meeting. The board of health met pursuant to adjournment in the mayor's office. Present: His honor, the mayor, Controller Black, President of the Police Commission Grummond, Dr. C. C. Miller, Dr. Duncan McLeod, Dr. Jos. Schulte. President Miller in the chair. Controller gave as his figures on the boat \$5,000. Capt. Grummond will caulk her and put her in shape and rent her to the board for two years, the board to pay the insurance on \$12,000, and, in case the city buys the boat, \$7,000, without the engine. Controller Black moved that this proposition be accepted. Seconded and carried. President Miller asked how the transfer was to be made. It was stated this should be made to the controller. Capt. Grummond said he would fit up stoves, and said also that the best place to anchor would be in the neighborhood of Zug Island. It was resolved that the controller and the health officer be a committee to look after the expenditures, etc. On motion, the board adjourned. Samuel P. Duffield, Secretary." Counsel for the plaintiff objected that this was incompetent evidence, and moved that it be stricken out. Counsel for defendant, in answer to a question from the court in regard to its competency, said: "It is part of the history of this transaction by which the board of health got possession of this boat, and it is important in this way: That the first record we have of any dealings with the boat, which will identify it as this boat, was on the 8th day of September, 1892, at the time when Capt. Grummond was a member of the board of health of the city of Detroit, and at the time when Capt. Stephen B. Grummond was the owner of the Milton D. Ward. The only contract or arrangement that was ever made, as we expect to show, between the board of health and Capt. Grummond, or by authority of the board of health and Capt. Grummond, or any one else, was contained in this record." The court excluded the entry, and counsel for defendant excepted.

On the 22d of November, 1892, the common council approved and allowed the following account: "U. Grant Grummond, rent for steamer Milton D. Ward, two years from Sept. 14, 1892, \$5,000.00."

On the 30th of November, 1892, the contract upon which this suit is founded was executed, as follows:

"It is hereby agreed between U. Grant Grummond, of the city of Detroit, Michigan, of the first part, and the city of Detroit, of the second part, as follows:

"The said party of the first part, in consideration of the sum of five thousand dollars (\$5,000) to him in hand paid, the receipt of which is hereby acknowledged, and of the agreements hereinafter contained, doth hereby let and charter to the said party of the second part the sidewheel steamer Milton D. Ward, for the term of two (2) years from and after the fourteenth day of September, A. D. 1892, to be used by said party of the second part as a hospital ship, hereby covenanting with the said party of the second part, and that at the time of the delivery of these presents he is the sole and true owner of said steamer, and that she is staunch, seaworthy and fit for use as a hospital ship and for navigation upon the rivers.

"And the said party of the second part hereby hiring and chartering the said steamer for the term of two years aforesaid, doth covenant and agree that it will at its own expense keep said steamer insured to the satisfaction of the party of the first part in the sum of twelve thousand dollars (\$12,000) against any loss by fire, and against any loss from any marine risks, at such

times as said vessel may be exposed to danger from any such risks, and at the end of said term will return the said boat to the said party of the first part, his representatives and assigns at the port of Detroit, in like good condition as when taken, reasonable use, wear and tear excepted.

"Said insurance to be for the benefit of the said party of the first part and the payment of the insurance in case of loss shall be taken in lieu of return of the vessel, provided that if said vessel be lost or destroyed by reason of any peril, risks or cause not insured against and by the fault of the said party of the second part, said party of the second part shall pay to the said party of the first part the sum of twelve thousand dollars (\$12,000) as the value of said vessel.

"It is hereby mutually agreed that the said second party shall have the right to purchase said steamer at any time within the said two years, for the sum of seven thousand dollars (\$7,000), but if such sale be made, the party of the first part shall have the right of removing the engine of said steamer.

"In witness whereof, the said party of the first part hereto sets its hand and seal and the said second party hereunto sets its corporate seal and causes these presents to be subscribed in its behalf by the president of the board of health and the health officer, this 30th day of November, 1892.

"U. Grant Grummond. [Seal.]
The City of Detroit.

"[Seal.]

"By C. C. Miller, President of the Board of Health.

"Samuel P. Duffield, M. D.,
Health Officer.

"Attest:

"John R. Schmid, Deputy City Clerk."

The city clerk testified that the records of the common council did not show that a contract of that kind was at any time submitted to the common council. The secretary of the board of health testified that there was no entry in the records of the board concerning any contract between U. Grant Grummond and the city in relation to the steamer.

The defendant called as a witness Dr. Jos. Schulte, who testified that he was a member of the board of health on September 8, 1892, and afterwards through that year. Counsel for defendant asked this question: "While you were a member of the board of health in the year 1892, did your board authorize the making of any contract with U. Grant Grummond concerning the steamer Milton D. Ward, either on behalf of the board of health or of the city of Detroit?" The question was objected to, but no ground for the objection was stated. The court, however, sustained the objection, and counsel for defendant excepted. There being no statement of the answer expected, we cannot review this ruling. There was testimony showing that the boat was never used as a hospital, but was kept by the city, moored near an island in the Detroit river, the caretaker being paid by the city on bills rendered from time to time during the time the city had possession.

On August 15, 1894, the boat took fire (from the carelessness of the men employed to put up a stove in her), and was somewhat damaged thereby. In respect to the extent of the damage the witnesses were widely apart; some saying the vessel became a total wreck thereby, and others that the damage was slight either to the boat or her machinery. The boat was an old one, built about 1870, of a sidewheel pattern.

On September 14, 1894, U. Grant Grummond demanded of the city that it either return the boat to him in as good condition as when taken, reasonable wear and tear excepted, or pay him the sum of \$12,000. The city tendered back the boat to him as it was, but refused to pay the \$12,000 demanded. Grummond refused to accept the boat, and brought suit. The declaration contains three counts, all declaring upon the special contract of November 30, 1892, and claiming to recover \$12,000 damages. The plea, as amended, consisted of the general issue and a notice added, pursuant to a statute of the state, authorizing it, stating that the defendant would prove thereunder that during the time while the negotiations for the boat were pending she belonged to Stephen B. Grummond; that he was a member of the board of health at the time when the proposition to let her to the board of health was made to the board and when the proposition was accepted by it, and par-

ticipated in its proceedings; and thereupon, after referring to certain provisions of the charter of the city forbidding, under penalties, its officials from making contracts with the city in which they should be interested, averred that the contract for the hiring of the vessel was made with Stephen B. Grummond, and not with U. Grant Grummond, and was contrary to public policy, and void.

The case was tried by the court and a jury, and the result was a verdict and judgment for \$16,366.66, being the amount of \$12,000 and interest.

Certain rulings of the court on the trial respecting the admission of testimony and in the instructions to the jury are assigned as errors, and are noted in the opinion which follows.

Timothy E. Tarsney, for plaintiff in error.

F. H. & G. L. Canfield, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

A question in its nature preliminary should first receive attention. It is contended for the defendant in error that by the failure of the city to file an affidavit denying the execution of the contract set out in the declaration it admits the execution and the authority of those signing it in behalf of the city, and reference is made to rule 28 of the court in which the trial was had, and which is also a rule of the circuit courts of the state, by which it is provided that, "upon the plea of the general issue in an action upon any written instrument, under seal or without seal, the plaintiff shall not be put to the proof of the execution of the instrument or the handwriting of the defendant, unless the defendant, or some one in his behalf, shall file and serve a copy of an affidavit denying the same." This rule has been given a broad construction by the Supreme Court of the state, and has been held to require an affidavit when the contract in suit purports to be executed in behalf of the defendant by attorney, if the defendant proposes to deny that the instrument was duly executed as its contract. *Peoria Ins. Co. v. Perkins*, 16 Mich. 384; *Inglish v. Ayer*, 92 Mich. 370, 52 N. W. 639. And, notwithstanding such a construction may not be due in all circumstances, we were, upon the argument, much impressed by this objection to that part of the defense upon which the plaintiff in error relies. But upon more careful examination of the record we do not find that this objection was made in the court below, and it is quite clear that the trial proceeded without regard to the rule, as if the question of authority was an open one; and the case was submitted to the jury upon the assumption that the contract derived its validity from the ratification of the city. In these circumstances we ought to deal with the case in accordance with the position taken by the parties and the action of the court upon the trial. The course pursued amounted to a waiver by the plaintiff of the affidavit required by the rule. If the plaintiff or the court had stood upon the rule, it would have been competent for the defendant to have then applied for leave to file an affidavit, and the court might have granted it; for it is held by the state Supreme Court that the affidavit may be filed at any time before the trial is ended. In *Freeman v. Ellison*, 37 Mich. 459, the Supreme Court, Judge Campbell delivering the opinion, reversing the

judgment in a case where the defendant had neglected to file an affidavit denying the execution of the contract in suit, said:

"We take occasion to repeat what we have said before, that there is no reason whatever why a circuit court should not allow an affidavit to be filed at any stage of the case, and that such leave ought not to be declined where it will work manifest injustice to decline it."

It is apparent from the record that it was material to ascertain whether the hiring of the steamer in behalf of the city was by the contract with U. Grant Grummond of November 30th, or was by a contract with Stephen B. Grummond, made previous to the bill of sale of September 14th, and with respect to which U. Grant Grummond, in consequence of the transfer, succeeded his father as lessor. It was material in more ways than one. First, because, if the latter was the fact, Stephen B. Grummond being a member of the board of health, it vitiated the contract of hiring—a consequence which would follow the transaction into the hands of the transferee, and no recovery could be had upon it in any condition of the pleadings which the court might permit (Dillon on Municipal Corp. § 444); and, secondly, because, as the sequel shows, the case was put to the jury as one in which the plaintiff was entitled to recover upon the ground that the contract of hiring, although not shown to have been originally authorized either by the common council or the board of health, had yet been ratified by the city by taking and keeping the possession of the vessel during the two years, and paying the \$5,000 "in hand paid." In order to show the intention and the effect of the supposed ratification, it was necessary to understand to what the action of the city was referable. There was nothing in its records, either of the common council or of the board of health, to show that the city had a contract with U. Grant Grummond. On the other hand, it was known to the city that the health officer, who was one of those charged with the execution of the authority given by the common council, had reported a proposition which had been made to the board of health for the letting of the steamer, and its acceptance by the board, before the 14th of September. It also knew that, contemporaneously with that transaction, possession of the steamer had been delivered to the city. There was a record in the office of the board of health, of which the city might be charged with notice, especially as the common council committed full power and authority to act in the matter, and which showed that on the 8th of September the board of health had hired the steamer upon terms there stated. It was the only record of the city offices expressly showing that any contract had been made for the steamer. This was read in evidence, but subsequently excluded by the court, as already stated. We think this was error. It is not advisable that we should express any opinion upon the weight of the facts recited as evidence, but we are constrained to say that they had a direct bearing upon the subject of the ratification, by which the court held the city bound; and none of the matter referred to seems to us more persuasive than that which was excluded. While upon this subject, we will refer to the payment of the \$5,000 by the city on November 22, 1892, upon which much reliance is placed as showing a ratification. Certainly, it is impossible to say that as matter of law it had any such

consequence. To begin with, it was made eight days before the contract of November 30th. There is nothing to show that there had been any negotiations with U. Grant Grummond prior to the date of this last contract. The only contract in evidence when the payment was made, so far as appears, was the one made with Stephen B. Grummond. Whether U. Grant Grummond had made known to the city the transfer to him does not appear; but from the fact that no contract had been made with him, it is probable that he had made known the transfer. At all events, there is room for saying that the payment of the \$5,000 was quite as easily referable to the contract which the city knew had been made as to one which did not exist, and of which it had no contemplation; and it was a question for the jury to determine what inference should be drawn from the circumstances in respect to the question what contract the common council intended to ratify by the payment. Another thing which the jury might regard was the improbability that the steamer should have been delivered to the city, and devoted to its use for more than two months, without any contract between the owner and the city. Similar considerations apply to the facts that the city continued to possess the boat, and paid for taking care of it. It was at least an open question of fact to what contract such action referred. But it is urged by counsel for defendant in error that the entry in the records of the board of health was incompetent to contradict or impeach the contract sued upon, because it only showed negotiations with Stephen B. Grummond, or possibly another contract with him. But neither of the parties contended or admitted at the trial that there was more than one contract for the hiring of the boat, and there is no room for any such contention now. The question upon this branch of the case was, what was the agreement upon which the parties acted, or, more precisely, which the city acted upon in its supposed ratification?

A similar question was presented to us in the recent case of *Stoll v. Loving*, 120 Fed. 805, where we were compelled to reverse the judgment of the Circuit Court, for the reason that the court had refused to submit to the jury the question as to which of two possible contracts the plaintiff had for performing the services for which he sought to recover.

It is further urged that the entry does not amount to an agreement with Stephen B. Grummond. But we think that it is evidence tending to show that such an agreement as is therein stated was made; and that, followed up as it was almost immediately by delivery of the vessel to the city, the jury might have found, if they were satisfied of the fact, that an agreement for the hiring of the boat was made in behalf of the city with Stephen B. Grummond. Again, it is said that it does not appear what boat was referred to, or what were the terms of the contract. But the earmarks are amply sufficient to show *prima facie*, at least, the identity of the vessel referred to with the vessel which was employed. The similarity of the terms of the contract with those of the contract of November 30th, though they are not identical, tends to show that they related to the same subject. Nothing appears to suggest an inference that some other vessel was intended. It is pointed out, however, that the bill of exceptions does not purport to con-

tain all the evidence, which is true. But when that which is shown by the bill points distinctly to a definite result, the defendant in error should see to it that enough is stated to show that the conclusion from what does appear is not the necessary one, if he proposes to rebut or deny the inference which should be drawn from it. It should at least be made to appear that there was other evidence upon that point which might affect the conclusion.

In the instructions to the jury, the court, waiving all question as to whether the contract in suit was authorized in its execution by either the common council or the board of health, put the case to them upon the assumption that, although it might not have been so authorized, it had been distinctly ratified by the city, and was thereby made valid. The only question left to the jury was with reference to the measure of damages. The general proposition of law involved that a municipality may, by ratification, make valid a contract made in its behalf by an unauthorized agent, which the municipality had authority to make, may be conceded. For the reasons we have stated, we think it was a question of fact whether the city had ratified the contract on which the suit was founded, and that the error of the court was in excluding material testimony bearing upon that question.

Other rulings relating to the admission of evidence touching that subject are assigned as error, but, as the judgment must be reversed, and they may not be again presented, we do not pass upon them.

Another matter is this: No insurance was effected upon the vessel, and under the ruling of the court as given to the jury the only question of fact submitted was upon the measure of damages. There was a difference between the contract sued on and the contract represented by the health officer to the common council to have been made and in the excluded record of the board of health in respect to the matter of insurance. By the former the city was to effect the insurance in the sum of \$12,000. By the latter it was to pay the insurance, a stipulation which would devolve taking the initiative step upon the owner, who would effect the insurance, and have recourse to the city for the premium. The plaintiff was permitted, under the charge of the court, to recover the whole amount of the contemplated insurance, upon the ground that by neglecting to insure the vessel the city became insurer in that sum—a result which could not have been permissible unless the contract of November 30th had become the contract of the city. It is suggested by counsel for defendant in error that the stipulations in the respective agreements, if there were two, were of the same legal effect; and the case of *The Barnstable*, 36 C. C. A. 199, 94 Fed. 213, is cited to sustain that proposition. The case cited was one where the owner of the vessel stipulated with the charterer to pay insurance upon the vessel. The ship became liable for the consequences of a collision, and the owner sought to establish the ultimate liability against the charterer. The owner had not effected insurance, and it was held that he could not prevail, for the reason that the risk contemplated by the stipulation was a risk of his own property, and the stipulation must, therefore, be interpreted as meaning an insurance which he would attend to; and, having failed to do what would have protected him against loss, he could not fix the liability on the

charterer. Here the situation is reversed, and, if the construction be doubtful, the case cited would tend to support the presumption that the owner would be expected to attend to his own insurance.

The court, in charging the jury upon the subject of damages, after referring to the testimony in respect to the condition of the vessel after the fire, told them that, while she was not physically consumed, she was, as claimed by the plaintiff, practically destroyed; that "the result would entitle the plaintiff to a recovery of the insured [insurer?] of that amount if you find that testimony is true, and you approve it, namely, that the damage to the vessel was to such an extent that it would cost more to repair her than she would be worth when repaired. If you think that was the extent and amount of the damage, then you would be entitled to give the plaintiff damages for the stipulated sum here of twelve thousand dollars, and interest from the 1st of October, 1894." We think this was erroneous and misleading. Apparently the learned judge had in mind a rule of marine insurance applicable in cases of abandonment. But some of the rules of marine insurance are founded on reasons not applicable to ordinary insurance, and we doubt whether the rule stated would be applied in marine insurance to circumstances such as these. But this contract was not maritime. It did not relate to navigation, but only to a vessel which was to lie moored in the Detroit river for two years as a hospital. 19 Am. & Eng. Encycl. of Law, 940; *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90; *The Richard Winslow*, 18 C. C. A. 344, 71 Fed. 426; *The Pulaski* (D. C.) 33 Fed. 383. It is, therefore, to be construed and given effect, so far as it may be, by the rules of the common law. It involved insurance against loss by fire. Insurance against "marine risks" was also included. To what extent insurance against marine risks other than fire, on such a subject, was possible, we need not inquire. The vessel was undoubtedly the subject of insurance against loss by fire. If we assume that the city, by its failure to insure, was put in the place of an insurer against fire, then we are to inquire what would have been the measure of the recovery in a suit brought by the owner against an insurer on such a loss. It must be answered that it would have the extent to which the value of the property had been depreciated by the fire, not exceeding the sum mentioned in the policy. The sum mentioned in the policy would serve only as the limit of the recovery. The vessel was an old one. It might be bad policy to spend much money in repairing her. Quite possibly it would be more profitable to dismantle her, or cast her away, than to repair her at all. She might not have been worth \$12,000 before the fire, or after it, if she had been repaired. To tell the jury that, if they thought she would not be worth the cost of repairs when repaired, they "would be entitled to give the plaintiff damages for the stipulated sum of twelve thousand dollars and interest," was a dangerous suggestion to come to a conclusion not warranted by the premises. The "stipulated sum" was not stipulated for any purpose here, but only stood as the limit of recovery in case of insurance.

Our attention is called by the brief for the defendant in error to that clause in the contract upon which the suit is brought, which reads as follows:

"Said insurance to be for the benefit of the said party of the first part and the payment of the insurance in case of loss shall be taken in lieu of return of the vessel, provided that if said vessel be lost or destroyed by reason of any peril, risks or cause not insured against and by the fault of the said party of the second part, said party of the second part shall pay to the said party of the first part the sum of twelve thousand dollars (\$12,000) as the value of said vessel."

And it is claimed that by this the city, in case the vessel was lost or destroyed in the circumstances stated, was bound to pay the sum of \$12,000. It is manifest, however, that a total loss or destruction was intended; for it cannot be supposed that if some partial loss should happen, and the damages recovered from the insurer for that should be paid to the owner, the parties intended that the title to the vessel should pass to the city. And the instruction of the court which we are considering does not require that the jury should find the destruction was total, but only that they should find that she was damaged to the extent that it would cost more to repair her than she would be worth when repaired.

Moreover, it is open to question whether the loss or destruction intended by this clause was one falling within the scope of the insurance which was stipulated for in the preceding clause. It would seem rather that the parties were supplementing those stipulations by providing for losses which would not be covered by the insurance before mentioned. But upon this we express no definite opinion, the question not having been raised or passed upon in the court below nor directly involved in the rulings we are reviewing.

It is contended for the defendant in error, and this seems to have been his theory when he refused the tender of the vessel at the expiration of the lease, that the city had no right to return the vessel unless she was returned in as good condition as she was at the time she was leased. But is this the proper construction of the contract? We do not think it was intended that the title to the vessel would pass to the city in consequence of a breach of the stipulation referred to. It was the common case of the hiring of property for a specific term. The hirer would, by implication, be bound to return the thing hired, and the gist of the stipulation is that when returned she should be in as good condition as when received. For a breach of this stipulation the lessor would have his remedy for the damages arising from the depreciation in the value of the thing hired in consequence of the breach. But the lessor cannot treat the thing hired as sold, and recover its value of the lessee. We think, therefore, that this contention of the defendant in error cannot be maintained, and that it did not follow that, because of the damaged condition of the vessel, he was entitled to refuse to accept her, and thereupon to demand the \$12,000 as her value.

For the reasons stated, the judgment must be reversed, and the cause remanded, with directions to award a new trial.

Note. Judge DAY participated in the decision of this case, although not now a member of the court.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER
HILL & S. MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. February 16, 1903.)

No. 895.

1. RES JUDICATA—EFFECT OF REVERSAL OF JUDGMENT IN PART.

Where, upon cross-writs of error from the same judgment, a portion of such judgment is affirmed and a portion reversed, the result is to reverse the entire judgment, and to remand the cause for a new trial, and no part of such judgment can be pleaded as an adjudication in bar of another suit.

2. ABATEMENT—PENDENCY OF ANOTHER SUIT—IDENTITY OF SUBJECT-MATTER.

The pendency of a suit to enjoin the removal of ore from a mining claim by defendant as ancillary to an action of ejectment to recover possession of the part of the claim from which it was alleged that defendant was taking ore, is not a bar to a suit subsequently commenced by the same complainant to quiet its title to its entire claim, including extralateral rights not in controversy in the prior action.

3. MINING CLAIMS—POSSESSION—EXTRALATERAL RIGHTS.

The possession and ownership of the surface of a lode mining claim is the possession of the lode to the full extent of the extralateral right of the owner of the claim.

4. SAME—DETACHED PORTION OF LODGE—INTERSECTION OF EXTRALATERAL RIGHTS.

The extralateral right of the owner of a lode mining claim extends to a portion of the lode between his end-line planes produced, although it is completely severed from that portion lying within the boundaries of the claim by the extralateral right of the owner of an older claim located on the same lode, whose end-line planes extended intersect both those of the newer claims, and his possession of the surface of his claim is possession of such detached portion of the lode.

5. SAME—SUIT TO QUIET TITLE—SUFFICIENCY OF BILL.

A bill by the owner of a lode mining claim to quiet his title to his claim, including that portion of the lode within his extralateral rights, which alleges possession of the claim by complainant, does not negative such allegation as to a portion of the lode within such extralateral right, and show possession thereof in defendant, because it alleges a trespass thereon, and the removal of ore therefrom by defendant, and prays for an injunction.

6. SAME—JURISDICTION OF EQUITY—ADEQUATE REMEDY AT LAW.

Where defendant owned a number of mining claims located on the same lode as the claim of complainant, under which it claimed extralateral rights in such lode adverse to those of complainant, and under one of which it had commenced to extract ore from such lode, the remedy of complainant at law by an action of ejectment was not adequate, so as to exclude the jurisdiction of equity to entertain a bill to quiet title to complainant's entire claim, including all that portion of the lode in which it claimed extralateral rights.

7. REVIEW ON APPEAL—ORDER GRANTING PRELIMINARY INJUNCTION.

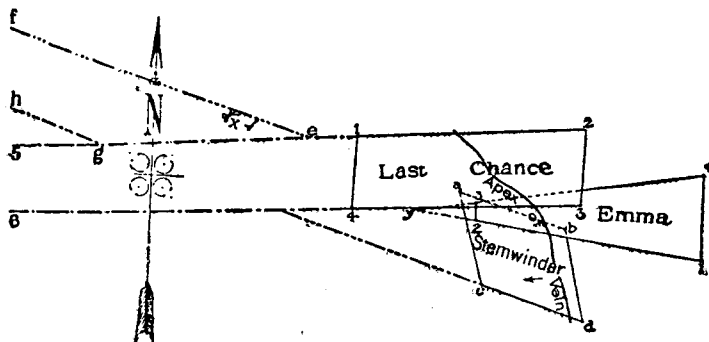
The granting of a preliminary injunction rests in the sound discretion of the trial court, and its decision will not be reviewed unless it appears that its discretion was improvidently exercised.

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

The appellee, the Bunker Hill & Sullivan Mining & Concentrating Company, a corporation, brought its bill in equity against the appellant, the

¶ 3. See Mines and Minerals, vol. 34, Cent. Dig. § 75.

Empire State-Idaho Mining & Developing Company, to quiet title to the Stemwinder lode mining claim in Shoshone county, Idaho. The controversy relates more particularly to extralateral rights, and it may be best explained by reference to the following diagram:



The bill avers that the appellee owns and is in possession of the Stemwinder claim, the surface ground of which is indicated by the parallelogram a—b—d—c, excepting thereout such portions as are included within the surface lines of the Emma and Last Chance lode claims; also excepting such parts of the lode or vein which lie within the surface lines of the Emma and Last Chance claims, and such parts thereof as lie within the extralateral rights of said last-named claims as the planes thereof extended indicate upon the said diagram. The bill alleges that the course of the apex at the surface is as shown upon the diagram, and that its downward course is westwardly; that the appellee owns and is in possession of all of the said vein throughout its entire depth on its downward course between the end-line planes of said Stemwinder claim marked upon the diagram respectively b—a—e—f and d—c—g—h, excepting therefrom such underground parts of said vein as are included within planes drawn through the end lines of said Emma lode claim from 1 to y, and vertical planes drawn through the end lines of the Last Chance claim, 2—1—5 and 3—4—6. The portion of the underground vein which is in controversy is defined by planes e—f and g—h, the same being the end lines of the Stemwinder extended beyond the planes of the end lines of the Emma and Last Chance claims. The bill avers that the appellant claims an interest adverse to the appellee in that portion of said vein which lies northerly and westerly of the northerly end line plane of the Last Chance claim, 2—1—5, and that such claim is false and groundless, and is a cloud upon the appellee's title; that since September 1, 1898, the appellant, by means of underground works, of which it has exclusive possession and control, has penetrated into that part of the underground vein so claimed to lie within the Stemwinder extralateral boundaries, and beyond the end line plane of the Last Chance northern boundary, and that said underground vein, where so penetrated, contains large and valuable ore bodies which the appellant is extracting and threatens to extract and remove unless enjoined. Upon the filing of the bill an application was made for an injunction. The application was heard upon affidavits and counter affidavits, and thereupon the appellant was enjoined from extracting such ore pending the suit. On July 12, 1902, the appellant filed a demurrer and an answer to the bill under a stipulation providing that the demurrer should not be deemed to be waived by the answer, and thereafter the demurrer was argued and was overruled. Upon application of the appellant, the injunction order was thereafter vacated, and a further hearing was had upon the application for an injunction, and on the pleadings and the affidavits which were already on file. The court again enjoined the appellant as before. From that injunction the present appeal is taken. See 106 Fed. 471; 108 Fed. 189.

W. B. Heyburn, for appellant.

Curtis H. Lindley, Henry Eickhoff, M. A. Folsom, and John R. McBride, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It is assigned as error that the court overruled the plea which was filed by the appellant at the time of the hearing of the application for the injunction. The matter of the plea was, first, a former judgment between the two parties; and, second, another action pending. The plea of a former judgment alleges: That on September 29, 1898, an action at law was commenced by the appellee against the appellant and the Last Chance Mining Company, in which the appellee alleged that it owned the Stemwinder mining claim, together with the lode or vein above referred to, and on its downward course, including the ledge and ore bodies which are in controversy in the present suit, and that the appellant and the Last Chance Mining Company were in possession of said ore bodies, and demanded judgment for the recovery and possession of the said property, and for the sum of \$200,000 damages for ore extracted therefrom. That the defendants therein answered, denying the title of the appellee and its possession, and denying that the appellant was in possession of said lode, or had extracted therefrom the ore as charged in the complaint. That the said cause was tried before the court without a jury, and a judgment was rendered in favor of the plaintiff therein as to that portion of the Stemwinder lode lying between lines drawn on the plane of the south side line of the Emma claim and the south end line of the Stemwinder claim extended in their own direction, but in favor of the defendants therein as to all of the ground claimed by the Last Chance Mining Company in its answer in said action. That upon separate writs of error from this court to review said judgment that portion of the judgment of the Circuit Court in favor of the defendants was affirmed, and that portion thereof in favor of the plaintiff in said action was reversed. The plea of the pendency of another suit alleged that a suit in equity was brought by the appellee against the appellant, the appellee alleging therein the same facts as in its present bill in this suit, and praying for the same relief. As to the first portion of the plea it is sufficient to say that the premises in controversy are not the premises in controversy herein, and that no final judgment is pleaded. The reversal of a portion of said judgment by this court upon the writ of error was a reversal of the whole thereof, and operated to set aside the affirmance of the judgment which was adjudged upon the first writ, and to remand the cause for a new trial. *Montana Mining Company v. St. Louis Mining & Milling Co.*, 186 U. S. 24, 22 Sup. Ct. 744, 46 L. Ed. 1039. The plea of another suit pending refers to a suit in equity which was ancillary to the action of ejectment just referred to. It was brought for the purpose of preserving, pending the law action, the ore bodies lying within the conflicting segments claimed respectively by the owner of the Last Chance and the appellee herein. The appellant

claimed no right to the ores in controversy, but it denied that it had invaded the disputed premises. The only relief prayed for was an injunction to restrain the extraction of ore pending the law action. In the present suit the relief prayed for is a decree to quiet the appellee's title to the whole vein lying within the Stemwinder's extralateral rights, and does not include the point where it was alleged in the action at law that the appellant had trespassed. We find no error in the ruling of the court upon the plea.

It is contended that the demurrer to the bill should have been sustained both for want of equity and for the reason that the appellee had an adequate remedy at law. It is said that there is no equity in the bill, for the reason that it appears therefrom that the possession of the property in controversy is not in the appellee, but is in the appellant. In answer to this the appellee points to the averments of the bill, which it claims establishes the fact of its possession. It is alleged therein that the appellee is in possession of the Stemwinder lode claim, describing its boundaries, and that within said claim is a mineral-bearing lode the apex of which runs through said claim northwesterly and southeasterly and across the end lines thereof, and that its downward course is to the westward, and that it extends indefinitely beyond the side lines of the claim, and within vertical planes extended in the direction of the end lines, and beyond the vertical plane of the northwesterly boundary of the Last Chance claim. The bill proceeds to allege that the appellee is in possession of all of said lode or vein so extending beyond the plane of the northwesterly end line of the Last Chance claim, and within the vertical planes of the end lines projected. Here is an averment of possession of all that part of the lode which is in controversy in this suit, the only qualification of the possession so alleged being that the appellant has trespassed on a certain portion of said lode, and is engaged in extracting the ore therefrom. But it is admitted on the argument that the possession of the appellee, if it has possession of the premises in controversy, is not an actual occupation of the ledge at any point within the lines f—e—g—h as shown upon the plat, but that it is such possession as the law imputes to the possessor and owner of the Stemwinder claim. We held in *Montana Mining Company v. St. Louis Mining & Milling Company*, 42 C. C. A. 415, 102 Fed. 430, that the possession and ownership of the surface of a lode mining claim is the possession of the lode to the full extent of the extralateral right of the owner of the claim. A new and important question, however, arises in the present case from the fact that the extralateral right claimed by the appellee is cut in twain by those of the Emma and Last Chance claims, and that thereby that part of the lode which is in controversy in the present suit is detached from that part which apexes within the appellee's claim. It is contended by the appellant that by the intervention of the extralateral rights belonging to the Emma and Last Chance claims the extralateral right of the appellee is cut off, and the appellant asserts the right to mine the ledge in question by reason of other claims located to the northwestward of the Last Chance, but subsequent in time to the Stemwinder location. We know of no case in which this pre-

cise question has been presented. In *Empire State-Idaho Mining & Developing Company v. Bunker Hill & Sullivan Mining Company*, 52 C. C. A. 219, 114 Fed. 417, this court recognized the extralateral right of the San Carlos claim beyond the point where the prior extralateral right of the Viola claim ended, but in that case the Viola extralateral right did not wholly intervene at any point to cut off the ore body to which the San Carlos had the extralateral right; in other words, there was in that claim upon the outcrop of the ledge in the surface location a point from which the owners of the San Carlos could, without interruption and continuously, proceed on the ledge on its downward course to the full extent of the extralateral right awarded by the court. By section 2336 of the Revised Statutes [U. S. Comp. St. 1901, p. 1436] it is provided that where two or more veins intersect or cross each other the prior locator shall be entitled to all the mineral contained within the space of intersection, and that the subsequent locator shall have the right of way through the space of intersection for the purpose of the convenient working of his mine. The case so provided for by statute is not the precise case of two conflicting extralateral rights upon the same ledge, which is here presented, but in principle it is the same. If the vein upon which the Stemwinder is located were in fact a separate vein from that on which the Last Chance is located, but passed through the latter in the same direction in which extralateral rights are claimed in the present suit, there could be no doubt of the right of the owner of the Stemwinder to pursue the vein beyond the point of intersection, and to maintain a right of way through the vein of the Last Chance at the point of intersection. We see no reason why that right, which is so recognized by the statute, and which would probably be recognized in the absence of a statute, shall be denied when the point of intersection of extralateral rights is not upon separate veins, but upon the same vein. If this conclusion is correct, it follows, we think, that the possession of the ore body at the surface carries with it the possession of all that belongs to the location. The mining right is an integral one. It is secured by a single location. The title to it is conveyed by one patent. The bill, moreover, does not recognize possession in the appellant of the ore body to which the appellee seeks to quiet title. It alleges a trespass upon the vein, and the extraction of ore therefrom, and the threat of the appellant to continue to extract such ore. These facts call for the intervention of equity. *Simmons Creek Coal Company v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Pardee v. Murray*, 4 Mont. 234, 2 Pac. 16; *Barr v. Gratz*, 4 Wheat. 213, 4 L. Ed. 553; *Hunnicutt v. Peyton*, 102 U. S. 333, 26 L. Ed. 113.

Nor do we find that the court erred in overruling the demurrer on the ground that the appellee had an adequate remedy at law. It is true that by an action of ejectment the appellee might have determined the question of its title and right to the possession of that particular portion of the ledge upon which the appellant is alleged to have trespassed. But that relief is not all that the appellee is entitled to, if the averments of the bill are true. The suit is brought to determine the adverse claims of the appellant as to

the whole of the ore body lying between the planes of the appellee's end lines projected beyond the extralateral rights of the Last Chance. In answering an action of ejectment, the appellant would have been required to set up only its claim of right and title to the ore body at the particular spot where it had taken possession. The judgment would have left undetermined the question of its right to other portions thereof. That it in fact asserted adverse claims to other portions is shown by its answer in this suit, in which it set up ownership of several claims located along the lode northwestward from the Last Chance claim, the extralateral rights of which would, but for the Stemwinder location, include separate portions of the ore body the title to which the appellee seeks to quiet. No remedy would be adequate unless it quieted the title of the appellee to the whole subject of the controversy. As was said in *Kilbourn v. Sunderland*, 130 U. S. 506, 514, 9 Sup. Ct. 594, 596, 32 L. Ed. 1005: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances." See, also, *Gormley v. Clark*, 134 U. S. 349, 10 Sup. Ct. 554, 33 L. Ed. 909; *Coosaw Mining Company v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537.

The remainder of the assignments of error challenge the injunction order on the ground that it was not sustained by the facts as they were shown by affidavits upon the hearing. These are matters which pertain to the merits of the controversy. Upon an inspection of the affidavits and the issues in the case, we are not convinced that the court abused its discretion in granting the injunction. The question of granting an injunction pending the suit was one which rested in the sound discretion of the trial court, and its decision will not be reviewed unless it appears that legal discretion was improvidently exercised. *Duplex Printing Press Co. v. Campbell Printing Press & Mfg. Co.*, 16 C. C. A. 220, 69 Fed. 250; *Bissel Carpet Sweeper Co. v. Goshen Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 545; *Southern Pacific Co. v. Earl*, 27 C. C. A. 185, 82 Fed. 690.

The decree is affirmed.

THE OSCAR B.

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

No. 800.

1. ADMIRALTY—REVIEW ON APPEAL—FINDINGS OF FACT.

While the Circuit Court of Appeals is not limited to the review of questions of law, only, in admiralty appeals, it is the settled practice to give great weight to the findings of fact by the trial judge, and not to disturb such findings, in cases of conflicting testimony, unless they are found to be clearly against the weight of evidence.

2. TUG WITH TOW—INJURY TO FISHING NET—LIABILITY.

A tug with a tow, passing through a channel in which there were a number of boats fishing with seines, *held* not liable for an injury to a seine from becoming entangled with the tow, where she took a middle course, and was not shown to have been negligently navigated, but it appeared that the seine had caught on the rocks, and for that reason did

not drift with the tide, as usual, which fact was not known to the master of the tug until too late to prevent the injury.

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

Edward W. Franklin, for appellant.

William Martin, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant filed a libel against the tugboat Oscar B. for damages caused to the purse seine of the appellant by the tugboat and its tow on or about the 25th day of July, 1900, in the waters off Iceberg Point, San Juan county, Wash. The appellee denied generally the charges of the libel, and, upon testimony being taken, the court entered a decree in favor of the appellee. From this decree the cause is brought to this court on appeal.

It was alleged in the libel that the appellant was at the time mentioned a fisherman by occupation, and on the morning of July 25, 1900, was, with his crew, engaged in fishing with a purse seine off Iceberg Point, on the coast of Washington; that, while so fishing, the said tugboat, being then engaged in towing a pile driver and some piles, did, by reason of the gross neglect of the master and crew of said tugboat in failing to keep any lookout, and by the lack of seamanship in handling said tugboat and her tow, cause said pile driver and piles to run afoul of and cut in pieces said purse seine, thereby causing the loss of the fish in the seine; that the appellant and his crew were compelled to remain on shore for four days, while engaged in repairing and putting together the said seine; that by reason of the loss of fish in the seine at the time of collision, and by the loss of time required to repair the same, the appellant was damaged in the sum of \$350.

It was admitted by the appellee in his answer that the meshes of the appellant's seine were caught in certain of the piles being towed by the appellee, but denied that damages to the extent of more than \$20 resulted therefrom, and further denied that such damage was caused by the negligence or carelessness of the appellee. As matter of defense it was alleged that appellant did not have a sufficient number of men with him to properly handle the seine; that the said seine became caught and fastened upon the rocks at the bottom of the ocean so that it could not be released and drift with the tide in the usual manner; that the appellee was navigating his tugboat and tow with all due care while approaching and passing said point, and was not warned of the fact that appellant's seine had become fastened to the rocks; that he believed that the seine would drift with the tide, and made due allowance for the same in selecting his course; that, by reason of the nondrifting of the seine, it became entangled in the piles of the tow as they passed, the piles being carried by the tide in the direction of the seine; that therefore the appellant's negligence in allowing the seine to be caught, and in not warning the appellee of the condition, was the entire cause of the damage resulting.

It appears from the evidence that the tugboat, with a pile driver and four sections of piles in tow, started from Richardson to Kelly's Ledge, passing Iceberg Point on the way; that the distance between Iceberg Point and Hall Island, almost opposite, was about $1\frac{1}{4}$ miles, and the course of the tugboat lay between these points; that various parties with boats and seines were on either side of the course, lying in wait for the fish to run; that the appellant's net was placed the farthest out; and that a strong tide was running toward it at the time of collision.

On the appellant's behalf it was testified that, while the seine may have been caught on the rocks in places, it did not interfere with the handling of it, and that they were pulling the net in, and could have completed the operation without difficulty if the tugboat had kept farther away; that, as soon as they could see that there was danger of collision, they waved their hats and shouted to inform those on the tugboat of the danger.

On the other hand, it was testified for the appellee that the tugboat was kept in the middle of the course, was about a quarter of a mile distant when abreast of the same, and, with a tow between 1,100 and 1,200 feet long, would have swung entirely clear of the seine, had the seine been drifting with the tide; that the captain of the tugboat was in the pilot house all the time, and saw no signal given and received no warning that the net was not free until after coming abreast of the net; that he then sheered his boat off, and, upon finding that the tow was not going to swing clear of the net, he stopped the boat, in order to prevent the carrying of the net along and tearing it; that the fishermen then disentangled the net from the piles, and the voyage was proceeded with.

With regard to the damage sustained, appellant testified that the collision occurred on the 25th day of July; that the fish were then running, and, from the indications of the fish jumping, it was estimated that there were from one to two hundred salmon in the net at the time of the collision; and that there would undoubtedly have been fish caught upon the four succeeding days, had the net been in condition to use.

The appellee introduced evidence tending to show that the collision occurred on the 19th of July, from entries in a book in which a record of the work done by the tugboat was kept. On the 19th the entry was, "Took pile driver, four sections of piles, to Kelly's Ledge, and went for water," while on the 25th there was no record of taking any piles, but merely the pile driver to Anacortes for water. There was also corroborating oral testimony tending to show that the collision occurred on the 19th of July. With respect to the time when fishing commenced at this point, William Stewart, a buyer of fish for the cannery of Myer & Co. at that place, testified that he purchased the catch each day from the majority of the fishermen there—the appellant among them—and that he kept a record of each day's catch in a book which he produced. This book contained an entry showing a purchase of fish on July 29th, but he testified that the fish were not running to any extent that season at the point in question before July 30th, and no fish, to amount to anything,

were purchased until that day. It was admitted by appellant that only one fish was actually seen jumping in his net, by himself or his crew, on the day of the collision.

From this testimony the court below reached the conclusion that by a fair preponderance of evidence it was shown that the run of salmon for the season had not commenced when the net was injured, and did not commence until after the four days had elapsed in which the net was mended; that the only loss suffered by the appellant was, therefore, the time of his crew engaged in mending the net instead of fishing, and that under the circumstances this could not positively be determined to be a pecuniary loss; that the damage to the same resulted from a combination of unfavorable circumstances beyond the control of the captain of the tugboat, and not involving any negligence or fault on the part of the boat or her captain.

"The libellant's seine had become entangled on the rocks at the bottom, or was snagged so that it did not drift freely with the tide, and, when the steamer with her tow came out beyond Iceberg Point so as to meet the force of the incoming tide, the raft necessarily drifted towards the seine and became entangled. There is no arbitrary rule requiring a tugboat to avoid a fishnet in a fairway. If the steamer injures the net, she will be liable for damages if the injury was wanton or caused by negligence; otherwise she will not be liable."

While this court is not limited to the review of questions of law, only, in admiralty appeals, it is nevertheless the settled practice to give great weight to the findings of fact by the trial judge, and not to disturb such findings, in cases of conflicting testimony, unless they are found to be clearly against the weight of the evidence. *The Alijandro*, 56 Fed. 621, 6 C. C. A. 54; *The Brandywine*, 87 Fed. 652, 31 C. C. A. 187. The court has read the entire testimony in this case, and has reached the conclusion that the negligence of the appellee has not been established. The tugboat, with its tow, was being navigated in the usual course, with due regard to the various fishing boats on either side. Had the appellant's seine not been snagged or caught on the rocks, the evidence shows that it would not have been injured by the tow.

The preponderance of evidence shows that the warning given by the appellant as to the seine's condition was not given soon enough; that, when it was received by the captain of the tugboat, he used all possible care and diligence to prevent injury to the same, but that the force of the incoming tide at this point carried the tow against it. A tug is only bound to use reasonable care and skill, and, when employing that degree of care and skill, is not liable for the sudden sheering of the tow. *The Stranger*, 1 Brown, Adm. 281, Fed. Cas. No. 13,525; *The Lady Wimet*, 99 Fed. 1004, 40 C. C. A. 212.

The decree of the District Court is affirmed.

In re GUREWITZ.

(Circuit Court of Appeals, Second Circuit. April 9, 1903.)

No. 168.

1. BANKRUPTCY—PRIORITY—WAGES—PIECE WORK.

Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], provides that "wages" due workmen for service, earned within three months before commencement of proceedings in bankruptcy, shall be entitled to priority. Section 1, subd. 27, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3420], provides that "wage-earner" shall mean an individual who works for wages, salary, or hire at a compensation not exceeding \$1,500 a year. Section 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provides that any natural person, except a wage-earner or one engaged in farming, may be adjudged an involuntary bankrupt. *Held*, that the word "wage-earner" was defined in section 1 for the purposes of section 4b, and, such word not being found in section 64, the word "wages" in the latter section is to be construed as including a sum due one who worked by the piece.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

On petition, filed by the trustee of the above-named bankrupt, to review an order of the District Court for the Southern District of New York, affirming a decision of the referee refusing to expunge the claim of Samuel Reitzen and holding that the said Reitzen is entitled to priority under section 64b (4) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), his claim being for wages earned within three months before the date of the bankruptcy proceedings. The trustee maintains that Reitzen is not entitled to preference because he was paid by the piece, namely, at so much per garment, and that only those workmen are within the meaning of the act whose wages are measured and fixed by periods of time.

Emanuel Blumenstiel, for trustee.

L. E. Miller, for claimant.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The sole purpose of this review is to obtain an answer to the question whether or not so-called "piece-workmen" are entitled to priority under section 64b (4) of the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

During the three weeks prior to the filing of the petition Reitzen worked for the bankrupt at the latter's place of business as a piece-worker and earned the sum of \$42.16 which he insists is entitled to priority. The amounts due this class of workmen, as well as those working by the week, had always been paid weekly by the bankrupt.

The section in controversy, so far as it relates to the present question, is as follows:

"Sec. 64. Debts which have priority. * * * 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." 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

The legislative intent in the foregoing provision is manifest. It is to give a preference, limited in time and amount, to those em-

ployés of the bankrupt who work for wages. It surely could not have been the purpose of Congress to make the method of computation a criterion of priority. There is absolutely nothing in the language quoted upon which to base such an assumption. In order to secure priority under this subdivision the creditor must establish the following facts: First, that he was a workman, clerk or servant of the bankrupt. Second, that he earned wages within three months prior to the commencement of the proceedings.

There is nothing ambiguous about the use of the word "wages" in this connection. It means the agreed compensation for services rendered by the workmen, clerks or servants of the bankrupt,—those who have served him in a subordinate or menial capacity and who are supposed to be dependent upon their earnings for their present support. Whether their employer has agreed to pay them by the hour, the day, the week, the month or by the "job" or piece, is wholly immaterial.

It is incredible to suppose that Congress intended to discriminate against the vast army of laborers who, in the coal mines, the foundries, the clothing manufactories and in almost every branch of industry, are paid not according to the time consumed but according to the work accomplished. An element of perplexity has been imported into the discussion by the assumption that the language quoted must be interpreted in the light of the definition of the word "wage-earner," found in section 1 of the act. Subdivision 27 provides that:

"'Wage-earner' shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." 30 Stat. 544 [U. S. Comp. St. 1901, p. 3420].

It will be observed that the word "wage-earner" is not used in the subdivision now under consideration. The word used is "wages" and no technical definition of this word is found elsewhere in the act, probably because the lawmakers concluded that when a word so plain and simple was used no further explanation was necessary.

The reason for a concise definition of "wage-earner" is made apparent by an examination of section 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], which provides that "any natural person, except a wage-earner or person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt." When a wage-earner was thus excepted from the operation of the involuntary features of the act it became necessary to define with precision the meaning of the term. We are, however, of the opinion that the definition has no application to the present controversy for the reason that the defined word is not found in section 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

The order of the district court is affirmed, with costs.

In re HAUSMAN.

(Circuit Court of Appeals, Second Circuit. March 12, 1903.)

No. 135.

1. BANKRUPTCY—FAILURE OF BANKRUPT TO COMPLY WITH ORDER—PUNISHMENT FOR CONTEMPT.

Before punishing a bankrupt for contempt because of his failure to comply with an order, the court should give him an opportunity to prove his inability to do so.

Petition for Revision of the Proceedings of the District Court of the United States for the Southern District of New York in Bankruptcy.

Stillman F. Kneeland, for petitioner.

Thaddeus D. Kenneson, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. In affirming the order of the court below, we do not consider the question whether the bankrupt should be punished for contempt in the event of failing to comply with the order, as that question, although the one principally argued, is not here. If it should be sought to punish him for contempt, the court below will doubtless give him an opportunity to prove his inability to comply with the order.

In re KANTER & COHEN.

(Circuit Court of Appeals, Second Circuit. February 25, 1903.)

No. 75.

1. RECEIVER OF BANKRUPT'S ESTATE—SUIT IN STATE COURT—LEAVE OF COURT—INJUNCTION.

Under Act Cong. Aug. 13, 1888, c. 866, § 3 (25 Stat. 436 [U. S. Comp. St. 1901, p. 583]), permitting suits against receivers to be brought without previous leave of court, and on the principle that state courts have concurrent jurisdiction to determine the rights or titles of third persons claiming property adversely to a bankrupt's estate, an injunction sought by the temporary receiver of a bankrupt's estate to restrain the prosecution of an action of trover in a state court by one claiming chattels in the receiver's hands is properly refused.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

H. B. Clausson, for petitioner.

M. D. Stwer, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. This is a petition to review an order of the United States District Court for the Southern District of New York, in bankruptcy, denying the application of a receiver to restrain the prosecution of an action of trover brought against him in one of the state courts by one Steinburg. Kanter & Cohen, having filed their

petition to be adjudicated bankrupts, the court, pending the adjudication, by its order appointed Hough as temporary receiver of their estate. Shortly thereafter certain chattels which were supposed to be the property of the bankrupts were delivered into the possession of Hough by the police of New York City. Steinburg, claiming to be the owner of the chattels, brought the action to recover their value the prosecution of which the receiver sought to restrain.

If the action had been in replevin, a different question would arise, but as it is we entertain no doubt that the court below properly refused the receiver's application. The questions involved were considered by this court in *Re Russell & Birkett*, 3 Am. Bankr. R. 658, 101 Fed. 251, and the decision in that case disposes of them. See, also, Act Aug. 13, 1888 (chapter 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 583]), permitting suits against receivers to be brought without previous leave of the court.

Order affirmed, with costs.

WILLIS v. MILLER et al.

(Circuit Court of Appeals, Second Circuit. March 12, 1903.)

No. 132.

1. PATENTS—ACTION FOR INFRINGEMENT—QUESTIONS FOR JURY.

In an action at law for infringement of a patent, the question of invention is one of fact for the jury, where the evidence is such as to warrant its submission.

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

T. Hart Anderson, for plaintiff in error.

A. Bell Malcomson, for defendants in error.

Before WALLACE and COXE, Circuit Judges.

COXE, Circuit Judge. This is an action at law brought by Tobias Miller and Louis P. Whiteman, the plaintiffs below, to recover damages for infringement of letters patent No. 632,819, granted September 12, 1899, for improvements in alarm bells for bicycles. At the trial the jury found a verdict for the plaintiffs in the sum of \$84. The defendant sued out a writ of error for the review of the judgment entered upon such verdict.

The patent is concededly an exceedingly narrow one. The only question which demands serious consideration is whether the court erred in not directing a verdict for the defendant at the close of the testimony on the ground that the evidence was insufficient to warrant the submission of the question of invention to the jury. The question of invention is one of fact, and after examining the testimony we are of opinion that there was sufficient evidence to warrant its submission to the jury. The jury having found for the plaintiffs, the verdict should not be disturbed.

¶ 1. See Patents, vol. 38, Cent. Dig. § 434.

At the argument various exceptions were discussed, but upon examination it appears that the objections were general in character and insufficient to sustain the exceptions. The only exception which presents a question for our consideration was taken to the ruling of the court striking out an answer upon motion of the plaintiffs. The witness Robinson was called by the defendant to prove that he had constructed a similar bell prior to the date of the invention. He was asked how long it required to produce the bell in question, and he answered: "Well it might have been a week or ten days." He was then asked: "Was it a difficult matter for you?" and answered "No." This was objected to by counsel for plaintiffs and upon his motion, and against the defendant's exception, the answer was stricken out. We are inclined to think that the answer was incompetent and was properly stricken from the records, but from any point of view the ruling was inconsequential and could, in no event, affect the result injuriously to the defendant. The facts regarding the construction of the bell were all before the jury. The opinion of the witness that it was not difficult to construct added nothing to the testimony.

The judgment is affirmed.

LATTIMORE v. HARDSOCG MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1903.)

No. 1,748.

1. PATENTS—INFRINGEMENT—MEASURE OF DAMAGES.

On an accounting for infringement of a patent for an improvement in miners' lantern holders, where defendant made and sold miners' caps to which it attached the infringing holders, complainant was entitled to recover only the profits made on the holders, and not that made on the caps, which were separate articles, from which the holders were readily detachable, and having a market value when sold alone, and substantially the same value when sold equipped with other lantern holders which defendant was free to use.

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

E. Hayward Fairbanks (Hazen I. Sawyer, on the brief), for appellant.

William McNett, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This is a suit in equity brought by Walter A. Lattimore, the appellant, against the Hardsocg Manufacturing Company, the appellee, for infringement of patent No. 415,720, issued to the appellant for an improvement in a miner's lantern holder. The Circuit Court found claim 1 of the patent valid; that it

¶ 1. Accounting by infringer of patents for profits, see note to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.

See Patents, vol. 38, Cent. Dig. §§ 567, 572.

had been infringed by the appellee, which was enjoined from further infringing; and a reference was made to William C. Howell, the master in chancery, to assess the appellant's damages resulting from the infringement. The master reported that the appellant was entitled to recover the sum of \$211.98, the profits realized by the appellee on the manufacture and sale of the infringing lantern holder, and that the appellant was not damaged beyond the amount of these profits. The Circuit Court confirmed the master's report, and rendered a decree accordingly, and the appellant appealed to this court.

The appellee manufactured and sold miners' caps, and the lantern holders which it manufactured and sold were attached to these miners' caps, and the only question in the case is whether the appellant, in addition to the profits the appellee made upon the manufacture and sale of the lantern holder attached to the caps, is also entitled to receive the profits made upon the sale of the miners' caps themselves. The appellant's patent was not for an entirely new device, but only for an improvement in a miner's lantern holder. There are several other lantern holders in use and on the market, some of which have been in use for a great many years; and any of which might be attached to a miner's cap. A miner's cap, or some equivalent covering for the head, has been in use time out of mind, and their manufacture and sale is open to every one.

These lantern holders can be attached to any hat or cap worn by a miner. One is as necessary as the other. Separated from the cap, the lantern holder is of no service to the miner; but the cap has a merchantable value without any holder, and, when provided with any of the other holders in common use, its selling price is substantially the same as when it was equipped with the appellant's holder. The master found the caps had a value in themselves, separate and distinct from the holder, from which they could readily be detached, and that the value of the caps as a marketable article was not attributable to the patented feature of the appellant's holder. The difference in the cost of the caps and lantern holders was very great. The master finds that 6,379½ dozen lantern holders cost \$414.56, while the same number of caps cost \$3,906.12, and the profits on the cap with the lantern holder attached were in proportion to the cost of these articles respectively.

Upon these facts, the rule for computing the plaintiff's damages is well settled by repeated decisions of the Supreme Court of the United States. This is not a case where the entire or any considerable value of the article sold is attributable to the patented feature, and profits upon the entire article are only allowable where such article is wholly the invention of the patentee, or where its entire value is properly and legally attributable to the patented feature. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609. In *McCreary v. Penn. Canal Co.*, 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817, the Supreme Court say that, where the "device is a mere improvement upon what was known before, and was open to the defendant to use, the plaintiff is limited to such profits as have arisen from the use of the improvement over what the defendant might have made by the use of that or other devices without such improvements. This

is a familiar doctrine, announced by this court in a number of cases." And in *Warren v. Keep*, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144, the court said that it was "well settled that, where a patent is for a particular part of an existing machine, it is not sufficient to ascertain the profits of the whole machine, but it must be shown what portion of the profits is due to the particular invention secured by the patent in suit." See, to the same effect, *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024; *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. 945, 29 L. Ed. 177; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577. The damages were assessed by the master in conformity to this rule.

The decree of the Circuit Court is affirmed.

DOWAGIAC MFG. CO. v. FOWLER et al.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1903.)

No. 1,746.

1. PATENTS—INFRINGEMENT—GRAIN DRILLS.

The Hoyt patent, No. 446,230, for an improvement in grain drills, is infringed by the drill made in accordance with the Denyes & Schutt patent, No. 672,596, which, while not employing the clamping plates of the Hoyt patent, in form substitutes an equivalent part for transmitting the pressure from the spring pressure rods to the drawbars.

Appeal from the Circuit Court of the United States for the District of North Dakota.

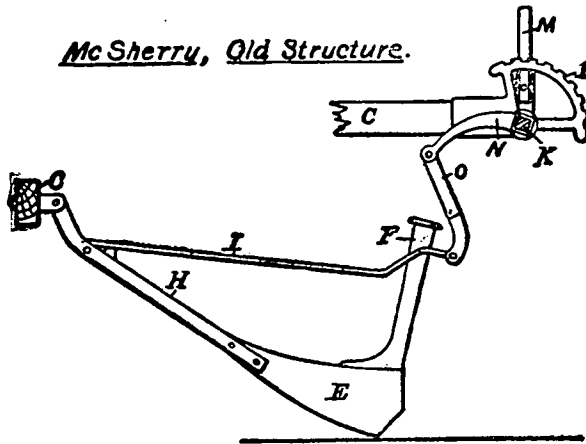
Fred L. Chappell, for appellant.

Charles M. Peck, for appellees.

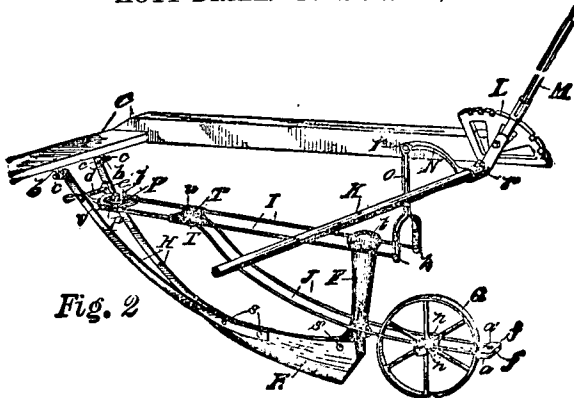
Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action to restrain the infringement of letters patent No. 446,230, issued to Will F. Hoyt on February 10, 1891, being the same patent that was before this court for consideration at its last term in a case entitled "*Dowagiac Manufacturing Company v. Minnesota Moline Plow Company*," 118 Fed. 136. In that case the court was unanimous in holding that what was there termed the "McSherry old structure" (a cut of which appears on the adjoining page) was an infringement of the device described and covered by the patent issued to Hoyt (a cut whereof, including the clamping plates, PP', also appears on the opposite page). In the case formerly decided by this court the crucial question that was involved as respects the McSherry old structure was whether an infringement was avoided by dispensing in the latter device with the clamping plates, PP', which were described in the Hoyt specification. This court adopted, through comity, the view of the Circuit Court of Appeals for the Sixth Circuit in *McSherry Manufacturing Company v. Dowagiac Manufacturing Company*, 41 C. C. A. 627, 101 Fed. 716, that the drill covered by the Hoyt patent disclosed patentable novelty;

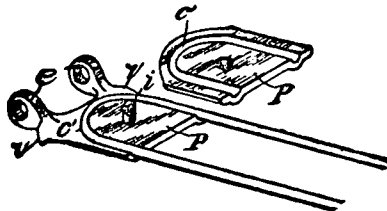
that the clamping plates, although described in the Hoyt patent and mentioned in the claims, really formed a section of what are termed in the patent the spring pressure rods, II; that the plates might



HOYT DRILL. PAT. No. 446,230.



CLAMPING PLATES. PP'.



have been omitted, and the ends of the spring rods, II, pivoted directly to the bolt, e e, between the forward ends of the drawbars, the spring rods being provided with lugs to bear on the drawbars when the rods were bent downward; that the clamping plates as de-

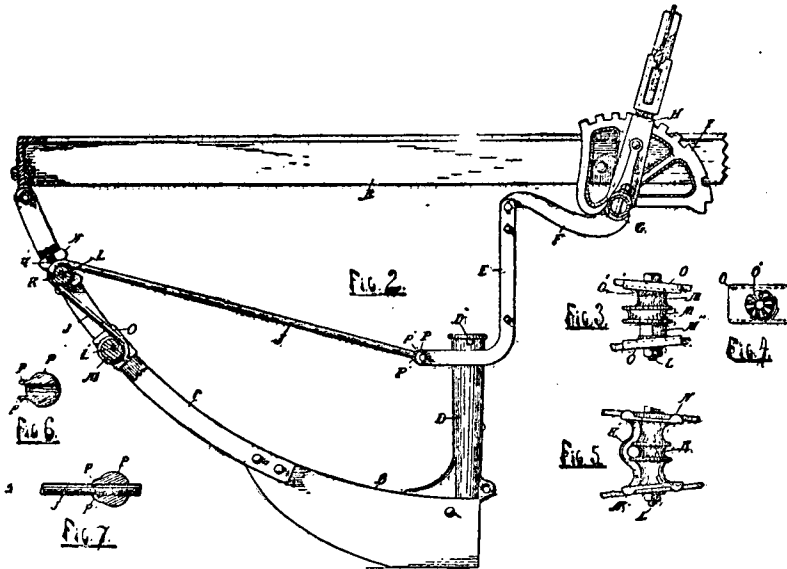
scribed were really nonessential parts of the invention; that the omission of the same in the McSherry old structure did not avoid an infringement of the Hoyt patent, since a full equivalent of the clamping plates was found in the McSherry old structure, consisting of a wedge-plate provided with lugs to engage the drawbars when the spring rods which McSherry employed were pressed downward by means of the lever. 41 C. C. A. 631, 632, 101 Fed. 718.

The drill which forms the subject-matter of the present controversy, and is claimed to be an infringement of the Hoyt patent, differs somewhat in form from the McSherry old structure. A drawing of the drill and its various parts, which is claimed to be an infringement of the Hoyt patent, will be found on another page. It is manufactured under patent No. 672,596, issued to Denyes & Schutt on April 23, 1901. It will be observed that the patentee of this drill has dispensed with one of the two spring rods that are described in the Hoyt patent, using but one rod, J, the rear end of which is secured between parallel bars, E, which embrace the boot, D. The spring rod, J, extends forward to a point between the drawbars, C, to which the shoe, B, is attached, such point being at or near their forward ends, and is there bent over a block (L) which is interposed between the drawbars, and then extends downward and forward some little distance between the drawbars, and is again bent or wrapped around another block between the drawbars, marked O, so as to grasp it. The result of this arrangement is that when pressure is applied to the rear end of the spring rod, J, by the movement of the lever arm, F, pressure is cast by the spring rod upon the blocks, L and O, which serve as a fulcrum, and the shoe at the rear end of the draw bars is forced into the ground. The movement of the lever arm in the opposite direction has the effect of raising the shoe by means that are obvious. It is manifest, therefore, that the mechanism which is employed performs the same function as the mechanism in the Hoyt patent, and the question to be resolved is whether the means employed to accomplish the same are not substantially identical.

The elements of the combination covered by the first and second claims of the Hoyt patent, which are very similar, consist of the transporting wheels and frame of the drill, the hopper or boot, the shoe attached to the draft rods, the clamping plates, PP', the spring rods, the forked arm coupled to said rods, and means for raising and lowering the arm. The third claim describes the plates as having "shoulders bearing on the draft rods," but in other respects it corresponds with claims 1 and 2. The drill manufactured under the patent of Denyes & Schutt responds very plainly to the claims of the Hoyt patent, except as to the clamping plates. It has, of course, the transporting wheels and frame, the hopper or boot, the shoe, the draft rods, a spring pressure rod, a forked arm coupled to the spring-rod in front instead of behind the boot, which is immaterial, and means for raising and lowering the arm. It is true that the defendants construct their drill with one spring rod instead of two, making it apparently somewhat heavier than either of the two rods of the Hoyt drill, but this single rod is a plain equivalent for the two rods

in the other device and performs the same function in no other or better way. The substitution of one spring rod in place of two, no better or different results being obtained, will not exempt the device from the charge of infringement. Moreover, in view of the manner in which the single spring rod of the defendants' drill is bent around the upper block interposed between the drawbars, and thence downward and forward around the lower block, O, it is manifest that the same pressure is brought to bear on the drawbars in the one device as in the other by a lever action which does not differ essentially in the two devices. When a downward pressure is applied to the lower end of the spring rod, its forward end is drawn around the upper block, which is interposed between the drawbars, giving to the rod a pivotal

DENYES & SCHUTT DRILL AND VARIOUS PARTS THEREOF.



connection, since it is not rigidly attached to the block. Besides, the bolts connecting the two drawbars which support the two blocks last referred to are equivalent to the lugs or projecting shoulders of the clamping plates in the Hoyt structure, which engage the drawbars and transmit pressure thereto.

It is urged, however—and this is the principal contention on the part of the appellees—that the charge of infringement is not sustained, because the clamping plates, PP', of the Hoyt drill, are not found in the appellee's drill. Referring to this contention, we repeat, in substance, what has already been said, that this court decided in *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 118 Fed. 136, following in that respect the previous decision in the Sixth Circuit, that the clamping plates, in the form shown by the Hoyt specification, are not of the essence of the invention therein claimed; that the clamp-

ing plates, or the "swinging head," as they are termed in the second claim, having a pivotal connection with the draft rods, really form an extension of the spring rods, and are a part thereof, their sole function, besides connecting the spring rods pivotally with the draft rods by means of the bolt on which they are hung, being to transmit pressure to the draft rods by means of projecting shoulders which engage the draft rods; and that clamping plates were disclosed in substance, although not in form, in a structure then under consideration, having spring rods with lugs thereon to engage the drawbars, and also eyes in their forward ends by which they were pivotally and immediately connected with the drawbars by means of a bolt passing through the drawbars and said eyes. We feel constrained to adhere to that view, and, applying it to the case in hand, we are forced to conclude that the clamping plates, considering the functions which they were designed to perform, are also found in substance, although not in form, in the appellee's drill. The spring rod, as heretofore shown, is pivotally connected with the drawbars by means of the upper block between the draw bars over which it is bent, while the bolt which passes through the drawbars, and supports the lower interposed block, O, around which the end of the spring rod is hooked, serves to transmit pressure from the spring rod to the drawbars in substantially the same manner in which that end is accomplished by the Hoyt device. We are unable to discover that Denyes & Schutt improved the Hoyt drill to any appreciable extent. They made some slight and seemingly colorable changes in the mechanism by which pressure at the rear end of the long flexible spring rods was transmitted to the draft rods at or near their forward ends, but they made no change in the principle of operation or substantial change in the mode of operation, nor did they simplify the device, or attain any better result. Upon the whole, therefore, following our previous decision, we conclude that the decree below must be reversed, with directions to enter a decree for the complainants below, for an injunction, and an accounting in the usual form.

It is so ordered.

In re F. A. HALL CO.

(District Court, D. Connecticut. March 17, 1903.)

No. 991.

1. **BANKRUPTCY—EFFECT OF ACT—SUSPENSION OF STATE INSOLVENCY LAWS.**

Bankr. Act 1898 (Act July 1, 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), on its passage, at once suspended and superseded all state insolvency laws, as to cases coming within its purview, whether the insolvent be a person, partnership, or corporation, and proceedings instituted thereafter under any such insolvency law by or against an insolvent subject to adjudication as a bankrupt, either voluntary or involuntary, are void.

In Bankruptcy. On review of an order of the referee directing an assignee in insolvency under the state law to turn over the estate of the bankrupt to the trustee in bankruptcy.

The following is the opinion of Referee Munn:

The F. A. Hall Company was a corporation organized under the laws of the state of Connecticut, engaged in the mercantile business at Torrington, Connecticut. On the 24th day of September, 1902, it made an assignment for the benefit of its creditors to John Workman, of Torrington, in said district, under the insolvency laws of the state of Connecticut. The assignment was confirmed by the probate court for the district of Torrington, and the probate court thereafter began the settlement of said estate of said company as an insolvent estate under the insolvent laws of the state of Connecticut. On the 10th day of January, 1903, the said F. A. Hall Company was adjudicated a bankrupt by the United States District Court for the District of Connecticut. The petitioner herein was appointed trustee in bankruptcy, and, after duly qualifying as such trustee, made demand upon said John Workman for all of the estate of said bankrupts. The said John Workman refused to deliver over the possession of said estate to the trustee in bankruptcy, whereupon this petition was brought, and the question as to who was entitled to the possession of said estate submitted to the District Court by the consent of all parties.

The respondent claims that as the assignment was made to him under the insolvency laws of the state of Connecticut, and as the probate court for the district of Torrington (that being the proper court under said laws) had confirmed his said appointment, and taken jurisdiction over the F. A. Hall Company and its assets, and had begun the settlement of said estate under said insolvency laws prior to the adjudication, said adjudication conferred no jurisdiction upon the United States District Court either as to the bankrupt corporation or its assets; that neither the United States District Court in bankruptcy, nor its trustee, has any right to the possession of said estate, but that said estate must be settled under the insolvency laws of the state of Connecticut by the probate court for the district of Torrington; and that he (said Workman), as trustee appointed by said probate court for the district of Torrington, is entitled to the possession of said estate of said bankrupts for the purpose of settlement and distribution among the creditors of said estate under said insolvent laws in said probate court. In short, the question, as presented, is this: Did the act of Congress, passed in 1898 (Act July 1, 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), entitled "An act to establish a uniform system of bankruptcy throughout the United States," suspend the insolvency laws of this state, and give the United States District Courts exclusive jurisdiction over bankrupt estates, or have the United States District Courts in bankruptcy, under the said act of Congress, and the probate courts under the insolvency laws of this state, concurrent jurisdiction in bankrupt estates, so that whichever first gets jurisdiction of the estate shall be entitled to retain it and settle the estate under the law by virtue of which it is given jurisdiction over said estates?

The question of procedure or of comity between courts was not presented, claimed, or argued, except as set forth in the pleadings, no evidence was offered in the case, and the whole case was submitted on the pleadings, with argument, and the only question submitted is the one stated above.

Before the passage of the bankruptcy act of 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), the state of Connecticut had an insolvency system in force. Chapter 52, Gen. St. 1888. Substantially the same provisions are found in Chapter 23, Gen. St. 1902. These statutes provided for a written assignment of all of the property of the insolvent, to some person chosen as assignee by the insolvent, for the benefit of all the creditors, in proportion to their respective claims; such deed or assignment, to be valid, to be lodged in the office of the court of probate having jurisdiction, for certain judicial proceedings therein, of such deed or assignment, by which the assignee named in the deed was approved by the court as trustee, or a trustee was appointed by the court. Thereafter the administration of the estate was conducted by the trustee under the order of court, acting as a court of insolvency. They provided for certain allowances, benefits, and privileges to the insolvent if he filed his affidavit that he had fully complied with the provisions of the chapter. Such allowances were not to exceed \$3 a week for each member

of his family, and not to exceed \$15 a week, in the whole, for a period of time not exceeding six months, to be fixed by the court of probate. If no reservation was made in the deed or assignment, he might have a further allowance, not exceeding \$100. If the estate, upon final settlement, paid seventy per cent. or more on claims allowed, the insolvent might be discharged by the court, with an exemption of his property for two years from all legal process founded on any claim that might have been proved against his estate, except such founded upon fraud or breach of trust. The chapter also contains a provision for the assignment of a corporation by the vote of its directors, and also contains a section providing for an involuntary insolvency upon petition of a creditor and hearing by the court, upon which it might decree the debtor to be insolvent, and appoint a trustee to take possession of, manage, and dispose of his property. "These statutes constitute, in the fullest sense, an insolvent law." *Ketcham v. McNamara*, 72 Conn. 711, 46 Atl. 146, 50 L. R. A. 641.

It was under the provisions of this chapter that the F. A. Hall Company made its assignment to the respondent, and the proceeding had as heretofore stated. The respondent claims that these laws are in full force; that, the probate court having assumed jurisdiction, notwithstanding the adjudication of said company as a bankrupt by the United States District Court, said probate court has full power, authority, and jurisdiction to hold possession of the estate, and to complete its settlement and distribution in the manner provided by the state law. And this is true unless these statutes were suspended by the act of Congress passed in 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) entitled "An act to establish a uniform system of bankruptcy throughout the United States." Of the power of Congress to establish a uniform system of bankruptcy, there can be no question. That power is expressly conferred on Congress by the United States Constitution (article 1, § 8, cl. 4), and is abundantly sustained by decisions of both state and federal courts. The power granted to Congress by the Constitution gave it the power to establish a uniform system of bankruptcy for the United States. In this grant of power by the several states to Congress there was no reservation, and, under that section of the Constitution, Congress might act or refuse to act. It might establish a complete system, covering every case, or a system covering only certain classes of cases. So long as it did not act, the several states had the right to establish their own systems of insolvency or bankruptcy, and to provide laws for the carrying out of such systems; but when Congress did act, and established a system of bankruptcy, that act was the supreme law of the land as to those cases covered by it. *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *In re Bruss-Ritter Co.*, 1 Am. Bankr. R. 59, 90 Fed. 651; *R. H. Herron Co. v. Superior Court*, 8 Am. Bankr. R. 493, 68 Pac. 814; *In re Deposit & Savings Inst.*, Fed. Cas. No. 12,211; *Mauran v. Carpet Lining Co.*, 6 Am. Bankr. R. 737, 50 Atl. 331.

Is this case one covered by the bankruptcy law? Section 4, subd. "b," of the act of 1898, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provided that "any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits, owing debts to the amount of \$1,000 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." The F. A. Hall Company were engaged in mercantile pursuits, and therefore come within the provision of the section. Section 3, subd. 4, provided that a making of a general assignment for the benefit of creditors is an act of bankruptcy, and there are other provisions of that section which undoubtedly apply also. Clearly, then, this corporation was one that came within the purview of the bankruptcy law, and was subject to its provisions. Upon the act of 1867 (14 Stat. 517) the Supreme Court, in the cases of *Hawkins' Appeal*, 34 Conn. 548. and *Maltbie v. Hotchkiss*, 38 Conn. 80, 9 Am. Rep. 364, and *Gerry's Appeal from Probate*, 43 Conn. 289-299, 21 Am. Rep. 653, held "that a voluntary assignment by a debtor under the insolvent laws of this state, no proceedings having been instituted under the bankrupt act, was not void, although the United States bankrupt act was in existence, and applicable to the case, at the time of the assignment." And in the case

of *Maltbie v. Hotchkiss*, 38 Conn. 83, 9 Am. Rep. 364, speaking of the insolvent laws of this state: "We are not sure that any complaint was made of the insufficiency of those statutes, or of any hardship in their practical operation, that is not inherent in this kind of legislation. No demand for a bankrupt act was made upon any such ground, and we can hardly believe that Congress intended to repeal or suspend those state laws, except so far as was necessary for the accomplishment of the main object in view; and that necessity, as it seems to us, may well be limited to those cases over which the courts of the United States actually assert their jurisdiction within the time limited for that purpose. The act of Congress does not in express terms repeal the state laws. A repeal by implication, arising from the force and effect of the Constitution of the United States, and from the supremacy of the laws of Congress passed in pursuance thereof, must be limited by the terms and provisions of the act from which the implication is derived." But the court did not go so far as to say in the cases quoted above that the state court's jurisdiction was superior to the bankruptcy court. In discussing that question the court said: "If any insolvent debtor, or any creditor of such, desires that the estate shall be settled in that court, it can be done. If all the parties concerned desire that it shall be settled in the state courts, as yet, we see no good reason why that may not be done. Should a case arise in which there will be an actual conflict of jurisdiction, the state court must yield to the national. Even in this case, should the bankrupt court within the time limited assert its jurisdiction, proceedings in our own courts would be thereby superseded." *Maltbie v. Hotchkiss*, 38 Conn. 82, 9 Am. Rep. 364. And to the same end were the decisions of *In Re Ziegenfuss*, 24 N. C. 463; *Reed v. Taylor*, 32 Iowa, 209, 7 Am. Rep. 180. But the federal and state courts, by a great majority, under the bankruptcy law of 1867 (14 Stat. 517), held that "the passage of the bankruptcy law ipso facto suspended the state laws on the same subject, so that they could no longer operate upon persons or cases within the purview of the bankrupt act." See *Shryock v. Bashore*, 13 N. B. R. 481, Fed. Cas. No. 12,820, where the cases on this subject are exhaustively studied and classified. See, also, *Parmenter Mfg. Co. v. Hamilton*, 1 Am. Bankr. R. 41, note; 16 Am. & Eng. Ency. of Law (2d Ed.) 642.

While there is a conflict in these decisions as to whether the bankruptcy law suspended the state laws, or whether cases might proceed under the state laws until the bankruptcy law was invoked, they all conceded that when the bankruptcy law was invoked the jurisdiction of the state court yielded at once to the federal court. If the probate court had jurisdiction at all in this case, it still has it. If the bankruptcy act itself did not suspend the state insolvency law, and give the District Court exclusive jurisdiction over all cases within its purview, then the mere adjudication in bankruptcy could add nothing to the law. If the probate court had jurisdiction before the adjudication, it had it after, and will have it until the case is perfected and the proceedings ended by the distribution of the estate under the provision of the law which the probate court has assumed to act. *Commonwealth v. O'Hara*, 1 N. B. R. 93. It is the law itself which must determine whether the bankruptcy court has sole and exclusive jurisdiction, or whether its jurisdiction is concurrent with the probate court under the insolvency laws; and, if the probate court had jurisdiction at all, then nothing is clearer than that the adjudication of this company as a bankrupt did not suspend its jurisdiction. If the insolvency law is in force, then the bankruptcy court has no right to interfere with its proceedings. In *Compton v. Jessup*, 15 C. C. A. 397, 68 Fed. 263, 279, the court says: "Necessity and comity both require that where, by its officers acting under color of its orders and processes, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with the complete control and disposition of the property for the purpose of the cause in which its action has been invoked." This principle has been laid down by the Supreme Court of the United States in a long line of cases. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Williams v. Benedict*, 8 How. 107, 12 L. Ed. 1007; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Bank v. Cal-*

houn, 102 U. S. 256, 26 L. Ed. 101; *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374; *In re Tyler*, 149 U. S. 191, 13 Sup. Ct. 793, 37 L. Ed. 698.

But has the probate court any jurisdiction whatever in matters of insolvency, as to those cases which come within the provisions of the bankruptcy act of 1898? If the state laws in the matter of insolvency are suspended, it has not. If they are still operative, it has. The acts which constitute an act of bankruptcy under the laws of 1867 (14 Stat. 517) and the act of 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) are essentially different. Under the law of 1867 the assignment by the bankrupt of his property for the benefit of his creditors might be, as construed by some of the decisions, an act of bankruptcy, and was as construed by a majority of decisions. Hence the conflict of decisions. Under the bankruptcy act of 1898 there is no question an assignment by a bankrupt is an act of bankruptcy. There is also an essential difference between the last section (section 50) of the bankruptcy act of 1867 (14 Stat. 541) and the similar section (section 70) of the bankruptcy act of 1898 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). Section 70, subd. "a" (30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]), provides: "This act shall go into full force and effect from its passage." The remainder of the clause is simply a limitation of time as to when proceedings may be brought under it. Can there be any question as to what this language means? This act was to have full force and effect upon every case within its purview from its passage. If there be any question as to what this means, it is settled by the next clause of section 70, subd. "b" (30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]). "Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it." The language of these sections carries with them the clearest implication that Congress, with full power to enact a bankruptcy law under the Constitution, and having enacted such a law, and with the full knowledge of the conflict of decisions as to the effect of the law of 1867 (14 Stat. 517) on state laws and courts, intended that clause to mean that every case within its provisions should be affected by it, by being subject to, and proceeded with under, its provisions, and by the bankruptcy courts, and that every state insolvency law covering such cases after its passage should be suspended; for the authority of Congress is paramount and exclusive, and so is the jurisdiction of the District Court thereunder. *Platt v. Archer*, Fed. Cas. No. 11,213; *In re Deposit & Saving Inst.*, Fed. Cas. No. 12,211; *In re Bruss-Ritter Co.*, 1 Am. Bankr. R. 60, 90 Fed. 651; *Lea Bros. & Co. v. West*, 1 Am. Bankr. R. 264, 265, 91 Fed. 237; *In re Herron*, 8 Am. Bankr. R. 493, 68 Pac. 814.

That the bankruptcy act of 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) has suspended all insolvency laws of the states affecting cases within its scope and purview, and that the United States District Court has exclusive jurisdiction over all cases covered by that act, is upheld by the decisions of both the federal and state courts with almost unanimity. *Parmenter Mfg. Co. v. Hamilton*, 1 Am. Bankr. R. 40, 41, 51 N. E. 529; *In re Bruss-Ritter Co.*, 1 Am. Bankr. R. 59, 90 Fed. 651; *In re Gutwillig*, 1 Am. Bankr. R. 81, 90 Fed. 475, approved by Circuit Court of Appeals, 1 Am. Bankr. R. 388, 34 C. C. A. 337, 92 Fed. 337; *In re Etheridge Furniture Co.*, 1 Am. Bankr. R. 112, 115, 92 Fed. 329; *In re Rouse-Hazard Co.*, 1 Am. Bankr. R. 234-240, 91 Fed. 96; *In re McKee*, 1 Am. Bankr. R. 313; *Blake, Moffitt & Towne v. Valentine Co.*, 1 Am. Bankr. R. 372-374, 89 Fed. 691; *In re Curtiss*, 1 Am. Bankr. R. 440, 91 Fed. 739; *Davis v. Bohle*, 1 Am. Bankr. R. 412, 34 C. C. A. 372, 92 Fed. 325; *In re Houston*, 2 Am. Bankr. R. 110, 94 Fed. 119; *E. C. Westcott Co. v. Berry*, 4 Am. Bankr. R. 266, 45 Atl. 352; *Mauran v. Carpet Lining Co.*, 6 Am. Bankr. R. 737, 50 Atl. 331; *Carling v. Seymour Co.*, 8 Am. Bankr. R. 29-37, 114 Fed. 483; *In re Storck Lumber Co.*, 8 Am. Bankr. R. 87, 88, 114 Fed. 360; *Littlefield v. Gray*, 8 Am. Bankr. R. 409, 52 Atl. 925; *Herron Co. v. Superior Court*, 8 Am. Bankr. R. 492, 493, 68 Pac. 814. See, also, *Ketchum v. McNamara*, 72 Conn. 707-713, 46 Atl. 146, 50 L. R. A. 641. And these decisions are abundantly supported by the authority of *Sturges v. Crowninshield*, 4 Wheat. 396, 4 L. Ed. 529; *Ex parte Eames*, Fed. Cas. No. 4,237; *Thornhill v. Bank of Louisiana*, Fed. Cas. No. 13,992.

If, then, the insolvency laws are suspended, what title has the respondent?

In the case of *Ketchum v. McNamara*, quoted above, speaking of the title by assignment, similar to that under which the respondent makes his claim, the court says the insolvent laws "make the title under a general assignment executed by an insolvent debtor in trust for the benefit of all his creditors, which is lodged for record in the court of probate, only an inchoate one. To perfect it requires a judgment of confirmation from that court." If the laws under which this confirmation has been made by the probate court are suspended, then the confirmation of the probate court has added nothing to the respondent's title. His title is still inchoate. But it is claimed that, because the bankruptcy act of 1898 (Act July 1, 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides no way for the corporation itself to petition for an adjudication as a bankrupt, therefore the law does not apply to it until it has been invoked by proper proceedings by petition to the bankruptcy court, and that up to that point the probate court has jurisdiction. The bankruptcy court has two purposes: (1) The equitable distribution of the assets of the bankrupt among the creditors according to the provisions of the bankruptcy law; (2) the discharge of the bankrupt. In the cases of individuals or partnerships the bankrupts themselves or their creditors may apply to the court for an adjudication—the bankrupts, that they may obtain a discharge by having their estates administered in conformity with the bankruptcy law; the creditors, that an equitable distribution of the assets of the bankrupt may be had under the law. The main purpose of the law is the collection and distribution of the assets. The discharge is an incident to, but not a part of, the bankruptcy proceedings, as to such distribution. In the case of a corporation there can be no discharge. The corporation ends its existence, but its stockholders cannot be discharged, and, if there is no liability, there is no need of a discharge; and therefore the creditors alone are interested to procure the adjudication of the corporation as a bankrupt, to the end that an equitable distribution of the assets may be had under the law; and as to corporations the law has no other purpose. *Buchanan v. Smith*, 16 Wall. 27, 21 L. Ed. 280; *Platt v. Archer*, Fed. Cas. No. 11,213; *In re Independent Ins. Co.*, Fed. Cas. No. 7,017. And to escape the danger which might arise from allowing the directors of a corporation to at any time, and for any purpose, petition for an adjudication of it as a bankrupt, Congress has seen fit by the act to limit to those parties to petition for the adjudication to whom alone the benefit from the adjudication must come; and, when either or both parties come under the provisions of the bankruptcy law, there its jurisdiction is exclusive, and there the state laws are suspended. Authorities quoted supra. Any other construction of the bankruptcy law creating a uniform system of bankruptcy would make that system a farce; creating conflict of laws and of jurisdictions, entailing great expense, and resulting in hopeless confusion. "It was not the intention of the framers of the Constitution, or of Congress when it enacted the bankruptcy act, to have in existence two distinct and divers systems, affecting the same persons, property, and rights, and leaving it to the option of the debtor to elect one or the other at his pleasure." *In re Independent Ins. Co.*, Fed. Cas. No. 7,017; *Griswold v. Pratt*, 9 Metc. 23. As the court said in the case of *Ketchum v. McNamara*, in deciding that case: "Any different construction of the acts of Congress would often lead to frittering away insolvent estates in legal expenses. One creditor would resort to the state insolvent court. Another, later, would institute bankruptcy proceedings in the District Court of the United States. Costs would accrue in each tribunal, and in suits brought under the orders of each. Creditors proving claims in the state court would have to present them again in that of the United States, and yet the proceedings there, if taken more than four months after the act of bankruptcy, might result in nothing but a barren decree, adjudicating the debtor, indeed, a bankrupt, but affording no means of reclaiming property which he had previously made way with, or placed in the hands of a trustee in insolvency." *Littlefield v. Gray*, 8 Am. Bankr. R. 409, 52 Atl. 925; *In re Storck Lumber Co.*, 8 Am. Bankr. R. 88, 114 Fed. 360.

As the respondent is not an assignee for value (*Bryan v. Bernheimer*, 5 Am. Bankr. R. 627, 21 Sup. Ct. 557, 45 L. Ed. 814), and as he has acquired no title to the property of the bankrupt in his possession, because the law under

which he obtained such assignment has been suspended, he is not entitled to the possession of the bankrupt company's assets for any purpose, and as the probate court for the district of Torrington has no jurisdiction of either the bankrupt corporation or its assets, because the law under which it assumed to act has been suspended, therefore the petitioner is entitled to the immediate possession of all of the assets of said bankrupt estate, that they may be administered by the bankruptcy court under the provisions of the bankruptcy law.

The respondent is ordered to turn over to the trustee in bankruptcy all of the estate and assets of the bankrupt corporation.

W. W. Bierce, in pro. per.

S. A. Herman, for respondent.

PLATT, District Judge. The Connecticut statutes to be found in chapter 23 of the Revision of 1902 provide a system which is, without question, an insolvent law. It is also clear that the act of Congress approved July 1, 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) establishes a uniform system of bankruptcy throughout the United States; that, by its terms, it went into full force and effect upon its passage, and, ipso facto, at once suspended and superseded all state insolvent laws. Whether it cuts any deeper, it is unnecessary to inquire at the present juncture. It is not important that by an express provision of the bankruptcy act a corporation is excepted from the category of those who are permitted to enjoy its privileges as voluntary bankrupts. A way is provided by which the District Courts can and do acquire and retain jurisdiction of the property which before the passage of the act could and would have been administered by the probate courts.

The order issued by the referee on March 6, 1903, was lawful, and is sustained. Let an order of like effect issue from the court.

SHERBURNE v. HIRST et al.

(Circuit Court, D. Oregon. March 13, 1903.)

No. 2,730.

1. DAMAGES—CONSTRUCTION OF CONTRACT—PENALTY OR LIQUIDATED DAMAGES.

A provision in a contract that time is of its essence, and that payments made thereon are to be deemed damages and retained as such in case of a future default, is not conclusive on the court, and where it is apparent from the whole contract that the provision is in fact one for a penalty, and not for damages, the contract will be so construed.

2. SAME—RELIEF AGAINST PENALTY.

A supplemental agreement extending the time for making the final payment on certain lands contracted to be sold by defendants to complainant, and on which complainant had made partial payment, provided that time was of its essence, and that, on default in making such final payment within the time extended, defendants should be released from any obligation to convey the property, and the payments made thereon should be deemed and considered as damages which defendants had sustained by reason of such default. The agreement contained a further statement that "it is understood and agreed that, in case of default by

¶ 1. See Damages, vol. 15, Cent. Dig. § 157.

the second party, the first parties expect to sell the land to another party." It was admitted that defendants had at the time received an offer of a higher price for the land from another party, who was the one referred to in the agreement. *Held*, that under such circumstances the provision for the forfeiture of the payments made was clearly one for a penalty, and not for damages, and that, the default having occurred, on which defendants immediately made the second sale to their advantage, a court of equity would grant relief against such penalty by requiring repayment of the sum paid by complainant on the contract.

In Equity. On demurrer to bill.

Gantenbein & Veazie, for complainant.

Cotton, Teal & Minor and J. W. Bennett, for defendants.

BELLINGER, District Judge. On the 17th day of August, 1901, S. F. Cook and the defendants entered into a contract in writing by which the defendants sold to Cook, for the sum of \$50, an option to purchase certain timber lands, situated in Douglas county, Or. The agreement recites that:

"It is understood that this option is to expire at noon August 26th, 1901, when said S. F. Cook shall become the purchaser of said land by the payment of certain moneys already agreed upon or shall forfeit this option with the fifty dollars. It is further agreed that a telegram from said S. F. Cook shall be considered the same as a personal meeting."

The price agreed upon was \$7.25 per acre, to be paid as follows: \$950, August 26, 1901; \$6,500, September 26, 1901; and the balance, January 15, 1902. On the 26th day of August, 1901, Cook gave notice to the defendants of his acceptance of the option, and paid to them the further sum of \$950, as provided for in the option; and thereafter, on about the 26th day of September, 1901, he paid to the defendants the further sum of \$6,500. The defendants thereupon, in conformity with their agreement, executed deeds for the conveyance of said lands to Cook, and placed the same in escrow with the First National Bank of Portland, Or. Thereafter, about the 15th day of January, 1902, the date provided for the last payment, the defendants extended the time for such final payment, and on the 15th day of February, 1902, in pursuance of such extension, a further agreement in writing was entered into between the parties, which recited the former agreement, and provided for an extension of time in which the final payment was to be made until the 15th day of May, 1902. This agreement was in consideration of the sum of \$1,000 then paid by Cook to the defendants. The provision of the new agreement was that, in addition to said final payment, which aggregated the sum of \$44,336.86, Cook was to pay interest at the rate of 6 per cent. per annum from the 15th day of January, 1902, until the time final payment was made, and all taxes assessed upon the property sold for that year. There was a further condition as to securing a part of the final payment, not necessary to be considered in this connection. The two concluding paragraphs of the supplementary agreement are as follows:

"In the event of failure to comply with the terms hereof by said second party, the said first parties shall be released from any and all obligation in law or in equity to convey said property, or any part thereof, to the second

party; and said second party shall forfeit all right thereto; and the money thereunder paid by the second party shall be deemed and considered as damages which the first parties have sustained by reason of such default on the part of the second party.

"It is distinctly understood, and the principal consideration to the first parties for the execution hereof, and the extension of the time for final payment as aforesaid is, that time is of the essence of this contract; that the stipulations hereof are to apply and bind the heirs, executors, administrators, and assigns of the respective parties hereto; it being specially understood and provided that, coupled with the forfeiture clause hereinbefore referred to, time is intended and hereby is made of the very essence of this contract. And it is understood and agreed that in case of default by the second party the first parties expect to sell the land to another party."

Cook was unable to make the final payment on the 15th day of May, 1902, as provided for in said agreement, and thereupon sought from the defendants a further extension of time of five days in which to make the same; but the defendants refused to allow him any extension, and declared their purpose of proceeding immediately to sell the lands to another party, as specified in the last written agreement.

It is alleged that, prior to the 15th day of February, 1902, the time of the making of the last agreement, the defendants had received an offer for the lands sold to Cook, from one William Coach, and were, at the time of the making of said agreement, contemplating a sale of the said lands to the said Coach, in case Cook did not become the purchaser thereof; that said Coach was the other party referred to in the agreement as the party to whom the defendants expected to sell the lands in case Cook made default. It is further alleged that, immediately after the default of Cook, the defendants entered into negotiations with said Coach for the sale of the lands in question to him, and that about the 15th day of June, 1902, a sale of the lands to Coach was agreed upon, and about the 1st of July, 1902, said lands were sold and conveyed by the defendants to said Coach for a large sum of money paid therefor by Coach and received by the defendants. Complainant alleges that he has no means of knowing how much the defendants received from Coach as the purchase price for the lands so sold to him, but that he is informed and believes that the sum is not less than \$8 per acre for the whole of said lands—the number of acres being 7,287.85 in all; and it is alleged that the sum so received was more than sufficient to cover the whole of the purchase price contracted to be paid by Cook, with interest and taxes and expenses of sale, and that the defendants have received from Coach an amount sufficient to make them entirely whole, without recourse for damages upon the moneys paid by Cook to them.

Complainant is the assignee from Cook of all the latter's right and claim to be repaid the moneys advanced to the defendants by Cook as aforesaid.

The plaintiff prays that the defendants may be required to allege and show forth what damages they have sustained by reason of Cook's default, and that an accounting may be had respecting such damages, and of the money received from Coach on the sale to him, and that the defendants may be decreed to pay to plaintiff such sum as may be due on account of the \$8,500 paid by Cook as alleged, and for such other and further relief as may be agreeable to equity.

To this complaint the defendants demur, on the grounds: First, that it appears from the bill of complaint that the plaintiff is not entitled to the relief prayed for; and, second, that the plaintiff has a full, adequate, and speedy remedy in a court of law.

The general rule is that, where there is no certain measure of the injury which will result from the violation of the terms of an agreement, the parties may fix upon a sum which shall be compensation for such violation, and this is what has been attempted in the present case. The provision in the contract that time is of the essence of the contract, and the payments made are to be deemed damages, is not conclusive of the question as to whether the money paid is to be deemed damages or a penalty. "If upon the whole agreement the court can see that the sum stipulated to be paid was intended as a penalty, the designation of it by the parties as liquidated damages will not prevent this construction." 1 Pomeroy's Eq. Jur. § 440.

Upon the facts alleged, there is not the least doubt that the money forfeited to the defendants by the terms of the agreement was intended as a penalty. The agreement is exceptional in this, that it contemplated a sale to a particular person upon Cook's default: "And it is understood and agreed that in case of default by the second party the first parties expect to sell the land to another party." It is alleged that prior to this agreement the defendants had received an offer from one William Coach, and that he was the person referred to in the agreement as "another party," to whom it was expected to sell the land if Cook made default. The expectation was to sell to Coach upon an offer then existing, and which complainant alleges, upon information and belief, was of a sum larger in the aggregate by above \$5,000 than the price Cook was to pay. Suppose there had been an agreement between Cook, Hirst, and Coach by which Cook was to have the option to purchase this land on the terms embodied in this agreement, and that upon Cook's default Hirst was to sell and Coach purchase the land at a price \$5,000 greater than that to be paid by Cook; would it be seriously contended that a stipulation by which on his default Cook should pay Hirst \$8,500 as damages sustained by Hirst was not a penalty—that Hirst was entitled to \$8,500 from Cook to compensate him for the advantage that had resulted to him in the sale of the property at an advance of \$5,000 over what Cook was to pay? And this is what the case comes to. The clause in question was in effect an agreement by the parties that, if Cook made default, the defendants should sell to Coach for a sum known at least to the defendants to be much larger than Cook was to pay; and so they did, immediately on Cook's default. The provision that time was of the essence of the contract had reference to the acceptance of the offer to purchase by Coach. It was to enable Hirst to avail himself of the more advantageous offer of Coach. Cook's default occurred on the 15th day of June, and on that day a sale was agreed upon between the defendants and Coach. There was no damage to the defendants, but a large profit, as a consequence of Cook's default, and this identical sale was foreseen and provided for in the agreement with Cook. To say that in such circumstances the parties intended that the defendants should retain the \$8,500 paid by Cook as compensation for an injury done

them by his default is unreasonable. The court can see that it is a penalty, and no words in the contract can make anything else of it.

The cases cited by the defendants are the usual cases where payments have been made upon contracts for the purchase of lands under an agreement that such payments should constitute liquidated damages, and they are cases where there was no certain measure of the injury that would result from a violation of the agreement. In one of these cases, *Hansbrough v. Peck*, 5 Wall. 499, 18 L. Ed. 520, the purchaser making default had been in the possession and enjoyment of the premises for two years, and the court in its opinion says that, with every disposition to temper the sternness of the law as applicable to the grounds for relief relied upon, "We are compelled to say that, according to the settled principles both of law and equity, a case for relief has not been established."

In *Glock v. Howard*, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, decided in the Supreme Court of California, there was a contract for the purchase of land, made in 1891. The purchaser was to pay in installments until February 21, 1895. The defendant agreed to cultivate the land for three years and plant the tract to fruit trees. For the land the plaintiff was to pay the aggregate sum of \$625, with interest on deferred payments, and \$375 for the cultivation and planting of trees undertaken by defendant. He was also to pay all taxes and water rates. On the former account plaintiff paid \$250 and interest, and on the latter \$125 and interest; a total of \$375. Plaintiff made default, and several months thereafter made a tender of the amount due under his contract, and, upon the refusal of the defendant to accept the same, brought his action to recover the money paid under the contract. The parties had stipulated that time was of the essence of the contract, and that, on default of the purchaser, the installments paid were to be treated as liquidated damages. The case is a good illustration of the rule which permits the parties to fix the damages when there is no certain measure of the injury that will result from a breach. When the life and requirements of the contract, the amount paid, and the length of time the default has continued, are considered, there is no room for an inference that the damages fixed were greater than those suffered. The court in its opinion quotes from Lord Eldon in *Hill v. Barclay*, 18 Ves. 59:

"The result of experience is that, where a man, having contracted to sell his estate, is placed in this situation: that he cannot know whether he is to receive the price when it ought to be paid—the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the court can offer as compensation."

The reason here stated for the conclusion reached is illustrated by the following extract from the opinion, citing *Pomeroy on Specific Performance*:

"It may frequently be of the utmost consequence to the vendor that he should have the right to enforce the contract and receive payment for his land in money, since he may much prefer the full purchase price to retaining the estate and receiving smaller monetary compensation by way of damages. And, finally, it is to be considered that during the life of such contracts the vendor foregoes his right to convey to another. He may thus lose an opportunity to make an advantageous sale, and, while this right is admittedly valuable, it is extremely difficult to put a price upon it."

These considerations, as already appears, do not apply in the present case. Here the opportunity to make another sale in fact existed, and was within the contemplation of the parties when the contract in question was entered into. The facts alleged have the effect of an agreement between the purchaser, the defendants, and Coach, to the effect that, upon the purchaser's failure to pay the full purchase price, his contract of purchase was to be abandoned, and the defendants were to sell, and Coach to buy, for a price in advance of that agreed upon in the abandoned contract. It is well settled that after a vendee's breach the vendor may agree to a mutual abandonment, in which case the vendee in default is entitled to a repayment of his money. In such case the covenant for liquidated damages is held to be void. If the parties may so agree after default, a fortiori they may so provide in the agreement itself. Without this agreement and understanding, and the consideration for it, the purchaser, by tender or full payment within the five days' time for which he asked an extension, or within a longer and reasonable time, might have insisted upon performance by the defendants or repayment of the money paid. It could be readily seen at all times that no damages would result from the default of the first purchaser, and the stipulation to allow the defendants to retain \$8,500 as pretended damages is a mere expedient to get such sum without any consideration therefor. The claim asserted by the defendants to this money is shocking to the moral sense. If equity will grant relief against penalties whenever the actual damages sustained by the creditor party can be adequately compensated, there is all the more reason why it should do so in a case like this.

It is held in *Re Dagenham Dock Co.*, 8 Chan. App. Cases, 1022, that where there is a stipulation that if on a certain day an agreement remains wholly or in part unperformed—in which case the real damages may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty, from which the court will grant relief. To the same effect is the case of *Allison v. Cocke's Executors* (decided in the Kentucky Court of Appeals) 51 S. W. 593.

The doctrine that equity will relieve against a penalty or forfeiture where the damages resulting from nonperformance are readily ascertainable is not open to question.

The defendants seriously put forward, as one of the grounds of their demurrer, the alleged fact that the plaintiff has not offered to do equity, by which is meant, as must be presumed, that the plaintiff has not offered to pay the defendants the damages which they have not suffered, or rather has not offered to pay them for the large advance which they have realized on the second sale contemplated in the agreement in question as a result of its abandonment upon Cook's default.

The demurrer is overruled.

In re KNICKERBOCKER.

(District Court, W. D. New York. April 22, 1903.)

No. 17.

1. BANKRUPTCY—PREFERENCE—SATISFIED EXECUTION—SUMMARY PROCEEDINGS—PROPRIETY.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], invalidates all judgments, levies, attachments, or other liens obtained against an insolvent within four months of filing a petition in bankruptcy, and the property affected passes to the trustee. By section 60, subds. "a," "b," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], a preference is given by suffering a judgment against the person of an insolvent within the specified four months, and such preference is recoverable by the trustee if the creditor had reasonable cause to believe one was intended. Section 23b, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798, authorizes suits by a trustee only in the courts in which the bankrupt could have sued, had no bankruptcy proceedings been had, unless by consent of defendant, except suits to recover property under section 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], etc. *Held*, that a creditor's title to the proceeds of an execution issued against the bankrupt within four months of filing the petition, which have been paid over to the creditor by the sheriff, cannot be summarily attacked by an order to show cause issued by the referee, since it has become adverse to the bankrupt's estate, but the trustee must bring an independent suit, of which, however, the bankruptcy court will have jurisdiction concurrently with the state courts; and the fact that the proceeds of the execution were insufficient to satisfy the judgment, so as to leave the creditor still creditor in some degree, will not alter the case.

In Bankruptcy.

Herendeen & Mandeville (E. G. Herendeen, of counsel), for trustee.
H. M. Clarke, for respondents.

HAZEL, District Judge. The trustee in bankruptcy claims to be entitled to receive from certain judgment creditors of the bankrupt the sum of \$1,652.74, the proceeds of an execution issued upon a judgment against the bankrupt within four months prior to the filing of the petition upon which the adjudication of bankruptcy was made. By virtue of the execution, the property of the bankrupt was levied upon and sold by the sheriff, and the proceeds paid over to the judgment creditors, leaving a balance unpaid upon the judgment. The referee in bankruptcy, at the instance of the trustee, upon the foregoing facts, issued an order to show cause, returnable before him at a future day, why the proceeds of the sale should not be paid over to the trustee. On the return day of the rule to show cause, the judgment creditors appeared specially and questioned the jurisdiction of the court on the ground that the referee had not jurisdiction of the subject-matter, nor the power to require by summary process the payment of the proceeds which prior to the filing of the petition had been paid over by the sheriff to the respondents. At a later hearing before the referee a demurrer to the claim of the trustee was filed on the ground that, assuming the facts set forth in the statement to be true, it appeared that the respondents held the money adversely, and, furthermore, that the property to which the trustee asserted the claim had never come

into the possession of the bankruptcy court. An answer was also filed to the claim of the trustee, by which it was alleged that the property, the subject of the execution sale, was not the property of the bankrupt, but was owned by a codefendant of the bankrupt in an action in which the judgment was recovered. The referee overruled the demurrer; deciding that the respondents were properly parties to the bankruptcy proceeding, and that the asserted adverse claim is not adverse to the bankrupt, within the decisions construing section 23 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), but is only adverse to the claim made by the trustee, and therefore the bankruptcy court has jurisdiction to hear and determine the questions arising upon the claim of the trustee to the proceeds of the execution sale. The case is now before me upon a certificate of the referee, who submits the following questions for my decision:

"First. Whether the court of bankruptcy * * * has jurisdiction of proceedings, at the instance of the trustee of said bankrupt, for the recovery from a creditor of said bankrupt of moneys alleged to have been received by such creditor as a void or voidable preference, or upon a judgment and lien against the property of said bankrupt made void by the adjudication of bankruptcy herein.

"Second. Whether the court of bankruptcy * * * has jurisdiction of such a creditor without the creditor consenting thereto."

The right of the bankruptcy court to restrain a sheriff from paying money collected on an execution issued against the property of the bankrupt, and invalidated by the bankruptcy proceedings, to a judgment creditor, and to require such sheriff to pay the proceeds of the sale on execution issued against the property of the bankrupt to a trustee of the bankrupt estate, while those proceeds still remain in his custody, is now firmly established by the recent decision of the Supreme Court in *Clarke v. Larremore, Trustee, etc.* (decided February 23, 1903) 23 Sup. Ct. 363, 47 L. Ed. —, affirming *In re Kenney* (D. C.) 97 Fed. 555. It seems, however, to be still an open question whether a trustee in bankruptcy may recover from a judgment creditor the proceeds of a levy and sale on execution, voided by bankruptcy proceedings, where the writ of execution has been fully executed by payment to the judgment creditor. At the end of the opinion in the case of *Clarke v. Larremore*, the Supreme Court mooted a case such as this, and said:

"A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and that which was done under them, as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend upon many other considerations."

The precise question was, however, considered in *Re Blair* (D. C.) 102 Fed. 987. Judge Brown was of the opinion that, as the transaction was completely executed by the payment of the money by the sheriff before the petition was filed, the remedy of the trustee was by plenary action. Persons in possession of property claimed by the bankrupt, or by his trustee, who is vested by operation of law with the title of the bankrupt, and who claim an actual adverse right

thereto, cannot be deprived of the right to litigate a disputed right to possession or ownership of property in a plenary suit. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Jaquith v. Rowley* (Feb. 23, 1903) 23 Sup. Ct. 369, 47 L. Ed. —. When, however, such property is merely held in the capacity of agent or bailee, the person holding it has no adverse claim thereto. *Muel-ler v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In such case the referee has jurisdiction by summary procedure to compel the delivery to the trustee of property belonging to the bankrupt estate, and withheld from his possession and control. In the case at bar the property, the possession of which is sought for the trustee by summary process, is in the actual possession of the respondents, who have asserted an adverse claim thereto, and hold the same by a fully executed legal process of an independent tribunal. The referee, however, still has the power by summary procedure to ascertain the status of the parties, either upon the undisputed facts disclosed by the papers presented to him, or upon examination of witnesses. The referee is empowered to discover the bona fides of the asserted adverse claim, and necessarily is clothed by implication with authority to determine promptly or by summary procedure whether the asserted claim is adverse to that of the trustee. Should it appear that the claim is fictitious or colorable, this court will retain jurisdiction, for, in theory, the property is then constructively in the possession of the bankruptcy court. Such is the holding of the cases. *In re Tune* (D. C.) 115 Fed. 906; *In re Michie*, 8 Am. Bankr. Rep. 734, 116 Fed. 749. On the other hand, if, in the exercise of sound judicial discretion, the referee is satisfied that the asserted adverse holding of the third party is in good faith, and without intent to thwart or obstruct a just and equitable distribution of the bankrupt estate among the creditors, the moving party must be relegated for his remedy to an action, and is not entitled to summary relief from this court. It is quite true that by section 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], all judgments, liens, levies, and other liens are invalidated by adjudication in bankruptcy, and the property affected by them passes to the trustee; but where the proceeds of an execution sale have actually been paid to the judgment creditor—in other words, where the transaction is completely executed—the execution creditor ceases to be a lienor, but has title to the proceeds of his execution. This title may or may not be defeasible, as may be disclosed by an action brought to recover these proceeds under section 23b, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]. The remedy of the trustee is dependent upon the construction given by the decisions to section 60, subds. "a," "b," of the bankrupt act (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). By that section a preference is given by procuring or suffering a judgment against a person within four months before the filing of the petition, where such person is insolvent, and such preference is recoverable by the trustee where the creditor receiving the same has reasonable cause to believe a preference was intended. *In re Eggert*, 43 C. C. A. 1, 102 Fed. 735; *Levor, Trustee, etc., v. Seiter et al.*, 69 App. Div. 33, 74 N. Y. Supp. 499. In the case at bar, the undisputed facts, as set forth, show the possession of the

respondents, and a claim which must be considered adverse to that of the bankrupt or his trustee. Under such circumstances, the bankruptcy court has no power by summary process to compel the payment of the money realized on execution sale to the trustee in bankruptcy.

The referee was of the opinion that, as the judgment was not satisfied in full by the money realized on the execution sale, the respondents were creditors of the bankrupt, and that jurisdiction may therefore be exercised over this controversy. This contention is without merit. The respondents are not now before this court in the capacity of creditors. They are not seeking to prove a claim; and no order has been made directing a surrender of a preference as a condition of its allowance. The questions submitted must, in the light of the amended act, be answered in the affirmative. The remedy of the trustee, however, must be sought in a plenary suit brought under the provisions of section 23(b), as amended (Act Feb. 5, 1903, c. 487, § 8; 32 Stat. 798), either in this court, or the proper state tribunal, at his election.

NATIONAL BISCUIT CO. v. SWICK.

(Circuit Court, W. D. New York. March 17, 1903.)

No. 134.

1. TRADE-MARKS—INFRINGEMENT.

A technical trade-mark, although not a fac simile of another, may be so used by a rival manufacturer as to imitate another's trade-mark, and, when such use actually deceives the public, it constitutes an infringement, against which a court of equity will grant relief.

2. SAME.

Complainant used and registered a trade-mark consisting of a square label or seal of a vivid red color, with the corners clipped, on which was an arbitrary combination of straight and curved lines in white, in which were printed the letters and word "In-er-seal." These labels were placed on the ends of complainant's cartons containing bakery products. Another manufacturer of the same class of goods registered as a trade-mark, and used in the same manner on its cartons, a label the same in size, shape, and color, having thereon a combination of white lines consisting of circles and straight lines with the words "Factory" and "Seal" printed thereon. The figure or symbol was not the same, but the general effect of the combination in a label used in the same place on a carton of the same size, shape, and color, together with a similar figure and the word "Seal," was to simulate the trade-mark of complainant, and to deceive purchasers. *Held*, that such use of defendant's trade-mark was an infringement of that of complainant, which entitled it to an injunction.

In Equity. Suit for infringement of trade-mark. On final hearing.

Moot, Sprague, Brownell & Marcy, Offield, Towle & Linthicum, and Earl D. Babst (Charles K. Offield, of counsel), for complainant.

Banning & Banning and Benjamin C. Starr, for defendant.

HAZEL, District Judge. The bill, as originally filed, charges the defendant with unlawful infringement of a trade-mark and five trade-names used by complainant upon its various bakery products. A stipulation was filed before answer, admitting infringement by defendant as to five of the trade-names. Accordingly a decree was entered

by consent of all parties restraining and enjoining the future use of such trade-names by the defendant. The alleged infringement by the defendant of complainant's "In-er-seal" registered trade-mark No. 35,108, dated September 18, 1900, is now the sole and specific subject for judicial determination.

COMPLAINANT'S TRADE-MARK.



The vivid red background is designated by the black background.

DEFENDANT'S TRADE-MARK.



The vivid red background is designated by the black background.

The defendant's infringement consists in the use of the registered trade-mark No. 35,597, dated December 18, 1900, issued to the Ohio Baking Company.

The proofs show that complainant manufactures various kinds of bakery products, which it places upon the market in special and distinct sizes of cartons or packages. Such cartons and packages widely vary in form and coloring, and are lettered on their sides in different-size type. Upon the ends of each package or carton is applied the trade-mark printed upon a square label or seal, clipped at the corners, in clear white lines upon a vivid red background. The proofs further show that the trade-mark seal has since its adoption regularly been applied to the ends of the cartons in the manner described, except in a few instances. Complainant contends that its product has become well known to the general public because of the peculiarly quaint configuration of its trade-mark, which is uniquely displayed. The bill charges the adoption of the trade-mark on or about the month of March, 1899, and its subsequent registration in the office of the Commissioner of Patents May 12, 1900. It is specifically described as—

"An arbitrarily-selected design or symbol representing an oval-shaped figure separated centrally and horizontally in the direction of its greatest length by a bar, from which there rises centrally and at right angles thereto a perpendicular bar, which near its upper end is intersected by double horizontal cross-bars, thus forming what might be designated as a "double-T-shaped" figure or cross-tree, while with said oval-shaped section and above the horizontal dividing-bar and to the left of the perpendicular intersecting bar appear the letters 'I N,' and on the opposite side of said perpendicular intersecting bar appear the letters 'E R,' the lower section of said oval-shaped figure having therein the word 'Seal.'"

The specification describes and the drawings show the design as applied upon a rectangular background, the corners thereof being clipped or irregular. The specification states a preference for the employment of a bright red or orange-colored background in connection with the trade-mark design with the figures and lines printed in white. The specification further says that the purpose and object of the peculiarity of the design is to produce a conspicuous effect, securing the greatest possible prominence. The design is usually printed on the labels attached to the ends of the cartons or packages containing complainant's product. This arbitrary and fanciful designation was first appropriated by complainant as a trade-mark for its bakery product, and it is, therefore, entitled to protection from infringement. It quite clearly appears from the evidence that complainant's trade-mark has been extensively advertised at large expense throughout the United States and in the locality where the defendant carries on his business of selling bakery products, and where the alleged infringing trade-mark is asserted to have been fraudulently used. The defendant is a dismissed employé of complainant. He was well acquainted with complainant's customers in the territory where the alleged infringements were committed. Soon after his dismissal from complainant's employ, he commenced to divert the trade of complainant by introducing the bakery product of a competitive manufacturer, and finally simulated complainant's trade-mark, as a result of which his sales increased. Defendant's bakery product is manufactured by the Ohio Baking Company, and is put upon the market wrapped up in carton form, sealed at the ends, and having a vivid red rectangular label at each end, clipped at the corners. Upon the seals or square labels is

imprinted in distinctive white lines the registered trade-mark of the Ohio Baking Company, above set forth. The labels upon which is printed the infringing device as to color, size, and irregular shape are in similitude of complainant's labels or seals. The configuration of the infringing trade-mark consisting of curved and straight lines, flaring at the ends in resemblance of complainant's lines, is more particularly described in the specification as consisting of three parallel vertical bars and central cross-bar and two circles arranged in the manner shown by the figure itself. Defendant claims that the Ohio Company trade-mark really consists of a fanciful monogram of the word "Ohio," and that he has the right to use it in any size, shape, and color. Prominently appearing in defendant's label are the words "Factory" at the upper end and "Seal" at the lower end. This also would appear to be in simulation of the word "In-er-seal" printed on complainant's device. The packages or cartons of both complainant and defendant have printed matter upon their sides, indicating the character of their contents and the name of the manufacturer. The form of the package and style of type and color of wrapper are concededly the property of the public, as, indeed, are the labels clipped at the corners having a bright red background. No point is made to any similitude of cartons, style, or color of print, nor even of the separate features of complainant's trade-mark. The defendant contended generally on argument that the specifically defined trade-mark of complainant as to its general features and characteristics must be interpreted as limiting its scope to that which is actually described. If this contention means that complainant is restricted to the use of the trade-mark, and has obtained no exclusive right in the collocation of its parts and the distinguishing features by which the trade-mark has become known to the public, such contention is without merit. The gist of the complaint is a violation of a trade-mark, which is composed of a peculiar configuration of lines and a combination of other features. In other words, the distinguishing characteristics of the trade-mark consist in the circles and straight lines in relation to each other, and printed upon the label in white and upon a vivid red background. In the case of *Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co.* (C. C.) 109 Fed. 317—a case of unfair competition—it was held that no one can have a trade-mark monopoly of any color of paper, or any shape of label, or any color of ink, or any one or other detail, yet the general collocation of such details will be protected. The sole question, therefore, is whether the defendant's design for a trade-mark imprinted on a vivid red background in simulation of complainant's design is fairly within complainant's asserted exclusive scope. That complainant's trade-mark and manner of displaying the same attracts the public attention cannot be successfully disputed. Undoubtedly, complainant's manufactured product has become extensively known to the public solely by its peculiar trade-mark. I have no doubt that an intending purchaser of complainant's product using ordinary care is attracted to the arbitrary trade-mark design, and not to any printed words on the sides of the packages, or even to the nomenclature of the manufacturer of the product. When both designs were exhibited on the hearing, I became well satisfied that de-

defendant's device and manner of applying it in combination with the other features are in imitation of complainant's. Such resemblance tends to deceive an ordinary purchaser giving the usual attention, and causes him to purchase the one believing it to be the other. Although defendant's device and configuration is not in strict resemblance to complainant's, yet force is given to the impression which I obtained on the hearing because of the adoption by defendant of a bright red background and a label clipped at the corners of corresponding size to that of complainant. The record discloses that the trade-mark seal of the defendant and the manner of displaying it upon the ends of cartons and packages is likely to deceive the ordinary purchaser into the belief that he was purchasing the product of complainant. By the testimony of defendant's witness Gaiser, a grocer, it appears that an intending purchaser must make a close examination of both packages in order to distinguish defendant's packages and cartons from complainant's. The witness was unable at the hearing, when both packages were exhibited to him, to discover much difference, and was compelled to look for the name of the manufacturer to distinguish the product of complainant from that of defendant. Other evidence was given by complainant upon the hearing showing the similitude of the, respective trade-marks to be such as to deceive the public into buying the bakery product of defendant under the impression that they are buying those of complainant. Irrespective, however, of such proof, the trade-mark imprinted upon a bright red-colored label, clipped at the corners, and of corresponding size to complainant's is alone calculated to deceive, and must be regarded as an infringement of complainant's rights secured by its registered trade-mark. Specific proof of purchases by individuals actually deceived under such circumstances appears not to be necessary. *Cleveland Stone Co. v. Wallace* (C. C.) 52 Fed. 431; *National Biscuit Co. v. Baker* (C. C.) 95 Fed. 135; *Von Mumm v. Frash* (C. C.) 56 Fed. 830. In the controversy it is immaterial that the size of cartons, color of wrapper, size and kind of label, and separate features of complainant's trade-mark are old, and may, therefore, be used by any one. The complainant's trade-mark, its features of coloring, rectangular labels, white lines on a vivid background, manner of displaying the arbitrary designation at the ends of the packages, all in combination, are peculiarly distinguishing marks for its goods. I am well satisfied that a technical trade-mark, although not a fac simile of another, may, nevertheless, be so used by a rival manufacturer as to imitate another's trade-mark, and when such use actually deceives the public a court of equity will afford relief. *Scheuer v. Muller*, 20 C. C. A. 161, 74 Fed. 225; *Draper v. Skerrett* (C. C.) 94 Fed. 912. I have examined the case of *Richter v. Anchor Remedy Co.* (C. C.) 52 Fed. 455, and other cases cited by counsel, but such cases are either not in point or do not disturb the conclusion reached. By the manner of defendant's use of the Ohio Baking Company's trade-mark he obtains a benefit to which he is not entitled. He appropriates the good will of a rival business by purloining his rival's method of dressing his vendible goods. *City of Carlsbad v. Schultz* (C. C.) 78 Fed. 471; *Sprague Elec. Ry. & Motor Co. v. Nassau Elec. Ry. Co.*, 37 C. C. A. 286, 95 Fed. 821. As Judge Wanty said when

the case against the Ohio Baking Company was before him on application for preliminary injunction, "Why does the defendant use the exact shade of red used by complainant?" Further inquiry is pertinent. Why white letters of substantially the same type? Why labels of uniform size, and with clipped corners? Other questions of like kind may be propounded. The record discloses no satisfactory answer, and therefore it is manifest that the defendant deliberately and fraudulently imitates the trade-mark of complainant, and in that manner designs to palm off his goods for those of complainant.

The complainant may have a decree, with costs, enjoining the defendant from imitating or simulating complainant's "In-er-seal" trade-mark, as set out in this opinion. So ordered.

**BOARD OF TRADE OF CITY OF CHICAGO v. DONOVAN COMMISSION
CO. et al.**

SAME v. CELLA COMMISSION CO. et al.

(Circuit Court, E. D. Missouri, E. D. April 6, 1903.)

Nos. 4,370, 4,371.

**.1. BOARD OF TRADE—PROPERTY IN QUOTATIONS—INJUNCTION—GAMBLING CON-
TRACTS.**

Where it was proved that over 90 per cent. of the transactions executed in the pits of a board of trade were mere gambling transactions, which both parties intended to settle by a payment of differences in the subsequent price of the commodities dealt in before the maturity of the option, quotations so obtained were of no legitimate value as tending to promote the commerce of the country, and dissemination thereof could not be restrained by such board of trade.

Henry S. Robbins and Boyle, Priest & Lehmann, for complainant.
Chester H. Krum, Dickson & Smith, Johnson & Richards, and
H. A. Loevy, for defendants.

ADAMS, District Judge. There are separate records in these cases, but both present practically the same issues, and are determinable by practically the same proof, and will, therefore, be considered together. These are bills for injunction to restrain the commission companies from receiving or using certain market quotations known as "continuous," claimed to be the property of the complainant. It is charged that the complainant is a commercial exchange, wherein is conducted daily by its members a great volume of business in buying and selling grain and hog products for present and future delivery; that the quotations of the prices made in such transactions constitute a valuable property, which complainant utilizes by licensing certain telegraph companies, for consideration paid to it, to distribute them among their patrons and customers; that such quotations are furnished to the telegraph companies under contracts prohibiting them from distributing the same to any persons conducting a "bucket-shop" business; that the defendants in these cases are engaged in that business; and that they and each of them are

surreptitiously acquiring these "continuous quotations" emanating from complainant's exchange, either from the telegraph companies or through some other agencies, without the consent of the complainant or of the telegraph companies, in violation of the contract existing between complainant and such companies, thereby subjecting complainant to irreparable damage. The main facts controlling these cases are stated and much of the evidence now before me is set out in the case of Board of Trade v. O'Dell Commission Company (C. C.) 115 Fed. 574, to which reference is made for a more complete statement of the present cases and of the evidence controlling their determination.

The argument of counsel took a wide range, and embraced many questions, namely, whether complainant itself, as distinguished from its members, has any property right in the quotations; whether, if it had, complainant has not, by a long course of dealing, so devoted the same to public use without charge that it is not now permitted to assert a monopoly thereof; and whether complainant's business out of which the quotations arise is not so violative of the laws of the state of Illinois as to constitute a criminal offense against such laws, etc. But, in the view taken of this case by the court, it is not necessary or material to pass upon many of these questions. The main question argued, and the one which underlies the whole case, is whether the property right, whatever complainant may have in the "continuous quotations" in question, is so tainted with immorality as to preclude resort to a court of equity by the complainant for its protection. After careful consideration of the proof, it is found that the "continuous quotations" in question result largely from wagering on the future price of grain and hog products by the members of the board of trade operating in the "pits" on the floor of the exchange. I am satisfied by the proof that a very large per cent. of the so-called "sales for future delivery" which furnish the basis of the quotations in question are mere gambling transactions, involving no purpose on the part of the seller to deliver and no purpose on the part of the buyer to receive the subject of sale, but rather involving the mere purpose of settling at or before the date of assumed delivery the difference between the alleged contract price and market price. It makes little difference that the rules of the exchange subject to which all transactions are required to be made provide that no fictitious sales shall be made, and that all transactions must amount to "a bona fide purchase and sale of property for actual delivery." Courts of equity look beyond the forms of things, and will not permit suitors to screen themselves behind the form and semblance of the transaction, and escape a consideration of its essential quality. The proof shows that largely over 90 per cent. of all the transactions in the "pits," which alone determine the "continuous quotations" which are sent out over the country, are in fact closed out by a settlement of differences, and that actual deliveries of the article bought or sold are rarely ever made. This practice relates to the transaction in the "pits" on the floor of the exchange, where trades for alleged future delivery are made, and has no relevancy to the cash or real transactions in wheat and provisions for consumption or ex-

port, which are conducted in another part of the exchange. The fact just alluded to that deliveries are rarely, if ever, actually made in cases of sales in the "pits" for future delivery, and the great weight of evidence bearing on the issue, leads me irresistibly to the conclusion that no deliveries in such cases are intended or contemplated by either party. It is a time-honored maxim of the law that every person must be held to have intended the reasonable and usual consequences of his acts. The property, therefore, which the complainant asks this court to protect by its injunctive process is the right to monopolize the speedy dissemination of information instructing the public what wagers are being made on the future price of grain and other commodities by the members of Chicago Board of Trade. Information of the prices made in other parts of the exchange on grain and other provisions for actual consumption or export, or even for the purposes of holding for speculative profit in cases where the grain or other provisions are delivered in fact, or are intended to be delivered, might, and undoubtedly would, be very valuable to the public, and such information would promote legitimate trade and commerce; but the other kind of information, conveying intelligence as to the wagers that are made in the "pits," in my opinion has no legitimate tendency to promote the commerce of the country, but, on the contrary, tends only to excite the gambling propensities of the public. Such is not a species of property which appeals to a court of conscience for protection.

The bills in both these cases must be dismissed.

In re SMITH.

(District Court, S. D. New York. April 7, 1903.)

1. TRUSTEE IN BANKRUPTCY—ACTION AGAINST.

A trustee in bankruptcy may be sued without first obtaining leave from the court.

In Bankruptcy.

Edward J. Krug, Jr., for petitioner.
Elmer E. Cooley, for trustee.

HOLT, District Judge. This is a motion for leave to sue a trustee. The petitioner proposes to bring an action to foreclose a mechanic's lien on property of the bankrupt, and desires to join the trustee as the owner of the equity of redemption.

In my opinion, no leave is necessary to sue a trustee in bankruptcy. The general rule is, of course, that, in the absence of statutory permission, officers of a court, like a receiver, cannot be sued without obtaining leave from the court that appointed them. This rule, however, has been changed by statute as to receivers appointed by United States courts. They can be sued without leave. Act March 3, 1887, c. 373, § 3, 24 Stat. 554 [U. S. Comp. St. 1901, p. 582], as re-enacted by Act August 13, 1888, c. 866, § 3, 25 Stat. 436 [U. S. Comp. St.

1901, p. 582]. This statute probably applies to receivers in bankruptcy. *Matter of Kanter & Cohen* (U. S. Circuit Court of Appeals, Second Circuit, decided Feb. 25, 1903) 121 Fed. 984. A trustee in bankruptcy is defined by the bankrupt act as an officer (section 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and is, in a certain restricted sense, an officer of the court (*McLean v. Mayo*, 7 Am. Bankr. R. 115, 113 Fed. 106); but he is not an officer of the court in any such sense as a receiver. He takes the legal title to the property, and in respect to suits stands in the same general position as a trustee of an express trust, or an executor. Judge Lowell, in his treatise on Bankruptcy, thus states the rule:

"The assignees are, in a certain sense, officers of the court of bankruptcy. As such, they are subject to summary proceedings in respect to the execution of their trust. It has sometimes been held that their custody is that of the court as fully as is the case with receivers. But the authorities do not support this view. They are trustees appointed by and accountable to the court; but their legal title is absolute, and they may act or be proceeded against as owners of the assigned property, subject to their responsibility to the court. This was early decided, and is the law." Lowell on Bankruptcy, § 295.

The case *In re Emslie*, 4 Am. Bankr. R. 126, 102 Fed. 291, which is relied on by the counsel for the petitioner, simply holds that a person may be enjoined, in a proper case, by a court of bankruptcy from suing a trustee. The intimation in the opinion, that the order staying the prosecution was properly granted because the suit was brought without leave, was not the real point of the decision, and is a dictum, and the inference sought to be drawn from it is, in my opinion, inconsistent with Judge Wallace's opinion in the *Matter of Kanter & Cohen* (C. C. A.) 121 Fed. 984.

The motion is therefore denied.

PENNSYLVANIA GLOBE GASLIGHT CO. v. GLOBE GASLIGHT CO.

(Circuit Court, D. Massachusetts. July 3, 1902.)

No. 1,507.

1. EQUITY—DISMISSAL OF BILL.

A complainant has an absolute right to dismiss his bill after the evidence is closed, the case put on the calendar, and ordered by the court to stand for hearing, but before the hearing, where the dismissal would deprive the defendant of no substantial right accrued since the suit was commenced, unless defendant is entitled to affirmative relief, though defendant might thereby be subjected to annoyance from a subsequent suit.

In Equity.

W. B. H. Dowse and John R. Bennett, for complainant.
Richardson, Herrick & Neave, for defendant.

COLT, Circuit Judge. The general rule that a complainant has the right to dismiss his bill at any time before hearing is too firmly established to require any citation of authority. It is equally well settled

¶ 1. See Equity, vol. 18, Cent. Dig. §§ 751, 752.

that the annoyance to the defendant of a second litigation is no ground for refusing to dismiss the bill. The only question which can arise in any given case is whether the complainant comes within the exceptions to the rule. These exceptions may be briefly stated: First, where the dismissal would deprive the defendant of some substantial right which has accrued to him since the suit was commenced; second, where the defendant prays for, or is entitled to, some affirmative relief, as, for example, where there is a cross-bill.

The case at bar does not fall within either of these exceptions. The bill is the ordinary one for infringement of a patent. The evidence is closed, the record printed, the case put upon the calendar, and, by order of the court, stands for hearing. During the progress of the suit the defendant has acquired no substantial right, and it asks for no affirmative relief. So far as appears, the defendant is in no way prejudiced by the dismissal of this suit further than his liability to a second suit for the same cause of action.

The contention of the defendant is that the general rule giving the right to complainant to dismiss his bill at any time before hearing means "at any time before setting down for hearing." Whatever may have been the practice in England, this interpretation of the rule has not been adopted by the federal courts. The form of the order, in my opinion, is of little consequence, so long as it appears that the dismissal was not on the merits. The order, "Upon complainant's motion, the bill stands dismissed on payment of costs," is perhaps more usual, and would seem to be sufficient under the federal practice; but, in order to avoid any possible question as to its effect, it is a safe practice to add the words "without prejudice."

Motion granted.

STANDARD DISTILLING & DISTRIBUTING CO. v. WOOLSEY et al.

(Circuit Court, S. D. New York. July 3, 1902.)

1. EQUITY PLEADING—PLEAS—MOTION TO STRIKE OUT.

Matters set up in a combined "plea and answer" in the form of pleas, but which might properly be pleaded by way of answer, will not be stricken out on motion. Nor will a plea to the jurisdiction, where the same point has been previously raised, and passed on adversely, on a motion for a preliminary injunction.

In Equity.

The motion for a preliminary injunction was opposed by defendant Woolsey on the ground that the court was without jurisdiction; the claim being that neither the complainant nor one of the several defendants—the Hammond Distilling Company—was a resident of the district in which the suit was brought. The objection was overruled, and, after the preliminary injunction was granted, defendant Woolsey served a paper designated as a plea and answer. Complainant moved to strike out the first six paragraphs as strictly pleas. The first went to the jurisdiction, based on the same ground as the objection to the granting of the injunction; the second set up want of capacity to enforce the contract; the third, want of necessary and indispensable parties; the fourth, that complainant had a plain, adequate, and complete remedy at law; the fifth, that the showing made by the bill did not entitle complainant to the relief prayed for; and the sixth, that there was a

misjoinder of parties. Defendant contended that, while the matter might be used as pleas, it could also properly be set up by way of answer.

Alexander & Green and Moran, Mayer & May, for plaintiff.
Otto Horwitz, for defendants.

On Motion for Preliminary Injunction.

LACOMBE, Circuit Judge. The motion to enjoin the Hammond Distilling Company is denied. That company has not voluntarily appeared. This is not the district of its residence, and this court has not acquired jurisdiction of it. As to Woolsey, the case seems to be entirely plain; there is no substantial dispute as to the facts; and complainant may take injunction pendente lite restraining him from violating the conditions of his contract of June 29, 1898. The trust company is also enjoined against delivering the stock to Woolsey or to his order without further instructions from the court.

On Motion to Strike Pleas from the Files.

(January 6, 1903.)

The phraseology of the combined plea and answer imports that six pleas are advanced, each of which goes to the whole bill. It is thought that the interests of justice, and the convenience of the parties and the court, will be best subserved, not by striking them out, thus leaving the answer shorn of averments which might fairly be presented in defense, but by allowing them all to stand as part of the answer, so that the whole case may be disposed of upon proofs as to all the issues raised by the combined pleadings—especially so as the points raised on the first plea have already been decided against the defendant on the motion for preliminary injunction.

It is so ordered.

MEMORANDUM DECISIONS.

AUSTRALIAN KNITTING CO. v. WRIGHT'S HEALTH UNDERWEAR CO. (Circuit Court of Appeals, Second Circuit. February 4, 1903.) No. 58. Appeal from the Circuit Court of the United States for the Southern District of New York. Motion for leave to apply to the Circuit Court to reopen cause on the ground of newly discovered evidence. See (C. C.) 115 Fed. 527. L. C. Raegener, for the motion. W. P. Preble, Jr., opposed. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The motion to call mandate and amend instructions to the court below, so as to permit that court to order a rehearing and consider newly discovered evidence, is denied, because it has not been satisfactorily made to appear that the defendant could not have discovered the new evidence, if reasonable diligence had been exercised.

BRABENDER v. UNITED STATES. (Circuit Court of Appeals, Third Circuit. March 6, 1903.) Appeal from the District Court of the United States for the District of New Jersey. Irving M. Dittenhoefer, for appellant. David O. Watkins, for the United States.

DALLAS, Circuit Judge. This cause being called for argument in its regular order and counsel for the respective parties having filed a stipulation that the cause be dismissed, it is now here ordered, adjudged and decreed by this court that the appeal from the said District Court be and the same is hereby dismissed at the costs of the appellant.

BROWER v. NEWBURGER COTTON CO. (Circuit Court of Appeals, Fifth Circuit. March 24, 1903.) No. 1,215. In Error to the Circuit Court of the United States for the Northern District of Mississippi. Robertson Horton, for plaintiff in error. Jas. Stone and J. O. Wilson, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The only material assignment of error is that the circuit court erred in not directing a verdict for the defendant (plaintiff in error here). After a careful consideration of the evidence and the able argument in behalf of the plaintiff in error, we are of opinion that the case was properly submitted to the jury, and that there is no error in the record. The judgment of the circuit court is therefore affirmed.

CALHOUN v. SOUTHERN COTTON OIL CO. (Circuit Court of Appeals, Fifth Circuit. April 7, 1903.) No. 1,214. Appeal from the Circuit Court of the United States for the Northern District of Georgia. Benj. F. Abbott and C. P. Joree, for appellant. Alex. C. King and Jack J. Spalding, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. For reasons given by Judge Newman ([C. C.] 120 Fed. 513) found in the transcript, and on the further ground of laches (see McLaughlin v. People's Railway Co. [C. C.] 21 Fed. 574; Woodmance & Hewitt Mfg. Co. v. Williams, 15 C. C. A. 720, 68 Fed. 489; Richardson v. Osborne & Co., 36 C. C. A. 610, 93 Fed. 828; Covert v. Travers Bros. [C. C.] 96 Fed. 568), the decree appealed from is affirmed.

DAVID ARMITAGE & SON, Limited, v. HANIFEN. (Circuit Court of Appeals, Third Circuit. April 2, 1903.) Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. A. B. Stoughton, for appellant. W. P. Preble, for appellee.

PER CURIAM. This cause being called in its regular order, on the transcript of record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and on motion of Joseph C. Fraley, of counsel for appellee, it is now here ordered, adjudged, and decreed by this court that the appeal in this cause be, and the same is hereby, dismissed at the costs of appellant.

In re DUNNING. (Circuit Court of Appeals, First Circuit. April 23, 1903.) No. 476. Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy. E. S. Mansfield and George R. Swasey, for petitioner. Jeremiah Smith, Jr., for respondent. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. Petition dismissed by the court without prejudice and without costs, as per stipulation on file.

DUNNING v. SMITH. (Circuit Court of Appeals, First Circuit. April 22, 1903.) No. 475. Appeal from the District Court of the United States for the District of Massachusetts. E. S. Mansfield and George R. Swasey, for appellant. Jeremiah Smith, Jr., for appellee. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. Appeal dismissed, without prejudice and without costs, as per stipulation on file.

FELSENHELD v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. March 11, 1903.) No. 379. In Error to the Circuit Court of the United States for the District of West Virginia. Henry M. Russell and John DeWitt Warner, for plaintiff in error. Chas. J. Faulkner and Joseph H. Gaines, for the United States. No opinion. Judgment of the Circuit Court reversed, and cause remanded.

FIRST NAT. BANK OF WILMINGTON, DEL., v. FLORIDA CENT. & P. R. CO. et al. FLORIDA CENT. & P. R. CO. et al. v. FIRST NAT. BANK OF WILMINGTON, DEL. (Circuit Court of Appeals, Fifth Circuit. April 7, 1903.) No. 1,224. In Error and Cross-Error to the Circuit Court of the United States for the Southern District of Florida. C. D. Rinehart, for plaintiff in error. J. A. Henderson and J. C. Cooper, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. We do not find any reversible error in the record. The judgment of the Circuit Court is therefore affirmed. The costs of this court to be taxed one-half against the plaintiff in error and one-half against the cross-plaintiffs in error.

HALL v. MASON. (Circuit Court of Appeals, Fourth Circuit. March 13, 1903.) No. 482. In Error to the District Court of the United States for the District of West Virginia. Frederick C. McLaughlin, for plaintiff in error. Frank Gosnell and John P. Poe, for defendant in error. Dismissed, without costs, under rule 20 (31 C. C. A. clxii, 90 Fed. clxii).

KAUFFMAN v. JOS. WEILL & CO. et al. (Circuit Court of Appeals, Fifth Circuit. April 10, 1903.) No. 1,167. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. B. R. Forman, for appellant. Hewes T. Gurley, J. D. Rouse, and Wm. Grant, for appellees. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. We are of opinion that the decree of the court below should be affirmed, and it is so ordered.

L. BUCKI & SON LUMBER CO. v. ATLANTIC LUMBER CO. et al. (Circuit Court of Appeals, Fifth Circuit. April 7, 1903.) No. 1,143. Appeal from the Circuit Court of the United States for the Northern District of Florida. 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 (121 Fed. 233), and the rehearings applied for are denied.

McGUIRE et al. v. BLOUNT et al. (Circuit Court of Appeals, Fifth Circuit. March 24, 1903.) No. 1,202. In Error to the Circuit Court of the United States for the Northern District of Florida. E. T. Davis, E. Howard McCaleb, Girault Farrar, and Simeon Belden, for plaintiffs in error. W. A. Blount and A. C. Blount, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the trial of this case the trial judge directed a verdict for the defendants, and the correctness of that direction turns upon the admissibility in evidence and effect of the purported will of Gabriel Rivas, ancestor of the plaintiffs below, plaintiffs in error here, and a certain protocol and documents showing judicial proceedings before the Spanish governor of West Florida and other Spanish officials in West Florida from 1807 to 1821, all in the settlement of the estate of the said Gabriel Rivas, and showing the judicial sale of the land in controversy. Upon consideration, and in the light of the very able arguments and brief submitted, we are of opinion that the said will, protocol, and documents were properly admitted in evidence, and that their effect, sustained, as they were, by proof of corroborating facts and circumstances, is to show that the plaintiffs below, plaintiffs in error here, as the heirs and descendants of Gabriel Rivas, have no right to recover the lands in controversy. The direction to the jury to find for the defendants was correct, and the judgment of the Circuit Court is affirmed.

MILES v. GAAR, SCOTT & CO. (Circuit Court of Appeals, Eighth Circuit. February 26, 1903.) No. 1,804. In Error to the Circuit Court of the United States for the District of North Dakota. Before CALDWELL, SANBORN, and THAYER, Circuit Judges. Taylor Crum, for plaintiff in error. H. R. Turner (Arthur B. Lee, on the brief), for defendant in error.

SANBORN, Circuit Judge. This is a writ of error to reverse a judgment which sustained a demurrer to an amended complaint for damages for personal injury against Gaar, Scott & Co., a corporation. The plaintiff was an employé of the purchaser of a threshing machine rig from the defendant, and alleged that he sustained injuries on account of the defective covering of the cylinder. The complaint in this case differs in no material respect from that which has been considered in *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, in which the opinion is filed herewith; and the judgment below is reversed, and the case remanded for further proceedings, upon the authority of the opinion in that case.

MONTGOMERY COUNTY v. COCHRAN et al. (Circuit Court of Appeals, Fifth Circuit. April 7, 1903.) No. 1,205. In Error to the Circuit Court of the United States for the Middle District of Alabama. 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 (121 Fed. 17), and the rehearing is denied.

NONPAREIL CORK MFG. CO. v. KEASBEY & MATTISON CO. (Circuit Court of Appeals, Third Circuit. March 4, 1903.) No. 1. In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Arthur B. Huey, for plaintiff in error. Henry La Barre Jayne, for defendant in error.

PER CURIAM. This cause being called for argument in its regular order, and on motion of counsel for defendant in error, it is now here ordered and adjudged that the writ of error be, and the same is hereby, dismissed at the costs of plaintiff in error.

PHENIX INS. CO. OF BROOKLYN, N. Y., v. LEONARD. (Circuit Court of Appeals, Seventh Circuit. October 7, 1902.) No. 879. In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. D. J. Schuyler, for plaintiff in error. Myron H. Beach, for defendant in error. Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

PER CURIAM. The principal and controlling questions are the same as in *Orient Ins. Co. v. Leonard* (herewith decided) 120 Fed. 808. In that case, the former decision of this court in *Leonard v. Orient Ins. Co.*, 48 C. C. A. 369, 109 Fed. 286, 54 L. R. A. 706, furnished the law of the case on the construction of the policy. Here it stands simply as a precedent; but it is one we are disposed to follow. A few of the minor questions made on the trial differ from those in the *Orient Case*. We have examined them carefully and find no error. The judgment is affirmed.

PHILADELPHIA & B. FACE BRICK CO. v. WARFORD et al. (Circuit Court of Appeals, First Circuit. April 30, 1903.) No. 467. Appeal from the District Court of the United States for the District of Massachusetts. Sherman L. Whipple and William R. Sears, for appellant. Eugene P. Carver and Edward E. Blodgett, for appellees. Before COLT, Circuit Judge, and ALDRICH, District Judge. Appeal dismissed, without costs; mandate to issue forthwith.

SAPPINGTON et al. v. FIRST NAT. BANK OF CINCINNATI et al. (Circuit Court of Appeals, Fourth Circuit. February 3, 1903.) No. 448. Petition for Revision of Proceedings of the District Court of the United States for the District of Maryland. William S. Bryan, Jr., for petitioners. John E. Semmes and Albert O. Ritchie, for respondents. Cause dismissed, with costs, on agreement of counsel.

SCOTT et al. v. CAREW et al. (Circuit Court of Appeals, Fifth Circuit. March 24, 1903.) No. 1,160. Appeal from the Circuit Court of the United States for the Southern District of Florida. Henry W. Anderson, Francis P. Fleming, and Francis P. Fleming, Jr., for appellants. Wm. Wade Hampton, E. R. Gunby, M. G. Gibbons, William Hunter, and H. Bisbee, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After a careful examination and consideration of the elaborate decisions of Mr. Secretary Noble, Mr. Secretary Smith, Mr. Secretary Bliss, and Judge Locke, all found in the transcript, and all adverse to the claims of the appellants, and a study of the very able briefs filed by eminent counsel, we are of opinion that the judge of the Circuit Court properly ruled in sustaining the demurrer to the complainants' bill; and therefore the judgment appealed from is affirmed.

S. JARVIS ADAMS CO. v. BOSSERT. (Circuit Court of Appeals, Sixth Circuit. March 4, 1903.) No. 1,133. Appeal from the Circuit Court of the United States for the Southern District of Ohio. Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. This cause comes from the same court and is like that of *S. Jarvis Adams Company v. Knapp* (just decided) 121 Fed. 34, in all particulars, and for the reasons given in our opinion in that case requires a like decision. The cases were argued and submitted together. The decree must be reversed, and remanded to the court below, with instructions to take further proceedings not inconsistent with the opinion of this court.

DAY, Circuit Judge, participated in the decision of this case.

TURNBULL v. NEW ORLEANS & C. R. CO. (Circuit Court of Appeals, Fifth Circuit. April 7, 1903.) No. 1,186. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. 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 (120 Fed. 783), and the rehearing is denied.

TYEE CONSOL. MIN. CO. v. GUSTSON et al. SAME v. ISAACSON. SAME v. FLAHERTY et al. SAME v. JACOBSON. SAME v. NORAN. SAME v. FRANKENSON et al. SAME v. NOREEN. (Circuit Court of Appeals, Ninth Circuit. March 3, 1903.) Nos. 876-882. In Error to the District Court of the United States for the First Division of the District of Alaska. John G. Heid, R. F. Lewis, and Alfred Sutro, for plaintiff in error. Crews & Hellenthal and L. S. B. Sawyer, for defendants in error.

PER CURIAM. Upon motion of counsel for the plaintiff in error, the judgments of the District Court in the above-entitled causes are reversed, with costs, and the causes remanded to the said District Court for further proceedings in accordance with the views expressed in the opinion of this court in the case of *Tyee Consolidated Min. Co. v. Ernest Langstedt* (No. 875) 121 Fed. 709.

UNITED STATES v. J. D. ILER BREWING CO. (Circuit Court of Appeals, Eighth Circuit. February 9, 1903.) No. 1,776. Appeal from the Circuit Court of the United States for the Western District of Missouri. A. S. Van Valkenburgh and D. P. Dyer (William Warner, on the brief), for the United States. James H. Harkless (John O'Grady and Charles S. Cryser, on the brief), for appellee. Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This case having been properly brought to this court by writ of error, the appeal from the same judgment is dismissed, without costs to either party in this court. See 121 Fed. 41.

BRINCKERHOFF v. HOLLAND BLDG. ASS'N et al. (Circuit Court, S. D. New York. February 20, 1903.) Motion to Continue Temporary Receivership. Duncan & Duncan, for the motion. Stephen M. Yeaman, opposed.

LACOMBE, Circuit Judge. Every creditor and every stockholder of the building association was duly notified of this hearing, and with a single exception not one of them interposes any objection, while both defendants likewise assent. The single objector is a judgment creditor to the amount of \$7,000, and no proceedings here taken should be allowed to interfere with

or reduce his security. If parties interested will file a bond in the amount of \$7,500, conditioned to make good whatever loss he may sustain by reason of his being deprived of any remedy available to him against property of the association, which has been taken possession of by the receiver, the motion will be granted, and receiver continued. If no such bond is filed within one week, the motion will be denied, the temporary receivership vacated, and the receiver heretofore appointed by this court directed to turn over all property in his possession to the receiver who has subsequently been appointed by the state court.

FRANK et al. v. JONES. (Circuit Court, S. D. New York. January 6, 1903.) Chas. C. Gill, for complainants. Jno. Dane, Jr., for defendant.

WHEELER, District Judge. The defendant is shown to have sold infringing articles before suit, but not after sufficiently definite notice of the patents to warrant a decree for damages. Decree for an injunction, with costs. See 121 Fed. 126.

KEASBEY & MATTISON CO. v. PHILIP CAREY CO. (Circuit Court, S. D. New York. March 2, 1903.) Edward K. Jones, for the motion. Kenyon & Kenyon, opposed.

LACOMBE, Circuit Judge. The motion for an order directing that all further evidence be taken in open court is denied. The court has carefully read the deposition of the witness Mattison, called by the complainant, including the 1,300 cross-questions, and all the objections and comments of counsel which accompanied the taking of the testimony. No comment is now made on this fraction of the record. It will have to be considered by the judge who hears the cause, in connection with the other evidence. In view of the impression produced by this examination of the deposition, however, it may be proper to suggest to counsel for the defendants that they might with advantage to themselves make the most of such time as remains out of that allotted for the taking of their proofs.

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ABANDONMENT.

Of claims under public land laws, see "Public Lands," § 2.
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ABATEMENT AND REVIVAL.

Judgment as bar to another action, see "Judgment," § 1.

§ 1. Another action pending.

The pendency of an ancillary suit by the owner of a mining claim for an injunction in aid of an action of ejectment held not a bar to a subsequent suit to quiet title.—*Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co.* (C. C. A.) 973.

§ 2. Death of party and revival of action.

Under Rev. St. § 956 [U. S. Comp. St. 1901, p. 697], where one of two defendants in an action to determine an adverse claim to a mining property died pending the suit, it was properly continued against the surviving defendant, since the action survived under Hill's Ann. Laws Or. §§ 369, 370.—*Mackay v. Fox* (C. C. A.) 487.

Where suit was brought by plaintiff in a representative capacity for himself and others, and another was permitted to intervene as party plaintiff, the suit did not abate by reason of the death of the original complainant.—*Edwards v. Mercantile Trust Co.* (C. C.) 203.

ABUTTING OWNERS.

Compensation for taking of or injury to lands or easements for public use, see "Eminent Domain," § 3.

ACTION.

Abatement, see "Abatement and Revival."
Bar by former adjudication, see "Judgment," § 1.
Jurisdiction of courts, see "Courts."
Limitation by statute, see "Limitation of Actions."
Malicious actions, see "Malicious Prosecution."
Pendency of action, see "Abatement and Revival," § 1.
Review of proceedings, see "Appeal and Error"; "Equity," § 4; "Exceptions, Bill of."
Survival, see "Abatement and Revival," § 2.

Actions between parties in particular relations.

See "Master and Servant," § 1.
Between stockholders and bank, see "Banks and Banking," § 1.

Actions by or against particular classes of parties.

See "Carriers," § 2; "Corporations," § 5; "Municipal Corporations," § 1; "Street Railroads," § 1.
Stockholders, see "Banks and Banking," §§ 1, 2; "Corporations," § 3.
Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.
Trustees in bankruptcy, see "Bankruptcy," §§ 4, 6.

Particular causes or grounds of action.

See "Collision," § 6; "Conspiracy," § 1; "Death," § 1; "Malicious Prosecution," § 1; "Negligence," § 2; "Trespass"; "Use and Occupation."
Bond of Indian agent, see "Indians."
Breach of contract, see "Contracts," § 4.
Determination of rights to mining claims, see "Mines and Minerals," § 1.
Ejection of passenger, see "Carriers," § 2.
Indemnity bond, see "Indemnity."
Infringement of copyright, see "Copyrights," § 2.
Infringement of patent, see "Patents," §§ 7, 8.
Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 2.
Insurance policy, see "Insurance," § 8.
Personal injuries, see "Carriers," § 2; "Master and Servant," § 1; "Railroads," § 2.
Price of goods, see "Sales," § 3.
Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.
Unfair competition in trade, see "Trade-Marks and Trade-Names," § 2.

Particular forms of action.

See "Ejectment"; "Replevin"; "Trespass," § 1.

Particular forms of special relief.

See "Injunction"; "Specific Performance."

Particular proceedings in actions.

See "Costs"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Removal of Causes"; "Stipulations"; "Trial."
Verdict, see "Trial," § 5.

Particular remedies in or incident to actions.

See "Deposits in Court"; "Discovery"; "Injunction"; "Receivers."

Proceedings in exercise of special jurisdictions.

Criminal prosecutions, see "Criminal Law."
Suits in admiralty, see "Admiralty"; "Collision," § 6.
Suits in equity, see "Equity."

§ 1. Nature and form.

While a remedy given by the act creating the right is ordinarily exclusive, a new remedy, provided in a case in which the right and an appropriate remedy already existed, is merely cumulative.—*King v. Pomeroy* (C. C. A.) 287.

ACTION ON THE CASE.

See "Trespass," § 1.

ACTS OF BANKRUPTCY.

See "Bankruptcy," § 2.

ADJUDICATION.

Of courts in general, see "Courts," § 2.
Operation and effect of former adjudication, see "Judgment," §§ 1-3.

ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 5.
Of estate of decedent, see "Executors and Administrators."
Of property by receiver, see "Receivers," § 1.

ADMIRALTY.

See "Collision"; "Salvage"; "Seamen"; "Shipping"; "Towage."

§ 1. Appeal.

The appellate court in an admiralty suit will not disturb a finding of fact made by the trial judge on conflicting testimony, unless clearly against the weight of evidence.—*The Oscar B* (C. C. A.) 978.

ADVERSE POSSESSION.

See "Limitation of Actions."

§ 1. Nature and requisites.

A city cannot acquire rights in the right of way of a railroad by adverse possession under the statute of North Carolina, nor by occupation under a dedication by a lessee of the road, as against the lessor.—*City of Durham v. Southern Ry. Co.* (C. C.) 894.

§ 2. Pleading, evidence, trial, and review.

To constitute actual adverse possession, which will defeat an action of ejectment by the owner of the legal title, it is not sufficient that such possession was "actual, open, notorious, and continuous," with claim of ownership, but it must also have been exclusive and hostile.—*Tyee Consol. Min. Co. v. Langstedt* (C. C. A.) 709.

AFFIDAVITS.

See "Depositions."

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

AGRICULTURE.

Irrigation, see "Waters and Water Courses," § 1.

ALIENS.

See "Indians."

Removal of suits by or against aliens to United States court, see "Removal of Causes," § 2.

§ 1. Exclusion or expulsion.

Act May 5, 1902, relating to the exclusion of Chinese, *held* not a creation of a new law or a repeal of an old one, but a continuation without interruption of Exclusion Act May 6, 1882 (22 Stat. 58, c. 126), as amended and extended by acts of 1884 and 1892.—*Sims v. United States* (C. C. A.) 515.

Act July 5, 1884 (23 Stat. 117, c. 220 [U. S. Comp. St. 1901, p. 1305]), *held* to prohibit persons from knowingly landing ineligible Chinese, without regard to their knowledge as to the alien's right to enter the United States.—*Sims v. United States* (C. C. A.) 515.

The Chinese exclusion act, as extended by Act May 5, 1892, *held* continued in force as to an offense committed before its expiration by Rev. St. § 13 (Act Feb. 25, 1871, c. 71; 16 Stat. 432 [U. S. Comp. St. 1901, p. 61]), though the prosecution was not commenced until after the act expired.—*Sims v. United States* (C. C. A.) 515.

An indictment for violation of Chinese exclusion act of 1882 (Act July 5, 1884, c. 126), as reenacted by Act April 29, 1902 (32 Stat. 176, c. 641), *held* not objectionable for failure to charge that the Chinese landed were not entitled to land by virtue of treaty obligations.—*Sims v. United States* (C. C. A.) 515.

In a prosecution under Act July 5, 1884, § 11 (23 Stat. 117, c. 220 [U. S. Comp. St. 1901, p. 1305]), for aiding and abetting the landing of Chinese, an indictment charging defendants with "aiding and abetting" and with "landing" the Chinese was not objectionable for repugnancy.—*Sims v. United States* (C. C. A.) 515.

An indictment for aiding and abetting the landing of Chinese, prohibited by Act July 5, 1884 (23 Stat. 117, c. 220 [U. S. Comp. St. 1901, p. 1305]), *held* not demurrable for failure to set out the facts constituting the alleged unlawful landing.—*Sims v. United States* (C. C. A.) 515.

An indictment in a prosecution for aiding the landing of Chinese *held* not objectionable on the

ground that it showed that the Chinese had already entered the United States before being landed.—*Sims v. United States* (C. C. A.) 515.

AMBASSADORS AND CONSULS.

Documents of foreign consulate as privileged communications, see "Witnesses," § 1.

AMENDMENT.

Of bill of exceptions, see "Exceptions, Bill of," § 1.

Of bond in proceedings for removal of cause to federal court, see "Removal of Causes," § 3.

Of statute, see "Statutes," § 2.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Courts," § 2.

ANSWER.

In pleading, see "Equity," § 2.

To petition in bankruptcy, see "Bankruptcy," § 2.

APPEAL AND ERROR.

See "Exceptions, Bill of."

Appellate jurisdiction of circuit court of appeals, see "Courts," § 2.

Review of action for infringement of patent, see "Patents," § 8.

Review of action for injuries to passenger, see "Carriers," § 2.

Review of criminal prosecutions, see "Criminal Law," § 2.

Review of proceedings in admiralty, see "Admiralty," § 1.

Right of indemnitor vouched in to defend to appeal, see "Indemnity."

§ 1. Decisions reviewable.

There is no provision of the Alaska Code (Act June 6, 1900, c. 786; 31 Stat. 379) requiring that a judgment shall be filed as a prerequisite to the perfecting of an appeal therefrom.—*Mackay v. Fox* (C. C. A.) 487.

§ 2. Right of review.

The right to review a judgment granting insufficient relief is not waived by moving for the entry of the judgment after being denied a new trial.—*Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* (C. C. A.) 524.

Where a fund in the hands of a bankrupt's trustee was awarded to petitioners, the fact that the court ordered a part of the fund to be retained until further order of the court did not deprive adverse claimants of the fund of their right to appeal from such order.—*Reid v. Pauly* (C. C. A.) 652.

§ 3. Presentation and reservation in lower court of grounds of review.

An exception in gross to the refusal of a list of instructions will not be noticed on appeal, when some of the instructions were superfluous.—*Hodge v. Chicago & A. Ry. Co.* (C. C. A.) 48.

The objection of variance must be made when the evidence is offered; otherwise, it is waived, and cannot be raised in the appellate court.—*Columbia Mfg. Co. v. Hastings* (C. C. A.) 328.

An exception to the court's charge on the burden of proof as a whole is insufficient to raise the objection on review that the court should have singled out a particular issue, and instructed otherwise as to that.—*Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* (C. C. A.) 524.

The objection of variance cannot be raised for the first time in the appellate court on writ of error.—*Ames v. Farrelly* (C. C. A.) 820.

The failure of a defendant to file an affidavit denying the execution of the contract sued on, as required by a rule of court, to put plaintiff on his proof, cannot be urged to prevent a consideration of the question of the due execution of the contract by the appellate court, where the objection was not made in the trial court, which might have permitted the affidavit to be filed at any time.—*City of Detroit v. Grummond* (C. C. A.) 963.

§ 4. Parties.

Where a contractor's trustee in bankruptcy recovered a balance due on the contract from a county, an appeal by such trustee from an order awarding the fund to indemnitors of the contractor's sureties was not subject to dismissal on the ground that the county was a necessary party.—*Reid v. Pauly* (C. C. A.) 652.

§ 5. Record and proceedings not in record.

The refusal of special instructions asked is presumptively without prejudice, where the record in the appellate court fails to show that the bill of exceptions contains all of the charge given.—*Columbia Mfg. Co. v. Hastings* (C. C. A.) 328.

An appeal held not subject to dismissal on the ground that the transcript did not show that the judgment appealed from had been entered of record.—*Mackay v. Fox* (C. C. A.) 487.

Where the evidence shown by a bill of exceptions points distinctly to a definite result, although the bill does not purport to contain all the evidence, if the defendant in error proposes to deny the inference to be drawn from it, he should see that enough is stated at least to show that there was other evidence on the point which might affect the conclusion.—*City of Detroit v. Grummond* (C. C. A.) 963.

§ 6. Assignment of errors.

A writ of error will not be dismissed, because the assignment of errors bears the clerk's file mark of a date later than that on which the writ was allowed, where it fairly appears from the transcript that it was in fact presented at the same time as the petition for the writ.—*Tyee Consol. Min. Co. v. Langstedt* (C. C. A.) 709.

An appeal is not defeated because the assignment of errors found in the record does not bear the file mark of the clerk of the trial court, where it appears from its recitals and

without contradiction that it was in fact presented to the court with the petition for appeal.—*Moore v. Moore* (C. C. A.) 737.

§ 7. Review.

A general finding is conclusive on all issues of fact raised by the pleadings, and the evidence is not reviewable to ascertain whether it supports the finding.—*McDowell v. McCormick* (C. C. A.) 61.

In an action for injuries to a railway brakeman, an instruction that plaintiff could not recover if the accident occurred through the negligence of the local telegraph operator was not subject to objection by defendant.—*Northern Pac. R. Co. v. Mix* (C. C. A.) 476.

A party in whose favor the jury has found an issue cannot allege error in the court's charge as to the burden of proof on that issue.—*Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* (C. C. A.) 524.

Findings of fact made in an action at law tried to the court stand as the verdict of a jury, and cannot be disturbed by the appellate court, when supported by evidence.—*McIntosh v. Price* (C. C. A.) 716.

Findings of fact, made by the trial court on conflicting evidence, will not be reviewed on appeal, unless obviously opposed to the weight of the evidence.—*Moore v. Moore* (C. C. A.) 737.

The granting of a preliminary injunction rests in the sound discretion of the trial court, and its decision will not be reviewed, unless it appears that its discretion was improvidently exercised.—*Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co.* (C. C. A.) 973.

§ 8. Determination and disposition of cause.

Decree denying injunction to restrain pile-driving on water front, and adjudging title in defendant, modified in view of want of evidence of defendant's ownership to one merely dismissing suit.—*Juneau Ferry & Navigation Co. v. Alaska S. S. Co.* (C. C. A.) 356.

In action by ejected passenger, an instruction called forth by counsel's disregard in argument of law of the case *held* proper.—*Pennsylvania Co. v. Scofield* (C. C. A.) 814.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 1.

APPORTIONMENT.

Of salvage compensation, see "Salvage," § 2.
Of water, see "Waters and Water Courses," § 1.

APPRAISAL.

Of merchandise subject to duty, see "Customs Duties," § 2.

ARGUMENT OF COUNSEL.

In criminal prosecutions, see "Criminal Law," § 1.

On trial after reversal, see "Appeal and Error," § 8.

ARMY AND NAVY.

Habeas corpus to determine status of minor enlisted in navy, see "Habeas Corpus," § 1.

The fact that a minor, enlisted in the navy without his parents' consent, in violation of Rev. St. § 1419 [U. S. Comp. St. 1901, p. 1007], has received pay or allowances which under Act March 3, 1893, c. 212, 27 Stat. 715 [U. S. Comp. St. 1901, p. 1006], subjects him to court-martial for fraudulent enlistment, does not affect the right of his parent to avoid the enlistment.—*Ex parte Reaves* (C. C.) 848.

Under Rev. St. § 1419, as amended by Act May 12, 1879, c. 5, 21 Stat. 3, and Act Feb. 23, 1881, c. 73, § 2, 21 Stat. 338 [U. S. Comp. St. 1901, p. 1007], providing that minors between the age of 14 and 18 years "shall not be enlisted for the naval service without the consent of their parents or guardians," an enlistment of a minor under 18 without the consent of his father is void ab initio as against the father, and gives him no status in the naval service which the United States can assert to deprive the father of his custody when the latter has regained the same.—*Ex parte Reaves* (C. C.) 848.

ARTICLES.

Of incorporation, see "Corporations," § 1.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 2.

Of loss on insured, see "Insurance," § 2.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 6.

ASSIGNMENTS.

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," §§ 3-7.

Of patents, see "Patents," § 4.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," §§ 3-7.

ASSOCIATIONS.

See "Exchanges."

ASSUMPSIT, ACTION OF.

See "Use and Occupation."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 1.

ATTACHMENT.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 1.

Argument of counsel on trial after reversal, see "Appeal and Error," § 8.

Attorneys as public officers, see "Attorney General."

Attorneys in fact, see "Principal and Agent."

Liability for contempt, see "Contempt," § 1.

Recovery of attorney's fees in action on replevin bond, see "Replevin," § 1.

§ 1. Compensation and lien of attorney.

Where an attorney having a lien for fees continued the suit after settlement by his client, and recovered judgment, he was entitled to be paid therefrom the reasonable value of his services, whereupon the balance of the recovery would be remitted.—*Herman v. Metropolitan St. Ry. Co.* (C. C.) 184.

A contract to pay an attorney 50 per cent. of the recovery and all disbursements held unconscionable and void.—*Herman v. Metropolitan St. Ry. Co.* (C. C.) 184.

Where an attorney contracted to prosecute a cause for 15 per cent. of the recovery, on an application for substitution the attorney's fees should be fixed with reference to the reasonable value of his services to the date of such substitution.—*Such v. Bank of State of New York* (C. C.) 202.

ATTORNEY GENERAL.

A special assistant to the Attorney General is not an officer of the Department of Justice, within Rev. St. §§ 359, 367 [U. S. Comp. St. 1901, pp. 207, 209], providing for the organization of the Attorney General's office.—*United States v. Rosenthal* (C. C.) 862.

That a merchants' association assured the Attorney General that, if necessary, it would furnish funds to compensate a special assistant appointed to investigate customs frauds, did not disqualify the appointee, who looked to the United States for compensation.—*United States v. Rosenthal* (C. C.) 862.

A special assistant to the Attorney General appointed to investigate as to alleged fraudulent importation of Japanese silks at the port of New York, and to prepare and conduct civil and criminal proceedings resulting therefrom, is not authorized to conduct proceedings before a federal grand jury.—*United States v. Rosenthal* (C. C.) 862.

Neither the Attorney General, the Solicitor General, nor any officer of the Department of

Justice, is authorized to conduct or to aid in the conduct of proceedings before a grand jury.—*United States v. Rosenthal* (C. C.) 862.

AUTHORITY.

Of agent, see "Principal and Agent," § 1.

Of broker, see "Brokers," § 1.

BAILMENT.

See "Pledges."

Embezzlement or larceny by bailee, see "Embezzlement."

BANKRUPTCY.**§ 1. Constitutional and statutory provisions.**

Bankr. Act 1898 (Act July 1, 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), on its passage, at once suspended and superseded all state insolvency laws as to cases coming within its purview, whether the insolvent be a person, partnership, or corporation; and proceedings instituted thereafter under any such insolvency law, by or against an insolvent subject to adjudication as a bankrupt, either voluntary or involuntary, are void.—*In re F. A. Hall Co.* (D. C.) 992.

§ 2. Petition, adjudication, warrant, and custody of property.

A corporation incorporated under the laws of a state cannot be adjudged an involuntary bankrupt as a "private banker," under Bankr. Act 1898, § 4b, Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423].—*In re Surety Guarantee & Trust Co.* (C. C. A.) 73.

A corporation engaged in buying and selling stocks, bonds, and other securities cannot be adjudged an involuntary bankrupt as engaged in trading or mercantile pursuits.—*In re Surety Guarantee & Trust Co.* (C. C. A.) 73.

Under Rev. St. §§ 566, 648, 649 [U. S. Comp. St. 1901, pp. 461, 525], and Bankr. Act, § 19, subd. "a," and section 18, subd. "d," Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], intervening creditors held not entitled to a jury trial on the issue of the bankrupt's insolvency and of the acts of bankruptcy alleged.—*In re Herzikopf* (C. C. A.) 544; *Cohn, Goldwater & Co. v. Gorchakoff, Id.*

An answer to an involuntary bankruptcy petition held objectionable, as not conforming to the form prescribed by United States Supreme Court orders, as prolix, and as neither admitting nor unevasively denying the material allegations of the petition.—*Bradley Timber Co. v. White* (C. C. A.) 779.

Where, after an answer was stricken from the files, defendant filed another answer, error, if any, in striking the previous answer, was waived.—*Bradley Timber Co. v. White* (C. C. A.) 779.

An involuntary bankruptcy petition held demurrable for want of facts showing the commission of an act of bankruptcy within four

months.—Bradley Timber Co. v. White (C. C. A.) 779.

Under Bankr. Law, § 32, Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], and general orders in bankruptcy, rules 6, 7, an involuntary petition *held* not objectionable for joinder of several acts of bankruptcy, all committed within four months of the filing of the petition.—Bradley Timber Co. v. White (C. C. A.) 779.

The recovery of a judgment against an insolvent, though resisted, *held* to constitute an act of bankruptcy, unless the bankrupt discharges the preference obtained thereby within five days before property affected thereby was disposed of.—Bradley Timber Co. v. White (C. C. A.) 779.

Under Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], sums due one who worked by the piece *held* wages, within section 64b (4), and entitled to priority.—In re Gurewitz (C. C. A.) 982.

The purchase and occasional sale of articles necessary to carry on the business of a corporation *held* not to have rendered it a "trading" or "mercantile" concern, susceptible to bankruptcy, under Bankr. Act, § 4, Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423].—In re H. J. Quimby Freight Forwarding Co. (D. C.) 139.

The difference in language between the bankruptcy act of 1867 and section 4 of the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), in regard to the susceptibility of corporations to bankruptcy, *held* to require exclusion of some corporations within the former act.—In re H. J. Quimby Freight Forwarding Co. (D. C.) 139.

A corporation cannot be rendered susceptible to bankruptcy, under Bankr. Act, § 4, Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], by carrying on a business unauthorized by its charter.—In re H. J. Quimby Freight Forwarding Co. (D. C.) 139.

A corporation *held* not to have become a "trading" concern, so as to be susceptible to bankruptcy under section 4 of the bankrupt act [U. S. Comp. St. 1901, p. 3423], by the occasional boarding or letting out of horses.—In re H. J. Quimby Freight Forwarding Co. (D. C.) 139.

Where a creditor has assented to an assignment under state laws, he is estopped from becoming a party to an involuntary bankruptcy petition.—Durham Paper Co. v. Seaboard Knitting Mills (D. C.) 179.

The filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction.—In re Breslauer (D. C.) 910.

Under Bankr. Act, § 11a (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), continuance of stay of suit for malpractice in state court refused after bankrupt's discharge had been ordered.—In re Flanders (D. C.) 936.

§ 3. Assignment, administration, and distribution of bankrupt's estate —Assignment, and title, rights, and remedies of trustee in general.

Where a trustee in bankruptcy has recognized that there is no cash surrender value to an insurance policy, and has turned it over to the bankrupt without an order of court, such action will be approved by the court *nunc pro tunc*.—In re Josephson (D. C.) 142.

Under Bankr. Act 1898, § 70a, cl. 5, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], where there is no surrender value, the bankrupt may hold, own, and carry a life policy free from the claims of his creditors.—In re Josephson (D. C.) 142.

Where an ordinary life insurance policy of a bankrupt has been pronounced valueless by his trustees, and turned over to him without an order of the court, on his death the court will not require that the proceeds of the policy be paid over to the trustees.—In re Josephson (D. C.) 142.

Owner of cotton, which was sold by mistake and proceeds deposited to account of bankrupt, *held* entitled to the value of the cotton.—In re Woods & Malone (D. C.) 599.

§ 4. — Preferences and transfers by bankrupt, and attachments and other liens.

Defense of usury *held* available to the trustee in bankruptcy against a mortgage given by the bankrupt.—In re Kellogg (C. C. A.) 333.

Subcontractors' claims, under New York mechanic's lien law (Laws 1897, p. 514, c. 418), *held* not liens on fund due from owner to bankrupt contractor; notices not having been filed till after the bankruptcy petition.—In re Roeber (C. C. A.) 449.

Payments by an insolvent on a running account for goods, where new sales succeed such payments and the net result is to increase the indebtedness, do not constitute preferential transfers of property, under Bankr. Act 1898, § 60a [U. S. Comp. St. 1901, p. 3445].—In re Sagor (C. C. A.) 658; Appeal of American Woolen Co., *Id.*

Payments made by a bankrupt, while insolvent, and within four months prior to the bankruptcy, on account of loans made to him by the creditor before the first of such payments, are preferences, which must be surrendered, although all the loans were made within the four months and during insolvency of the debtor.—In re Colton Export & Import Co. (C. C. A.) 663.

A creditor, holding a check given by his debtor, who transfers the same to a bank by indorsement, remains a creditor within the meaning of the bankruptcy act, and the payment of the check to the bank after the debtor's insolvency, and within four months prior to his bankruptcy, constitutes a preferential transfer of property to the indorser, under Act July 1, 1898, § 60a, 30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443].—In re Lyon (C. C. A.) 723.

Where, at the time a bankrupt became insolvent, he owed a creditor an account, and also a postdated check, given to close a prior account, the payment of the check thereafter constituted a preference, which must be surrendered before the creditor could prove the account.—In re Lyon (C. C. A.) 723.

Injunction by temporary receiver of bankrupt's estate to restrain trover in state court by one claiming chattels in receiver's hands *held* properly refused. Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 583].—In re Kanter & Cohen (C. C. A.) 984.

Note discounted by a bank *held* provable in bankruptcy against maker's estate, although the payee could not have proved the same without surrendering preferences received.—In re Levi (D. C.) 198.

The voluntary bankruptcy of a building contractor, and the appointment of a trustee for his estate, before the filing of notices of lien by subcontractors, does not defeat their right to such liens under the mechanic's lien law of the state, where they perfect the same within the time allowed by the statute.—In re Roeber (D. C.) 444.

Under Bankr. Act, § 67, subd. "f," Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], sale under attachment of a bankrupt's property after the filing of a petition in bankruptcy *held* to give the purchaser no title.—In re Goldberg (D. C.) 578.

Under Code S. C. § 2456, the creditors of a bankrupt, who became such after the giving of an unrecorded chattel mortgage, *held* entitled to all the proceeds of the mortgaged property, to the exclusion of both the mortgagee and prior creditors.—In re Cannon (D. C.) 582.

Referee *held* justified, on demurrer, in concluding that claimant was not entitled to lien on a saw mill, under Civ. Code Ga. 1895, § 2809.—In re Gosch (D. C.) 604.

Under section 67f of the bankruptcy act of 1898, a levy and sale under a judgment rendered void by the adjudication are also rendered void.—In re Breslauer (D. C.) 910.

A claim to money derived from an execution sale of the bankrupt's property, made after the petition was filed, but before the adjudication, *held* not an adverse claim.—In re Breslauer (D. C.) 910.

To constitute a preference, actual value in some form must have passed from the bankrupt to the creditor.—In re Steam Vehicle Co. (D. C.) 939.

§ 5. — Administration of estate.

A sale of real estate by a trustee, unless there is some special direction in the order, conveys only the interest of the bankrupt, and does not affect the right of a stranger to the proceeding, claiming an interest in the property adverse to the bankrupt, so as to give him an interest in the proceeds, nor has the court jurisdiction to adjudicate his rights after the property has been sold and conveyed.—In re Muhlhauser (C. C. A.) 669.

Leave to strangers, claiming an interest in property sold by a trustee, to file a petition in the bankruptcy proceedings, *held* properly re-

fused, on the ground that the issues presented were not within the court's jurisdiction.—In re Muhlhauser (C. C. A.) 669.

Before punishing a bankrupt for contempt because of his failure to comply with an order, the court should give him an opportunity to prove his inability to do so.—In re Hausman (C. C. A.) 984.

Under Bankr. Act 1898, § 21, cl. "a," 30 Stat. 551 [U. S. Comp. St. 1901, p. 3430], and Code Ga. § 5269, the trustees in bankruptcy cannot testify as to transactions or occurrences with the bankrupt on the trial of a suit brought by them against his widow.—In re Josephson (D. C.) 142.

Application to authorize trustees of bankrupt to pay costs of petition to review decision adjudging wife entitled to proceeds of life policy denied.—In re Josephson (D. C.) 146.

A bankruptcy court has power to determine whether a claim to money obtained from a sale of the bankrupt's property is an adverse claim existing at the time the petition was filed.—In re Breslauer (D. C.) 910.

A bankruptcy court has jurisdiction to compel the surrender to the trustee of funds not held under an adverse claim.—In re Breslauer (D. C.) 910.

§ 6. — Actions by or against trustee.

Under Bankr. Act 1898, § 2, subd. 7 [U. S. Comp. St. 1901, p. 3421], the bankruptcy court *held* to have jurisdiction to determine the validity of a mortgage on property of the bankrupt.—In re Kellogg (C. C. A.) 333.

A state court *held* not to have acquired jurisdiction of the property of a bankrupt, to the exclusion of the bankruptcy court, by the filing of the summons, complaint, and notice of pendency of an action to foreclose a mortgage thereon; petition in bankruptcy having been previously filed, and a receiver appointed, who had taken possession of the property. Code Civ. Proc. N. Y. § 416.—In re Kellogg (C. C. A.) 333.

A party to whom it is claimed property of a bankrupt has been conveyed in bad faith is an adverse claimant, and cannot be proceeded against in the bankruptcy court without his consent.—In re Hartman (D. C.) 940.

Section 8 of the Ray bill (Act Feb. 5, 1903, § 8, 32 Stat. 798), amending section 23b of the bankruptcy act of 1898, so as to give the bankruptcy court jurisdiction of suits for the recovery of certain preferences, is qualified by section 19 (32 Stat. 801), which provides that the provisions of the act shall not apply to pending bankruptcy cases.—In re Hartman (D. C.) 940.

Under Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 67f, 30 Stat. 562, 565 [U. S. Comp. St. 1901, pp. 3445, 3450], and section 23b, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798, the proceeds of an execution *held* not recoverable as a preference by summary proceeding, but an independent suit by the trustee is necessary.—In re Knickerbocker (D. C.) 1004.

A trustee in bankruptcy may be sued without first obtaining leave from the court.—In re Smith (D. C.) 1014.

§ 7. — Claims against and distribution of estate.

Where all firm creditors, who were such at the date the firm agreed to pay a debt of an individual partner, were paid prior to the firm's bankruptcy, the trustee or other creditors could not object to such agreement.—*Merchants' Bank v. Thomas* (C. C. A.) 306; *In re Wright & Berryhill*, Id.

A provision, in notes given by a bankrupt, for the payment of attorney's fees, *held* a claim provable against the bankrupt's estate.—*Merchants' Bank v. Thomas* (C. C. A.) 306; *In re Wright & Berryhill*, Id.

Under bankrupt act (30 Stat. 562, § 63 [U. S. Comp. St. 1901, p. 3447]), notes signed by a bankrupt partnership were *prima facie* provable against the estate, though they were partly given for a debt on which one of the partners was not primarily liable.—*Merchants' Bank v. Thomas* (C. C. A.) 306; *In re Wright & Berryhill*, Id.

Under Bankr. Act 1898, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], and Gen. Order 21, cl. 6 (32 C. C. A. xxiii, 89 Fed. x), *held*, that a proceeding may not be instituted by a creditor, without the concurrence of the trustee, to re-examine the allowed claims of other creditors.—*In re Lewensohn* (C. C. A.) 538.

Under Bankr. Act 1898, § 57i (Act July 1, 1898, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), contingent claim of surety *held* not provable against estate of bankrupt principal.—*Insley v. Garside* (C. C. A.) 699.

Contingent claims of surety of bankrupt principal *held* improperly allowed.—*Insley v. Garside* (C. C. A.) 699.

A mortgage executed to secure bonds for money loaned to a bankrupt, and an assignment of the bankrupt's equity in the bonds, made more than six months prior to bankruptcy, *held* entitled to priority over labor claims of operatives, under Rev. St. Ohio, § 6355.—*In re City Trust Co.* (C. O. A.) 706.

Rev. St. Ohio 1890, §§ 3206a, 6355, providing for preference of labor claims as against assigned estates, *held* not conflicting, since the latter section applies only to such laborers as are operatives.—*In re City Trust Co.* (C. C. A.) 706.

Mortgagee of homestead *held* not entitled to prove debt in bankruptcy as unsecured claim.—*Fenley v. Poor* (C. C. A.) 739.

Partnership creditors are entitled to share ratably with individual creditors in the individual assets of a bankrupt, where there is no partnership estate and no solvent partner.—*Conrader v. Cohen* (C. C. A.) 801.

Annual corporation license fee *held* not provable under Bankr. Act, § 63, cl. 4, Act July 1, 1898, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], as a debt founded on contract.—*In re Danville Rolling Mill Co.* (D. C.) 432.

Annual corporation license fee imposed by P. L. N. J. p. 232, *held* not provable as a tax under Bankr. Act, § 64, cl. "a," Act July 1, 1898, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].—*In re Danville Rolling Mill Co.* (D. C.) 432.

Where two notes were given by a bankrupt at the same time, both of which were held by the same creditor, and the one first maturing was paid within four months prior to the bankruptcy, the amount so paid must be surrendered as a preference, to entitle the creditor to prove the other in bankruptcy.—*In re E. O. Thompson's Sons* (D. C.) 607.

§ 8. Composition.

Holders of unenclosed mortgages against land formerly owned by a bankrupt, on which the bankrupt's liability for a deficiency was contingent, *held* not necessary or proper parties to a composition between the bankrupt and his creditors.—*In re Kahn* (D. C.) 412.

§ 9. Rights, remedies, and discharge of bankrupt.

A bankrupt, who has been refused a discharge for fraud, *held* not entitled to file a new petition alleging the same facts and prosecute a new application for discharge.—*In re Fiegenbaum* (C. C. A.) 69.

Creditor's petition for leave to amend objections to bankrupt's discharge *held* barred by laches.—*Kentucky Nat. Bank v. Carley* (C. C. A.) 822.

Under Bankr. Act, § 14b (Act July 1, 1898, 30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), a specification of an objection to a bankrupt's discharge for failure to keep books, in the language of the act, without further particulars, *held* sufficient.—*In re Patterson* (D. C.) 921.

Under Bankr. Act, §§ 14b, 29b (Act July 1, 1898, 30 Stat. 550, 554, c. 541 [U. S. Comp. St. 1901, pp. 3427, 3433]), an objection to a bankrupt's discharge for having fraudulently conveyed and concealed his property prior to bankruptcy *held* demurrable.—*In re Patterson* (D. C.) 921.

Under Bankr. Act, §§ 14b, 29b (Act July 1, 1898, 30 Stat. 550, 554, c. 541 [U. S. Comp. St. 1901, pp. 3427, 3433]), a specification in opposition to a bankrupt's discharge, alleging the making of a false oath, *held* demurrable for failure to allege that such oath was "knowingly and fraudulently" made.—*In re Patterson* (D. C.) 921.

A court of bankruptcy has jurisdiction to vacate a discharge, in the furtherance of justice, on its own motion, within a year after it was granted.—*In re Bimberg* (D. C.) 942.

Bankr. Act, § 57n, Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444], *held* not to deprive a creditor, who had failed to prove his claim against the bankrupt within a year after adjudication, of his right to move to vacate the discharge as a party in interest, within section 15, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428].—*In re Bimberg* (D. C.) 942.

BANKS AND BANKING.

Banking corporation as private bankers within meaning of bankruptcy act, see "Bankruptcy," § 2.

§ 1. Banking corporations and associations.

A complaint in an action by stockholders of an Indiana state bank to recover the proceeds of their stock, sold by the bank under the statute for nonpayment of assessments, *held* to state a cause of action.—*Chicago Title & Trust Co. v. State Bank of Ambia (C. C. A.)* 58.

§ 2. National banks.

Limitations do not run against an action by a receiver to enforce the liability of a shareholder of a national bank while proper liquidation proceedings are pending in equity.—*King v. Pomeroy (C. C. A.)* 287.

The liability of a shareholder of a national bank whose affairs are in the course of liquidation in equity does not mature until the court ascertains the necessity of enforcing it and determines the amount which the shareholder must pay.—*King v. Pomeroy (C. C. A.)* 287.

The right of a receiver of a national bank in liquidation to enforce the liability of shareholders does not accrue until such liability matures by the act of the court in determining the amount to be paid.—*King v. Pomeroy (C. C. A.)* 287.

Where a court has appointed a receiver of a national bank in voluntary liquidation, no action of the comptroller is required to empower such receiver to enforce the liability of the shareholders.—*King v. Pomeroy (C. C. A.)* 287.

The remedy of a creditors' suit to enforce the liability of shareholders of national banks in voluntary liquidation, provided by Act June 30, 1876, c. 156, § 2, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509], is cumulative, and not exclusive.—*King v. Pomeroy (C. C. A.)* 287.

Under Act June 3, 1864, c. 106, § 13 Stat. 99, a federal court in equity has jurisdiction to appoint a receiver to liquidate its obligations, and to authorize him to enforce the liability of shareholders of the bank under section 12 of the act. Rev. St. § 5151 [U. S. Comp. St. 1901, p. 3465].—*King v. Pomeroy (C. C. A.)* 287.

BAR.

Of action by former adjudication, see "Judgment," § 1.

BENEFITS.

Estoppel of corporation by acceptance of benefits under contract by officer, see "Corporations," § 5.

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 2.

BIAS.

Of juror, see "Jury," § 1.

BILL OF DISCOVERY.

See "Discovery," § 1.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF REVIEW.

See "Equity," § 4.

BOARD OF TRADE.

See "Exchanges."

BONA FIDE PURCHASERS.

Of lands, see "Vendor and Purchaser," § 3.

BONDS.

Bonds in legal proceedings, see "Removal of Causes," § 3; "Replevin," § 1.

Corporate bonds, see "Corporations," § 5.

Of county officers, see "Counties," § 1.

Of Indian agent, see "Indians."

BOOKS.

See "Copyrights," § 2.

BOUNDARIES.

Of mining claims, see "Mines and Minerals," § 1.

BREACH.

Of condition, see "Insurance," § 5.

Of contract, see "Contracts," § 3.

Of covenant, see "Insurance," § 5.

Of warranty, see "Insurance," § 4.

BROKERS.

See "Exchanges."

§ 1. Employment and authority.

All demands by a stockbroker upon his customer for margins must be specific, definite, and certain, and the customer is entitled to a reasonable time, under all the circumstances of the case, and taking into consideration the amount demanded, within which to comply with such demand.—*Boyle v. Henning (C. C.)* 376.

No demand by a broker on his customer for margins is specific, unless it mentions a particular sum of money, or unless it states facts from which a particular amount of money may be certainly ascertained.—*Boyle v. Henning (C. C.)* 376.

The right of a stockbroker, who, in accordance with the usages of the exchange, has borrowed stock to deliver to a purchaser, to whom he has sold such stock on the order of a customer, to purchase stock for repayment of that borrowed, considered, where the customer has failed to comply with a demand for further margins.—*Boyle v. Henning (C. C.)* 376.

An order by a customer to a New York stockbroker to sell stock must be considered as having

relation to the usages of the New York Exchange, and, where the same are shown, they will govern the rights of the parties in their relations to and dealings with each other.—*Boyle v. Henning* (C. C.) 376.

CANCELLATION OF INSTRUMENTS.

Cancellation of charter of vessel, see "Shipping," § 1.
Cancellation of insurance policy, see "Insurance," § 3.
Rescission of contracts, see "Sales," § 1.

CARGO.

See "Shipping."

CARRIERS.

Carriage of passengers by vessels, see "Shipping," § 3.

§ 1. Control and regulation of common carriers.

A wharf built by a railroad company in Pensacola Harbor, on which it had laid its tracks, making it a terminal for the transfer of goods from its line to vessels owned by other carriers, is affected by a public use; and the company cannot permit its use by such vessels as it may select, and exclude others, but all are entitled to use it on the same terms.—*West Coast Naval Stores Co. v. Louisville & N. R. Co.* (C. C. A.) 645.

A railroad company is not required by the interstate commerce act to give the same car-load rates on interstate shipments to forwarding agents, who solicit property for shipment from different owners, each having less than a car load, and combine it into car-load lots, that it makes on car-load shipments by a single owner.—*Lundquist v. Grand Trunk Western Ry. Co.* (C. C.) 915.

§ 2. Carriage of passengers.

Where, in an action for injuries to a passenger by the explosion of a boiler of a steamboat, the findings on which judgment for plaintiff were based rested on Act Cong. July 7, 1838, c. 191, § 13 (5 Stat. 305), previously repealed, the judgment should be reversed.—*Richtman v. Haley* (C. C. A.) 353.

Evidence in action by ejected passenger held to warrant recovery for display of force.—*Pennsylvania Co. v. Scofield* (C. C. A.) 814.

Evidence in action by ejected passenger, held not to warrant permitting award of damages for time spent in and expense of litigation.—*Pennsylvania Co. v. Scofield* (C. C. A.) 814.

Evidence in action by ejected passenger held not to warrant an award of damages for loss of time.—*Pennsylvania Co. v. Scofield* (C. C. A.) 814.

Evidence examined, and held insufficient to establish that injury to a passenger in a railroad collision was simulated.—*Stackpole v. Northern Pac. Ry. Co.* (C. C.) 389.

CAUSE OF ACTION.

See "Action."

CHALLENGE.

To juror, see "Jury," § 1.

CHANCERY.

See "Equity."

CHARGE.

To jury in civil actions, see "Trial," § 3.

CHARTER PARTIES.

See "Shipping," § 1.

CHATTEL MORTGAGES.

See "Pledges."

CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

CIRCUIT COURTS OF APPEALS.

See "Courts," § 2.

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Aliens"; "Indians."

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," § 2.
Equal protection of laws, see "Constitutional Law," § 3.

CIVIL RIGHTS.

See "Constitutional Law," § 3.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 7.

Against estate of decedent, see "Executors and Administrators," § 1.
Mining claims, see "Mines and Minerals," § 1.
Or patent, see "Patents," § 3.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 4.

COLLATERAL SECURITY.

See "Pledges."

COLLECTION.

Of costs, see "Costs," § 1.

COLLISION.**§ 1. Steam vessels meeting or crossing.**

A ferryboat *held* in fault for a collision with a crossing tug, because of her failure to act in accordance with the agreement made by signal.—In re Brooklyn Ferry Co. of New York (C. C. A.) 741; The Alaska, Id.

A steamer *held* solely in fault for a collision with a ferryboat crossing the Hudson river for negligent navigation and violation of the rule which required her, having the ferryboat on her own starboard side on a crossing course, to keep out of the way.—The O. J. Reno (D. C.) 149.

Evidence considered, in a case of collision between two steamers in Chesapeake Bay in the night, and one *held* solely in fault for violation of the rules and failure to signal on changing her course.—The Dorchester (D. C.) 889; The Thornhill, Id.

§ 2. Steam vessels and sail vessels.

A steamer *held* solely in fault for a collision with a schooner in passing through a draw-bridge.—The J. C. Ames (D. C.) 918.

The failure of a schooner to show a torch to a steamer approaching in the nighttime, in compliance with rule 12 of the rules for the Great Lakes, is not a fault contributing to a collision with the steamer, where she was seen and signaled by the steamer when a mile distant, and the omission in no way misled or confused the steamer.—The J. C. Ames (D. C.) 918.

§ 3. Vessels at rest, at anchor, or at piers.

A steamer *held* solely in fault for a collision with another, which was grounded and lying across the channel, where the collision occurred in the daytime and there was room to pass in safety.—The City of Macon (C. C. A.) 686.

The absence of a lookout on a tug while entering a slip *held* not a fault, contributing to her injury by striking a hawser stretched across the slip by another vessel, and which, owing to the darkness, could not have been seen by the lookout, if he had been in his proper place.—Erie R. Co. v. Oceanic Steam Nav. Co. (D. C.) 440.

A ship lying at a pier was in fault for stretching a hawser across a slip to the opposite pier in the night, without any warning to other vessels having occasion to use the slip, and liable for the damage to another vessel caused by her striking the hawser without contributory fault.—Erie R. Co. v. Oceanic Steam Nav. Co. (D. C.) 440.

§ 4. Narrow channels, harbors, rivers, and canals.

A steamer *held* in fault for a collision with two steam launches in a river, in which the

launches were sunk, for failing to keep a lookout and for attempting to pass to the left-hand side of the channel, in violation of the rules.—The Dauntless (D. C.) 420.

§ 5. Special circumstances and errors in extremis.

A steamer, in fault for a collision with a grounded vessel, is liable for all the damage resulting, although a large part of it might have been avoided by a different handling of the injured vessel, where those in charge acted in good faith and took what appeared at the time to be the safest course.—The City of Macon (C. C. A.) 686.

§ 6. Suits for damages.

In collision cases, courts of admiralty incline to accept the statements of a crew as to the movements on their own vessel, rather than the statements coming from the crew of the other vessel.—The Dorchester (D. C.) 889; The Thornhill, Id.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMITY.

Between courts, see "Courts," § 4.

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. Means and methods of regulation.

Under the rule that the police power of a state cannot obstruct interstate commerce beyond the necessity for its exercise, state officers cannot accomplish, under the protection of a valid law, results which the state is forbidden to accomplish by legislation; and it is open to the courts to determine whether their action is within the lawful and constitutional powers conferred upon them by the statute, or whether it exceeds such powers and amounts to an unconstitutional obstruction of interstate commerce.—Smith v. Lowe (C. C. A.) 753.

A bill *held* to state a cause of action for equitable relief against the unlawful enforcement by state authorities of a quarantine law against sheep.—Smith v. Lowe (C. C. A.) 753.

COMMISSION.

To take testimony, see "Depositions."

COMMON CARRIERS.

See "Carriers."

COMPENSATION.

Of attorney, see "Attorney and Client," § 1.
Salvage, see "Salvage," § 1.

COMPETENCY.

Of jurors, see "Jury," § 1.
Of witnesses in general, see "Witnesses," § 1.

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 2.

COMPOSITIONS WITH CREDITORS.

In bankruptcy proceedings, see "Bankruptcy," § 8.

COMPUTATION.

Of time, see "Time."

CONCLUSION.

Of witness, see "Evidence," § 5.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 4.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 4.

CONDITIONS.

In insurance policies, see "Insurance," § 5.
Precedent to condemnation of property, see "Eminent Domain," § 2.

CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Bankruptcy," § 6; "Courts," § 4.
What law governs as to limitation of actions, see "Limitation of Actions," § 1.

CONSIDERATION.

Of agreement to pay individual debts of partners, see "Partnership," § 1.
Of contract, see "Contracts," § 1.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

§ 1. Civil liability.

Employees have the right to combine for the purpose of securing better wages or conditions

from their employer, and to strike in concert to secure such ends, when refused, by peaceable and lawful means.—*Wabash R. Co. v. Hannahan* (C. C.) 563.

§ 2. Criminal responsibility.

Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], declaring a punishment for persons conspiring to commit an offense against the United States or to defraud it, will not support an indictment for conspiracy to defraud persons to whom circulars had been sent by mail.—*United States v. Clark* (D. C.) 190.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Eminent Domain," § 1; "Street Railroads," § 1; "Taxation," § 2.

Amendment of statutes, see "Statutes," § 2.
Exclusion of nonmailable matter, see "Post Office," § 1.

Revival of statutes, see "Statutes," § 3.

§ 1. Construction, operation, and enforcement of constitutional provisions.

The power of Congress to legislate on the subject of voting at purely state elections is entirely dependent upon the fifteenth constitutional amendment, and is limited by such amendment to the enactment of appropriate legislation to prevent the right of a citizen of the United States to vote from being denied or abridged by a state on account of race, color, or condition.—*Karem v. United States* (C. C. A.) 250.

Rev. St. § 5508 [U. S. Comp. St. 1901, p. 3712], is not appropriate legislation for the enforcement of the fifteenth constitutional amendment, but has no relation thereto, and will not support an indictment for conspiring to prevent a citizen from voting at a state or municipal election on account of his race or color.—*Karem v. United States* (C. C. A.) 250.

A penal act of Congress cannot be sustained as an exercise of the power given by a constitutional provision to enact appropriate legislation for its enforcement, where the act is broader in its terms than the constitutional provision, and the language used covers wrongful acts without, as well as within, the same.—*Karem v. United States* (C. C. A.) 250.

The invalidity of provisions of income tax law can only be invoked by persons against whom they are sought to be enforced.—*W. C. Peacock & Co. v. Pratt* (O. C. A.) 772.

§ 2. Obligation of contracts.

A statute exempting the property of a railroad company from state or local taxation for a term of years creates a contract, which is impaired by the state by the action of local authorities in imposing taxes upon the exempt property under the general power of taxation given by the state laws.—*Bancroft v. Wicomico County Com'rs* (C. C.) 874.

§ 3. Equal protection of laws.

The provision of the fourteenth constitutional amendment, which forbids states to deny to citi-

zens the equal protection of the laws, does not require taxes to be levied by a uniform method and at the same rate upon every class of property.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

CONTEMPT.

Failure of bankrupt to comply with order of court, see "Bankruptcy," § 5.

Violation of injunction, see "Injunction," § 4.

Violation of injunction in patent infringement suit as contempt, see "Patents," § 8.

§ 1. Acts or conduct constituting contempt of court.

A special representative of the department of justice *held* guilty of contempt of court in obstructing the execution of a writ of supersedeas.—*In re Noyes* (C. C. A.) 209; *In re Geary, Id.*; *In re Wood, Id.*; *In re Frost, Id.*

A district attorney of the United States for an Alaskan district adjudged guilty of contempt in refusing to turn over to deputy marshals charged with the execution of a writ of supersedeas the keys to boxes in which a receiver had stored gold dust which he was required by the writ to restore.—*In re Noyes* (C. C. A.) 209; *In re Geary, Id.*; *In re Wood, Id.*; *In re Frost, Id.*

An attorney for a receiver is not guilty of a contempt in advising his client that in his opinion a writ of supersedeas, issued by an appellate court, commanding the receiver to restore the property in his hands, was void, where he did not advise the receiver to disobey the writ, or as to what action he should take.—*In re Noyes* (C. C. A.) 209; *In re Geary, Id.*; *In re Wood, Id.*; *In re Frost, Id.*

Evidence examined, and *held* to show beyond reasonable doubt that respondent, a judge of the District Court for one of the Districts of Alaska, committed a contempt of the Circuit Court of Appeals by refusing to order a receiver appointed by him to obey a writ of supersedeas granted by such court, and by obstructing the execution of such writ.—*In re Noyes* (C. C. A.) 209; *In re Geary, Id.*; *In re Wood, Id.*; *In re Frost, Id.*

§ 2. Power to punish and proceedings therefor.

In proceedings for contempt of court in refusing to obey and obstructing the execution of writs of supersedeas granted by it, evidence of the relation of the respondents to the litigation or the parties concerned, and showing other acts of misconduct on their part in relation thereto besides those charged, is admissible to show their animus and motives, and to characterize their action.—*In re Noyes* (C. C. A.) 209; *In re Geary, Id.*; *In re Wood, Id.*; *In re Frost, Id.*

CONTINGENT FEES.

See "Attorney and Client," § 1. <

CONTRACTS.

Equity jurisdiction, see "Equity," § 1.

Impairing obligation, see "Constitutional Law," § 2.

Liquidated damages or penalties, see "Damages," § 1.

Operation and effect of gaming laws, see "Gaming," § 1.

Parol or extrinsic evidence, see "Evidence," § 4.

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Attorney and Client," § 1; "Corporations," § 5; "Municipal Corporations," § 1.

Contracts relating to particular subjects.

Carriage of passengers by vessel, see "Shipping," § 3.

Contingent fees, see "Attorney and Client," § 1.

Water supply, see "Waters and Water Courses," § 1.

Particular classes of express contracts.

See "Indemnity"; "Insurance"; "Liens"; "Sales."

Charter parties, see "Shipping," § 1.

For compensation of attorney, see "Attorney and Client," § 1.

Sale of realty, see "Vendor and Purchaser."

Stipulations in actions, see "Stipulations."

Particular classes of implied contracts.

See "Use and Occupation."

§ 1. Requisites and validity.

An agreement by defendant not to enter into competition with the business of complainant for 10 years, nor disclose or use its trade secrets, *held* valid as incidental to the sale by defendant to complainant of an equity in stock of complainant, the value of which would be affected by such competition or disclosure.—*S. Jarvis Adams Co. v. Knapp* (C. C. A.) 34.

A contract by which defendant agreed not to enter into competition with the business of complainant *held* based on a sufficient consideration.—*S. Jarvis Adams Co. v. Knapp* (C. C. A.) 34.

A contract for the purchase and sale of all the phosphate rock consumed by plaintiff in its factory for the manufacture of fertilizers for five years, the estimated or normal quantity used being stated, construed, and *held* not void for want of mutuality.—*Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. A.) 298.

A promise by a bank's cashier to divide with the president a surplus arising from the sale of collateral held by the bank, as security for a debt of a corporation which the cashier reorganized, *held* nudum pactum.—*Patton v. Wells* (C. C. A.) 337.

A contract for the furnishing of funds for the construction of houses *held* not to contain an implied provision that defendant was to furnish

purchasers therefor.—*Arthur v. Baron de Hirsch Fund* (C. C. A.) 791.

A contract for the sale of growing hops *held* not void for want of mutuality.—*Lilienthal Bros. v. Stearns* (C. C.) 197.

§ 2. Construction and operation.

A contract by a manufacturing concern for the purchase of all of a certain material used in its factory for five years at a fixed price per ton, to be shipped on orders as required, is entire, and not divisible.—*Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. A.) 298.

The question whether a word used in a written instrument has a technical meaning, more comprehensive than its ordinary meaning, in which the parties understood it, is an issue of fact for the jury.—*Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* (C. C. A.) 524.

Under Code Civ. Proc. Mont. §§ 3136, 3137, evidence of previous negotiations of parties *held* admissible on construction of written instrument.—*Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* (C. C. A.) 524.

Contract of a car company to make and deliver 400 cars to a railroad before a certain date, subject to delays from unavoidable contingencies, construed.—*Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A.) 609; *Eastern Ry. Co. of Minnesota v. Pressed Steel Car Co., Id.*

Where the language of a contract is ambiguous, the interpretation which evolves the more reasonable contract should be adopted.—*Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A.) 609; *Eastern Ry. Co. of Minnesota v. Pressed Steel Car Co., Id.*

The purpose of the construction of a contract is to ascertain the intention of the parties, and, when this is discovered, it prevails over verbal inaccuracies and inapt expressions.—*Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A.) 609; *Eastern Ry. Co. of Minnesota v. Pressed Steel Car Co., Id.*

The intention of the parties to a contract must be determined from the entire agreement, where it has several stipulations.—*Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A.) 609; *Eastern Ry. Co. of Minnesota v. Pressed Steel Car Co., Id.*

The fact that a contract between defendant and another was made by such other on behalf of himself and complainants, which was known to defendant, did not create any contractual relation between complainants and defendant which will support an action.—*Moore v. Hammond* (C. C. A.) 759.

The action of the trial court in submitting to the jury the question whether a contract was made between the parties *held* error, where the correspondence between them clearly constituted a contract.—*Roberts v. Pacific & A. Ry. & Nav. Co.* (C. C. A.) 785.

§ 3. Performance or breach.

A delay of a few days by a party to a contract before refusing a demand for further performance *held* not to estop it to deny its lia-

bility on the contract on the ground of a prior breach by the other party.—*Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. A.) 298.

A plaintiff, which, after contracting for all of a crude material consumed in its factory for five years, during nearly two years of the time substituted such material purchased from others in a partly manufactured state, because more economical, committed a substantial breach of the contract.—*Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. A.) 298.

A party to a contract who commits a substantial breach thereof cannot maintain an action against the other party for a subsequent failure or refusal to perform.—*Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. A.) 298.

§ 4. Actions for breach.

In an action by the president of a bank against the cashier to recover a portion of an alleged profit made by the cashier in reorganizing a corporation indebted to the bank, evidence *held* insufficient to show the making of a contract to divide the profit.—*Patton v. Wells* (C. C. A.) 337.

Whether plaintiff rendered services as a director and officer of a bank, relying on defendant's promise to remunerate him in accordance with the promise alleged, *held* a question for the jury.—*Patton v. Wells* (C. C. A.) 337.

In an action for services, a requested instruction, that plaintiff must prove by a preponderance of the evidence an express promise to pay for the services rendered, *held* improperly refused.—*Patton v. Wells* (C. C. A.) 337.

A bill to recover share of profits under contract with third party considered, and *held* not to state a cause of action against defendant.—*Moore v. Hammond* (C. C. A.) 759.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 1.

CONVEYANCES.

By corporation, see "Corporations," § 5.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

COPYRIGHTS.

§ 1. Nature and acquisition.

A colored photograph or picture of natural scenery may be the subject of a copyright.—*Cleland v. Thayer* (C. C. A.) 71.

§ 2. Infringement.

The common-law action of replevin, as it is practiced in Pennsylvania, is not an appropriate remedy by which to enforce the forfeiture provided by Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], and the legislation supplementary thereto relating to copyrights.—*Rinehart v. Smith* (C. C.) 148.

In a suit for infringement of copyright, evidence that complainant had itself appropriated the copyrighted matter of third persons is immaterial.—*Edward Thompson Co. v. American Law Book Co.* (C. C.) 907.

Reproduction in a rival legal encyclopædia of citations compiled by original labor *held* an infringement of copyright.—*Edward Thompson Co. v. American Law Book Co.* (C. C.) 907.

Where illustrations were reproductions of copyrighted photographs of plaintiff's painting, which was also copyrighted, such illustrations did not constitute an infringement of the copyright on the painting.—*Champney v. Haag* (C. C.) 944.

CORPORATIONS.

Condemnation of property, see "Eminent Domain."

Corporation license fee as debt provable against estate of bankrupt, see "Bankruptcy," § 7.

Enjoining sale of corporate stock, see "Injunction," § 2.

Liability for violation of injunction by officers in patent infringement suit, see "Patents," § 8.

Parol evidence affecting articles of incorporation, see "Evidence," § 4.

Subject to bankruptcy act, see "Bankruptcy," § 2.

Particular classes of corporations.

See "Exchanges"; "Municipal Corporations"; "Street Railroads," § 1.

Banks, see "Banks and Banking," § 1.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Water companies, see "Waters and Water Courses," § 1.

§ 1. Incorporation and organization.

Under a statute requiring articles of incorporation to be signed by the president and directors, the fact that the president and directors did sign them is a sufficient compliance with the statute, though they did not affix their official titles to their signatures.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

The filing of a duplicate of articles of incorporation with the clerk of the county selected by the corporation as its place of business *held* a sufficient compliance with Sand. & H. Dig. § 1334.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

§ 2. Capital, stock, and dividends.

Dividends paid by a corporation to its stockholders are not subject to any lien or claim on behalf of its general creditors, in the absence of proof of insolvency at the time the payments were made, or of a fraudulent purpose.—*New Hampshire Sav. Bank v. Richey* (C. C. A.) 956.

§ 3. Members and stockholders.

In an action to charge stockholders with a debt of the corporation, parol evidence is admissible to prove an agreement by which defendants received full-paid stock in payment for property transferred to the corporation, and that plaintiff was a party to such agreement.

—*Cunningham v. Holley, Mason, Marks & Co.* (C. C. A.) 720.

One who participated in the organization of a corporation, and in an agreement by which full-paid stock was issued in payment for property, cannot, on subsequently becoming a creditor of the corporation, impeach such agreement, for the purpose of charging other stockholders with liability, on the ground that the actual value of the property was less than the par value of the stock.—*Cunningham v. Holley, Mason, Marks & Co.* (C. C. A.) 720.

Under the statute of Nebraska as construed by the Supreme Court of the state, a creditor of a corporation can only maintain a suit against the stockholders after he has reduced his claim to judgment against the corporation and exhausted the corporate assets.—*New Hampshire Sav. Bank v. Richey* (C. C. A.) 956.

General creditors of a corporation can only proceed against its stockholders in a federal court of equity after they have exhausted their remedy against the corporation by reducing their claims to judgment.—*New Hampshire Sav. Bank v. Richey* (C. C. A.) 956.

Parties permitting and acquiescing in the issuance of stock to them in a corporation *held* to be liable as stockholders.—*Hecht, Liebmann & Co. v. Phenix Woollen Co.* (C. C.) 188.

§ 4. Officers and agents.

Code Civ. Proc. Mont. tit. 2, §§ 515, 554, prescribing a limitation for the recovery of statutory penalties, *held* not to apply to an action to enforce forfeiture against stockholders or directors of a corporation, as authorized by Civ. Code Mont. § 451.—*Davis v. Mills* (C. C. A.) 703.

§ 5. Corporate powers and liabilities.

Where a corporation accepted the benefits of a contract, and paid a large part of the consideration, it could not contest the validity of the contract after performance by the other party thereto.—*Owyhee Land & Irrigation Co. v. Tautphas* (C. C. A.) 343.

Neither stockholders nor general creditors of a corporation without liens are necessary parties to a suit to enforce liens on its property, nor need they be served with a rule for confirmation of a sale of such property.—*Godchaux v. Morris* (C. C. A.) 482.

A solvent corporation, while a going concern, may dispose of its property, like an individual, free from any lien or trust in favor of general creditors.—*New Hampshire Sav. Bank v. Richey* (C. C. A.) 956.

Showing *held* insufficient to entitle a bondholder to intervene and be made a party complainant in a suit to foreclose a corporate mortgage.—*Land Title & Trust Co. v. Asphalt Co. of America* (C. C.) 587.

The fact of a voluntary compromise and settlement of their claims by a majority of the bondholders of a corporation, pending a suit to foreclose, does not prejudice the rights of the minority, who do not assent to such settlement.—*Land Title & Trust Co. v. Asphalt Co. of America* (C. C.) 587.

§ 6. Insolvency and receivers.

Court will not compel a receiver at the instance of a stockholder to set up matters by way of defense to a bill for sale of securities, which the receiver avers are without foundation.—*Land Title & Trust Co. v. Asphalt Co. of America* (C. C.) 192.

A court will not direct suits by its receivers, appointed for an insolvent corporation, to ascertain and enforce the liability of officers and promoters until its visible assets have been liquidated.—*Land Title & Trust Co. v. Asphalt Co. of America* (C. C.) 587.

§ 7. Foreign corporations.

In an action on a contract with a foreign corporation, evidence as to what occurred at an alleged meeting of directors, and letters written by alleged officers and persons in control of the company's funds, *held* admissible.—*Owyhee Land & Irrigation Co. v. Tautphas* (C. C. A.) 343.

In an action on a contract with a foreign corporation for the construction of an irrigation canal, evidence that plaintiff attended a meeting of the board of directors, and as to where such meeting was held, was admissible.—*Owyhee Land & Irrigation Co. v. Tautphas* (C. C. A.) 343.

A certificate made by a foreign corporation, appointing agents on whom process might be served in another state, *held* admissible to show that the person recited therein to be the president of the corporation was the president in fact.—*Owyhee Land & Irrigation Co. v. Tautphas* (C. C. A.) 343.

COSTS.

§ 1. Payment and remedies for collection.

Under the provision of Code Civ. Proc. N. Y. § 779, made applicable by rule to procedure in the Circuit Court of the United States in the Northern District of New York, where a bill was dismissed at complainant's costs, without prejudice to a new suit the failure to pay the costs of the first suit operates only to stay proceedings in the second suit until such payment is made.—*Kellogg Switchboard & Supply Co. v. Glen Telephone Co.* (C. C.) 174.

COUNTIES.

§ 1. Government and officers.

A county treasurer in Alabama, required by law to receive and keep the proceeds of certain bonds, accepted the check of the purchaser, a local bank, and receipted to the county board for the amount as the proceeds of the bonds, and charged himself with the amount on his books. He deposited the check to his credit as treasurer in the bank, which subsequently failed. *Held*, that the transaction was the same as though he had received coin or bank bills, and had deposited the same, and that he was liable on his bond for the loss to the county; his act in making a general deposit of county funds constituting a conversion under the law of the state.—*Montgomery County v. Cochran* (C. C. A.) 17.

A county treasurer, required by statute to safely keep all "funds or money" of the county, who accepts checks or other forms of paper authorized by general commercial usage, is chargeable with the same as money.—*Montgomery County v. Cochran* (C. C. A.) 17.

Where, under the statute, the bond of a county treasurer is conditioned that he shall faithfully discharge all official duties, safely keep all public money, and shall be responsible for the improper or neglectful performance of any duty imposed on him by law, his acceptance of a check, instead of demanding coin or bank bills, conceding it to have been unauthorized, was an improper or neglectful performance of duty, which renders him liable on his bond for a loss resulting to the county.—*Montgomery County v. Cochran* (C. C. A.) 17.

COURTS.

Contempt of court, see "Contempt."
Jurisdiction in bankruptcy, see "Bankruptcy," § 5.

Jurisdiction of actions by or against trustee in bankruptcy, see "Bankruptcy," § 6.

Jurisdiction of suits for infringement of patents, see "Patents," § 8.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

§ 1. Nature, extent, and exercise of jurisdiction in general.

The objection that the evidence is insufficient to establish plaintiff's jurisdictional allegation of citizenship cannot properly be raised by asking an instruction directing a verdict for defendant.—*Southern Electric Ry. Co. v. Hageman* (C. C. A.) 262.

§ 2. Establishment, organization, and procedure in general.

General expressions in opinions of courts are not authoritative beyond the questions they were considering and deciding when they used them.—*King v. Pomeroy* (C. C. A.) 287.

A decision rendered upon reversing an order granting a preliminary injunction becomes the law of the case.—*Western Union Telegraph Co. v. City of Toledo* (C. C. A.) 734.

§ 3. United States courts.

The law of Louisiana, although it makes no provision for liens aside from contractual privileges and mortgages, does not preclude the allowance and enforcement of an equitable lien by a federal court.—*Howard v. Delgado & Co.* (C. C. A.) 26.

The value of the matter in dispute, on which the jurisdiction of the federal circuit court is based, is the value of that which complainant seeks to recover, or the value of that which defendant will lose.—*Cowell v. City Water Supply Co.* (C. C. A.) 53.

In a suit by an alleged owner of $1/325$ of certain real property, consisting of waterworks and their appurtenances, to cancel and avoid mortgages thereon, the value in dispute is the value of $1/325$ of the property, which complainant claims to own and seeks to relieve from

the incumbrances.—*Cowell v. City Water Supply Co.* (C. C. A.) 53.

A decision of the Supreme Court of a state on a general law, such as the effect of the invalidity of a contract on the rights of the parties to a suit, is not binding upon a federal court.—*Gilbert v. American Surety Co.* (C. C. A.) 499.

Where an action is dismissed by the Circuit Court for want of jurisdiction, no other question being determined, the judgment is not reviewable by the Circuit Court of Appeals, but only by the Supreme Court.—*Hays v. Richardson* (C. C. A.) 536.

A state statute of limitations cannot bar an action by the United States on the bond of a public officer.—*United States v. Fidelity Trust Co.* (C. C. A.) 766.

Under Act March 3, 1891, § 6, 26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 549], Circuit Court of Appeals *held* to have no power to review question as to diversity of citizenship, vesting jurisdiction in Circuit Court.—*Sun Printing & Publishing Ass'n v. Edwards* (C. C. A.) 826.

On error to the Circuit Court from the Circuit Court of Appeals, a question as to the jurisdiction of the Circuit Court will be certified to the Supreme Court, and meanwhile other questions will be reserved.—*Sun Printing & Publishing Ass'n v. Edwards* (C. C. A.) 826.

§ 4. Concurrent and conflicting jurisdiction, and comity.

Where there exist two tribunals of concurrent and complete jurisdiction to appoint a receiver of a corporation, the jurisdiction becomes exclusive in the one before which proceedings are first instituted.—*McDowell v. McCormick* (C. C. A.) 61.

COVENANTS.

In insurance policies, see "Insurance," § 5.

CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances." Subrogation to rights of creditor, see "Subrogation."

CRIMINAL LAW.

Indictment, information, or complaint, see "Indictment and Information."

Particular offenses.

See "Conspiracy," § 2; "Contempt"; "Embezzlement."

Offenses against internal revenue laws, see "Internal Revenue."

Offenses against postal laws, see "Post Office," § 2.

Violation of Chinese exclusion laws, see "Aliens," § 1.

§ 1. Trial.

In a prosecution of a clerk of the mint for failing to deposit moneys, a remark of counsel for the government, which was withdrawn on

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objection, *held* not error.—*Dimmick v. United States* (C. C. A.) 638.

§ 2. Appeal and error, and certiorari.

An objection to an indictment on the ground of repugnancy cannot be reviewed on appeal, when it was not raised in the Circuit Court.—*Sims v. United States* (C. C. A.) 515.

CUSTODY.

Of jury, see "Trial," § 4.

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.

Gauge glasses, consisting of glass tubes ready for mounting, *held* "blown glassware," and taxable for duty under Tariff Act 1897, par. 100 (Act July 24, 1897, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633]), and not under paragraph 112, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1634], as manufactures of glass not specially provided for.—*Rogers v. United States* (C. C. A.) 546.

Evidence of the trade meaning of a term used in a tariff act is inadmissible, unless such meaning differs from the ordinary meaning of the term.—*United States v. Nordlinger* (C. C. A.) 690.

Where the evidence as to the trade meaning of fruits preserved in sugar, under Tariff Act 1883, par. 302, 22 Stat. 504, was conflicting, the words would be given their ordinary meaning.—*United States v. Nordlinger* (C. C. A.) 690.

Leghorn citron *held* taxable for duty as fruits preserved in sugar, under Tariff Act 1883, par. 302, 22 Stat. 504, and not entitled to free admission, under paragraph 704, 22 Stat. 519, as dried fruits not specifically enumerated.—*United States v. Nordlinger* (C. C. A.) 690.

Filled bottles, holding not more than a pint, *held* not taxable for duty under Tariff Act 1894, par. 88 (Act Aug. 27, 1894, c. 349, 28 Stat. 513), as vials or other glassware.—*United States v. Austin, Nichols & Co.* (C. C. A.) 729; *Same v. Leggett, Id.*; *Same v. Schering & Glatz, Id.*; *Same v. Bogle & Scott, Id.*

Trimmings cut out of cotton velvet fabric, in scroll work designs and colors, are dutiable as pile cotton fabrics, under the second proviso of paragraph 315 of the tariff act of July 24, 1897 (30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]), and not as cotton trimmings, under paragraph 339 (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]).—*Horstmann, Von Hein & Co. v. United States* (C. C.) 147.

Articles *held* dutiable, not as silk trimmings, under Tariff Act 1897, par. 390 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), but as manufactures of silk not specially provided for, under paragraph 391.—*Garrison, Wright & Co. v. United States* (C. C.) 149.

Articles, such as paper weights, made wholly or chiefly of agate or onyx, *held* dutiable by

similitude to "precious stones cut, but not set," under Tariff Act Oct. 1, 1890, § 5, 26 Stat. 613, and Rev. St. § 2499.—*Hahn v. United States* (C. C.) 152.

Tariff Act July 24, 1897, c. 11, § 29, 30 Stat. 210 [U. S. Comp. St. 1901, p. 1957], relating to smelting or refining ores, provides a way by which, without evasion, the crude material can come into the country for the purpose of being smelted or refined.—*In re Guggenheim Smelting Co.* (C. C.) 153.

Arbitrary allowance of 10 per cent. for waste, as allowed by Tariff Act 1897, § 29 (Act July 24, 1897, c. 11, 30 Stat. 210 [U. S. Comp. St. 1901, p. 1957]), gives the bonded smelter of right that much more than the previous act accorded him.—*In re Guggenheim Smelting Co.* (C. C.) 153.

Section 29 of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 210 [U. S. Comp. St. 1901, p. 1957]) construed, and *held* to require the exportation of 90 per cent. only of the refined metal produced from ores or base metals imported under its provisions for smelting or refining in bond, in order to relieve such ores or metals from the payment of duty, and not 90 per cent. of the quantity of pure metal in the ores or base metals as shown by assay.—*In re Guggenheim Smelting Co.* (C. C.) 153.

Decorated and ornamented plaster of paris statuettes *held* taxable under Revenue Act July 24, 1897, c. 11, par. 450, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], as manufactured plaster of paris not specially provided for.—*T. Bing & Co.'s Successors v. United States* (C. C.) 194.

Grass piquets used for millinery purposes, *held* not assessable for duty under Revenue Act July 24, 1897, par. 449 (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]), as manufacture of grass, straw, etc., but under paragraph 425 (30 Stat. 191 [U. S. Comp. St. 1901, p. 1675]), as artificial or ornamental grains, leaves, fruits, and flowers.—*Herman & Guinzeberg v. United States* (C. C.) 201.

Precipitated chalk, dried and bolted, to be used for tooth powder, *held* taxable, as a manufacture of chalk not otherwise provided for, at 25 per cent. ad valorem, under Act July 24, 1897, par. 13, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627].—*I. W. Lyon & Son v. United States* (C. C.) 204.

Certain goods *held* not assessable as trimmings under Act July 24, 1897, par. 390, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], but as manufactures of silk, under paragraph 391.—*Robinson v. United States* (C. C.) 204.

Spangled horse hair braids *held* assessable under paragraph 408 of the act of July 24, 1897 (30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]), and not under paragraph 371 (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]).—*Veit. Son & Co. v. United States* (C. C.) 205.

Paper books in German, containing illuminated lithographic prints, *held* taxable under Revenue Act July 24, 1897, par. 400 (30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), and not entitled to free entry, under paragraph 502 (30

Stat. 196 [U. S. Comp. St. 1901, p. 1681]).—*F. H. Petry & Co. v. United States* (C. C.) 207.

Mixed linoleum *held* not taxable for duty as "inlaid linoleum," but as linoleum "figured or plain," under Act July 24, 1897, par. 337, 30 Stat. 180 [U. S. Comp. St. 1901, p. 1662].—*Hunter & Whitcombe v. United States* (C. C.) 207.

Commercial carbonate of baryta is exempt from duty under section 2 of the tariff act of July 24, 1897 (30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]), and not dutiable, under paragraph 3 (30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]), as a chemical compound or salt not provided for.—*Gabriel & Schall v. United States* (C. C.) 208.

An article *held* dutiable, not as a braid, under Tariff Act July 24, 1897, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], but as a binding or tape, under paragraph 320, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661].—*A. Steinhart & Bro. v. United States* (C. C.) 442.

An article, not an albumen in the technical language of chemists, but only in common speech, *held* not dutiable under Tariff Act 1897, par. 245, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], but on the free list, under paragraph 468 [page 1679].—*Merchants' Despatch Transp. Co. v. United States* (C. C.) 443.

§ 2. Entry and appraisal of goods, bonds, and warehouses.

An importer is entitled to have no greater portion of the importation produced and examined, on appeal to the board of general appraisers, than Rev. St. § 2939 [U. S. Comp. St. 1901, p. 1938], directs shall be sent to the appraiser.—*Renvy, Schmidt & Pleissner v. United States* (C. C.) 441.

An appraiser, in exercising discretion as to the production of packages for examination, is presumed to have acted fairly, unless the contrary is shown.—*Renvy, Schmidt & Pleissner v. United States* (C. C.) 441.

The act of the collector on reliquidation *held* to be the act finally imposing the duty, as regards the time of protest.—*In re Brown, Durrell & Co.* (C. C.) 605.

DAMAGES.

Damages for particular injuries.

Breach of contract of insurance, see "Insurance," § 2.

Ejection of passenger, see "Carriers," § 2.

Failure of ship to provide injured seaman with care and medical attendance, see "Seamen."

Infringement of patent, see "Patents," § 8.

§ 1. Liquidated damages and penalties.

Where it is certain that some damages will result from delay in performance of a contract, an agreement to pay a sum certain for each day of delay is a valid and enforceable agreement.—*Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A.) 609; *Eastern Ry. Co. of Minnesota v. Pressed Steel Car Co., Id.*

Where a contract provided for liquidated damages for delay in the erection of machinery purchased, the fact that the purchaser sustained no actual loss from such delay was no bar to a recovery of such damages.—*Wood v. Niagara Falls Paper Co.* (C. C. A.) 818.

A provision in a contract that time is of its essence, and that payments made thereon are to be deemed damages, and retained as such in case of a future default, is not conclusive on the court; and where it is apparent from the whole contract that the provision is in fact one for a penalty, and not for damages, the contract will be so construed.—*Sherburne v. Hirst* (C. C.) 998.

A provision in a contract for the sale of land that, in case of default in the last payment, the prior payments should be retained by the vendor as damages, construed, and held one for a penalty, against which the court would grant relief.—*Sherburne v. Hirst* (C. C.) 998.

§ 2. Inadequate and excessive damages.

A verdict for \$7,500 damages for a personal injury to plaintiff, amounting at most to a partial displacement or dislocation of his knee cap, held excessive.—*Langbein v. Swift* (C. C.) 416.

DEATH.

Of party to action ground for abatement, see "Abatement and Revival," § 2.

§ 1. Actions for causing death.

In estimating damages for wrongful death under the California statute, the ages and expectancy of life of dependent beneficiaries may properly be taken into account.—*The Dauntless* (D. C.) 420.

DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Executors and Administrators."

DEPOSITARIES.

See "Deposits in Court."

DEPOSITIONS.

Depositions cannot be taken under a *dedimus potestatem* issued under Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], under authority of section 863 [U. S. Comp. St. 1901, p. 661], which relates exclusively to depositions *de bene esse*.—*North American Transportation & Trading Co. v. Howells* (C. C. A.) 694.

That complainant refused to produce an agreement on the taking of his deposition, which was desired only to show complainant's interest in the suit, held not ground for striking his deposition or opening the same.—*Bullock Electric Mfg. Co. v. Crocker Wheeler Co.* (C. C.) 200.

DEPOSITS IN COURT.

Where payment of a fund in court was enjoined pending further proceedings between the parties, persons claiming a lien on the fund, who had not intervened and were not parties, held not entitled to an adjudication of their rights on motion in advance of the trial.—*Fry v. Bruhn Co. v. Meyer* (C. C. A.) 533.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators."

War revenue inheritance taxes, see "Internal Revenue."

DESIGN PATENTS.

See "Patents," § 3.

DETINUE.

See "Replevin."

DIRECTING VERDICT.

In civil actions, see "Trial," § 2.

DISCHARGE.

From indebtedness, see "Bankruptcy," § 9.

DISCOVERY.

§ 1. In equity.

Under equity rule 43, a complainant who waives an oath cannot have a discovery.—*Tillinghast v. Chace* (C. C.) 435.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 7.

DISMISSAL AND NONSUIT.

Dismissal of suit for infringement of patent, see "Patents," § 8.

Dismissal of suit in equity, see "Equity," § 3.

§ 1. Involuntary.

An order of dismissal at complainant's costs is not conditional, but absolute; nor is it void because granted *ex parte* on complainant's motion. If irregular, defendant's remedy is by motion to set it aside, in the absence of which the irregularity is waived.—*Kellogg Switchboard & Supply Co. v. Glen Telephone Co.* (C. C.) 174.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 7.

DISTRICT AND PROSECUTING ATTORNEYS.

Liability of attorney for contempt, see "Contempt," § 1.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 2.

DIVIDENDS.

On corporate stock, see "Corporations," § 2.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 3.

DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

EJECTION.

Of passenger, see "Carriers," § 2.

EJECTIONMENT.

§ 1. Right of action and defenses.

Under a statute providing that a plaintiff in ejectionment must have been seised or possessed of the premises within 10 years, the legal title is sufficient to establish both seisin and possession, unless actual adverse possession is shown.—*Tyee Consol. Min. Co. v. Langstedt* (C. C. A.) 709.

ELECTIONS.

Validity of federal laws relating to state elections, see "Constitutional Law," § 1.

EMBEZZLEMENT.

In a prosecution of a clerk of the mint for failing to deposit money received for old materials, a requested instruction *held* covered by the charge.—*Dimmick v. United States* (C. C. A.) 638.

A verdict of guilty on two counts of an indictment against a government clerk for failure to deposit moneys *held* not to operate as an acquittal by reason of other counts for embezzlement of the same moneys, on which no verdict was rendered.—*Dimmick v. United States* (C. C. A.) 638.

A verdict against a clerk of the mint for failure to deposit moneys received, as required by the treasury regulations, *held* sustained by the evidence.—*Dimmick v. United States* (C. C. A.) 638.

In a prosecution of a clerk of the mint for failing to deposit money received for old materials, a rule of the treasury department requiring such funds to be deposited before the end of the succeeding quarter *held* admissible.—*Dimmick v. United States* (C. C. A.) 638.

An indictment against a government employe for failing to deposit money in accordance with treasury regulations *held* not objectionable on

the ground that it merely charged a failure to deposit on a specified date.—*Dimmick v. United States* (C. C. A.) 638.

An indictment against a clerk of the United States Mint for failing to deposit money, as required by Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], *held* not objectionable for failure to describe the money.—*Dimmick v. United States* (C. C. A.) 638.

A general regulation of the Treasury Department, requiring moneys to be deposited on the last day of the quarter in which they were received, *held* a sufficient requirement by the Secretary of the Treasury, within Rev. St. § 5492 [U. S. Comp. St. 1901, p. 3705], providing a punishment for failing to deposit such moneys on request.—*Dimmick v. United States* (C. C. A.) 638.

In a prosecution of a clerk of the mint for failing to deposit moneys received for old materials, a requested instruction that he was not guilty if he deposited the money before the last of the succeeding quarter *held* properly refused.—*Dimmick v. United States* (C. C. A.) 638.

EMINENT DOMAIN.

§ 1. Nature, extent, and delegation of power.

Sand. & H. Dig. §§ 2757, 2758, 2770, granting to telephone and telegraph companies the right to condemn a right of way, *held* constitutional.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

A corporation of Arkansas has no right under the laws of that state to exercise the power of eminent domain in the Indian Territory.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

§ 2. Proceedings to take property and assess compensation.

The necessity for the taking by a corporation of property in condemnation proceedings is for the court.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

Where the Legislature has granted to a telephone company a right to condemn an easement on the right of way of a railroad company, the issue as to the necessity of taking is, first, whether the use of the right of way by the railroad company will be substantially obstructed; and, second, whether the location and easement sought to be acquired is necessary for the use of the telephone company.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

Where a failure to agree is alleged in a petition for condemnation, and is a condition precedent to the right to condemn, the fact that there was no such failure is no ground for an injunction against entry thereunder.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

Under Sand. & H. Dig. § 2770, a survey of a telephone or telegraph line is not an indispensable prerequisite to condemnation proceed-

ings, where the data for a clear description and location of the line otherwise exists.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

A description of the route of a telephone company in the articles of incorporation *held* not indispensable to the acquisition of the power to condemn the right of way given by Sand. & H. Dig. for such lines.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

§ 3. Remedies of owners of property.

A bill in equity for an injunction is the proper remedy in Arkansas to restrain an unauthorized exercise of the power of eminent domain.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

EMPLOYES.

See "Master and Servant."

ENLISTMENT.

In navy, see "Army and Navy."

ENTRY.

Of imported goods, see "Customs Duties," § 2.
Of judgment, see "Appeal and Error," § 1.
Of public lands, see "Public Lands," § 2.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE LIENS.

See "Liens."

Effect of state practice, see "Courts," § 2.

EQUITY.

Effect of state practice on allowance of equitable liens in federal courts, see "Courts," § 2.
Equitable liens, see "Liens."

Particular subjects of equitable jurisdiction and equitable remedies.

See "Discovery," § 1; "Fraudulent Conveyances"; "Injunction"; "Receivers"; "Specific Performance"; "Trusts."

Enforcement of lien on pledge, see "Pledges."
Suits for infringement of patents, see "Patents," § 8.

§ 1. Jurisdiction, principles, and maxims.

A court of equity is without jurisdiction of a suit to construe a written contract and recover damages for its breach, where neither fraud nor mistake is alleged, nor a reformation prayed for.—*Clarke v. Shirk* (C. C. A.) 340.

Default in the payment of an installment due on a contract for the purchase of hotel furniture, upon which a forfeiture was declared by the seller, *held* to have resulted from the unau-

thorized appointment of a receiver for the business of the purchaser, procured without notice to him and with the consent of the seller, which entitled the purchaser's assignee to have the forfeiture set aside.—*Foley v. Grand Hotel Co.* (C. C. A.) 509.

The principle that he who comes into equity must come with clean hands repels a complainant only when his wrongdoing consists of misconduct in the transactions raising the equity which he seeks to enforce.—*Trice v. Comstock* (C. C. A.) 620.

§ 2. Pleading.

A bill is multifarious which joins a cause of action against a corporation for the foreclosure of a mortgage and one against stockholders to recover dividends paid from income on which the mortgage was not a lien.—*New Hampshire Sav. Bank v. Richey* (C. C. A.) 956.

Matters set up in a combined "plea and answer," in the form of pleas, but which might properly be pleaded by way of answer, will not be stricken out on motion; nor will a plea to the jurisdiction, where the same point has been previously raised and passed on adversely on a motion for a preliminary injunction.—*Standard Distilling & Distributing Co. v. Woolsey* (C. C.) 1016.

§ 3. Dismissal before hearing.

A complainant *held* entitled to dismiss a bill before hearing, where defendant is not deprived of any substantial right, and is not entitled to affirmative relief.—*Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.* (C. C.) 1015.

§ 4. Bill of review.

A bill of review for newly discovered matters cannot be filed without leave of the appellate court.—*Camp Mfg. Co. v. Parker* (C. C.) 195.

Leave to file a bill of review can only be obtained from the court in which the decree is rendered and enrolled.—*Camp Mfg. Co. v. Parker* (C. C.) 195.

A bill of review for matters of law appearing on a record must be filed within the time allowed for an appeal, and for newly discovered matters within a reasonable time.—*Camp Mfg. Co. v. Parker* (C. C.) 195.

After decision of a cause in the Circuit Court of Appeals, a bill of review filed without leave of such court must be considered as filed on the date on which leave to file was subsequently granted.—*Camp Mfg. Co. v. Parker* (C. C.) 195.

Bill of review *held* not maintainable on the ground of newly discovered matter constituting fraud on complainant.—*Camp Mfg. Co. v. Parker* (C. C.) 195.

When a bill of review is based on newly discovered evidence, it must be on new matter which has arisen since the decree.—*Camp Mfg. Co. v. Parker* (C. C.) 195.

A bill of review may be based on newly discovered evidence which could not have been used on a former hearing, or for errors appearing on the record.—*Camp Mfg. Co. v. Parker* (C. C.) 195.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of railroads, see "Street Railroads," § 1.
Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.

ESTATES.

Decedents' estates, see "Executors and Administrators."

ESTOPPEL.

As between principal and agent, see "Principal and Agent," § 1.
By judgment, see "Judgment," §§ 1-3.
To deny authority of corporate officer, see "Corporations," § 5.
To deny breach of contract, see "Contracts," § 3.
To take appeal, see "Appeal and Error," § 2.

EVIDENCE.

See "Depositions"; "Discovery"; "Witnesses."
Questions of fact for jury, see "Trial," § 2.
Reception at trial, see "Trial," § 1.
Review dependent on presentation of questions by record, see "Appeal and Error," § 5.
Review on appeal or writ of error, see "Appeal and Error," § 7.

As to particular facts or issues.

Classification of imported goods, see "Customs Duties," § 1.
Construction of contract, see "Contracts," § 2.
Legality of contract as affected by gaming laws, see "Gaming," § 1.
Violation of injunction in patent infringement suit, see "Patents," § 8.

In actions by or against particular classes of parties.

See "Carriers," § 2; "Master and Servant," § 1;
"Municipal Corporations," § 1; "Railroads," § 2.
Foreign corporations, see "Corporations," § 7.
Railroad companies, see "Railroads," § 2.
Stockholders, see "Corporations," § 3.

In particular civil actions or proceedings.

See "Contempt," § 2; "Injunction," §§ 1, 3;
"Malicious Prosecution," § 1.
Admiralty, see "Collision," § 6.
For breach of contract, see "Contracts," § 4.
For causing death, see "Death," § 1.
For causing wrongful death at railroad crossing, see "Railroads," § 2.
For infringement of copyright, see "Copyrights," § 2.
For infringement of patents, see "Patents," § 8.
For injuries from railroad fires, see "Railroads," § 2.

For personal injuries, see "Carriers," § 2;
"Master and Servant," § 1.
On indemnity bond, see "Indemnity."

In criminal prosecutions.

See "Embezzlement."

§ 1. Relevancy, materiality, and competency in general.

Statements of a conductor *held* part of the *res gestæ* of an accident from a flying switch.—*Kansas City Southern Ry. Co. v. Moles* (C. C. A.) 351.

§ 2. Best and secondary evidence.

Original papers filed in a suit in a state court, identified by the proper custodian, *held* not objectionable as secondary evidence.—*Bradley Timber Co. v. White* (C. C. A.) 779.

§ 3. Documentary evidence.

Under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], motion by defendant in wrongful attachment to compel production of books *held* improperly granted.—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (C. C. A.) 233.

§ 4. Parol or extrinsic evidence affecting writings.

Parol testimony of an incorporator *held* admissible to show that machines mentioned, but not described, in the articles of incorporation, and which the corporation was authorized to manufacture and sell, were those for which a patent had been applied for, and the same as those alleged to infringe complainant's patent, for the purpose of connecting the corporation with the infringement.—*National Mechanical Directory Co. v. Polk* (C. C. A.) 742.

Evidence of prior negotiations *held* inadmissible, except for the purpose of aiding the court to interpret the contract as reduced to writing.—*Arthur v. Baron de Hirsch Fund* (C. C. A.) 791.

Parol evidence of usage is not admissible to affect the construction of a policy of marine insurance, where the contract is expressed in terms which are clear and plain, unless it is shown that the words used have by usage acquired a special and peculiar meaning different from their ordinary meaning.—*Ocean S. S. Co. v. Aetna Ins. Co.* (D. C.) 882.

§ 5. Opinion evidence.

In action for wrongful attachment, objection to question asked nonexpert as to plaintiff's future solvency *held* improperly overruled.—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (C. C. A.) 233.

Where the ordinary meaning of a word used in a written instrument is not in dispute, but the issue is as to its technical meaning, the evidence of a nonexpert witness is properly excluded.—*Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* (C. C. A.) 524.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 3.

EXCEPTIONS, BILL OF.

§ 1. Settlement, signing, and filing.

A bill of exceptions cannot be amended at a term subsequent to that at which it was filed, in order to correct an omission due to the party's own neglect or oversight.—*Adams v. Shirk* (C. C. A.) 823.

EXCESSIVE DAMAGES.

See "Damages," § 2.

EXCHANGES.

Board of trade contracts in restraint of trade, see "Monopolies," § 1.

A board of trade held not entitled to restrain the dissemination of market quotations emanating from its pits, in which more than 90 per cent. of the transactions occurring were mere gambling transactions.—*Board of Trade of City of Chicago v. Donovan Commission Co.* (C. C.) 1012; *Same v. Cella Commission Co.*, Id.

EXCISE.

Duties, see "Internal Revenue."

EXECUTION.

See "Judicial Sales."

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

EXECUTORS AND ADMINISTRATORS.

War revenue inheritance taxes, see "Internal Revenue."

§ 1. Allowance and payment of claims.

The rejection of a claim against the estate of a decedent by the superior court is not an adjudication which bars a subsequent suit thereon in another court, under the statutes of Washington.—*United States v. Fidelity Trust Co.* (C. C. A.) 766.

EXEMPTIONS.

From taxation, see "Taxation," § 3.

FACTORS.

See "Brokers."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FEES.

Of attorney, see "Attorney and Client," § 1.

FELLOW SERVANTS.

See "Master and Servant," § 1.

FIDUCIARY RELATIONS.

Creation of trust between persons in fiduciary relation, see "Trusts," § 1.

FILING.

Articles of incorporation, see "Corporations," § 1.

Of petition in bankruptcy, see "Bankruptcy," § 2.

FINDINGS.

Review in admiralty, see "Admiralty," § 1.

Review on appeal or writ of error, see "Appeal and Error," § 7.

FIRES.

Caused by operation of railroad, see "Railroads," § 2.

FORECLOSURE.

Of corporate mortgage, see "Corporations," § 5.

FOREIGN CORPORATIONS.

See "Corporations," § 7.

FOREIGN JUDGMENTS.

See "Judgment," § 3.

FORFEITURES.

Limitation of actions to recover forfeitures, see

"Limitation of Actions," § 1.

Of insurance, see "Insurance," § 5.

Under copyright laws, see "Copyrights," § 2.

FORMER ADJUDICATION.

See "Judgment," §§ 1-3.

FORMS OF ACTION.

See "Action," § 1; "Ejectment"; "Replevin"; "Trespass," § 1.

For enforcement of forfeitures under copyright laws, see "Copyrights," § 2.

FRAUD.

See "Fraudulent Conveyances."

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 4.

§ 1. Transfers and transactions invalid.

Under Code Ga. 1895, §§ 2695, 2724, 2727, mortgages withheld from record held fraudulent as to subsequent creditors, and postponed to claims of such creditors in bankruptcy proceed-

ing.—*Clayton v. Exchange Bank* (C. O. A.) 630.
In *re Josephson*, Id.

GAMING.

Gambling transactions on board of trade as affecting right to enjoin quotation prices, see "Exchanges."

§ 1. Gambling contracts and transactions.

An order by a customer to a stockbroker to sell a number of shares of stock for future delivery imports on its face a legitimate transaction by an actual sale and delivery of the stock, and the burden rests on the party alleging it to have been a gambling transaction to prove that no actual sale and delivery was intended, and that both parties so understood.—*Boyle v. Henning* (C. C.) 376.

GAS.

Specific performance of contract relating to natural gas land, see "Specific Performance," § 1.

GOOD FAITH.

Of purchaser, see "Vendor and Purchaser," § 3.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Indemnity."

HABEAS CORPUS.

§ 1. Nature and grounds of remedy.

When a minor under the age of 18, who was enlisted in the navy without his father's consent, but who returned to his father's custody, was taken therefrom by the naval authorities on the charge of desertion, habeas corpus is the proper proceeding to determine his status and the father's right to his custody.—*Ex parte Reaves* (C. C.) 848.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 7.

HIGHWAYS.

See "Navigable Waters," § 1.
Accidents at railroad crossings, see "Railroads," § 2.

HOMESTEAD.

Entry of homestead, see "Public Lands," § 2.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 2.

IMPLIED CONTRACTS.

See "Contracts," § 1; "Use and Occupation."

IMPORTS.

Duties, see "Customs Duties."

IMPRISONMENT.

Habeas corpus, see "Habeas Corpus."

INCOME TAX.

See "Taxation," §§ 2, 3.

Partial invalidity of statute, see "Statutes," § 1.

INCORPORATION.

See "Corporations," § 1.

INDEMNITY.

Subrogation of indemnitors, see "Subrogation."

An indemnitor, who has been vouched to defend in a suit brought against a surety, is entitled at his own expense to fully defend such suit, and to appeal from an adverse decree or judgment of the court of first instance.—*Robb v. Security Trust Co.* (C. C. A.) 460.

In an action on the indemnity of a surety on a forthcoming replevin bond, whether the surety discharged the indemnitor by unreasonable interference with his right to appeal held a question for the jury.—*Robb v. Security Trust Co.* (C. C. A.) 460.

In an action on an indemnity, where it was claimed that plaintiffs' directors were interested in the enforcement of the judgment indemnified against, evidence as to who such directors were, and who were the real parties in interest in the judgment, was competent.—*Robb v. Security Trust Co.* (C. C. A.) 460.

INDIANS.

The complaint in an action by the United States on the bond of an Indian agent held sufficient to support a recovery on the facts found, in view of the admissions made in the answer.—*United States v. Fidelity Trust Co.* (C. C. A.) 766.

INDICTMENT AND INFORMATION.

For particular offenses.

See "Embezzlement."

Offenses against Chinese exclusion laws, see "Aliens," § 1.

Offenses against postal laws, see "Post Office," § 2.

§ 1. Motion to quash or dismiss, and demurrer.

Indictments based on proceedings before a federal grand jury by an unauthorized officer will be quashed.—United States v. Rosenthal (C. C.) 862.

INFRINGEMENT.

Of copyright, see "Copyrights," § 2.

Of patent, see "Patents," §§ 4, 6.

Of trade-mark, see "Trade-Marks and Trade-Names," § 2.

INHERITANCE TAX.

See "Internal Revenue."

INJUNCTION.

Review of discretion of court as to granting, see "Appeal and Error," § 7.

In particular actions or proceedings.

See "Bankruptcy," § 4.

Restraining particular acts or proceedings.

Dissemination of market quotation emanating from exchange, see "Exchanges."

Exercise of power of eminent domain, see "Eminent Domain," § 3.

Infringement of patent, see "Patents," § 8.

Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 2.

Trover in state court by claimant to property in hands of temporary receiver in bankruptcy, see "Bankruptcy," § 4.

§ 1. Subjects of protection and relief.

Evidence *held* to show that circulars and letters sent by defendant to customers of complainant, threatening suits for infringement of patents, were not sent in good faith, but to coerce complainant into taking licenses, and to entitle complainant to an injunction and damages.—Adriance, Platt & Co. v. National Harrow Co. (C. C. A.) 827.

Whether circulars and letters sent by the owner of a patent to customers of a manufacturer of an alleged infringing article, threatening suits, are sent in good faith for legitimate purposes, must generally be determined by extrinsic evidence.—Adriance, Platt & Co. v. National Harrow Co. (C. C. A.) 827.

A manufacturer is entitled to an injunction restraining an owner of patents from sending circulars and letters to his customers, threatening suits for infringement, where such threats are not made in good faith, but solely to destroy complainant's business.—Adriance, Platt & Co. v. National Harrow Co. (C. C. A.) 827.

Labor organizations have the right by organic agreement to subject the individual members to rules and regulations and conduct prescribed by the majority, and the courts cannot enjoin the officers or committees of such organizations from ordering a strike pursuant to

authority delegated to them by the members.—Wabash R. Co. v. Hannahan (C. C.) 563.

§ 2. Actions for injunctions.

A bill for the protection of processes and methods used by complainant *held* to sufficiently allege their character as business secrets as against a general demurrer.—S. Jarvis Adams Co. v. Knapp (C. C. A.) 34.

An application for the stay of a public sale of corporate stock *held* barred by laches.—Edwards v. Mercantile Trust Co. (C. C.) 203.

§ 3. Preliminary and interlocutory injunctions.

In an action by a board of trade to restrain the use of "continuous quotations" where the proof did not show that the quotations received were continuous, as that term is construed by complainant, an injunction *pendente lite* will be denied.—Board of Trade of City of Chicago v. Consolidated Stock Exch. of Buffalo (C. C.) 433.

A bill by a railroad company, alleging that defendants, as officers of labor organizations, have conspired to interfere with interstate commerce, and to prevent complainant from carrying the mails or exchanging traffic with connecting lines, in violation of the laws of the United States, by threatening to order a strike of the members of such organizations in complainant's employ, against their wishes and for the purpose of compelling complainant to recognize such organizations and to "unionize" its service, states a case which requires a federal court to grant a temporary restraining order until a motion for a preliminary injunction can be heard.—Wabash R. Co. v. Hannahan (C. C.) 563.

Evidence on a motion for a preliminary injunction considered, and *held* not to sustain a charge of conspiracy, in violation of the laws of the United States.—Wabash R. Co. v. Hannahan (C. C.) 563.

§ 4. Violation and punishment.

A person may be guilty of a contempt of court in willfully doing an act which he knows the court has prohibited by injunction, although he was not a party to the suit in which the injunction was granted, and is not in privity with any of the parties.—Chisolm v. Caines (C. C.) 397; *In re Hucks*, Id.

INSOLVENCY.

See "Bankruptcy."

Of corporation, see "Corporations," § 6.

INSTRUCTIONS.

In civil actions, see "Trial," § 3.

INSURANCE.

Exemption of insurance companies from income tax, see "Taxation," § 3.

Parol evidence as to construction of policy, see "Insurance," § 4.

Policy as property passing to trustee in bankruptcy, see "Bankruptcy," § 3.

§ 1. Insurance agents and brokers.

A contract by a life insurance company appointing a local manager, to be paid by commissions, construed, and *held* by implication to create an agency for a specific term.—*Macgregor v. Union Life Ins. Co. (C. C. A.)* 493.

A principal who disables himself from continuing an agent in his employment, and refuses to permit him to act further, is liable for breach of contract, where such contract, either by its terms or by implication, created an agency for a certain term.—*Macgregor v. Union Life Ins. Co. (C. C. A.)* 493.

§ 2. Premiums, dues, and assessments.

Under a contract of life insurance requiring payment of assessments "within 30 days from the date of each notice," where notice is given by mail, the 30 days is to be computed from the day on which the printed notice is, or should be, received by the insured in due and regular course of mail.—*Ferrenbach v. Mutual Reserve Fund Life Ass'n (C. C. A.)* 945.

A policy holder in an assessment life insurance company *held* not entitled, on the evidence, to recover damages for breach of contract by reason of a change by the company in the method of making assessments which largely increased the rate.—*Gaut v. Mutual Reserve Fund Life Ass'n (C. C.)* 403.

§ 3. Cancellation, surrender, abandonment, or rescission of policy.

Return of unearned portion of premium *held* not necessary to cancellation of fire policy, where policy was not surrendered.—*El Paso Reduction Co. v. Hartford Fire Ins. Co. (C. C.)* 937.

§ 4. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Right of life insurance company to require insured to warrant his good health upheld.—*Standard Life & Accident Ins. Co. v. Sale (C. C. A.)* 664.

Statements in life policy *held* to be warranties, and not mere representations.—*Standard Life & Accident Ins. Co. v. Sale (C. C. A.)* 664.

Warranty in life policy *held* breached, though assured's answer was made in good faith.—*Standard Life & Accident Ins. Co. v. Sale (C. C. A.)* 664.

Whether insured had never had any bodily infirmity, as warranted by him, *held* a question for the jury, though he was wounded and received a pension therefor.—*Black v. Travellers' Ins. Co. (C. C. A.)* 732.

§ 5. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Fire policy covering manufacturing establishment *held* not to have been in force at time of fire, on account of operations having ceased longer than allowed by permit.—*El Paso Reduction Co. v. Hartford Fire Ins. Co. (C. C.)* 937.

§ 6. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

An indorsement on a fire insurance policy *held* not sufficient to show a waiver by the insurer of a condition against incumbrance of the property by chattel mortgage.—*Atlas Reduction Co. v. New Zealand Ins. Co. (C. C.)* 929.

§ 7. Extent of loss and liability of insurer.

A contract for the insurance against fire of a vessel while lying moored and in use as a hospital is not maritime, and the measure of liability for a loss by fire which partially destroyed the vessel is not governed by the rules of marine insurance, but by those of fire insurance.—*City of Detroit v. Grummond (C. C. A.)* 963.

§ 8. Actions on policies.

Whether insured had never had any bodily infirmity, as warranted by him, *held*, under the evidence, a question for the jury.—*Black v. Travelers' Ins. Co. (C. C. A.)* 732.

Allegation, in a complaint on a fidelity insurance policy, as to other insurance, *held* not irrelevant, but requiring change in wording to avoid influencing the jury.—*Bank of Timmons ville v. Fidelity & Casualty Co. (C. C.)* 934.

§ 9. Reinsurance.

A policy of marine insurance construed, and *held* to be one of reinsurance, which entitled the assured, on payment of losses incurred under "insured bills of lading" issued by it, to recover the full amount of such loss to the extent of the amount stipulated in the policy.—*Ocean S. S. Co. v. Aetna Ins. Co. (D. C.)* 882.

§ 10. Mutual benefit insurance.

A mutual benefit association did not waive a condition requiring prompt payment of assessments by a member to avoid suspension because payments were on some previous occasions made after the time limited, where that fact was not reported to the local council, nor known to the supreme council, but the assessments were in fact advanced by the collector.—*Supreme Council of Royal Arcanum v. Taylor (C. C. A.)* 66.

INTENT.

Of parties to contract, see "Contracts," § 2.

INTERIOR DEPARTMENT.

See "Public Lands," § 2.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 3.

INTERNAL REVENUE.

A mild form of beer, bottled and sold by the manufacturer under the name of "J. D. Iler's Rochester Tonic," was subject to the special stamp tax imposed on medicinal preparations, or articles advertised as such, by Sched-

ule B of the war revenue act of June 13, 1898 (30 Stat. 462), although the revenue tax as beer had been paid thereon before bottling.—United States v. J. D. Iler Brewing Co. (C. C. A.) 41.

Delivery of liquors by a seller to a carrier at the place where the order therefor is accepted, to be delivered to the purchaser on payment of the price, *held* a delivery to the purchaser; and the sale is there made, so that a seller is not liable to special tax under revenue law in county where purchaser lives.—United States v. Orene Parker Co. (D. C.) 596.

Under section 29 of the war revenue act of 1898 (Act June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]), where a testator bequeathed all his residuary estate to his executors, in trust, to be paid to a son on his reaching a certain age, and, in case of his death before then, to be paid to other lineal descendants of the testator, the tax imposed by such section became fixed on the passing of the property to the executors, as trustees, as a single bequest, without regard to where or to whom it should pass from them.—Vanderbilt v. Eidman (C. C.) 590.

INTERNATIONAL LAW.

See "Aliens."

INTERROGATORIES.

To witnesses, see "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

INTERVENTION.

In action to foreclose corporate mortgage, see "Corporations," § 5.

INVENTION.

See "Patents."

IRRIGATION.

See "Waters and Water Courses," § 1.

JUDGES.

See "Courts."

Liability for contempt, see "Contempt," § 1.

JUDGMENT.

Decisions of courts in general, see "Courts," § 2.

Decisions of land department, see "Public Lands," § 2.

On appeal or writ of error, see "Appeal and Error," § 8.

Rejection of claim against decedent's estate as bar to suit thereon, see "Executors and Administrators," § 1.

Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

§ 1. Merger and bar of causes of action and defenses.

A decree sustaining a demurrer to a bill and dismissing the suit is an adjudication only as to the exact point raised by the pleadings and determined on the demurrer.—Dennison Mfg. Co. v. Scharf Tag, Label & Box Co. (C. C. A.) 313.

A decree dismissing a bill for unfair competition, on demurrer, *held* not a bar to a second suit, where the grounds for relief alleged were different.—Dennison Mfg. Co. v. Scharf Tag, Label & Box Co. (C. C. A.) 313.

Questions ruled by an appellate court are not thereby rendered *res judicata* as between the parties, where the judgment under review is reversed, and the cause remanded for a new trial, and the case is afterwards dismissed by the trial court for the want of prosecution.—Gilbert v. American Surety Co. (C. C. A.) 499.

A decree dismissing a bill for the specific performance of a contract for the sale of chattels, on the ground that under the facts shown a bill in equity for specific performance would not lie as matter of law, is not an adjudication of the rights of the parties under the contract.—McNamara v. Home Land & Cattle Co. (C. C. A.) 797.

Where, upon cross writs of error from the same judgment, a portion of such judgment is affirmed, and a portion reversed, the result is to reverse the entire judgment, and to remand the cause for a new trial; and no part of such judgment can be pleaded as an adjudication in bar of another suit.—Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 973.

§ 2. Conclusiveness of adjudication.

A question as to the liability of the property of a railroad company to taxation, determined in a suit to which the company was a party, is not *res judicata* as against a mortgage bondholder of the company, where no one claiming under the mortgage was a party.—Bancroft v. Wicomico County Com'rs (C. C.) 874.

§ 3. Foreign judgments.

A judgment rendered in the state of Washington *held* not a lien on defendant's property in Alaska, without suit brought and judgment recovered thereon.—Frye-Bruhn Co. v. Meyer (C. C. A.) 533.

A judgment of a court of Austria in a suit in which it had jurisdiction of the subject-matter and the parties will be accepted by the courts of the United States as conclusive between the parties of the matters adjudicated.—Strauss v. Corried (C. C.) 199.

§ 4. Payment, satisfaction, merger, and discharge.

Facts *held* to justify an injunction restraining defendant from collecting a judgment against plaintiff until plaintiff had established a foreign judgment as a set-off.—Frye-Bruhn Co. v. Meyer (C. C. A.) 533.

JUDICIAL SALES.

Where a federal court had jurisdiction, the fact that its decree directed a sale of real estate at a place other than at the courthouse in the county or parish where it is located, as required by Act March 3, 1893, 27 Stat. 751 [U. S. Comp. St. 1901, p. 710], does not render the sale void, nor is it ground for refusing confirmation.—*Godchaux v. Morris* (C. C. A.) 482.

The failure of a commissioner, appointed to make a sale of property under a decree of court, through inadvertence, to offer separately one parcel of land of small value, as required by the terms of the decree, before offering all as a totality, is a mere irregularity which will not defeat confirmation, where no loss or injury resulted.—*Godchaux v. Morris* (C. C. A.) 482.

JURISDICTION.

Amount in controversy, see "Courts," § 2.

Jurisdiction of particular actions or proceedings.

By or against trustees in bankruptcy, see "Bankruptcy," § 6.

Suits for infringement of patents, see "Patents," § 8.

Special jurisdictions.

See "Bankruptcy," §§ 2, 5; "Equity," § 1.

Particular courts, see "Courts."

JURY.

Custody and conduct, see "Trial," § 4.

Instructions in civil actions, see "Trial," § 3.

Questions for jury in civil actions, see "Trial," § 2.

Right to jury trial in involuntary bankruptcy proceedings, see "Bankruptcy," § 2.

Taking case or question from jury at trial, see "Trial," § 2.

Verdict in civil actions, see "Trial," § 5.

§ 1. Competency of jurors, challenges, and objections.

Overruling of challenges to jurors who had formed an opinion, but which they testified would not prevent them trying the cause on the evidence, *held* not error.—*Dimmick v. United States* (C. C. A.) 638.

LABOR UNIONS.

Restraining acts of, see "Injunction," §§ 1, 3.

LACHES.

In applying for injunction, see "Injunction," § 2.

In bringing suit for unfair competition, see "Trade-Marks and Trade-Names," § 2.

LANDLORD AND TENANT.

See "Use and Occupation."

LAND OFFICE.

See "Public Lands," § 2.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement."

LAW OF THE CASE.

See "Appeal and Error," § 8; "Courts," § 2.

LEAVE OF COURT.

To file bill of review, see "Equity," § 4.

To sue trustee in bankruptcy, see "Bankruptcy," § 6.

LEGACY TAX.

See "Internal Revenue."

LETTERS PATENT.

For inventions, see "Patents."

For public lands, see "Mines and Minerals," § 1.

LICENSES.

Corporation license fee as debt provable against estate of bankrupt, see "Bankruptcy," § 7.

Injuries to licensees, see "Railroads," § 2.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

Particular classes of liens.

See "Judgment," § 3.

Attorney's liens, see "Attorney and Client," § 1.

For timber furnished saw mills, see "Logs and Logging."

Pledge, see "Pledges."

One who made advances to a corporation to enable it to conduct its business of producing sugar, under an agreement that it would ship all its product to the lender, from the proceeds of which he was to retain payments, *held* to have an equitable lien on the sugar remaining in the factory at the time of the appointment of a receiver for the corporation, as against its general creditors.—*Howard v. Delgado & Co.* (C. C. A.) 26.

LIFE INSURANCE.

See "Insurance," § 4.

LIMITATION.

Of claim of patent, see "Patents," § 3.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Against shareholders in national bank, see "Banks and Banking," § 2.

Effect of state statutes in federal courts, see "Courts," § 2.

To enforce penalties against corporate officers, see "Corporations," § 4.

§ 1. Statutes of limitation.

Gen. St. Conn. 1888, § 1379, prescribing a limitation on actions to recover forfeitures for violation of penal statutes, *held* not to apply to an action against Connecticut trustees of a Montana mining company to recover debts of the company under Civ. Code Mont. § 451.—Davis v. Mills (C. C. A.) 703.

Comp. St. Mont. § 45, prescribing a limitation for actions to enforce a statutory penalty or forfeiture, *held* repealed by Code Civ. Proc. Mont. § 515, subd. 1, and section 3482.—Davis v. Mills (C. C. A.) 703.

§ 2. Pleading, evidence, trial, and review.

Where the statement of plaintiff's cause of action shows that plaintiff could not under any circumstances avoid the defense of limitations, such defense may be set up by demurrer.—Davis v. Mills (C. C. A.) 703.

LIQUIDATED DAMAGES.

See "Damages," § 1.

LIS PENDENS

Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

LITERARY PROPERTY.

See "Copyrights."

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

LOGS AND LOGGING.

Timber on public lands, see "Public Lands," § 1.

A sash and door factory is not a sawmill, within the meaning of Civ. Code Ga. 1895, § 2809, providing that persons furnishing sawmills with timber, etc., shall be entitled to liens.—In re Gosch (D. C.) 604.

LOTTERIES.

Exclusion from mail of matters relating to lotteries, see "Post Office," § 1.

LUMBER.

See "Logs and Logging."

MAIL.

See "Post Office," § 1.

Injunction to prevent strike interfering with carrying mail, see "Injunction," § 3.

MALICIOUS PROSECUTION.

§ 1. Actions.

Evidence in an action for wrongful attachment *held* to require the submission to the jury of the issues as to the want of probable cause and the existence of malice.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

Where the issue of probable cause in an action for wrongful attachment depends on conflicting evidence as to defendant's good faith, it is for the jury.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

In an action for wrongful attachment, the issue of malice per se is for the jury.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

Where an action for wrongful attachment is defended on the ground of advice of counsel, the fact that the counsel was a director of the defendant renders the issue of malice for the jury.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

In an action for wrongful attachment, defendant's motion for directed verdict *held* improperly granted.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

In an action for wrongful attachment, the testimony of defendants that they were not actuated by malice is properly admitted under the Florida rule admitting such evidence under a statute authorizing a party to a civil action to testify in his own behalf.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

In an action for wrongful attachment, evidence as to matters occurring after the issuing of the attachment is inadmissible to establish probable cause or show absence of malice.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

In an action for wrongful attachment, evidence as to what disposition was made of the attached property after its release and bonding is irrelevant.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

In an action for wrongful attachment, evidence of a witness as to how much he paid for property four years after the attachment is irrelevant.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

In an action for wrongful instructions given in the original action, expressive of opinion as to facts proved, are properly excluded.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

Refusal of leave to amend declaration in action for wrongful attachment *held* not an abuse of discretion.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 233.

MARINE INSURANCE.

See "Insurance," §§ 7, 9.

MASTER AND SERVANT.

§ 1. Master's liability for injuries to servant.

Use of unblocked frogs in a railroad freight yard *held* not negligence of the railroad company.—Kilpatrick v. Choctaw, O. & G. R. Co. (C. C. A.) 11.

In an action for injuries to a coal miner, failure to give an instruction at plaintiff's request, which would have aided the defense, *held* not error of which plaintiff could complain.—Roccia v. Black Diamond Coal Min. Co. (C. C. A.) 451.

In an action for injuries to a coal miner, an instruction that, if the defects were so obvious that a reasonably prudent man would have avoided them, plaintiff assumed the risk, *held* proper.—Roccia v. Black Diamond Coal Min. Co. (C. C. A.) 451.

In an action for injuries to a brakeman by a collision, an instruction as to defendant's duty to notify operatives of trains of the approach of others, etc., *held* not error.—Northern Pac. R. Co. v. Mix (C. C. A.) 476.

In an action for injuries to a brakeman in a collision, evidence of the negligence of the train dispatcher *held* to present a question for the jury.—Northern Pac. R. Co. v. Mix (C. C. A.) 476.

The violation of rules regulating the conduct of a train dispatcher is *prima facie* evidence of negligence.—Northern Pac. R. Co. v. Mix (C. C. A.) 476.

A complaint in an action by a brakeman for injuries sustained in a collision *held* to contain a sufficient averment of negligence.—Northern Pac. R. Co. v. Mix (C. C. A.) 476.

A railroad company *held* liable for the negligence of a train dispatcher in issuing orders for the movement of trains.—Northern Pac. R. Co. v. Mix (C. C. A.) 476.

Where a miner placed a rope in a chute to guard against falling, and continued to work after the rope had been removed by a fellow servant, he assumed the risk.—Bunker Hill & S. Mining & Concentrating Co. v. Kettleston (C. C. A.) 529.

Evidence in an action by railroad trainman for injuries *held* to require submitting contributory negligence to jury.—Olsen v. Cook Inlet Coal Fields Co. (C. C. A.) 726.

A ship *held* not liable for the injury of a seaman while in the performance of his duties; no negligence on the part of the owners or master being shown, nor insufficiency in the condition or equipment of the vessel.—The Troy (D. C.) 901.

MAXIMS.

Of equity, see "Equity," § 1.

MECHANICS' LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

MEDICINES.

War revenue taxes, see "Internal Revenue."

MERGER.

Of cause of action in judgment, see "Judgment," § 1.

MINES AND MINERALS.

Employés in mines, see "Master and Servant." Specific performance of contract relating to oil and gas, see "Specific Performance," § 1.

§ 1. Public mineral lands.

The suspension of work on a mining claim on Saturday night, December 30th, before the completion of the assessment work for that year, where the tools were left on the claim and the work resumed on Monday morning, January 1st, was not an abandonment of the claim, or of possession, nor a discontinuance of work, which subjected the claim to relocation after 12 o'clock Sunday night, under Rev. St. § 2324, as amended by Act Jan. 22, 1880, 21 Stat. c. 9, p. 61 [U. S. Comp. St. 1901, p. 1426], which authorizes a relocation on failure to do the assessment work within the year, "provided the original locators * * * have not resumed work upon the claim after failure and before such location."—Fee v. Durham (C. C. A.) 468.

In an action to determine an adverse claim to mining property, the fact that parties were joined as plaintiffs who had parted with their interest in the subject-matter was no ground for dismissal.—Mackay v. Fox (C. C. A.) 487.

An action to determine an adverse claim to a mining property *held* not subject to dismissal by reason of the nonjoinder of a purchaser of an interest after suit brought.—Mackay v. Fox (C. C. A.) 487.

The filing of an amended application by an adverse claimant to mining property, and the obtaining of a patent to a claim under such amended application, not including any of the property in suit, *held* not a waiver of the adverse claim, under Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430].—Mackay v. Fox (C. C. A.) 487.

In an action involving a placer mining claim in Alaska, located before survey and before Congress had made any provision for recording location notices, evidence in respect to the recording of the notice is immaterial, and error cannot be predicated on the admission of incompetent evidence to prove such fact.—McIntosh v. Price (C. C. A.) 716.

A second locator cannot enter within the boundaries of a placer mining claim, as staked by a prior locator, and make a valid location of ground of which the first locator is in actual possession, and which he is working in good faith, on the ground that the first claim, as stak-

ed, exceeded the width prescribed by the local rules and regulations.—*McIntosh v. Price* (C. C. A.) 716.

The boundaries of a placer mining claim *held* sufficiently designated.—*McIntosh v. Price* (C. C. A.) 716.

The possession and ownership of the surface of a lode mining claim is the possession of the lode to the full extent of the extralateral right of the owner of the claim.—*Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co.* (C. C. A.) 973.

The extralateral right of the owner of a lode mining claim extends to a portion of the lode within his end planes produced, which is entirely severed from that portion within the boundaries of the claim by an intersecting extralateral right of an older claim located on the same lode.—*Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co.* (C. C. A.) 973.

§ 2. Title, conveyances, and contracts.

A bill by the owner of a lode mining claim *held* to show possession in complainant.—*Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co.* (C. C. A.) 973.

A bill to quiet title to a mining claim *held* not demurrable on the ground of an adequate remedy at law.—*Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co.* (C. C. A.) 973.

MINORS.

Enlistment in navy, see "Army and Navy."

MISREPRESENTATION.

By insured, see "Insurance," § 4.

MODIFICATION.

Of judgment or order on appeal, see "Appeal and Error," § 8.

MONEY ORDERS.

See "Post Office," § 1.

MONOPOLIES.

§ 1. Trusts and other combinations in restraint of trade.

A contract by a board of trade relating to the distribution of its quotations is not a violation of the anti-trust law, as in restraint of trade and commerce, because it restricts the furnishing of such quotations to subscribers who agree that they shall not be used in the conduct of a bucket shop.—*Board of Trade of City of Chicago v. Christie Grain & Stock Co.* (C. C.) 608.

MORTGAGES.

Conclusiveness of judgment as between mortgagor and mortgagee, see "Judgment," § 2.

In fraud of creditors, see "Fraudulent Conveyances," § 1.

Priority over claims of laborers against estate of bankrupt, see "Bankruptcy," § 7.

Mortgages by particular classes of parties.

See "Corporations," § 5.

Bankrupts, see "Bankruptcy," § 4.

Mortgages of particular species of property.

See "Street Railroads," § 1.

MOTIONS.

Direction of verdict in civil actions, see "Trial," § 2.

Quashing indictment or information, see "Indictment and Information," § 1.

MULTIFARIOUSNESS.

Of bill in equity, see "Equity," § 2.

MUNICIPAL CORPORATIONS.

See "Counties."

Liability for obstructions in navigable waters within municipality, see "Municipal Corporations," § 2.

Street railroads, see "Street Railroads."

§ 1. Actions.

Evidence *held* admissible on the issue as to whether a contract made on behalf of a city had been validated by ratification.—*City of Detroit v. Grummond* (C. C. A.) 963.

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 10.

MUTUALITY.

Of contract, see "Contracts," § 1.

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 2.

NAVIGABLE WATERS.

§ 1. Rights of public.

The statutes of Ohio, giving cities control of all "highways," and requiring them to keep the same in repair, do not make a city liable for the failure to keep a navigable stream within its limits free from obstructions; such stream not being a highway within the meaning of the statute.—*Faust v. City of Cleveland* (C. C. A.) 809.

A municipal corporation cannot be held liable for an injury to a vessel from an obstruction in a navigable stream within its limits.

unless the duty of keeping such waters free from obstructions is positively imposed on the municipality by statute.—*Faust v. City of Cleveland* (C. C. A.) 809.

NAVIGATION.

See "Navigable Waters," § 1.

NAVY.

See "Army and Navy."

NEGLIGENCE.

Causing death, see "Death," § 1.

By particular classes of parties.

See "Carriers," § 2.

Employers, see "Master and Servant," § 1.

Officers and persons employed on vessel, see

"Shipping," § 2.

Railroad companies, see "Railroads," § 2.

Condition or use of particular species of property, works, or machinery.

See "Railroads," § 2; "Street Railroads," § 2.

Tugs, see "Towage."

Vessel, see "Shipping," § 1.

Contributory negligence.

Of person injured at railway crossing, see "Railroads," § 2.

§ 1. **Contributory negligence.**

It is error to measure and determine the question of contributory negligence solely by what actually happened.—*Olsen v. Cook Inlet Coal Fields Co.* (C. C. A.) 726.

§ 2. **Actions.**

The form of instruction submitting to the jury an issue of contributory negligence in an action for a personal injury considered.—*Langbein v. Swift* (C. C.) 416.

NEW TRIAL.

Remand by appellate court for new trial, see "Appeal and Error," § 8.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."

NOTICE.

Of insurance assessments, see "Insurance," § 2.

To purchaser of real property, see "Vendor and Purchaser," § 3.

OBJECTIONS.

For purpose of review, see "Appeal and Error," § 3; "Criminal Law," § 2.

To discharge of bankrupt, see "Bankruptcy," § 9.

To jurisdiction, see "Courts," § 1.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 2.

OBSTRUCTIONS.

In navigable waters, see "Navigable Waters," § 1.

OCCUPATION.

Of real property, see "Use and Occupation."

OFFER.

Of proof, see "Trial," § 1.

OFFICERS.

Embezzlement, see "Embezzlement."

Liability for contempt, see "Contempt," § 1.

Particular classes of officers.

See "Attorney General"; "Receivers."

Corporate officers, see "Corporations," §§ 4, 5.

County officers, see "Counties," § 1.

Indian agents, see "Indians."

OILS.

Specific performance of contract relating to oil land, see "Specific Performance," § 1.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 5.

OPINIONS.

Of courts, see "Courts," § 2.

ORDERS.

Review of appealable orders, see "Appeal and Error."

PARENT AND CHILD.

Habeas corpus to obtain custody of child, see "Habeas Corpus," § 1.

Right of parent to avoid enlistment of minor in navy, see "Army and Navy."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 4.

PARTIES.

Death ground for abatement, see "Abatement and Revival," § 2.

Persons entitled to maintain action for use and occupation, see "Use and Occupation."

Persons entitled to raise constitutional questions, see "Constitutional Law," § 1.

Persons liable as stockholders, see "Corporations," § 3.

Persons who may be adjudged bankrupts, see "Bankruptcy," § 2.

Persons who may be restrained from infringement of patent, see "Patents," § 8.

In actions by or against particular classes of parties.

See "Corporations," § 5.

In particular actions or proceedings.

Foreclosure of corporate mortgage, see "Corporations," § 5.

On appeal or writ of error, see "Appeal and Error," §§ 2, 4.

To particular classes of conveyances, contracts, or transactions.

See "Contracts," § 2.

§ 1. Defects, objections, and amendment.

An objection for nonjoinder or misjoinder of parties is too late, when made for the first time at the trial of the cause.—*Mackay v. Fox* (C. C. A.) 487.

PARTNERSHIP.

Priorities of partnership creditors of bankrupts, see "Bankruptcy," § 7.

§ 1. Mutual rights, duties, and liabilities of partners.

Mutual promises of several partners to pay the debts of individual members to the amount of goods contributed by each to the firm *held* based on a sufficient consideration.—*Merchants' Bank v. Thomas* (C. C. A.) 306; *In re Wright & Berryhill*, Id.

A₁ extension of time of a firm debt and the debt of an individual partner *held* a sufficient consideration for the firm's promise to pay the debt of such partner.—*Merchants' Bank v. Thomas* (C. C. A.) 306; *In re Wright & Berryhill*, Id.

PASSENGERS.

See "Carriers," § 2.

PATENTS.

For public lands, see "Mines and Minerals," § 1.

Injunction against sending out letters threatening customers of complainant with suits for infringement, see "Injunction," § 1.

Parol evidence as to patented machine mentioned in written instrument, see "Evidence," § 4.

§ 1. Patentability.

The exhibition of the subject of a design patent to others by the inventor after its completion, and more than two years prior to the application for a patent, constitutes a prior public use which invalidates the patent.—*Young v. Clipper Mfg. Co.* (C. C.) 560.

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§ 2. Applications, and proceedings thereon.

A second application for a patent, which describes precisely the same device as a former one, which has been abandoned by permission, will be treated as continuous of the first.—*L. E. Waterman Co. v. Forsyth* (C. C.) 103.

§ 3. Construction and operation of letters patent.

When two inventors have each adopted the substantial features or elements of an earlier invention, making, respectively, but slight changes in or improvements upon the earlier device, each will be limited to his own specific form of device, and, if there are differences therein, neither device will be held to be an infringement of the other.—*Sander v. Rose* (C. C. A.) 835.

A design patent cannot be made to cover a mechanical construction by which the shape of the article, which is the principal feature of the design, is produced.—*Royal Metal Mfg. Co. v. Art Metal Works* (C. C.) 128.

§ 4. Title, conveyances, and contracts.

A patentee, who makes a contract for the assignment of his patent, which he refuses to perform, although the other party has done all that was required thereby, cannot maintain a suit against such other party for infringement.—*Schmitt v. Nelson Valve Co.* (C. C.) 93.

§ 5. Regulation of dealings in patented rights and patented articles.

The fact that the marking of an article as patented is placed on a part not covered by the patent does not render the patent invalid.—*Dade v. Boorum & Pease Co.* (C. C.) 135.

§ 6. Infringement.—What constitutes infringement.

A patentee cannot maintain an action to recover damages for infringement, where by agreement defendants were given the right to use the invention, subject to the payment of a royalty in case the patentee's right thereto, which was denied, should be established by the final judgment of a court.—*Kilburn v. Holmes* (C. C. A.) 750.

It is necessary to specify in a claim all the parts whose co-operative action is essential to the performance of the function specified, and each is an essential element of the combination, so that infringement cannot be charged of a machine which eliminates one of such parts and employs no equivalent part.—*Mayo Knitting Machine & Needle Co. v. E. Jenckes Mfg. Co.* (C. C.) 110.

As between mechanical improvers in an advanced art, mere priority in the production of a commercial machine or commercial success affords no reason for excluding other and independent improvements.—*Mayo Knitting Machine & Needle Co. v. E. Jenckes Mfg. Co.* (C. C.) 110.

§ 7. — Actions at law.

In an action at law for infringement of a patent, the question of invention is one of fact for the jury, where the evidence is such as to warrant its submission.—*Willis v. Miller* (C. C. A.) 985.

§ 8. — Suits in equity.

An appeal from an order granting a preliminary injunction must be determined by the appellate court on the record as it stood at the time the order was made, and additional evidence or papers cannot be introduced into the record thereafter by stipulation.—*F. C. Austin Mfg. Co. v. American Well Works (C. C. A.)* 76.

On appeal from an order granting a preliminary injunction against infringement of a patent, the only question for consideration is whether the legal discretion of the trial court was improvidently exercised.—*F. C. Austin Mfg. Co. v. American Well Works (C. C. A.)* 76.

The question of the validity of a patent, which has been sustained in prior contested litigation, not only between other parties, but between the same parties, will not be considered on an appeal from an order granting a preliminary injunction against its infringement.—*F. C. Austin Mfg. Co. v. American Well Works (C. C. A.)* 76.

A patentee, who has assigned his patent and is in the employ of another, who is making an infringing article, has no ground to object to a decree enjoining him, as well as his employer, from making and selling such article, where he is not held for the damages caused by the infringement.—*Regent Mfg. Co. v. Penn Electrical & Mfg. Co. (C. C. A.)* 80.

Defendants in a suit for infringement held to have been so connected with the infringement by a codefendant as to have been properly included in the injunction.—*National Mechanical Directory Co. v. Polk (C. C. A.)* 742.

Where a bill for infringement makes profert of the patent, it will be regarded as a part of the bill, and will be examined on demurrer.—*Fowler v. City of New York (C. C. A.)* 747.

On an accounting for infringement of a patent for an improved miner's lantern holder, which defendant made and sold in connection with miners' caps, complainant was entitled to recover only the profits made on the holders, and not those made on the caps.—*Lattimore v. Hardsocg Mfg. Co. (C. C. A.)* 986.

A court held to have jurisdiction of a suit for infringement against a corporation of another state, on the ground that the acts of infringement charged were committed within the district, and that it had there a regular and established place of business.—*Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. (C. C.)* 101.

Where it is shown that a defendant abandoned the making of the alleged infringing articles some months before the commencement of suit, without any intention of resuming, and there is no reason to doubt his good faith, a preliminary injunction will not be granted.—*Edison General Electric Co. v. New England Electric Mfg. Co. (C. C.)* 125.

A complainant in a suit for infringement will not be granted leave to discontinue after the proofs have been taken and closed, at large expense to the defendant beyond his taxable

costs and disbursements, where no other ground is shown than the desire of complainant to relitigate the questions involved in a new suit.—*American Steel & Wire Co. v. Mayer & Englund Co. (C. C.)* 127.

The rule of practice that a preliminary injunction against infringement will not be granted, unless the patent has been adjudicated or long acquiescence is shown, applies only in cases where there is some question as to the validity of the patent.—*Fuller v. Gilmore (C. C.)* 129.

Where a patent sued on contains a large number of claims relating to different details of a structure, the court, on motion, may properly require complainant to specify the claims relied on and the particular parts of defendant's structure claimed to infringe.—*Morton Trust Co. v. American Car & Foundry Co. (C. C.)* 132.

Whether the specification and drawings of a patent are sufficiently full and exact to enable persons skilled in the art to understand them is a question of fact, which cannot be determined on a demurrer to a bill for infringement.—*Dade v. Boorum & Pease Co. (C. C.)* 135.

A preliminary injunction against infringement will not be granted where, before the determination of the motion therefor, the patent sued on has expired.—*Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co. (C. C.)* 136.

On a motion to punish for contempt in violating an injunction against infringement, doubtful questions are not to be resolved against respondent.—*Schlicht Heat, Light & Power Co. v. Aeolipyle Co. (C. C.)* 137.

What laches will defeat an application for a rehearing, after an interlocutory decree finding infringement, depends entirely on the facts in each case, and the effect which the granting or refusal of the application will have on the rights of the parties, respectively.—*Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C.)* 556.

An interlocutory decree finding infringement of the Hall patent, No. 400,766, for a process for reducing aluminum by electrolysis, set aside, and a rehearing granted, on a showing of newly discovered evidence.—*Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C.)* 556.

Where the article made by defendant prior to the filing of a bill for infringement of a patent did not infringe, and no intention then to infringe is shown, a subsequent change in structure, which transforms the noninfringing into an infringing device, will not warrant the granting of a preliminary injunction.—*Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C.)* 558.

The defense of license from some one who is claimed to have had an interest in the patent sued on is one to be made out by the defendant by a fair preponderance of proof.—*Armat Moving Picture Co. v. Edison Mfg. Co. (C. C.)* 559.

Where a patent has been sustained at final hearing after strong opposition, a preliminary injunction against another infringer will not ordinarily be refused upon affidavits to a prior public use.—*Armat Moving Picture Co. v. Edison Mfg. Co. (C. C.)* 559.

A prior adjudication sustaining the validity of a claim of a patent, and finding infringement, is not sufficient to justify the granting of a preliminary injunction against another defendant, whose structure is different, and does not appear to be within the claim as construed in the former suit.—*Westinghouse Electric Co. v. American Transformer Co. (C. C.)* 560.

Circumstantial evidence, although tending to show the violation of an injunction against infringement, is not sufficient to warrant the imprisonment of a defendant for contempt, against his sworn denial.—*Cimioti Unbairing Co. v. Frolloehr (C. C.)* 561.

A defendant corporation will be subjected to a fine for contempt, where, through the carelessness of its officers, sales of a patented article are made by its employes in violation of an injunction.—*Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C.)* 562.

PATENTS ENUMERATED.

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800. Fountain pen	109
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1,131. Ore converter	843
1880.	
4,641. Cane-ferrule	134
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33,962. Bedstead	126
33,963. Bedstead	126
33,964. Bedstead	126
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16,082. Ore converter	842, 847
33,446. Ore converter	843
49,052. Ore converter	843
51,398. Ore converter	843, 847
93,250. Transplanter	86
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115,688. Transplanter	87
127,648. Transplanter	89
145,102. Fountain pen	106
147,333. Fountain pen	109
177,668. Transplanter	90
193,734. Transplanter	86
194,745. Transplanter	87
197,545. Disk harrow	835, 837
211,370. Transplanter	87
214,744. Knitting machine	122
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246,106. Transplanter	89
253,953. Fountain pen	109
254,429. Station indicator	742, 743
263,403. Transplanter	89
272,066. Fountain pen	108, 109
276,692. Fountain pen	108, 109
277,134. Crushing mills	136
279,104. Fountain pen	109
293,545. Fountain pen	107
300,807. Transplanter	90
307,735. Fountain pen	108
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333,102. Knitting machine	112
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353,162. Fountain pencil	109
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382,280. Electrical motor	832
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390,721. Electrical motor	834
390,820. Electrical motor	834
394,587. Knitting machine	121
396,578. Knitting machine	121
400,766. Process for reducing aluminum	556
407,999. Fountain pen	106
410,828. Ferrule for umbrella	133
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423,724. Transplanter	85
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438,685. Knitting machine	122
440,738. Transplanter	89
446,230. Grain drill	988
456,516. Process of smelting copper	551
459,260. Knitting machine	123
461,357. Knitting machine	111
470,644. Ore converter	551, 841
485,994. Transplanter	90
486,200. Transplanter	85
491,327. Knitting machine	124
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511,560. Electrical motor	831, 832
524,426. Electrical motor	834
535,190. Electrical motor	833, 334
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570,451. Bitransit railway system.....	747
581,887. Knitting machine111, 124,	125
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600,671. Knitting machine111, 124	
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 Subrogation on payment, see "Subrogation."
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PENALTIES.

Liability of corporate officers, see "Corporations," § 4.
 Limitation of actions to recover penalties, see "Limitation of Actions," § 1.
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See "Negligence."
 Excessive damages, see "Damages," § 2.
 To employé, see "Master and Servant," § 1.
 To licensee, see "Railroads," § 2.
 To passenger, see "Carriers," § 2.
 To person injured by operation of street railroad, see "Street Railroads," § 2.
 To seaman, see "Seamen."
 To traveler on highway crossing railroad, see "Railroads," § 2.

PETITION.

In bankruptcy, see "Bankruptcy," § 2.

PHOTOGRAPHS.

As subject of copyright, see "Copyrights."

PLACE.

For judicial sale, see "Judicial Sales."

PLEA.

In civil actions, see "Equity," § 2.

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Objections for purpose of review, see "Appeal and Error," § 3.

Allegations as to particular facts, acts, or transactions.

Citizenship of parties to show federal jurisdiction, see "Removal of Causes," § 2.

Statute of limitations, see "Limitation of Actions," § 2.

In particular actions or proceedings.

See "Equity," § 2; "Injunction," § 2; "Malicious Prosecution," § 1; "Removal of Causes," § 3.

For breach of contract, see "Contracts," § 4.

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For personal injuries, see "Master and Servant," § 1; "Street Railroads," § 2.

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On bond of Indian agent, see "Indians."

On insurance policy, see "Insurance," § 8.

To quiet title to mining claim, see "Mines and Minerals," § 2.

PLEDGES.

Bill in equity by trustee will lie for the sale of securities pledged to secure payment of interest on certificates, though the agreement provides a method of enforcement.—*Land Title & Trust Co. v. Asphalt Co. of America (C. C.)* 192.

A bill for sale of pledged securities should not be dismissed, because it may be found on the hearing that it is not necessary to sell all the securities.—*Land Title & Trust Co. v. Asphalt Co. of America (C. C.)* 192.

POLICY.

Of insurance, see "Insurance."

POSSESSION.

See "Adverse Possession."

Right of possession of plaintiff in ejectment, see "Ejectment," § 1.

POST OFFICE.

Injunction to prevent strike interfering with carrying mail, see "Injunction," § 3.

§ 1. **Mailable matter, transmission and delivery of mail, and money orders.**

The statutes conferring on the Postmaster General the power to exclude persons or companies found to be conducting a lottery or fraudulent scheme from receiving money by registered letter or postal orders are constitutional.—*Public Clearing House v. Coyne (C. C.)* 927.

A scheme held in effect a lottery, justifying the issuance against it of a fraud order by the

Postmaster General.—Public Clearing House v. Coyne (C. C.) 927.

§ 2. Offenses against postal laws.

A circular offering prizes for estimates as to the number of cigarettes which will be stamped with internal revenue stamps during a certain month *held* not a lottery, within Rev. St. § 3894, amended 1 Supp. Rev. St. 803 [U. S. Comp. St. 1901, p. 2659], prohibiting the use of mails for lottery schemes.—United States v. Rosenblum (C. C.) 180.

An indictment, under Rev. St. § 5480, for using the mails to defraud, *held* insufficient in not showing the fraudulent scheme was to be effected through the mails as an essential part.—United States v. Clark (D. C.) 190.

POWERS.

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PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 2.

In land office, see "Public Lands," § 2.

In patent office, see "Patents," § 2.

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See "Contempt," § 2; "Ejectment"; "Replevin."

Condemnation proceedings, see "Eminent Domain," § 2.

Particular proceedings in actions.

See "Abatement and Revival"; "Costs"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Removal of Causes"; "Stipulations"; "Trial."

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Particular remedies in or incident to actions.

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Procedure in criminal prosecutions.

See "Criminal Law."

Procedure in exercise of special jurisdictions.

In admiralty, see "Admiralty"; "Collision," § 6.

In bankruptcy, see "Bankruptcy," § 2.

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PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

Effect on claim against estate of bankrupt, see "Bankruptcy," § 7.

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Ground for reversal in civil actions, see "Appeal and Error," § 7.

PRELIMINARY INJUNCTION.

See "Injunction," § 3; "Patents," § 8.

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Acquisition of rights, see "Adverse Possession," § 1.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

Conveyance to agent in trust for principal, see "Trusts," § 1.

Insurance agents, see "Insurance," § 1.

Liabilities of sureties on bond of county officers, see "Counties," § 1.

§ 1. Mutual rights, duties, and liabilities.

One who sold and delivered personal property, and received the consideration, after which it was placed in his possession as an employé and agent of the purchaser, cannot set up title in himself to defeat that of his employer, on the ground that the sale was in furtherance of an illegal combination in restraint of trade.—Gilbert v. American Surety Co. (C. C. A.) 499.

Where officers of a brewing corporation were employed to manage the plant on its being conveyed to plaintiff, such officers, on being discharged as managers, *held* estopped to assert title on the ground that the conveyance was in restraint of trade.—Star Brewery of Chicago v. United Breweries Co. (C. C. A.) 713.

PRINCIPAL AND SURETY.

See "Indemnity."

Contingent claims of surety as debt provable against estate of bankrupt principal, see "Bankruptcy," § 7.

Liabilities of sureties on bonds or undertakings in legal proceedings, see "Replevin," § 1.

Subrogation of indemnitors of sureties, see "Subrogation."

PRIORITIES.

Of claims against estate of bankrupt, see "Bankruptcy," § 7.

Priority of jurisdiction, see "Courts," § 4.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 1.

PROCESS.

See "Injunction"; "Replevin."

PROPERTY.

See "Copyrights"; "Logs and Logging"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."

Adverse possession, see "Adverse Possession."
Taking for public use, see "Eminent Domain."

PROTEST.

By importer, see "Customs Duties," § 2.

PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

§ 1. Government ownership.

Act June 3, 1878, § 3, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1529], *held* to authorize the cutting of timber, not only on public mineral lands on which mining claims have been actually located, but also on neighboring lands having the character of mineral lands.—United States v. Basic Co. (C. C. A.) 504.

In an action for timber cut on mineral land, under Act June 3, 1878, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], a verdict for defendant could not be sustained, in the absence of proof of a compliance with the rules and regulations of the Interior Department.—United States v. Basic Co. (C. C. A.) 504.

§ 2. Survey and disposal of lands of United States.

A homestead settler cannot acquire rights in land included in an unforfeited railroad grant, and which is not at the time public land, which entitle him to the time given by section 3 of Act May 14, 1880, 21 Stat. 141 [U. S. Comp. St. 1901, p. 1393], to file his application after the land has been opened for settlement.—Edwards v. Begole (C. C. A.) 1.

One who had made some small improvement on land within a land grant in Michigan, subsequently forfeited by Act March 2, 1889 (25 Stat. 1008), with the intention of making a homestead entry thereof, but whose residence was elsewhere, *held* not a claimant by "actual occupation" on May 1, 1888, whose claim was confirmed by section 3 of the act.—Edwards v. Begole (C. C. A.) 1.

A homestead claimant, who acquiesced in an adverse decision of the land department on his claim, and afterwards made a new application to enter the land as a homestead, on the ground of the invalidity of an entry made by another, must be *held* to have abandoned his original claim, and cannot thereafter maintain a suit based thereon.—Edwards v. Begole (C. C. A.) 1.

A determination by the land department in a contest between homestead claimants, that one of the parties did not become an actual occupant of the land until a certain date, is one of fact, and conclusive on the courts.—Edwards v. Begole (C. C. A.) 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 1.

QUARANTINE.

Quarantine regulations as interference with interstate commerce, see "Commerce," § 1.

QUASHING.

Indictment or information, see "Indictment and Information," § 1.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 2.

QUIETING TITLE.

To mining claim, see "Mines and Minerals," § 2.

RAILROADS.

See "Street Railroads"; "Taxation," § 3.

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Res gestæ in action resulting from railroad accident, see "Evidence," § 1.

§ 1. Right of way and other interests in land.

If a conveyance by a railroad company of a portion of its right of way to another company be regarded as an abandonment of its easement, such abandonment can only be taken advantage of by the owner of the fee.—City of Durham v. Southern Ry. Co. (C. C.) 894.

§ 2. Operation.

Plaintiff's intestate, in an action against a railroad for negligent death, *held* not to have been guilty of contributory negligence as a matter of law.—Northern Pac. Ry. Co. v. Spike (C. C. A.) 44.

A decedent *held* to be presumed to have exercised care to avoid the accident by which he was killed at a railroad crossing.—Northern Pac. Ry. Co. v. Spike (C. C. A.) 44.

Conditions at a crossing *held* to make it imperative for a railroad train to give statutory signals on approaching it.—Northern Pac. Ry. Co. v. Spike (C. C. A.) 44.

Sending cars by a flying switch onto a siding, without warning or adequate means to control them, *held* negligence.—Kansas City Southern Ry. Co. v. Moles (C. C. A.) 351.

A requested instruction limiting the obligation of a railroad company to exercise care in switching its cars to persons engaged in work in or about the cars on the track *held* too restricted.—Kansas City Southern Ry. Co. v. Moles (C. C. A.) 351.

Plaintiff's failure to stop before driving on a railroad crossing in a city, where his view was obstructed by freight cars standing on a switch

track and other obstacles, *held* contributory negligence as a matter of law.—*Shatto v. Erie R. Co.* (C. C. A.) 678.

In an action for injuries at a railroad crossing, evidence of defendant's negligence *held* sufficient to go to the jury.—*Shatto v. Erie R. Co.* (C. C. A.) 678.

Evidence *held* insufficient to support a finding that fire was communicated to a building by a locomotive, so that verdict was properly directed for defendant.—*Ragsdale v. Southern Ry. Co.* (C. C.) 924.

REAL ACTIONS.

See "Ejectment."

RECEIVERS.

Of corporations in general, see "Corporations," § 6.

§ 1. Management and disposition of property.

In the absence of restrictive legislation, a receiver in liquidation proceedings may enforce the rights of creditors, as well as the rights of the debtor.—*King v. Pomeroy* (C. C. A.) 287.

RECORDS.

Of conditional contract of sale, see "Sales," § 4.

Transcript on appeal or writ of error, see "Appeal and Error," § 5.

RE-EXAMINATION.

Of claims against estate of bankrupt, see "Bankruptcy," § 7.

REGISTRATION.

Of conditional contract of sale, see "Sales," § 4.

REINSURANCE.

See "Insurance," § 9.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 1.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 8.

REMOVAL OF CAUSES.

§ 1. Power to remove and right of removal in general.

A defendant *held* not to have waived his right to remove cause from state to federal court.—*Fogarty v. Southern Pac. Co.* (C. C.) 941.

§ 2. Citizenship or alienage of parties.

A suit by a citizen of the state in which it is brought against a citizen of another state and an alien is removable on the joint petition of defendants.—*Roberts v. Pacific & A. Ry. & Nav. Co.* (C. C. A.) 785.

An allegation in a petition for removal that one of the petitioners is a corporation organized under the laws of a foreign country is a sufficient allegation that it was a citizen of such country when the action was commenced against it.—*Roberts v. Pacific & A. Ry. & Nav. Co.* (C. C. A.) 785.

Where joint liability was alleged against a railroad company of the same citizenship as plaintiff, and its receivers, the receivers were not entitled to remove the cause to the federal courts, either alone or with the railway company.—*Rupp v. Wheeling & L. E. R. Co.* (C. C. A.) 825.

§ 3. Proceedings to procure and effect of removal.

A petition for the removal of a cause, which incorrectly designated the division of the district, but correctly stated the place of holding court, *held* not fatally defective.—*Hodge v. Chicago & A. Ry. Co.* (C. C. A.) 48.

A bond of removal of a cause, incorrectly stating the district, could be amended by leave of court after the expiration of the time to remove the cause.—*Hodge v. Chicago & A. Ry. Co.* (C. C. A.) 48.

A defendant *held* to have removed cause to federal court within a reasonable time.—*Fogarty v. Southern Pac. Co.* (C. C.) 941.

§ 4. Proceedings in cause after removal.

A commission to take the deposition of a witness in a case removed to the Circuit Court is improperly granted before the expiration of the time within which defendant was required to file the record.—*North American Transportation & Trading Co. v. Howells* (C. C. A.) 694.

REPLEVIN.

As remedy for enforcement of forfeiture under copyright laws, see "Copyrights," § 2.

§ 1. Liabilities on bonds and undertakings.

Attorney's fees and stenographers' fees expended by defendant are not recoverable on a replevin bond.—*Gilbert v. American Surety Co.* (C. C. A.) 499.

REQUESTS.

For instructions in civil actions, see "Trial," § 3.

RESCISSION.

Of contract for sale of goods, see "Sales," § 1. Of insurance policy, see "Insurance," § 3.

RES GESTÆ.

In civil actions, see "Evidence," § 1.

RES JUDICATA.

See "Judgment," §§ 1, 2.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error"; "Criminal Law," § 2.
Bill in equity, see "Equity," § 4.

REVOCATION.

Of discharge of bankrupt, see "Bankruptcy," § 9.

RIGHT OF WAY.

Of railroads, see "Railroads," § 1.

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Assumed by employé, see "Master and Servant," § 1.

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Of property of bankrupt, see "Bankruptcy," § 5.
Of realty, see "Vendor and Purchaser."
On order or judgment of court, see "Judicial Sales."

§ 1. Modification or rescission of contract.

The right to rescind a contract made by the acceptance of an order sent by an agent, on the ground that such agent was interested in the firm making the order, is waived where the contract is recognized as valid and partially performed after knowledge of the connection.—*Columbia Mfg. Co. v. Hastings* (C. C. A.) 328.

§ 2. Warranties.

A contract for furnishing paper for use in the publication of a newspaper construed, and *held* not to contain a warranty that the paper furnished should be of the exact weight specified as the basis of settlement.—*Pulitzer Pub. Co. v. Rumford Falls Paper Co.* (C. C. A.) 519.

§ 3. Remedies of seller.

A contract for the sale and purchase of a herd of cattle on the range, to be delivered from time to time during the ensuing season, construed, and the rights of the parties thereunder determined.—*McNamara v. Home Land & Cattle Co.* (C. C. A.) 797.

§ 4. Conditional sales.

Under Code Ga. 1895, § 2777, a conditional bill of sale, which clearly bears date, must be recorded within 30 days from that time, and not within 30 days from the actual delivery of the property sold.—*In re Gosch* (D. C.) 602.

Under Code Ga. 1895, §§ 2776, 2777, a conditional sale is absolute as to subsequent creditors, unless it is evidenced by writing, and unless the writing is recorded within 30 days from its date.—*In re Gosch* (D. C.) 602.

SALVAGE.**§ 1. Right to compensation.**

Services rendered by the crew of a stranded steamer in jettisoning cargo to save the vessel, which was not abandoned, cannot be recovered for as special salvage services, but are within the duties of their employment, and paid for by the wages stipulated in the articles.—*Gilbraith v. Stewart Transp. Co.* (C. C. A.) 540.

§ 2. Amount and apportionment.

An award of \$18,200 made to the owner and crew of a tug for the salvage of a bark worth \$63,000, found anchored and in a helpless and leaking condition, near a dangerous shore, in the stormy season and deserted by her captain and crew.—*The Pinmore* (D. C.) 423.

Amount of salvage to be awarded a tug for services to drifting scows determined.—*Scows Nos. 21 and 59* (D. C.) 430.

SEAMEN.

A seaman, injured while in the service of the ship, without fault on his part, *held* entitled to compensation from the ship for the failure to provide him with proper support, medical attendance, and care until he was cured, so far as that was possible.—*The Troy* (D. C.) 901.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 2.

SEPARABLE CONTROVERSY.

Removal from state court, see "Removal of Causes," § 2.

SET-OFF AND COUNTERCLAIM.

Set-off of judgments, see "Judgment," § 4.

SHIPPING.

See "Admiralty"; "Collision"; "Salvage"; "Seamen"; "Towage."

§ 1. Charters.

A provision, in a charter party for a steam launch, that it was to be used for a coaching launch for college boat crews "on the Hudson river," *held*, in view of the circumstances under which the charter was made, a material part of the agreement, so that the taking of the boat to a different and more dangerous locality, where she was injured, constituted a deviation from the charter party, and rendered the charterer liable as an insurer for the damages resulting.—*Sutcliffe v. Seligman* (C. C. A.) 803.

A charterer is liable for an injury to a scow resulting from the negligence of a tug hired

by him to tow the same.—William H. Beard Dredging Co. v. Hughes (C. C. A.) 808.

The owner of a dredging plant, who sold the dredge, after the plant had been returned by a charterer, and before the expiration of the charter term, cannot recover the stipulated rental of the plant after that time as damages for breach of the charter.—William H. Beard Dredging Co. v. Hughes (C. C. A.) 808.

Under a contract by which the hirer of a vessel agreed to "pay the insurance" thereon for a certain sum, the duty of procuring the insurance devolved upon the owner, who had recourse upon the hirer only for the amount of the premium.—City of Detroit v. Grummond (C. C. A.) 963.

A stipulation requiring the hirer of a vessel to return her in as good condition as when taken, reasonable use, wear, and tear excepted, does not entitle the owner to refuse to accept the vessel when tendered back, because she is not in such good condition, and to recover her value.—City of Detroit v. Grummond (C. C. A.) 963.

Under a contract requiring a city to pay a stipulated price for a vessel hired, in case it should be "lost or destroyed" through its fault, the city was not bound to pay for the vessel because of its injury by fire not amounting to a total loss.—City of Detroit v. Grummond (C. C. A.) 963.

Matters held not to authorize charterer to cancel the charter.—Ansgar S. S. Co. v. William W. Brauer S. S. Co. (D. C.) 426.

A charter party, which does not fix any definite time for discharging the vessel, but provides that she shall be loaded and discharged "at charterer's risk and expense," does not render him liable for a delay caused by a strike for which he was not in fault, but requires him only to use reasonable diligence under the circumstances.—Marshall v. McNear (D. C.) 428.

A provision of a charter party that the vessel shall sail within a specified time is not a condition precedent, a breach of which entitles the charterer to cancel the contract, where there is a subsequent provision for a canceling date in case the vessel has not previously arrived at the loading port, and she arrives within the time so fixed.—Rosasco v. Pitch Pine Lumber Co. (D. C.) 437.

§ 2. Liabilities of vessels and owners in general.

The duty of guarding or warning the men engaged in discharging a ship against the dangers caused by improper stowage in matters of detail is that of the contracting stevedores, rather than of the officers of the ship.—The Beechdene (D. C.) 593.

A ship held not liable for injury to a stevedore, employed in discharging cargo, from the falling of an adjoining pile of sugar in bags, because one of the bags was improperly placed by the stevedores in loading.—The Beechdene (D. C.) 593.

§ 3. Carriage of passengers.

Evidence held to show compliance with contract to land passenger as near to a river's mouth as safety would permit.—Torrey v. Kelly (C. C. A.) 542.

Where the master of a vessel agrees to transport a passenger to a point as near the mouth of a certain river as will admit of a safe landing, it is for the master to determine, in good faith, where the landing shall be made.—Torrey v. Kelly (C. C. A.) 542.

Evidence held to show contract to carry passenger as near to the mouth of a river as could be done with safety, and not to the river's mouth.—Torrey v. Kelly (C. C. A.) 542.

SIGNALS.

At railway crossings, see "Railroads," § 2.

SPECIFICATIONS.

In opposition to discharge of bankrupt, see "Bankruptcy," § 9.

SPECIFIC PERFORMANCE.

§ 1. Contracts enforceable.

A court of equity will not decree specific performance of a contract which is unfair or unconscionable, or where performance by the complainant is entirely optional and no offer of performance is made.—Federal Oil Co. v. Western Oil Co. (C. C. A.) 674.

A lessee under an oil or gas lease held not entitled to a specific enforcement of the contract for want of mutuality, and because of delay in performance.—Federal Oil Co. v. Western Oil Co. (C. C. A.) 674.

STARE DECISIS.

See "Courts," § 2.

STATES.

Attorney general, see "Attorney General." Courts, see "Courts."

STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 2. Laws impairing obligation of contracts, see "Constitutional Law," § 2.

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See "Bankruptcy," § 1; "Customs Duties"; "Depositions"; "Evidence," § 3; "Judicial Sales"; "Limitation of Actions," § 1; "Logs and Logging"; "Navigable Waters," § 1; "Post Office," §§ 1, 2; "Public Lands," § 1; "Street Railroads," § 1.

Exclusion of Chinese, see "Aliens," § 1. Revenue laws, see "Internal Revenue."

§ 1. Enactment, requisites, and validity in general.

The fact that an income tax law does not expressly exempt the salaries of judges, and contains unconstitutional provisions relating to its enforcement, does not render it invalid as a

whole.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

§ 2. Amendment, revision, and codification.

Const. Ark. art. 5, § 23, providing that no law shall be revived or amended by reference to its title, has no application to legislation which affects remedies and methods of procedure alone.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

§ 3. Repeal, suspension, expiration, and revival.

Const. Ark. art. 5, § 23, providing that no law shall be revived or amended by reference to its title, has no application to legislation affecting remedies and methods of procedure alone.—*St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.* (C. C. A.) 276.

§ 4. Construction and operation.

The construction necessarily given to a previous statute is impressed on one which follows and is derived from it.—*In re Guggenheim Smelting Co.* (C. C.) 153.

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Recovery of fees in action on replevin bond, see "Replevin," § 1.

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Under the stipulation filed by the parties to an action for personal injuries, *held*, that there was not a mere admission on defendant's part of negligence, but also of injury resulting therefrom.—*Stackpole v. Northern Pac. Ry. Co. (C.)* 389.

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Corporate stock, see "Corporations," § 2.

STOCKBROKERS.

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STREET RAILROADS.

See "Railroads."

§ 1. Establishment, construction, and maintenance.

Comp. St. Mont. 1887, div. 5, c. 25, § 44G, *held* to authorize the organization of a corporation to own and operate a street railway.—*Central Trust Co. v. Warren (C. C. A.)* 323.

The execution of a mortgage on a street railway company's property in due course of busi-

ness *held* not a violation of Const. Mont. art. 15, § 17, as an attempted alienation of the company's franchise.—*Central Trust Co. v. Warren (C. C. A.)* 323.

Comp. St. Mont. 1887, div. 5, § 707, providing for priority of judgments against railroads for injuries, *held* not to apply to street railroads.—*Central Trust Co. v. Warren (C. C. A.)* 323.

§ 2. Regulation and operation.

A motorman in charge of a street car is under the same obligation to exercise care and prudence to avoid collisions and to avoid injuring people as they are to exercise care not to get in way of cars; each having an equal right to the use of the street.—*Southern Electric Ry. Co. v. Hageman (C. C. A.)* 262.

A general allegation, charging negligence of a motorman operating a street car as the cause of a collision, is sufficient to entitle the plaintiff to prove and rely on any omission of duty on his part, where no motion is made to have it made more specific.—*Southern Electric Ry. Co. v. Hageman (C. C. A.)* 262.

The charge of the court, in an action to recover damages from a street railroad company for injuries received by plaintiff by reason of the vehicle in which she was riding having been struck by a car, examined, and *held* not erroneous nor misleading, as applied to the evidence and considered as a whole, to properly submit to the jury the questions of negligence and contributory negligence.—*Southern Electric Ry. Co. v. Hageman (C. C. A.)* 262.

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See "Conspiracy," § 1.

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SUBROGATION.

Indemnitors of sureties of a bankrupt building contractor, having been compelled to pay judgments against the contractor, *held* entitled to an equitable lien on a balance due on the contract to the extent of the judgments paid.—*Reid v. Pauly (C. C. A.)* 652.

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Partial invalidity of statute, see "Statutes," § 1.

Validity of tax laws as denial of equal protection of laws, see "Constitutional Law," § 3.

Validity of tax laws as impairing obligation of contracts, see "Constitutional Law," § 2.

§ 1. Nature and extent of power in general.

The organic act of the territory of Hawaii confers full and comprehensive power to legislate in the matter of taxation.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

§ 2. Constitutional requirements and restrictions.

Article 8, § 1, of the Constitution of the United States, requiring that "all duties, imports and excises shall be uniform throughout the United States," establishes the rule only for taxation by the federal government, and has no application to the powers of taxation of a state or territorial Legislature.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

The income tax law of the territory of Hawaii (Act No. 20, pp. 31-35, Sess. Laws 1901) is not invalid as to its provisions imposing a tax on the incomes of corporations, as being in violation of the Constitution of the United States or the organic act of the territory.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

§ 3. Liability of persons and property.

The exemption of insurance companies from the operation of an income tax law does not render it invalid as to other corporations who are made subject to the law, where the exemption is expressly made on the ground that such companies are required by another law to pay a tax on the premiums received.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

A provision of an income tax law allowing an exemption of income to the amount of \$1,000 per year to persons, not allowed to corporations, is not an illegal discrimination against the latter.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

A provision of an income tax law exempting from its operation private schools, colleges, commercial colleges, and fraternal benefit societies, does not make an illegal discrimination which renders the law invalid as to other corporations or persons upon whom the tax is imposed.—*W. C. Peacock & Co. v. Pratt* (C. C. A.) 772.

A railroad company, succeeding to the property of another company sold under foreclosure, *held* to have also succeeded, under the statutes of Maryland, to an exemption from taxation granted to the previous owner for a term of years.—*Bancroft v. Wicomico County Com'rs* (C. C.) 874.

A special act exempting property of a railroad company from taxation construed.—*Bancroft v. Wicomico County Com'rs* (C. C.) 874.

TELEGRAPHS AND TELEPHONES.

Condemnation of property, see "Eminent Domain."

§ 1. Establishment, construction, and maintenance.

Telegraph company *held* not to have complied with decision on previous appeal requiring it to obtain consent of common council before installing district telegraph system in city streets.—*Western Union Telegraph Co. v. City of Toledo* (C. C. A.) 734.

TENDER.

See "Deposits in Court."

TERRITORIES.

Power of territories to legislate as to taxation, see "Taxation," § 1.

TIMBER.

See "Logs and Logging."

On public lands, see "Public Lands," § 1.

TIME.

For performance of contract, see "Contracts," § 2.

For removal of cause to federal court, see "Removal of Causes," § 3.

In the computation of damages for breach of contract, where any definite period is the agreed standard of measurement, every intervening Sunday must be included and counted.—*Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A.) 609; *Eastern Ry. Co. of Minnesota v. Pressed Steel Car Co., Id.*

When the last day within which a deed is to be performed falls on Sunday, the act may be done on the succeeding day.—*Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A.) 609; *Eastern Ry. Co. of Minnesota v. Pressed Steel Car Co., Id.*

TITLE.

Color of title, see "Adverse Possession."

Retention of apparent title by grantor, see "Fraudulent Conveyances," § 1.

To mining property, see "Mines and Minerals," § 2.

To maintain trespass, see "Trespass," § 1.

TORTS.

Causing death, see "Death," § 1.

Particular torts.

See "Conspiracy," § 1; "Malicious Prosecution"; "Negligence"; "Trespass."

Maritime torts, see "Collision."

TOWAGE.

A tug *held* not in fault for injury to a scow, which she had placed in a fleet preparatory to towing down the Hudson, caused by the scow breaking adrift in the night during an extraordinary storm, which rendered it dangerous for the tug to approach the fleet, and where the scow, through negligence of the owner, was unprovided with an anchor.—*Brown v. Cornell Steamboat Co.* (C. C. A.) 632.

The injury of a seine by a tow *held* not to have been due to any negligence on the part of the tug which would render her liable therefor.—*The Oscar B* (C. C. A.) 978.

A tug and schooner, which the tug had contracted to tow from the wharf in a dangerous locality, both *held* in fault for the grounding of the schooner on a reef.—*The Jane McCrea* (D. C.) 932.

A vessel which undertakes a towage service is liable for reasonable care of the tow, and that reasonable care is measured by the dangers and hazards to which the tow is exposed, which it is the duty of the master of the tug to know and to guard against.—*The Jane McCrea* (D. C.) 932.

TOWNS.

See "Counties."

TRADE-MARKS AND TRADE-NAMES.

Judgment dismissing bill for unfair competition as bar to subsequent action, see "Judgment," § 1.

§ 1. Marks and names subjects of ownership.

A manufacturer cannot have a trade-mark in letters of the alphabet, used by him to mark his goods to indicate the different grade or quality and dimensions.—*Stevens Linen Works v. William & John Don & Co.* (C. C.) 171.

The word "Elastic" is not so aptly descriptive of sectional bookcases as to preclude its appropriation as a valid trade-mark by one manufacturer to designate the origin of his goods.—*Globe-Wernicke Co. v. Brown* (C. C.) 185.

§ 2. Infringement and unfair competition.

Marking an unpatented article with a patent imprint through a mistake of employes *held* not to support a suit in equity for an accounting and injunction, where there was no evidence of an intention to continue.—*Globe-Wernicke Co. v. Brown & Besly* (C. C. A.) 90.

The imitation of complainant's box letter files by defendant, by the use of the same names,

emblems, and colors in such manner as to deceive purchasers as to their origin, *held* to constitute unfair competition, which entitled complainant to an injunction.—*Globe-Wernicke Co. v. Brown & Besly* (C. C. A.) 90.

A manufacturer, who places his trade-mark upon an article in such place that it cannot be removed by one having a right to reconstruct and resell the article after it has become useless, except at increased cost, will not be granted a preliminary injunction against infringement, by a resale without removing its trade-mark, in the absence of clear proof that it was so placed for legitimate trade-mark purposes and not for the purpose of preventing a re-use of the article.—*General Electric Co. v. Re-New Lamp Co.* (C. C.) 164.

Defendant bought burned out electric lamps, made by complainant and bearing its trade-mark, and remade the same, by cleaning and repairing and inserting new filaments, after which they were resold. *Held*, that such process was a reconstruction, and not merely a repairing, and the new product was not entitled to be sold under complainant's trade-mark.—*General Electric Co. v. Re-New Lamp Co.* (C. C.) 164.

The mere use by one manufacturer of the same letters to indicate the quality of his goods as are used for a similar purpose by another older in the business does not constitute unfair competition, where there is no proof of an intent to deceive purchasers, or that any one was deceived as to the origin of the goods.—*Stevens Linen Works v. William & John Don & Co.* (C. C.) 171.

A plaintiff *held* entitled to protection against unfair competition by the use by others of the word "Elastic," as applied to sectional bookcases or similar articles, which had acquired a secondary meaning in the trade and with the general public as denoting the goods made by plaintiff.—*Globe-Wernicke Co. v. Brown* (C. C.) 185.

The right to relief against unfair competition is not dependent upon an actual fraudulent intent, where the conduct of defendant was such as would naturally deceive the public as to the origin of its goods, and where it is shown that such deception actually resulted.—*Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.) 357.

Simple laches in the institution of a suit for unfair competition, as by a delay of six years with knowledge of defendants' acts, will not defeat the right of a complainant to an injunction, where the right is clear, although it may preclude the recovery of damages for the past wrong.—*Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.) 357.

A defendant *held* chargeable with unfair competition in adopting a corporate name similar to that of complainant, containing the name of the organizer of complainant, where no one of that name was connected with defendant, and in using such name to mark its goods, which came in competition with those of complainant.—*Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.) 357.

The fact that two corporations are located in different communities does not affect the right of one to an injunction by adopting a similar corporate name, where they are engaged in the same business, and their products are both sold in the same open markets.—*Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.) 357.

A trade-mark *held* infringed by such use by defendant of another trade-mark as to simulate that of complainant and deceive purchasers.—*National Biscuit Co. v. Swick* (C. C.) 1007.

A technical trade-mark, although not a fac simile of another, may be so used by a rival manufacturer as to imitate another's trade-mark; and, when such use actually deceives the public, it constitutes an infringement, against which a court of equity will grant relief.—*National Biscuit Co. v. Swick* (C. C.) 1007.

TRADE SECRETS.

Validity of contract not to disclose, see "Contracts," § 1.

TRADE UNIONS.

Enjoining officers of labor organization from ordering strike, see "Injunction," §§ 1, 3.

TRANSCRIPTS.

Of record for purpose of review, see "Appeal and Error," § 5.

TRANSFER TAX.

See "Internal Revenue."

TREASURERS.

County treasurer, see "Counties," § 1.

TREES.

See "Logs and Logging."

Timber on public lands, see "Public Lands," § 1.

TRESPASS.

Ejection of trespasser, see "Carriers," § 2.

§ 1. Actions.

In an action against a sheriff for wrongfully seizing plaintiff's property under a writ of replevin against third parties, the rule which authorizes recovery on the strength of possession alone against a trespasser *held* not to apply.—*McDowell v. McCormick* (C. C. A.) 61.

TRESPASS TO TRY TITLE.

See "Ejectment."

TRIAL.

See "Witnesses."

After remand by appellate court, see "Appeal and Error," § 8.

Construction of contract as question for jury, see "Contracts," § 2.

Discharge of indemnitor as question for jury, see "Indemnity."

Harmless error in instructions, see "Appeal and Error," § 7.

Review of instructions dependent on presentation of questions by record, see "Appeal and Error," § 5.

Trial of particular civil actions or proceedings.

See "Malicious Prosecution," § 1; "Negligence," § 2.

For breach of contract, see "Contracts," § 4.

For infringement of patent, see "Patents," § 7.

For personal injuries, see "Master and Servant," § 1; "Railroads," § 2; "Street Railroads," § 2.

Trial of criminal prosecutions.

See "Criminal Law," § 1; "Embezzlement."

§ 1. Reception of evidence.

The court *held* to have discretion to refuse to admit cumulative evidence.—*Ragsdale v. Southern Ry. Co.* (C. C.) 924.

§ 2. Taking case or question from jury.

Rule for directing verdict stated.—*Standard Life & Accident Ins. Co. v. Sale* (C. C. A.) 664.

A request by both parties for the direction of a verdict *held* equivalent to a request for a finding of the facts by the court.—*Bradley Timber Co. v. White* (C. C. A.) 779.

§ 3. Instructions to jury.

A failure to cover all the aspects of a case in a charge will not be considered on appeal, when no exception was taken to the charge as given.—*Hodge v. Chicago & A. Ry. Co.* (C. C. A.) 48.

A court is not required to give an instruction prepared by counsel, no matter how correct it may be in the abstract, if the same principle, or substantially the same principle, has been enunciated in its charge, though in different language.—*Southern Electric Ry. Co. v. Hageman* (C. C. A.) 262.

Erroneous instruction *held* not cured by subsequent correct charge.—*Standard Life & Accident Ins. Co. v. Sale* (C. C. A.) 664.

§ 4. Custody, conduct, and deliberations of jury.

Permitting an exhibit, not introduced in evidence, and which tended to corroborate plaintiff's testimony, to go to the jury, *held* prejudicial error.—*Alaska Commercial Co. v. Dinkelspiel* (C. C. A.) 318.

§ 5. Verdict.

Where it could not be ascertained from the appeal record on which of two counts the verdict was rendered, and no recovery could be had on one of the counts, the judgment rendered thereon would be reversed.—*Patton v. Wells* (C. C. A.) 337.

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

§ 1. Creation, existence, and validity.

Evidence examined, and *held*, that the title acquired by agent was charged with a constructive

trust for the benefit of the principals and enforceable in equity.—*Trice v. Comstock* (C. C. A.) 620.

The test of a constructive trust is the fiduciary relation existing between the parties, and a betrayal of the confidence imposed under it to acquire property to the damage of the other party.—*Trice v. Comstock* (C. C. A.) 620.

An acquisition by one of two parties, placed in fiduciary relations, by means of such relation, of an interest which hinders the carrying out of the object of such relation, charges the property acquired by him by means of such information with a constructive trust for the benefit of the other party.—*Trice v. Comstock* (C. C. A.) 620.

Where a person is in such relation to another that he becomes interested for or with him in any property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whom he is associated.—*Trice v. Comstock* (C. C. A.) 620.

The location of land in the name of one for the joint use and benefit of himself and another, who helps select and improve it, creates a trust, and a contract between the two, by which the trustee of the title obtains the rights of his cestui que trust, will not be sustained, unless it affirmatively appears to have been fair and just.—*Moore v. Moore* (C. C. A.) 737.

TUGS.

See "Towage."

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 2.

UNITED STATES.

See "Army and Navy"; "Customs Duties"; "Post Office."

Conspiracy to defraud, see "Conspiracy," § 2.
Courts, see "Courts," § 3; "Removal of Causes."
Indians, see "Indians."
Public lands, see "Public Lands," § 2.

USE AND OCCUPATION.

Plaintiff *held* not entitled to maintain assumpsit for use and occupation of real estate, where defendant claimed possession under a third party.—*Adsit v. Kaufman* (C. C. A.) 355.

USURY.

Defense available to trustee in bankruptcy, see "Bankruptcy," § 4.

VACATION.

Of discharge of bankrupt, see "Bankruptcy," § 9.

VALUE.

Limits of jurisdiction, see "Courts," § 2.
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VENDOR AND PURCHASER.

See "Sales."

Specific performance of contract, see "Specific Performance."

§ 1. Requisites and validity of contract.

Where a brewing company conveyed its property to plaintiff, and after the discharge of its officers, who had been employed by plaintiff to manage the property, they took forcible possession thereof, vendor *held* not entitled to avail itself of such acts to repudiate the conveyance.—*Star Brewery of Chicago v. United Breweries Co.* (C. C. A.) 713.

§ 2. Construction and operation of contract.

A contract for the sale of real estate *held* not ambiguous, so as to require construction by a court of equity.—*Clarke v. Shirk* (C. C. A.) 340.

§ 3. Rights and liabilities of parties.

The purchaser of premises leased to the operator of a smelter for dumping purposes is put on notice of the sense in which the word "tailing" is used in the lease, by the practical construction given the instrument in the dumping of slag.—*Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* (C. C. A.) 524.

The actual payment before notice of the price is indispensable to the maintenance of the claim that one is a bona fide purchaser for value without notice.—*Trice v. Comstock* (C. C. A.) 620.

Contract for the sale of a brewery to a consolidated corporation construed, and *held* not to entitle the officers of the vendor to possession until the vendee had paid incumbrances specified in the deed.—*Star Brewery of Chicago v. United Breweries Co.* (C. C. A.) 713.

VERDICT.

Directing verdict in civil actions, see "Trial," § 2.

In civil actions, see "Trial," § 5.

In prosecution for embezzlement, see "Embezzlement."

VICE PRINCIPALS.

See "Master and Servant," § 1.

WAGERS.

See "Gaming," § 1.

WAGES.

Preference of claim for, against estate of bankrupt, see "Bankruptcy," § 7.

WAIVER.

Of objections to particular acts or proceedings.

Breach of contract, see "Contracts," § 3.

Nonjoinder or misjoinder of parties, see "Parties," § 1.

Of rights or remedies.

See "Insurance," § 6; "Removal of Causes," § 1.
 Adverse claim to mining property, see "Mines and Minerals," § 1.
 Right to appeal, see "Appeal and Error," § 2.
 Right to rescind contract of sale, see "Sales," § 1.
 Right to suspend member of mutual benefit insurance association, see "Insurance," § 10.

WAR.

See "Army and Navy."

WARRANTY.

By insured, see "Insurance," § 4.
 On sale of goods, see "Sales," § 2.

WATERS AND WATER COURSES.

See "Navigable Waters."

§ 1. Public water supply.

Apportionment of water by water company in time of drought *held* a reasonable regulation, within contract authorizing such regulations.—*Souther v. San Diego Flume Co.* (C. C. A.) 347.

Contract of water company construed, and *held* to authorize apportionment of water, in time of drought, among consumers, and not to entitle one consumer to full quota of water as soon as cities and towns were supplied.—*Souther v. San Diego Flume Co.* (C. C. A.) 347.

WILLS.

See "Executors and Administrators."
 War revenue inheritance taxes, see "Internal Revenue."

WITNESSES.

See "Depositions"; "Evidence."
 Opinions, see "Evidence," § 5.

§ 1. Competency.

Documents which are a part of the archives of a foreign consulate are privileged, and a witness cannot be compelled to disclose their contents.—*Kessler v. Best* (C. C.) 439.

A circuit court of one district, under whose subpoena a witness has been brought before an examiner to give testimony in a suit pending in another district, has power to strike out from his testimony anything which violates the privilege of a foreign government.—*Kessler v. Best* (C. C.) 439.

WRITS.*Particular writs.*

See "Habeas Corpus"; "Injunction"; "Replevin."
 Writ of error, see "Appeal and Error."

WRONGFUL ATTACHMENT.

See "Malicious Prosecution."