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IN THE

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

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OF THE

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CASES REPORTED.

	Page
Abbot, York County Sav. Bank v. (C. C.)	980
A. Booth & Co., Davis v. (C. C. A.)	31
A. B. & E. L. Shaw Co., Blumberg v. (C. C.)	608
Adelaide, The (D. C.)	1002
Admiral Schley, The (C. C. A.)	433
Ætna Indemnity Co., York City School Dist. v. (C. C.)	131
Albright v. Langfeld (C. C.)	473
Aldrich v. Bingham (D. C.)	363
Allen, Viquesney v. (C. C. A.)	21
Allen-West Commission Co., Patillo v. (C. C. A.)	680
Allison White, The (D. C.)	991
Alphin & Lake Cotton Co., In re (D. C.)	824
American Acetylene Burner Co. v. Kirchberger (C. C.)	94
American Alkali Co. v. Salom (C. C. A.)	46
American Electrical Novelty & Mfg. Co. v. Howard Electrical Novelty Co. (C. C.)	495
American Electrical Novelty & Mfg. Co. v. Stein & Langlos Electric Mfg. Co. (C. C.)	495
American Electric Tel. Co., Western Tel. Mfg. Co. v. (C. C. A.)	75
American Exp. Co., United States v. (C. C.)	656
American Graphophone Co. v. Leeds & Catlin Co. (C. C.)	281
American Graphophone Co., Victor Talking Mach. Co. v. (C. C. A.)	67
American Sugar Refining Co., United States v. (C. C. A.)	833
American Surety Co. of New York, Shelton v. (C. C. A.)	210
Anderson, Gibson v. (C. C. A.)	39
Arnold, Brown v. (C. C. A.)	723
Arrott v. Standard Sanitary Mfg. Co. (C. C.)	457
Asher Lumber Co., Lockard v. (C. C. A.)	689
Astoria & C. R. R. Co., United States v. (C. C.)	1006
Astrich v. German-American Ins. Co. of New York (C. C. A.)	13
Atlanta, K. & N. R. Co. v. Southern R. Co. (C. C. A.)	657
Atlantic & N. C. R. Co., Cuyler v. (C. C.)	95
Babcock, The W. I. (D. C.)	632
Bailey v. Willeford (C. C. A.)	242
Baker, Consolidated California & V. Min. Co. v., two cases (C. C.)	989
Barker, Clancy v. (C. C. A.)	161
Barlow, Wickham v. (D. C.)	819
Bartels, Northwestern Commercial Co. v. (C. C. A.)	25
Bartram Bros., United States v. (C. C. A.)	833
Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. (C. C. A.)	215
Beavers, In re (C. C.)	366
Bechtold v. Nowacke (C. C.)	275
Benjamin H. Howell Son & Co., United States v. (C. C. A.)	833
Benson, In re (C. C.)	968
Bernard, Frank v. (C. C.)	269
Bethel v. Mellor & Rittenhouse Co. (D. C.)	129
Bibber-White Co. v. White River Valley Electric R. Co. (C. C.)	995
Bingham, Aldrich v. (D. C.)	363
Bisel Co. v. Welsh (C. C.)	564
Bliss Co. v. Buffalo Tin Can Co. (C. C. A.)	51
Blue Mountain Iron & Steel Co. v. Portner (C. C. A.)	57
Blumberg v. A. B. & E. L. Shaw Co. (C. C.)	608
Bobbs-Merrill Co. v. Snellenburg (C. C.)	530
Boise City Irrigation & Land Co. v. Clark (C. C. A.)	415
Booth & Co., Davis v. (C. C. A.)	31
Boston & M. R. Co., Stockwell v. (C. C.)	152
Boston & M. R. Co., Stockwell v. (C. C.)	153
Boyd v. Schneider (C. C. A.)	223
Brady, The John I., two cases (C. C. A.)	235
Brannock, In re (D. C.)	819
Breese, United States v. (D. C.)	915
Breitenbach Co. v. Spangenberg (C. C.)	160
Brinckerhoff v. Roosevelt (C. C.)	955
Britain S. S. Co. v. J. B. King Transp. Co. (C. C. A.)	62
Britton v. Central Union Tel. Co. (C. C. A.)	844
Brodrick Copygraph Co. of New Jersey v. Mayhew (C. C.)	92
Brown v. Arnold (C. C. A.)	723
Brown v. Harkins (C. C. A.)	63
Brown v. Huntington Piano Co. (C. C.)	273
Brown, Tennessee Oil, Gas & Mineral Co. v. (C. C. A.)	696
Brunswick-Balke-Collender Co. v. Klump (C. C.)	93
Brunswick-Balke-Collender Co. v. Klumpp (C. C. A.)	255
Buckingham v. First Nat. Bank (C. C. A.)	192
Buffalo Expanded Metal Co., New Jersey Wire Cloth Co. v. (C. C.)	265
Buffalo Tin Can Co., E. W. Bliss Co. v. (C. C. A.)	51
B. Ulmann & Co. v. United States (C. C.)	649
Bunker Hill & S. Mining & Concentrating Co., Empire State-Idaho Mining & Developing Co. v. (C. C. A.)	591
Bunker Hill & S. Mining & Concentrating Co., Last Chance Min. Co. v. (C. C. A.)	579
Burns v. Burns (C. C. A.)	238
Burnstine, In re (D. C.)	828
Burton, United States v. (D. C.)	552
Butterwick, In re (D. C.)	371
Campbell, The Gordon (D. C.)	963
Carleton, In re (D. C.)	146
Castleberry, Phœnix Bridge Co. v. (C. C. A.)	175

	Page
Ceballos, Havana City R. Co. v. (C. C.)	381
Centennial, The (D. C.)	816
Central Union Tel. Co., Britton v. (C. C. A.)	844
Chadwick v. Wiley (D. C.)	1003
Chaffee Mfg. Co. v. Selchow (C. C.)	543
Charles F. Mayer, The (C. C. A.)	433
Cheatham v. Edgefield Mfg. Co. (C. C.)	118
Chicago Great Western R. Co. v. Roddy (C. C. A.)	712
Chicago, M. & St. P. R. Co., Galow v. (C. C. A.)	242
Chief, The (D. C.)	400
Church Co. v. Zimmermann (C. C.)	652
Clancy v. Barker (C. C. A.)	161
Clark, Boise City Irrigation & Land Co. v. (C. C. A.)	415
Clarke v. Eureka County Bank (C. C.)	145
Cleveland Foundry Co. v. Detroit Vapor Stove Co. (C. C.)	740
Cleveland Foundry Co. v. Detroit Vapor Stove Co. (C. C. A.)	853
Clifford v. Williams (C. C.)	100
Clowney, Weisgerber v. (C. C.)	477
Coburn, Moulton v. (C. C. A.)	201
Coburn & Co., In re (C. C. A.)	201
Coffin, The (D. C.)	1002
Cohen, In re (D. C.)	391
Coleman, In re (D. C.)	151
Commonwealth Title Ins. & Trust Co., Sprigg v. (C. C. A.)	5
Consolidated California & V. Min. Co. v. Baker, two cases (C. C.)	989
Consolidated Dental Mfg. Co. v. Holliday (C. C.)	384
Cook & Co. v. Heywood Bros. & Wakefield Co. (C. C.)	755
Cora F. Cressy, The (D. C.)	144
Cosmopolitan Shipping Co., Dana & Co. v. (D. C.)	158
Coster v. Parkersburg Branch R. Co. (C. C.)	115
Coulter, Louisville & N. R. Co. v. (C. C.)	282
Cressy, The Cora F. (D. C.)	144
Crown Cork & Seal Co., Ideal Stopper Co. v. (C. C. A.)	244
Curtain Supply Co. v. Keeler (C. C.)	871
Cuyler v. Atlantic & N. C. R. Co. (C. C.)	95
Daly v. Quinlan (D. C.)	394
Dana & Co. v. Cosmopolitan Shipping Co. (D. C.)	158
Daniel v. Restein & Co. (C. C.)	469
Daniels, In re (C. C.)	95
Davis v. A. Booth & Co. (C. C. A.)	31
Davis-Colby Ore Roaster Co., Lackawanna Iron & Steel Co. v. (C. C. A.)	68
Delaware River Amusement Co., Jackson v. (C. C.)	134
Detroit Timber & Lumber Co., United States v. (C. C. A.)	668
Detroit Vapor Stove Co., Cleveland Foundry Co. v. (C. C. A.)	853
Detroit Vapor Stove Co., Cleveland Foundry Co. v. (C. C.)	740
Diamond Drill & Machine Co. v. Kelley (C. C.)	89
Dickson v. United States (C. C.)	573
Dodge v. United States (C. C. A.)	849
Douglas Coal & Coke Co., In re (D. C.)	769
Downing & Co., United States v. (C. C.)	653
Drewson v. Hartje Paper Mfg. Co. (C. C. A.)	734
Dun & Co., Mower-Hobart Co. v. (C. C.)	812
Echo, The (D. C.)	622
Edgefield Mfg. Co., Cheatham v. (C. C.)	118
Eidman, Tilghman v. (C. C.)	651
836,693 Feet of Lumber, McArthur v. (D. C.)	389
Elliott, Rupp & Wittgenfeld v. (C. C. A.)	730
Ellis v. Inman, Poulsen & Co. (C. C. A.)	182
Elton, The (D. C.)	562
Empire Electrical Instrument Co., Weston Electrical Instrument Co. v. (C. C.)	82
Empire Electrical Instrument Co., Weston Electrical Instrument Co. v. (C. C.)	90
Empire Electrical Instrument Co., Weston Electrical Instrument Co. v. (C. C.)	494
Empire Mill. & Min. Co. v. Tombstone Mill & Min. Co. (C. C.)	339
Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.)	591
Enterprise Mfg. Co. v. Landers, Frary & Clark (C. C. A.)	240
Erie Preserving Co., Griggs, Cooper & Co. v. (C. C.)	359
Erskine M. Phelps, The (C. C. A.)	1
Eureka County Bank, Clarke v. (C. C.)	145
E. W. Bliss Co. v. Buffalo Tin Can Co. (C. C. A.)	51
Farmers' Loan & Trust Co. v. Sioux Falls (C. C.)	890
Farrington, McBride v. (C. C.)	797
Fessenden, International Wireless Tel. Co. v. (C. C.)	491
Fessenden, International Wireless Tel. Co. v. (C. C.)	493
F. H. Leggett & Co. v. United State (C. C.)	817
First Nat. Bank v. State Nat. Bank (C. C. A.)	422
First Nat. Bank v. State Nat. Bank (C. C. A.)	430
First Nat. Bank, Buckingham v. (C. C. A.)	192
Fleitmann & Co., United States v. (C. C.)	396
Folsom, Ex parte (C. C.)	496
Folsom v. Ninety-Six Tp. (C. C.)	496
Force v. Sawyer-Boss Mfg. Co. (C. C.)	884
Frank v. Bernard (C. C.)	269
Fries v. Leeming (C. C.)	765
Galow v. Chicago, M. & St. P. R. Co. (C. C. A.)	242
Garlich v. Northern Pac. R. Co. (C. C. A.)	837
Gartner & Friedenheit v. United States (C. C.)	574
Geddes, United States v. (C. C. A.)	452
General Electric Co. v. Yost Electric Mfg. Co. (C. C.)	874
General Electric Co., Star Brass Works v. (C. C. A.)	78
George Lueders & Co. v. United States (C. C.)	655
George M. Coburn & Co., In re (C. C. A.)	201
George Riggs & Co. v. United States (C. C.)	568
George T. Bisel Co. v. Welsh (C. C.)	564
German-American Ins. Co. of New York, Astrich v. (C. C. A.)	13
Gibson v. Anderson (C. C. A.)	39

	Page
Godillot & Co., United States v. (C. C.)	653
Goldfarb Bros., In re (D. C.)	643
Gordon Campbell, The (D. C.)	963
Graveson, Maxfield v. (C. C. A.)	841
Gray, James v. (C. C. A.)	401
Griggs, Cooper & Co. v. Erie Preserving Co. (C. C.)	359
Grunberg, United States v. (C. C.)	137
Guthrie v. Sparks (C. C. A.)	443
Haas Co., In re (C. C. A.)	232
Habeler v. Rogers (C. C. A.)	43
Hahn v. United States, two cases (C. C.)	1000
Hallahan, Zeigler v. (C. C. A.)	205
Hall & Bishop v. United States (C. C.)	648
Hampton Roads Ry. & Electric Co. v. Newport News & O. P. Ry. & Electric Co. (C. C.)	534
Hardware Jobbers' Purchasing Co., Morrill v. (C. C.)	882
Harkins, Brown v. (C. C. A.)	63
Hartje Paper Mfg. Co., Drewson v. (C. C. A.)	734
Harts, United States v. (D. C.)	886
Harway Dyewood & Extract Mfg. Co., Hemolin Co. v. (C. C.)	483
Hatfield v. King (C. C.)	791
Havana City R. Co. v. Ceballos (C. C.)	381
H. B. Chaffee Mfg. Co. v. Selchow (C. C.)	543
Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. (C. C.)	483
Heywood Bros. & Wakefield Co., S. A. Cook & Co. v. (C. C.)	755
Hilands, Van Tine v. (C. C.)	124
Hill, Wilkin v. (C. C.)	762
Hoeninghaus & Curtis v. United States (C. C.)	570
Holst v. Savannah Electric Co. (C. C.)	931
Holliday v. Consolidated Dental Mfg. Co. (C. C.)	384
Horstmann Co., Oehrle v. (C. C.)	487
Howard Electrical Novelty Co., American Electrical Novelty & Mfg. Co. v. (C. C.)	495
Howell Son & Co., United States v. (C. C. A.)	833
Huntington Piano Co., Brown v. (C. C.)	273
Ideal Stopper Co. v. Crown Cork & Seal Co. (C. C. A.)	244
Inman v. New York Interurban Water Co. (C. C.)	997
Inman, Poulsen & Co., Ellis v. (C. C. A.)	182
International Wireless Tel. Co. v. Fessenden (C. C.)	491
International Wireless Tel. Co. v. Fessenden (C. C.)	493
Jabine v. Sparks (C. C. A.)	440
Jackson v. Delaware River Amusement Co. (C. C.)	134
James, Ex parte (C. C. A.)	401
James, In re (C. C. A.)	401
James v. Gray (C. C. A.)	401
Jameson v. Lewis (C. C. A.)	728
Janney v. Pan-Coast Ventilator & Mfg. Co. (C. C.)	143
J. B. King Transp. Co., Britain S. S. Co. v. (C. C. A.)	62
John Church Co. v. Zimmermann (C. C.)	652
John I. Brady, The, two cases (C. C. A.)	235
J. R. Simon & Co. v. United States (C. C.)	649
Kahn v. Starrells (C. C.)	464
Kane, In re (D. C.)	386
Kane v. Luckman (C. C.)	609
Keeler, Curtain Supply Co. v. (C. C.)	871
Keen v. Mutual Life Ins. Co. (C. C.)	559
Kelley, Diamond Drill & Machine Co. v. (C. C.)	89
Keystone Lantern Co., Spear v. (C. C.)	879
King, Hatfield v. (C. C.)	791
King Gruffydd, The (C. C. A.)	189
King Transp. Co., Britain S. S. Co. v. (C. C. A.)	62
Kirchberger, American Acetylene Burner Co. v. (C. C.)	9
Kirk v. United States (C. C.)	331
Klump, Brunswick-Balke-Collender Co. v. (C. C.)	93
Klumpp, Brunswick-Balke-Collender Co. v. (C. C. A.)	255
Kuntz v. Young (C. C. A.)	719
Lackawanna Iron & Steel Co. v. Davis-Colby Ore Roaster Co. (C. C. A.)	68
Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co. (C. C.)	147
Landers, Frary & Clark, Enterprise Mfg. Co. v. (C. C. A.)	240
Langfeld, Albright v. (C. C.)	473
Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.)	579
L. B. Weisenberg & Co., In re (D. C.)	517
Leeds & Catlin Co., American Graphophone Co. v. (C. C.)	281
Leeming, Fries v. (C. C.)	765
Leggett & Co. v. United States (C. C.)	817
Lennox, The M. A. (D. C.)	1002
Levin, In re (D. C.)	388
Lewis, Jameson v. (C. C. A.)	728
Lillian, The (D. C.)	375
Lincoln Ironworks v. W. H. McWhirter Co. (C. C.)	860
Lockard v. Asher Lumber Co. (C. C. A.)	689
Louisville & N. R. Co. v. Coulter (C. C.)	282
Luckman, Kane v. (C. C.)	609
Lueders & Co. v. United States (C. C.)	655
McAlarney v. Supreme Council A. L. H. (C. C.)	538
McArthur v. 836,693 Feet of Lumber (D. C.)	389
McArthur Bros. Co. v. 622,714 Feet of Lumber (D. C.)	389
McBride v. Farrington (C. C.)	797
McCaffrey, Sackett v. (C. C. A.)	219
McIntire, In re (C. C. A.)	422
McIntyre v. Southern R. Co. (C. C.)	985
McWhirter Co., Lincoln Ironworks v. (C. C.)	860
Majestic, The (D. C.)	395
M. A. Lennox, The (D. C.)	1002
Mallory v. Maryland Glass Co. (C. C.)	111
Marra v. San Jacinto & P. V. Irr. Dist., two cases (C. C.)	780
Maryland Glass Co., Mallory v. (C. C.)	111
Mason, The W. G. (D. C.)	632
Maxfield v. Graveson (C. C. A.)	841

	Page
Mayer, The Charles F. (C. C. A.)	433
Mayhew, Brodrick Copygraph Co. of New Jersey v. (C. C.)	92
Mellor & Rittenhouse Co., Bethel v. (D. C.)	129
Merrow, In re (D. C.)	993
Mertens, In re (D. C.)	507
Mertens, In re (D. C.)	972
Meyer & Lange v. United States (C. C.)	817
M. J. Breitenbach Co. v. Spangenberg (C. C.)	160
Montgomery Electric Light & Power Co., Westinghouse Electric & Mfg. Co. v. (C. C.)	86
Moody, In re (D. C.)	525
Morrill v. Hardware Jobbers' Purchasing Co. (C. C.)	882
Moulton v. Coburn (C. C. A.)	201
Mower-Hobart Co. v. R. G. Dun & Co. (C. C.)	812
Mutual Life Ins. Co., Keen v. (C. C.)	559
Naretti v. Scully (D. C.)	399
Neresheimer v. United States (C. C.)	977
Newell, Regina Music Box Co. v. (C. C.)	606
New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co. (C. C.)	265
Newport News & O. P. Ry. & Electric Co., Hampton Roads Ry. & Electric Co. v. (C. C.)	534
New York Air Brake Co., Westinghouse v. (C. C.)	607
New York Cotton Exch., Ex parte (D. C.)	647
New York Interurban Water Co., Inman v. (C. C.)	997
Ninety-Six Tp., Folsom v. (C. C.)	496
Nishimiya v. United States (C. C.)	650
Northern Pac. R. Co., Garlich v. (C. C. A.)	837
Northwestern Commercial Co. v. Bartels (C. C. A.)	25
Nowacke, Bechtold v. (C. C.)	275
O'Connell v. Pinnacle Gold Mines Co. (C. C.)	106
O'Donnell, In re (D. C.)	150
Oehrle v. William H. Horstmann Co. (C. C.)	487
155,453 Feet of Lumber, Ronan v. (D. C.)	345
Our Friend, The (D. C.)	395
Pan-Coast Ventilator & Mfg. Co., Janney v. (C. C.)	143
Parkersburg Branch R. Co., Coster v. (C. C.)	115
Patillo v. Allen-West Commission Co. (C. C. A.)	680
Pearson & Emmott, United States v. (C. C.)	571
Peterson v. Roessler & Hasslacher Chemical Co. (C. C.)	156
Phelps, The Erskine M. (C. C. A.)	1
Philadelphia Pneumatic Tool Co., Timolat v. (C. C.)	257
Phœnix Bridge Co. v. Castleberry (C. C. A.)	175
Pinnacle Gold Mines Co., O'Connell v. (C. C.)	106
Portner, Blue Mountain Iron & Steel Co. v. (C. C. A.)	57
Power, The William (D. C.)	136
Prince & Walter, In re (D. C.)	546
Quinlan, Daly v. (D. C.)	394
Radford, United States v. (D. C.)	378
Ramsey, Richmond Locomotive Works v. (C. C. A.)	197
R. C. Veit, The (D. C.)	400
Regina Music Box Co. v. Newell (C. C.)	606
Restein & Co., Daniel v. (C. C.)	469
R. F. Downing & Co., United States v. (C. C.)	653
R. G. Dun & Co., Mower-Hobart Co. v. (C. C.)	812
Richmond Locomotive Works v. Ramsey (C. C. A.)	197
Rickmers, The Robert (D. C.)	638
Riggs & Co. v. United States (C. C.)	568
Robert Rickmers, The (D. C.)	638
Roberts v. Shelby Steel Tube Co. (C. C. A.)	729
Roddy, Chicago Great Western R. Co. v. (C. C. A.)	712
Roessler & Hasslacher Chemical Co., Peterson v. (C. C.)	156
Roessler & Hasslacher Chemical Co., United States v. (C. C.)	576
Rogers, Habeler v. (C. C. A.)	43
Roosevelt, Brinckerhoff v. (C. C.)	955
Ronan v. 155,453 Feet of Lumber (D. C.)	345
Rupp & Wittgenfeld Co. v. Elliott (C. C. A.)	730
Ryttenberg v. Schefer (D. C.)	313
Sackett v. McCaffrey (C. C. A.)	219
S. A. Cook & Co. v. Heywood Bros. & Wakefield Co. (C. C.)	755
Sacramento, The (D. C.)	373
Salom, American Alkali Co. v. (C. C. A.)	46
Sanborn, In re (D. C.)	397
Sanitary Fireproofing & Contracting Co. v. Sprickerhoff (C. C.)	868
San Jacinto & P. V. Irr. Dist., Marra v., two cases (C. C.)	780
Santiago, The (D. C.)	383
Savannah Electric Co., Holst v. (C. C.)	931
Sawyer-Boss Mfg. Co., Force v. (C. C.)	884
Schefer, Ryttenberg v. (D. C.)	313
Schenectady R. Co., Thompson v. (C. C. A.)	577
Scherber, In re (D. C.)	121
Schneider, Boyd v. (C. C. A.)	223
Scully, Naretti v. (D. C.)	399
Selchow, H. B. Chaffee Mfg. Co. v. (C. C.)	543
Seven Barrels of Whisky, United States v. (D. C.)	806
Shaw Co., Blumberg v. (C. C.)	608
Shelby Steel Tube Co., Roberts v. (C. C. A.)	729
Shelton v. American Surety Co. of New York (C. C. A.)	210
Simmons Mfg. Co. v. Southern Spring Bed Co. (C. C.)	278
Simon & Co. v. United States (C. C.)	649
Simpson, Southern R. Co. v. (C. C. A.)	705
Sioux Falls, Farmers' Loan & Trust Co. v. (C. C.)	890
622,714 Feet of Lumber, McArthur Bros. Co. v. (D. C.)	389
Snellenburg, Bobbs-Merrill Co. v. (C. C.)	530
Southern R. Co. v. Simpson (C. C. A.)	705
Southern R. Co., Atlanta, K. & N. R. Co. v. (C. C. A.)	657
Southern R. Co., McIntyre v. (C. C.)	985
Southern Spring Bed Co., Simmons Mfg. Co. v. (C. C.)	278

	Page
Spangenberg, M. J. Breitenbach Co. v. (C. C.)	160
Sparks, Guthrie v. (C. C. A.)	443
Sparks, Jabine v. (C. C. A.)	440
Spear v. Keystone Lantern Co. (C. C.)	879
Sprickerhoff, Sanitary Fireproofing & Contracting Co. v. (C. C.)	868
Sprigg v. Commonwealth Title Ins. & Trust Co. (C. C. A.)	5
Stalmann, Thompson v. (C. C.)	809
Standard Sanitary Mfg. Co. v. Arrott (C. C.)	457
Standard Spoke & Nipple Co., Bean-Chamberlain Mfg. Co. v. (C. C. A.)	215
Star Brass Works v. General Electric Co. (C. C. A.)	78
Starrells, Kahn v. (C. C.)	464
State Nat. Bank, First Nat. Bank v. (C. C. A.)	422
State Nat. Bank, First Nat. Bank v. (C. C. A.)	430
Stein & Langlos Electric Mfg. Co., American Electrical Novelty & Mfg. Co. v. (C. C.)	495
Stockwell v. Boston & M. R. Co. (C. C.)	152
Stockwell v. Boston & M. R. Co. (C. C.)	153
Supreme Council A. L. H., McAlarney v. (C. C.)	538
Sutter Bros., In re (D. C.)	654
Swan, United States v. (D. C.)	140
Sweetser, In re (D. C.)	567
Taylor v. Ziegenhagen (C. C. A.)	232
Tennessee Oil, Gas & Mineral Co. v. Brown (C. C. A.)	696
Thompson v. Schenectady R. Co. (C. C. A.)	577
Thompson v. Stalmann (C. C.)	809
Tiffany v. United States (C. C.)	398
Tilghman v. Eidman (C. C.)	651
Timolat v. Philadelphia Pneumatic Tool Co. (C. C.)	257
Titania, The (C. C. A.)	229
Tombstone Mill & Min. Co., Empire Mill. & Min. Co. v. (C. C.)	339
Traitel Bros. v. United States (C. C.)	994
Tucker, In re (D. C.)	647
Tweed, In re (D. C.)	355
Ulmann & Co. v. United States (C. C.)	649
United States v. American Exp. Co. (C. C.)	656
United States v. American Sugar Refining Co. (C. C. A.)	833
United States v. Astoria & C. R. R. Co. (C. C.)	1006
United States v. Bartram Bros. (C. C. A.)	833
United States v. Benjamin H. Howell Son & Co. (C. C. A.)	833
United States v. Breese (D. C.)	915
United States v. Burton (D. C.)	552
United States v. Detroit Timber & Lumber Co. (C. C. A.)	668
United States v. Fleitmann & Co. (C. C.)	396
United States v. Geddes (C. C. A.)	452
United States v. Godillot & Co. (C. C.)	653
United States v. Grunberg (C. C.)	137
United States v. Harts (D. C.)	886
United States v. Pearson & Emmott (C. C.)	571
United States v. Radford (D. C.)	378
United States v. R. F. Downing & Co. (C. C.)	653
United States v. Roessler & Hasslacher Chemical Co. (C. C.)	576
United States v. Seven Barrels of Whisky (D. C.)	806
United States v. Swan (D. C.)	140
United States v. York (C. C.)	323
United States, B. Ulmann & Co. v. (C. C.)	649
United States, Dickson v. (C. C.)	573
United States, Dodge v. (C. C. A.)	849
United States, F. H. Leggett & Co. v. (C. C.)	817
United States, Gartner & Friedenheit v. (C. C.)	574
United States, George Lueders & Co. v. (C. C.)	655
United States, George Riggs & Co. v. (C. C.)	568
United States, Hahn v., two cases (C. C.)	1000
United States, Hall & Bishop v. (C. C.)	648
United States, Hoeninghaus & Curtis v. (C. C.)	570
United States, J. R. Simon & Co. v. (C. C.)	649
United States, Kirk v. (C. C.)	331
United States, Meyer & Lange v. (C. C.)	817
United States, Neresheimer v. (C. C.)	977
United States, Nishimiya v. (C. C.)	650
United States, Tiffany v. (C. C.)	398
United States, Traitel Bros. v. (C. C.)	994
Valentine, The (D. C.)	352
Van Tine v. Hilands (C. C.)	124
Vedamore, The (D. C.)	154
Veit, The R. C. (D. C.)	400
Victor Talking Mach. Co. v. American Graphophone Co. (C. C. A.)	67
Viquesney v. Allen (C. C. A.)	21
Ward v. Ward, two cases (C. C.)	946
Weisenberg & Co., In re (D. C.)	517
Weisgerber v. Clowney (C. C.)	477
Welsh, George T. Bisel Co. v. (C. C.)	564
West End Trust & Safe Deposit Co., Lake Drummond Canal & Water Co. v. (C. C.)	147
Westinghouse v. New York Air Brake Co. (C. C.)	607
Westinghouse Electric & Mfg. Co. v. Montgomery Electric Light & Power Co. (C. C.)	86
Western Tel. Mfg. Co. v. American Electric Tel. Co. (C. C. A.)	75
Weston Electrical Instrument Co. v. Empire Electrical Instrument Co. (C. C.)	82
Weston Electrical Instrument Co. v. Empire Electrical Instrument Co. (C. C.)	90
Weston Electrical Instrument Co. v. Empire Electrical Instrument Co. (C. C.)	494
Weston Electrical Instrument Co. v. Whitney Electrical Instrument Co. (C. C.)	280
Westport, The (D. C.)	815
W. G. Mason, The (D. C.)	632
White, The Allison (D. C.)	991
White River Valley Electric R. Co., Bibber-White Co. v. (C. C.)	995
Whitney Electrical Instrument Co., Weston Electrical Instrument Co. v. (C. C.)	280
W. H. McWhirter Co., Lincoln Ironworks v. (C. C.)	860
W. I. Babcock, The (D. C.)	632
Wickham v. Barlow (D. C.)	819
Wildcroft, The, two cases (C. C. A.)	235
Wilde's Sons, In re (D. C.)	142
Wiley, Chadwick v. (D. C.)	1003

	Page
Wilka, In re (D. C.)	1004
Wilkin v. Hill (C. C.)	762
Willeford, Bailey v. (C. C. A.)	242
William H. Horstmann Co., Oehrle v. (C. C.)	487
William Power, The (D. C.)	136
Williams, Clifford v. (C. C.)	100
York, United States v. (C. C.)	323
York City School Dist. v. Ætna Indemnity Co. (C. C.)	131
York County Sav. Bank v. Abbot (C. C.)	980
Yost Electric Mfg. Co., General Electric Co. v. (C. C.)	874
Young, Kuntz v. (C. C. A.)	719
Zeigler v. Hallahan (C. C. A.)	205
Ziegenhagen, Taylor v. (C. C. A.)	232
Zimmermann, John Church Co. v. (C. C.)	652

CASES CITED.

Page

Abner Doble Co. v. U. S., 56 C. C. A. 40, 119 Fed. 152 979
Abraham, In re, 35 C. C. A. 592, 93 Fed. 767, 782, 784 432
Adansonia, In re, L. R. 9 Ch. 635 521
Adee v. Thomas (C. C.) 41 Fed. 345 270
Advance, The (D. C.) 63 Fed. 704 965
Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390 180
Aldrich v. McClaine (C. C.) 98 Fed. 378.. 365
Aldrich v. Skinner (C. C.) 98 Fed. 375 365
Alert, The (D. C.) 15 Fed. 620 968
Alexander Folsom, The, 3 C. C. A. 165, 52 Fed. 411 635
Alger v. Anderson (C. C.) 92 Fed. 696 ... 409
Allan v. Cooley, 60 S. C. 370, 38 S. E. 622 120
Allegheny Coal Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764 700
Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532 903
Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542 414
Allen v. Palace Car Co., 139 U. S. 658, 11 Sup. Ct. 682, 35 L. Ed. 303 621
Allen v. U. S. (C. C.) 127 Fed. 777 397
Allen-West Com. Co. v. Patillo, 33 C. C. A. 194, 196–198, 90 Fed. 628, 630, 631 632 ..... 682, 687, 688
Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491 661
Allison v. Corson, 32 C. C. A. 12, 88 Fed. 581 662
Alpena Case, 8 Fed. 280 374
Alvin Mfg. Co. v. Scharling (C. C.) 100 Fed. 87 ..... 270, 271
American Ass'n v. Innis, 60 S. W. 388, 22 Ky. Law Rep. 1196 ..... 691, 693
American Bell Telephone Co. v. Telephone Co. (C. C.) 109 Fed. 1005 749
American Electrical Novelty & Mfg. Co. v. Newgold (C. C.) 108 Fed. 957, 960; 51 C. C. A. 501, 113 Fed. 877 495
American Fisheries Co. v. Lennen (C. C.) 118 Fed. 869 360
American Mortgage Co. v. Hopper (C. C.) 56 Fed. 67; 12 C. C. A. 293, 299, 64 Fed. 553, 559 676
Ames Ironworks v. Warren, 76 Ind. 512, 40 Am. Rep. 258 820
Anaces, The, 34 C. C. A. 558, 93 Fed. 240 384
Anderson v. U. S., 171 U. S. 615, 19 Sup. Ct. 54, 43 L. Ed. 300 185
Andrews v. Cross, 19 Blatchf. 294, 8 Fed. 269 855
Angell v. Draper, 1 Vern. 398, 399 ..... 24.
Ankeney v. Hannon, 147 U. S. 118, 128, 13 Sup. Ct. 206, 37 L. Ed. 105 406
Antisdel v. Bent (C. C.) 122 Fed. 811 ... 757

Page

Apgar v. U. S., 24 C. C. A. 113, 78 Fed. 332 979
Applegate v. Mining Co., 117 U. S. 269, 6 Sup. Ct. 742, 29 L. Ed. 892 59
Argentine M. Co. v. Mining Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140 .. 588, 600, 604
Ariadne, The, 13 Wall. 475, 20 L. Ed. 542 631
Armour v. Hahn, 111 U. S. 318, 4 Sup. Ct. 433, 28 L. Ed. 440 243
Armstrong v. Trautman (C. C.) 36 Fed. 275 538
Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918 984
A. R. Robinson, The (D. C.) 57 Fed. 667.. 636
Arthur v. Fox, 108 U. S. 125, 2 Sup. Ct. 371, 27 L. Ed. 675 1002
Arturo, The (D. C.) 6 Fed. 308 637
Aspinwall v. Commissioners, 22 How. 364, 16 L. Ed. 296 912
Atkinson v. Allen, 17 C. C. A. 570, 572, 71 Fed. 58, 60 683
Atlantic Nat. Bank v. Tavener, 130 Mass. 407 ..... 403, 405
Atlantic Trust Co. v. Water Co., 75 App. Div. 354, 78 N. Y. Supp. 120 1000
Atoka Coal & Mining Co. v. Adams, 43 C. C. A. 651, 104 Fed. 472 802
Auchenarden, The (D. C.) 100 Fed. 895.. 383
Aultman & Taylor Co. v. Kennedy, 114 Iowa, 444, 87 N. W. 435, 89 Am. St. Rep. 373 820
Austin v. Railroad Co., 45 Vt. 215 ..996, 997
Austin v. Terminal Co., 34 S. E. 852 943
Ayers, In re, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216 99

Babcock v. Clarkson, 11 C. C. A. 351, 63 Fed. 607 270
Babcock v. Wyman, 19 How. 289, 299, 300, 301, 15 L. Ed. 644 408
Backus v. Minor, 3 Cal. 231 688
Bailey v. Railroad Co., 49 N. Y. 70 318
Bainbridge v. Wilcocks, Baldw. 536, Fed. Cas. No. 755 688
Baird v. New York, 96 N. Y. 567 515
Baker v. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150 318
Ball, The Daniel, 10 Wall. 557, 565, 566, 19 L. Ed. 999 ..... 453, 454
Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.. 180
Baltimore & O. R. Co. v. Railroad Co., 57 C. C. A. 322, 119 Fed. 678 967
Bank v. Sherman, 101 U. S. 403, 407, 25 L. Ed. 866 ..... 204, 358, 515, 528
Bank v. Tyndale, 176 Mass. 547, 550, 57 N. E. 1022, 51 L. R. A. 447 ..... 401, 412

Page

Bank of Scott City v. Sandusky, 51 Mo. App. 398, 401 429
Barbed-Wire Patent, The, 143 U. S. 275, 284, 12 Sup. Ct. 443, 447, 36 L. Ed. 154 263, 459, 475, 477
Bardes v. Bank, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262; 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175 ..... 124, 318, 527–529
Bardon v. Railroad, 145 U. S. 535–543, 12 Sup. Ct. 856, 36 L. Ed. 806 42
Barfield v. McCombs (Ga.) 15 S. E. 666.. 726
Barker v. Bradley, 42 N. Y. 316, 319, 1 Am. Rep. 521 349
Barkley v. Levee Com'rs, 93 U. S. 258, 23 L. Ed. 893 790
Barnsdall v. Boley (C. C.) 119 Fed. 191.. 703
Barnstable, The, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954 642
Barre R. Co. v. Montpelier Co., 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877 ..... 666, 667
Barron v. Mt. Eden (D. C.) 87 Fed. 483... 968
Barrow v. Hunton, 99 U. S. 80, 25 L. Ed. 407 329
Barry v. Mercein, 5 How. 118, 12 L. Ed. 70 102
Bartholomew v. Austin, 29 C. C. A. 568, 85 Fed. 359 909
Bass v. Railroad Co., 36 Wis. 450, 459, 463, 17 Am. Rep. 495 ..... 164, 167, 171
Batchelder & Lincoln Co. v. Whitmore, 58 C. C. A. 517, 122 Fed. 355 402
Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68.. 881
Bay City, The (D. C.) 3 Fed. 47 968
Bayley v. Greenleaf, 7 Wheat. 46, 57, 5 L. Ed. 393 678
Beach v. Beach (S. D.) 43 N. W. 701.... 726
Beach v. Grocery Co., 53 C. C. A. 463, 116 Fed. 143 527
Beale, In re, 4 Ch. 249 412
Beardstown v. Virginia, 76 Ill. 34 908
Beavers, In re (D. C.) 125 Fed. 988..... 367
Bedingfield, In re (D. C.) 96 Fed. 190..... 202
Beesley v. Wheeler & Co., 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266 843
Beeson v. Chicago (C. C.) 75 Fed. 880.... 943
Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735 ..... 110, 585
Bell v. Mining Co., 36 Cal. 214 586
Bement v. Harrow Co., 186 U. S. 70, 91, 22 Sup. Ct. 747, 46 L. Ed. 1058 731
Ben Adams, The, 2 Ben. 445, 449, Fed. Cas. No. 1,289 230
Benefactor, The, 103 U. S. 239, 241, 243, 26 L. Ed. 351 ..... 374, 375
Bensinger v. Wren, 100 Pa. 505 209
Bensley v. Railroad Co., 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274 36
Benson Mining Co. v. Mining Co., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762.. 110
Berkowitz v. U. S., 35 C. C. A. 379, 93 Fed. 452 325
Berkshire, The, 21 C. C. A. 169, 74 Fed. 906, 910 434
Bernheimer v. Bryan, 35 C. C. A. 592, 93 Fed. 767 527
Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255 46
Berry v. Seawall, 13 C. C. A. 101, 65 Fed. 753 121

Page

Berthold v. Fox, 21 Minn. 51, 53 725
Bigelow v. Railroad Co., 2 Head, 624.... 666
Bigler v. Morgan, 77 N. Y. 312, 319..... 46
Bissell Co. v. Goshen Co., 19 C. C. A. 25, 72 Fed. 545 660
Black v. Mining Co., 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221 108
Black v. O'Brien, 23 Hun, 82 990
Black v. Supreme Council A. L. H. (C. C.) 120 Fed. 580 ..... 539, 540
Black Diamond Coal Min. Co. v. Grady (D. C.) 87 Fed. 483 968
Blount v. Railroad Co., 9 C. C. A. 526, 61 Fed. 375 ..... 840, 841
Blount v. Societe, etc., 3 C. C. A. 455, 457, 53 Fed. 98 662
Blue Mountain Iron & Steel Co., In re, 131 Fed. 57 779
Board v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573 942
Boardman, In re, 4 Am. Bankr. R. 620.... 976
Bodine v. Glading, 21 Pa. 50, 59 Am. Dec. 749 ..... 617, 620
Bogart v. Steamboat John Jay, 58 U. S. 399, 15 L. Ed. 95 965
Bogk v. Gassert, 149 U. S. 17, 26, 13 Sup. Ct. 738, 37 L. Ed. 631 218
Bonar v. McDonald, 3 H. L. Cas. 226–238 208
Bonnifield v. Thorp (D. C.) 71 Fed. 924.. 794
Bonsall v. Comly, 44 Pa. 442 551
Book v. Mining Co. (C. C.) 58 Fed. 106.. 585
Boone v. Chiles, 10 Pet. 177, 209, 9 L. Ed. 388 678
Bordentown, The (D. C.) 40 Fed. 683.... 637
Borough of Millvale, In re, 162 Pa. 375, 29 Atl. 641, 644 901
Boskenna Bay, The (D. C.) 22 Fed. 662... 130
Bosset v. Nosworthy, 2 Lead. Cas. Eq. (4th Ed.) 71 678
Bostwick v. Railroad Co., 45 N. Y. 712.... 239
Bouldin v. Massie's Heirs, 7 Wheat. 122, 5 L. Ed. 414 66
Boulton v. Moore (C. C.) 14 Fed. 922.... 377
Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655 727
Boyd v. Glucklich, 53 C. C. A. 451, 116 Fed. 131–142 645
Boyden Power Brake Co. v. Air Brake Co., 17 C. C. A. 430, 70 Fed. 816..... 268
Boynton v. Hatch, 47 N. Y. 225..... 803
Bragg v. Fitch, 121 U. S. 478, 7 Sup. Ct. 978, 30 L. Ed. 1008 762
Brakefield v. Anderson, 87 Tenn. 211, 10 S. W. 360 668
Branfoot, The William, 3 C. C. A. 155, 52 Fed. 390 992
Brazos, The, Fed. Cas. No. 1,821..... 635
Breathitt Case, 51 S. W. 189, 21 Ky. Law Rep. 302 693
Breathitt Coal, Iron & Lumber Co. v. Strong, 51 S. W. 189, 21 Ky. Law Rep. 302 690–692
Breslauer, In re (D. C.) 121 Fed. 910.... 123
Brewster v. Striker, 2 N. Y. 41..... 954
Brick v. Brick, 98 U. S. 514, 516, 25 L. Ed. 256 408
Briggs v. Duell, 36 C. C. A. 38, 93 Fed. 974 769
Briggs v. Oliver, 68 N. Y. 336..... 949
Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662..... 228

Page
Brinker, In re (D. C.) 128 Fed. 634..... 549
Broadfoot v. Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610..... 506
Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350 429
Bronenberg v. Com'rs, 41 Ind. 502..... 914
Bronson v. Railroad Co., 1 Wall. 405, 409, 17 L. Ed. 616 431
Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896 504
Brown v. Ashley, 13 Nev. 251..... 991
Brown v. Wygant & Leeds, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284..... 336
Brown v. Zaubitz (C. C.) 105 Fed. 242.... 477
Brunswick Balke Collender Co. v. Thum, 50 C. C. A. 61, 111 Fed. 904..... 256
Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814..... 123, 527–529, 1006
Bryant v. Rich, 106 Mass. 188, 8 Am. Rep. 311 173
Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795..... 804
Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257 ..... 515, 529
Bucyrus Machine Co., In re, Fed. Cas. No. 2,100 523
Buel v. Transfer Co., 45 Mo. 563..... 682
Buffington v. Day, 11 Wall. 113, 20 L. Ed. 122 222
Buist v. Salvo, 44 S. C. 143, 21 S. E. 615 119
Bullock Co. v. Westinghouse Co., 129 Fed. 105 733
Bunker Hill & Sullivan M. & C. Co. v. Mining & Developing Co., 48 C. C. A. 665, 109 Fed. 538.....588, 600, 604
Buntin v. Railroad Co. (C. C.) 41 Fed. 744, 749 682
Burden v. Corning, 2 Fish. Pat. Cas. 477, 4 Fed. Cas. 701..... 490
Burgess v. Salmon, 97 U. S. 384, 24 L. Ed. 1104 42
Burgess v. Seligman, 107 U. S. 33, 2 Sup. Ct. 10, 27 L. Ed. 359..... 909
Burgess v. Telegraph Co. (C. C.) 108 Fed. 26 848
Burleigh v. Foreman, 60 C. C. A. 109, 125 Fed. 217 124
Burns v. Sennett & Miller, 99 Cal. 363, 372, 33 Pac. 916 844
Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650 762
Burrus Case, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500.....103, 106
Burton v. Driggs, 20 Wall. 134, 22 L. Ed. 299 67
Buskirk, Ex parte, 18 C. C. A. 410, 72 Fed. 21 99
Butler v. Rahm, 46 Md. 541..... 113
Butler v. Townsend, 126 N. Y. 105, 112, 26 N. E. 1017.....180, 243, 844
Byrne v. Railroad Co., 9 C. C. A. 666, 61 Fed. 605. 24 L. R. A. 693..... 709

Cadwalader v. Wanamaker, 149 U. S. 532, 13 Sup. Ct. 979, 983, 37 L. Ed. 837.... 575
Cadwalader v. Zeh, 151 U. S. 171, 14 Sup. Ct. 288, 38 L. Ed. 115.....1001
California Redwood Co. v. Litle, 79 Fed. 854; 31 C. C. A. 591, 87 Fed. 1004.... 676

Page
Callaghan v. Meyers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547..... 566
Callaway v. Allen, 12 C. C. A. 114, 64 Fed. 297 844
Calloway v. Sanford (Tenn.) 35 S. W. 778 699
Calye's Case, 4 Coke, 63, 66, 202, 206.... 163, 169, 174
Cameron v. Hodges, 127 U. S. 322, 326, 8 Sup. Ct. 1154, 32 L. Ed. 132..... 811
Cameron Case, The, 133 N. Y. 336, 31 N. E. 104 1000
Camp v. Railroad Co., 99 N. W. 735..... 840
Campbell v. Car Co. (C. C.) 42 Fed. 485.. 167
Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017..... 477
Carbonero, The, 58 C. C. A. 553, 122 Fed. 753, 755 437
Carey v. Railroad Co., 150 U. S. 170–179, 14 Sup. Ct. 63, 37 L. Ed. 1041..... 23
Carnegie Steel Co. v. Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968... 72
Carpenter v. Railroad Co. (C. C.) 75 Fed. 851 536
Carpenter v. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. Ed. 640..... 984
Carr v. Duvall, 14 Pet. 79, 10 L. Ed. 361.. 612
Carson v. Dunham, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 30 L. Ed. 992..... 811
Carter v. Arguimbau, 31 Abb. N. C. 3... 323
Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779 322
Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168 366
Cates v. Allen, 149 U. S. 451, 457, 13 Sup. Ct. 883, 884, 37 L. Ed. 804..... 24
Central R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418..... 180
Central Ry. v. State, 104 Ga. 831, 855, 31 S. E. 531, 540, 42 L. R. A. 518..... 814
Central Trust Co. v. Railroad Co. (C. C.) 59 Fed. 523 515
Chambers, Matter of, 17 App. Div. 343, 45 N. Y. Supp. 264..... 318
Chambers v. Chrichley, 33 Beav. 374..... 270
Chambers v. Tin Plate Co., 129 Fed. 561.. 843, 845
Champlain Const. Co. v. O'Brien (C. C.) 104 Fed. 930 .....661, 663
Chandler, The Zack (D. C.) 7 Fed. 684.... 377
Chapel, The Henry (D. C.) 10 Fed. 777.. 637
Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83..... 515
Chase, In re, 59 C. C. A. 629, 124 Fed. 753 .....203, 402
Chattanooga Terminal Co. v. Felton (C. C.) 69 Fed. 273 664
Chauncey v. Dyke Bros., 55 C. C. A. 579, 119 Fed. 1..... 588
Cherokee Nation v. Railroad Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295.... 801
Cherokee Trust Funds, The, 117 U. S. 288, 6 Sup. Ct. 718, 29 L. Ed. 880..... 799
Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 122 Fed. 593..... 994
Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121... 729
Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 307, 96 Fed. 713..... 847
Chester v. McDonald (Mass.) 69 N. E. 1075 150, 151
Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770..... 449

Page

Chicago v. Robbins, 2 Black, 419, 17 L. Ed. 298 178
Chicago v. Taylor, 125 U. S. 162, 8 Sup. Ct. 820, 31 L. Ed. 638..... 943
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979... 422
Chicago Great Western R. Co. v. Price, 38 C. C. A. 239, 243, 97 Fed. 423, 427, 428. 713
Chicago, St. P., M. & O. R. Co. v. Rossow, 54 C. C. A. 313, 117 Fed. 491..... 840
Chicago U. T. Co. v. Board (C. C.) 112 Fed. 607 303
Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33.....167, 173
Chicago & N. W. R. Co. v. Andrews (C. C. A.) 130 Fed. 65..... 840
Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053..... 744
China, The, v. Walsh, 7 Wall. 53, 19 L. Ed. 67 642
Christy v. Farlin, 49 Mich. 319, 13 N. W. 607 682
Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission, 162 U. S. 184, 191, 193, 16 Sup. Ct. 700, 703, 704, 40 L. Ed. 935 455
Citizens' Bank v. Farwell, 6 C. C. A. 30, 56 Fed. 539..... 432
Citizens' Bank of Louisiana v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451. 493
City Bank of Poughkeepsie v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513..... 366
City of Cleveland v. Railroad Co. (C. C.) 93 Fed. 123..... 121
City of East St. Louis v. Gaslight & Coke Co., 98 Ill. 415, 38 Am. Rep. 97..... 903
City of Helena v. Mills, 36 C. C. A. 1, 94 Fed. 916 903
City of Joplin v. Light Co., 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127..... 899
City of Leavenworth v. Wilson (Kan.) 76 Pac. 400 914
City of Manning v. Insurance Co., 46 C. C. A. 144, 147, 107 Fed. 52, 55..... 726
City of Ottumwa v. Water Supply Co., 56 C. C. A. 219, 119 Fed. 324, 59 L. R. A. 604 909
City of Titusville's Appeal, 108 Pa. 600... 550
City of Waco v. Bryan (C. C. A.) 127 Fed. 79 .....549, 550
City of Walla Walla v. Water Co., 19 Sup. Ct. 77, 43 L. Ed. 341..... 903
City R. Co. v. Railroad Co., 166 U. S. 557, 17 Sup. Ct. 653, 655, 41 L. Ed. 1114.... 983
Clancy v. Barker, 98 N. W. 440.....169, 175
Clark v. Bever, 139 U. S. 96–117, 11 Sup. Ct. 468, 35 L. Ed. 88..... 814
Clark v. Clark, 84 Hun, 362, 32 N. Y. Supp. 325 954
Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568.. 323
Clark v. Patterson, 158 Mass. 388, 391, 33 N. E. 589, 591, 35 Am. St. Rep. 498.... 401, 402, 412
Clark v. White, 2 Swan, 540; 12 Pet. 178, 9 L. Ed. 1046.....619, 664
Clarke, Ex parte, 100 U. S. 399, 25 L. Ed. 715 99
Clegg v. Houston, 1 Phila. 352..... 551
Cobb v. Hatfield, 46 N. Y. 533..... 515
Coe v. Errol, 116 U. S. 517, 528, 6 Sup. Ct. 475, 479, 29 L. Ed. 715.....453, 454

Page

Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821 473
Coffin v. U. S., 156 U. S. 459, 460, 15 Sup. Ct. 394, 39 L. Ed. 481..... 923
Cohens v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257.....168, 709
Coit v. Gold Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420..803, 804
Coit Case, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420..... 804
Colby University v. Canandaigua (C. C.) 69 Fed. 671 901
Collector, The, 6 Wheat. 194, 203, 5 L. Ed. 239 431
Colorado Coal Co. v. U. S., 123 U. S. 307, 309, 316, 319, 322, 8 Sup. Ct. 131, 31 L. Ed. 182 .....675, 677
Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253 612
Columbia, The, 19 C. C. A. 436, 73 Fed. 226 637
Columbia Ave. Sav. Fund Co. v. Dawson (C. C.) 130 Fed. 166..... 909
Columbian, The, 41 C. C. A. 150, 100 Fed. 991 .....437, 588
Colver v. Finch, 5 H. L. Cas. 694, 706.... 678
Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108 831
Com. v. Covington & Cincinnati Bridge Co. (Ky.) 70 S. W. 849..... 304
Com. v. Huntly, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839..... 449
Com. v. Power, 7 Metc. 596, 601, 41 Am. Dec. 465 .....168, 171, 174
Concord v. Robinson, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. Ed. 885..... 912
Conhaim, In re, 4 Am. Bankr. Rep. 59, 100 Fed. 268..... 550
Connecticut Mutual Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569 492
Conner v. Coal Co. (C. C.) 45 Fed. 802... 661
Connolly v. Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679..... 37
Conrad v. Moorehead, 89 N. C. 31..... 700
Conrader, In re, 9 Am. Bankr. Rep. 85, 118 Fed. 676..... 195
Conrader v. Cohen, 9 Am. Bankr. Rep. 619, 121 Fed. 801, 58 C. C. A. 249..... 195
Consolidated Elec. Lt. Co. v. Elec. Lt. Co. (C. C.) 20 Fed. 502..... 282
Consolidated Electric Light Co. v. McKeesport Co. (C. C.) 40 Fed. 21, 26..... 749
Consolidated Electric Mfg. Co. v. Holtzer, 15 C. C. A. 63, 67 Fed. 907..... 878
Consolidated Fruit Jar Co. v. Bellaire Co. (C. C.) 27 Fed. 381..... 749
Consolidated Safety Valve Co. v. Steam Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939..... 475
Continental National Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066..... 365
Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005, 114 Fed. 1021.....92, 731
Cosmopolitan M. Co. v. Foote (C. C.) 101 Fed. 518 .....588, 604
County of Stanislaus v. Canal & Irrigation Co., 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406 420
Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390..... 515

Page

Covington & L. R. Co. v. Kenton County Court, 12 B. Mon. 144 912
Cox v. Railroad, 2 Leg. Rep. 168 710
Coy, In re, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274 99
Crafts, Ex parte, 28 S. C. 281, 5 S. E. 718 177
Craker v. Railroad Co., 36 Wis. 657, 673, 17 Am. Rep. 504 ..... 167, 173
Craswell v. Belanger, 6 C. C. A. 1, 56 Fed. 529 810
Crawford v. Neal, 144 U. S. 585, 595, 12 Sup. Ct. 759, 36 L. Ed. 552 ..... 588, 675
Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220 703
Crehore v. Railroad Co., 131 U. S. 242, 9 Sup. Ct. 692, 33 L. Ed. 144 810
Crippen v. Hudson, 3 Kern. 161 24
Crocker v. Hopps, 78 Md. 260, 28 Atl. 99. 113
Crofford v. Cothran, 2 Sneed, 492 682
Cronin, In re (D. C.) 98 Fed. 584 202
Cross v. Allen, 141 U. S. 537, 12 Sup. Ct. 67, 35 L. Ed. 843 208
Crowder, Ex parte, 2 Vern. 706 195
Crow Dog, Ex parte, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030 449
Crown Cork & Seal Co. v. Stopper Co., 48 C. C. A. 72, 108 Fed. 847 244
Cumberland Telephone Co. v. Bills (C. C. A.) 128 Fed. 272 846
Cumberland Telephone Co. v. Loomis, 87 Tenn. 504, 11 S. W. 356 846
Cumberland & O. R. Co. v. Barren County Court, 10 Bush, 604 912
Curtis, Ex parte, 106 U. S. 371, 27 L. Ed. 232 99
Curtis, In re, 36 C. C. A. 430, 94 Fed. 630 203
Curtis v. Dinneen (Dak.) 30 N. W. 148, 149, 152, 153 ..... 163, 170, 174

Daix v. Supreme Council (C. C.) 127 Fed. 374; 130 Fed. 101 540
Dalzell v. Watch Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749 ..... 612, 616
Dana v. U. S. (C. C.) 91 Fed. 522; 116 Fed. 933 576
Daniel Ball, The, 10 Wall. 557, 565, 566, 19 L. Ed. 999 ..... 453, 454
Davenport v. Railroad Co. (C. C.) 124 Fed. 983 987
Davis, In re (D. C.) 119 Fed. 950 123
Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325 527
Davis v. Gray, 16 Wall. 218, 219, 21 L. Ed. 447 536
Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289 588
Davis v. Turner, 9 Am. Bankr. Rep. 704, 56 C. C. A. 669, 120 Fed. 605 523
Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238 586
Daylight Prism Co. v. Prism Co. (C. C.) 110 Fed. 980 476
Dayton Fan Co. v. Westinghouse, 55 C. C. A. 390, 118 Fed. 573 858
Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545 138
Dean v. Reid, 10 Pet. 524, 9 L. Ed. 519 .. 908
Deering v. Harvester Works, 155 U. S. 286, 300, 15 Sup. Ct. 118, 123, 39 L. Ed. 153 458
Delaware, The, 81 U. S. 579, 600, 20 L. Ed. 779 ..... 348, 349

Page

Delaware, L., etc., R. Co. v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. Ed. 213 686
Del Monte M. & M. Co. v. Mining Co., 171 U. S. 55, 83, 18 Sup. Ct. 895, 43 L. Ed. 72, 85 ..... 588, 601, 602, 604
De Loy v. Insurance Co. (C. C.) 59 Fed. 320 810
Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439 154
Derby, In re, 42 C. C. A. 637, 102 Fed. 808, 814 433
Devin v. Himer, 29 Iowa, 297 617
Devries v. Shanahan, 58 C. C. A. 482, 122 Fed. 629 432
Dewdney, Ex parte, 15 Ves. 479, 498 412
Deweese v. Smith, 45 C. C. A. 408, 106 Fed. 438 726
Diack, In re, 100 Fed. 770, 3 Am. Bankr. R. 723 976
Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618 120
Dickson v. Waldron (Ind.) 34 N. E. 506, 510, 24 L. R. A. 483, 41 Am. St. Rep. 440 ..... 167, 172
Diemer v. Guernsey, 112 Iowa, 393, 83 N. W. 1047 822
Dies Case, 98 Tenn. 655, 41 S. W. 860 708
Dietz, In re (D. C.) 97 Fed. 563 398
Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497 515
Dillaway, The Samuel, 38 C. C. A. 675, 98 Fed. 138, 141 434
Diller v. Hawley, 26 C. C. A. 514, 518, 81 Fed. 651, 655 676
Dimmick v. Railroad Co., 58 Iowa, 637, 12 N. W. 710 666
Directors, etc., v. Kisch, Law Rep. 2 H. L. 99 51
Doggett v. Railroad Co., 99 U. S. 72, 25 L. Ed. 301 908
Donald v. Guy (D. C.) 127 Fed. 228 631
Donaldson, The J. P., 167 U. S. 603, 17 Sup. Ct. 951, 42 L. Ed. 292 636
Douglas v. Wallace, 161 U. S. 346, 348, 16 Sup. Ct. 485, 40 L. Ed. 727 982
Doyle v. Perfect Cigar Shaper Co., 44 C. C. A. 301, 104 Fed. 997 476
Drake Case, 26 App. Div. 499, 50 N. Y. Supp. 826; 36 App. Div. 275, 55 N. Y. Supp. 225 1000
Draper v. Davis, 102 U. S. 370, 26 L. Ed. 121 146
Draper v. Fletcher, 26 Mich. 154 832
Drisko, In re, Fed. Cas. No. 4,090 722
Duck River R. Co. v. Cochrane, 3 Lea, 478 665
Dudley v. Board, 43 C. C. A. 184, 103 Fed. 209 23
Dudley v. Com'rs, 26 C. C. A. 82, 80 Fed. 672 909
Dudley v. Superior, 1 Newb. Adm. 176; Fed. Cas. No. 4,115 28
Dueber Watch-Case Mfg. Co. v. Doughterty, 62 Ohio St. 589, 596, 57 N. E. 455. 678
Duer v. Cabinet Lock Co., 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707 878
Duffy, In re, 9 Am. Bankr. Rep. 358, 118 Fed. 926 551
Duncan v. Associated Press (C. C.) 81 Fed. 417-422 ..... 661, 663

Page

Duncan v. Fulton (Colo.) 61 Pac. 244..... 604
Dunklin Township v. Wells, 31 C. C. A. 593, 87 Fed. 1004..... 498
Durando v. Durando, 23 N. Y. 331..... 954
Durfee v. Bawo (C. C.) 118 Fed. 853..... 477
Durham, In re (D. C.) 114 Fed. 750..... 123
Dwinelle v. Railroad Co., 120 N. Y. 117, 125, 126, 127, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611.....166, 173

Eames v. Andrews, 122 U. S. 40–55, 7 Sup. Ct. 1073, 30 L. Ed. 1064..... 856
Earl v. Railroad Co., 127 Fed. 235..... 134
Eastburn v. Kirk, 2 Johns. Ch. 318..... 930
East Tenn. Iron & Coal Co. v. Wiggin, 15 C. C. A. 510, 68 Fed. 446..... 699
Eaton v. Lewis (C. C.) 115 Fed. 635..... 480
E. C. Knight Case, 156 U. S. 16, 15 Sup. Ct. 255, 39 L. Ed. 325..... 187
Eddy, The, 5 Wall. 481, 495, 18 L. Ed. 486 230
Edison Phonograph Co. v. Pike (C. C.) 116 Fed. 863, 867..... 731
Eggert, In re, 43 C. C. A. 1, 102 Fed. 735 433
Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507..... 725
Elasser v. Haines (N. J.) 18 Atl. 1095.... 336
Elkin v. Green, 13 Bush, 612..... 429
Ellen McGovern, The (D. C.) 27 Fed. 868. 636
Ellis v. Fitzpatrick, 55 C. C. A. 260, 118 Fed. 430..... 802
Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335..... 913
Emerson v. McWhirter (Cal.) 65 Pac. 1036 586
Emma and Last Chance, The, 58 C. C. A. 311, 121 Fed. 973..... 596
E. M. Miller Co v. Bronze Co. (C. C.) 80 Fed. 523..... 261
Empire Co. v. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623.... 390
Empire M. & M. Co v. Mining Co. (C. C.) 100 Fed. 910.....588, 604
Empire State-Idaho M. & D. Co. v. M. & C. Co., 52 C. C. A. 219, 114 Fed. 417; 121 Fed. 973, 977, 58 C. C. A. 311, 315. 583, 588, 590, 593, 604, 605
Ensminger v. Powers, 108 U. S. 292, 302, 2 Sup. Ct. 643, 27 L. Ed. 732..... 431
Erber v. R. G. Dun & Co. (C. C.) 12 Fed. 526..... 814
Erhardt v. Boaro, 113 U. S. 527, 533, 5 Sup. Ct. 560, 28 L. Ed. 1113..... 590
Erie City v. Butler, 120 Pa. 374, 14 Atl. 153..... 560
Erwin v. U. S., 97 U. S. 392, 24 L. Ed. 1065..... 831
Evans v. McCaskill, 41 C. C. A. 577, 101 Fed. 658..... 23
Evers v. Watson, 156 U. S. 527, 532, 15 Sup. Ct. 430, 39 L. Ed. 520..... 59
Ewing v. St. Louis, 5 Wall. 413, 419, 18 L. Ed. 657..... 415
Eylenfeldt v. Steel Co., 165 Ill. 185, 46 N. E. 266..... 682

Falconer v. Railroad Co., 69 N. Y. 491... 912
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 111, 139, 17 Sup. Ct. 56, 41 L. Ed. 369..... 421
Fannie, The, 11 Wall. 243, 20 L. Ed. 114. 635

Page

Farmers' Loan & Trust Co. v. Railroad Co., 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689.... 308
Farquhar v. McAlevy, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497..... 373
Faulks v. Kamp (C. C.) 3 Fed. 898..... 271
Faulks Case, 3 Fed. 898..... 273
Felton v. Girardy, 104 Fed. 127, 43 C. C. A. 439.....847, 848
Fidelity Trust & Safety Vault Co. v. Lawrence, 34 C. C. A. 553, 92 Fed. 576..... 912
Fidelity & Casualty Co. v. Bank, 44 C. C. A. 225, 104 Fed. 858..... 588
Fiegenbaum, In re, 57 C. C. A. 409, 121 Fed. 69..... 722
Field v. Clark, 143 U. S. 649–672, 12 Sup. Ct. 495, 36 L. Ed. 294..... 42
Findlay v. Railroad Co., 106 Mich. 700, 64 N. W. 732..... 831
Finn v. Corbitt, 36 Mich. 318..... 831
Finney v. Lamb, 54 Ind. 1..... 914
First Nat. Bank, Ex parte, 70 Me. 369.... 522
First Nat. Bank v. Bank, 131 Fed. 422... 430
First Nat. Bank v. Day, 52 Iowa, 680, 3 N. W. 728..... 619
First Nat. Bank v. Lindenstruth, 79 Md. 136–140, 28 Atl. 807, 47 Am. St. Rep. 366 112
First Nat. Bank v. Prager, 34 C. C. A. 51, 91 Fed. 692..... 25
First Nat. Bank v. Railroad Co., 49 Vt. 167..... 666
Fish Bros. Wagon Co. v. Mfg. Co., 37 C. C. A. 146, 95 Fed. 457..... 362
Fisher, In re, 43 C. C. A. 381, 103 Fed. 860, 51 L. R. A. 292..... 433
Fisk, Ex parte, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117..... 99
Fitzgerald v. Arel, 63 Iowa, 104, 16 N. W. 712, 18 N. W. 713, 50 Am. Rep. 733.... 822
Flagstaff Min. Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253.....588, 604
Flatley v. Railroad Co., 9 Heisk. 230, 237. 682
Fleitas v. Richardson, 147 U. S. 550, 555, 13 Sup. Ct. 495, 37 L. Ed. 276..... 410
Flippen v. Knaffle, 2 Tenn. Ch. 238..... 662
Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. Supp. 810..... 803
Floyd v. Perrin, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242.....497, 498
Foland v. Frankton, 142 Ind. 546, 41 N. E. 1031..... 903
Folger v. Weber, 16 Hun, 512..... 965
Folsom v. Township 96, Abbeville County, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278..... 498
Fonda v. Railroad Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341..... 200
Fontain v. Ravenel, 17 How. 369, 394, 395, 15 L. Ed. 80..... 409
Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313..... 109
Ford v. Williams, 21 How. 289, 16 L. Ed. 36..... 521
Foreman v. Bigelow, 4 Cliff. 508, Fed. Cas. No. 4,334..... 515
Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207.....518, 519, 520
Fort v. Burch, 6 Barb. 76..... 949
Foster v. Chase (C. C.) 75 Fed. 797..... 364

Page

Foster v. Mora, 98 U. S. 428, 25 L. Ed. 191 ..... 120, 121
Foster v. Wolson (C. C. A.) 75 Fed. 797.. 364
Fowle v. Torrey, 135 Mass. 87..... 412
Frankel v. Frankel, 173 Mass. 214, 215, 53 N. E. 398, 73 Am. St. Rep. 266..... 405
Franklin Boiler Works Co. Case, 58 C. C. A. 405, 122 Fed. 69..... 258, 264
Freeland v. Heron, 7 Cranch, 147, 3 L. Ed. 297 688
Freeman v. Butler (C. C.) 39 Fed. 1..... 663
Freeman v. Howe, 24 How. 450, 16 L. Ed. 749 ..... 514, 529
Frost v. Knight, L. R. 7 Exch. 111..... 46
Fuller v. Hooper, 3 Gray, 341..... 520
Fuller v. Van Geesen, 4 Hill, 173..... 949

Gableman v. Railroad Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220..... 117
Gage v. Kellogg (C. C.) 23 Fed. 891-894.. 742
Galaway v. Mathew, 1 Camp. 403..... 523
Galpin v. Page, 3 Sawy. 93, Fed. Cas. No. 5,206 178
Gandolfi v. U. S., 20 C. C. A. 652, 74 Fed. 549 979
Gandy v. Belting Co., 143 U. S. 587, 594, 12 Sup. Ct. 598, 36 L. Ed. 272..... 475
Gannert v. Rupert (C. C. A.) 127 Fed. 962 360
Garner v. Bank, 16 C. C. A. 86, 67 Fed. 833 515
Garrard v. Silver Peak Mines Co. (C. C.) 76 Fed. 1..... 663
Garrigus v. Com'rs, 39 Ind. 66..... 914
Gavin v. Vance (C. C.) 33 Fed. 84....661, 663
General Electric Co. v. Power Co. (C. C.) 96 Fed. 563..... 79
General Electric Co. v. Specialty Co. (C. C. A.) 126 Fed. 755, 756, 758.....79, 80
Gerstel, In re (D. C.) 123 Fed. 166..... 645
Gertrude, The, 55 C. C. A. 80, 118 Fed. 130, 131, 132..... 434, 437
Gibson v. Railroad Co., 63 N. Y. 449, 20 Am. Rep. 552 847
Gilbert v. Hebard, 8 Metc. (Mass.) 129.... 722
Gilbert v. Hoffman, 66 Iowa, 206, 23 N. W. 632, 55 Am. Rep. 263..... 164
Gilbert v. Railroad Co., 38 C. C. A. 408, 97 Fed. 747 200
Gildersleeve v. People, 10 Barb. 40.... 336
Gladestry, The (C. C. A.) 128 Fed. 591... 564
Gladiator, The, 25 C. C. A. 32, 79 Fed. 445, 446, 447 434
Glascott v. Lang, 3 Mylne & C. 451, 455.. 662
Globe Refining Co. v. Cotton Oil Co., 190 U. S. 545, 23 Sup. Ct. 754, 47 L. Ed. 1171 56
Glover v. Shepperd (C. C.) 15 Fed. 833, 837 810
Goddard, The T. A. (D. C.) 12 Fed. 184.. 130
Goddard v. Railway, 57 Me. 202, 203, 213, 2 Am. Rep. 39..... 167, 173
Golden v. Cockrill, 1 Kan. 259, 81 Am. Dec. 510 820
Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656..... 811
Gooch's Case, 8 Ch. App. 266..... 364
Good, In re, 3 Am. Bankr. R. 605, 99 Fed. 389, 39 C. C. A. 581..... 433
Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229 983
Gould v. Bank, 86 N. Y. 75..... 515

Page

Grace v. Insurance Co., 109 U. S. 278, 283, 284, 3 Sup. Ct. 207, 27 L. Ed. 932..492, 811
Graham v. Spokane (Wash.) 53 Pac. 714.. 908
Graham v. State, 7 Blackf. (Ind.) 313.... 336
Grahs, In re, 1 Am. Bankr. R. 465..... 976
Grames v. Hawley (C. C.) 50 Fed. 319, 321 726
Grant v. Davenport, 36 Iowa, 396..... 903
Grant v. Walter, 148 U. S. 547-556, 13 Sup. Ct. 699, 37 L. Ed. 552..... 752
Graves v. Graham (City Ct. N. Y.) 43 N. Y. Supp. 508 726
Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778 909
Great Western R. Co. v. Railroad Co., 2 Phil. Ch. 602..... 662
Greeley v. Lowe, 155 U. S. 58, 67, 74, 15 Sup. Ct. 24, 39 L. Ed. 69..... 983
Green v. Mills, 16 C. C. A. 516, 69 Fed. 852, 30 L. R. A. 90..... 23
Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109 820
Greer, Ex parte, 2 D. & Ch. 113..... 402
Grier v. Castle (C. C.) 17 Fed. 523..... 490
Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718 54
Griffith v. Shaw (C. C.) 89 Fed. 313..... 270
Griffiths v. Gidlow, 3 Hurlstone & Norman, 648, 655 844
Grignon v. Astor, 2 How. 319, 11 L. Ed. 283 59
Grimes, In re, 2 Am. Bankr. Rep. 730, 96 Fed. 529 551
Grisar v. McDowell, 6 Wall. 363, 18 L. Ed. 863 41
Groetzinger, In re (C. C. A.) 127 Fed. 124 124
Grosvenor v. Phillips, 2 Hill, 147..... 318
Guaranty Co. v. Brick Co., 191 U. S. 416-425, 426, 24 Sup. Ct. 142, 48 L. Ed. 242 209, 211, 214
Guaranty Co. v. Railroad Co., 139 U. S. 147, 11 Sup. Ct. 512, 35 L. Ed. 116..... 178
Guaranty Savings Bank v. Bladow, 176 U. S. 448, 453, 20 Sup. Ct. 425, 44 L. Ed. 540 676
Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901 701
Gutman & Wenk, In re, 8 Am. Bankr. R. 255, 114 Fed. 1009..... 515
Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348..... 110

Hahn v. U. S., 40 C. C. A. 622, 112 Fed. 635 1002
Hale v. Bugg (C. C.) 82 Fed. 33..... 515
Hall v. Russell, 101 U. S. 503, 25 L. Ed. 829 108
Hallack v. Traber, 23 Colo. 14, 46 Pac. 110 604
Ham v. Van Orden, 84 N. Y. 270..... 951
Hamilton v. Rathbun, 175 U. S. 419, 20 Sup. Ct. 155, 44 L. Ed. 219..... 329
Hamilton v. Rogers, 8 Md. 301..... 113
Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 268, 13 Sup. Ct. 93, 36 L. Ed. 963..... 901
Hammer v. Freese, 19 Pa. 255..... 551
Hammond, In re (D. C.) 98 Fed. 845, 860.. 994
Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113....1005

Page

Harding, Ex parte, 120 U. S. 782, 7 Sup. Ct. 780, 30 L. Ed. 824 99
Harman v. Harman, 54 S. C. 100, 31 S. E. 881 119
Harrison v. Hughes, 60 C. C. A. 442, 125 Fed. 860 642
Harrison v. Maynard, Merrill & Co., 10 C. C. A. 17, 61 Fed. 689 ..... 531, 532
Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104 820
Hart v. Buckner, 5 C. C. A. 1, 54 Fed. 925 942
Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101 984
Hartranft v. Langfelt, 125 U. S. 128, 8 Sup. Ct. 732, 31 L. Ed. 672 575
Hartranft v. Meyer, 149 U. S. 544, 13 Sup. Ct. 982, 983, 37 L. Ed. 840 575
Harvey, In re, 10 Am. Bankr. Rep. 567, 122 Fed. 745 550
Harvey v. Railroad Co., 124 Mass. 424, 26 Am. Rep. 673 56
Harwood v. Wentworth, 162 U. S. 547, 16 Sup. Ct. 890, 40 L. Ed. 1069 42
Hatfield v. King, 22 Sup. Ct. 477, 46 L. Ed. 481 792
Hawk v. Railroad Co. (Pa.) 11 Atl. 459 .. 847
Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157 676
Hawley v. Sheldon, Har. Ch. (Mich.) 420 .. 617
Hayden v. Smithville M. Co., 29 Conn. 548 847
Heaton-Peninsular Button Fastener Co. v. Specialty Co., 25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728 ..... 731, 732, 734
Hebb v. Insurance Co., 138 Pa. 174, 20 Atl. 837 560
Hedden v. Robertson, 151 U. S. 521, 14 Sup. Ct. 434, 38 L. Ed. 257 650
Heine v. Com'rs, 19 Wall. 655, 657, 661, 22 L. Ed. 223 ..... 789, 790
Hekking v. Pfaff, 33 C. C. A. 328, 91 Fed. 60, 43 L. R. A. 618 177
Henderson Bridge Co. v. Com., 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73 304
Henderson Bridge Co. v. Negley (Ky.) 63 S. W. 989 304
Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500 612
Hennessy v. Patterson, 85 N. Y. 91, 103 .. 951
Henry Chapel, The (D. C.) 10 Fed. 777 637
Hensly v. Hamilton, 3 Ohio Cir. Ct. 201 .. 914
Herrick, In re, Fed. Cas. No. 6,420 523
Herrman, In re (D. C.) 102 Fed. 753, 754; 46 C. C. A. 77, 106 Fed. 987, 988 722
Hershberger v. Blewett (C. C.) 55 Fed. 170 108
Hervey v. Locomotive Works, 93 U. S. 669, 23 L. Ed. 1003 820
Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986 372
Hickey v. Taafe, 105 N. Y. 26, 12 N. E. 286 847
Hicks v. Cleveland, 45 C. C. A. 429, 106 Fed. 459 ..... 498, 504
Highlander, The, 1 Sprague, 510, Fed. Cas. No. 6,476 27
Hill v. Earl of Bute, 2 Fowl. Ex. Pr. 10 .. 653
Hill v. U. S., 9 How. 387, 13 L. Ed. 185 .. 339
Hills v. Chicago, 60 Ill. 86 908

Page

Hipp v. Babin, 19 How. 271, 15 L. Ed. 633 ..... 618, 621
H. M. Whitney, The, 30 C. C. A. 343, 86 Fed. 697, 700, 701 ..... 434, 439
Hoare v. Oriental Bank Corp., 2 App. Cas. 589 519
Hobbs v. Beach, 180 U. S. 396, 399–400, 21 Sup. Ct. 409, 45 L. Ed. 586 ..... 754, 858
Hobbs v. State, 22 S. W. 1035, 40 Am. St. Rep. 782 369
Holbrook, In re, Fed. Cas. No. 6,588 523
Hollins v. Brierfield Co., 150 U. S. 371–378, 14 Sup. Ct. 127–130, 37 L. Ed. 1113 24
Holloway v. Dunham, 170 U. S. 615, 619, 18 Sup. Ct. 784, 42 L. Ed. 1165 218
Holmes v. Railroad Co. (D. C.) 5 Fed. 523, 9 Fed. 220 177
Home Land & Cattle Co. v. McNamara, 49 C. C. A. 642, 111 Fed. 822 621
Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155 .. 642
House v. Jackson, 50 N. Y. 165 954
Hovey v. McDonald, 109 U. S. 150, 157, 3 Sup. Ct. 136, 27 L. Ed. 888 431
Howard v. Stillwell, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147 54
Howard v. Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039 878
Howell v. Sewing Machine Co., 12 Neb. 177, 10 N. W. 700 429
Hubbell v. Rochester, 8 Cow. 115 991
Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320 ..... 700, 701, 703
Hull v. Hull, 117 Iowa, 63, 90 N. W. 496 .. 619
Hunt v. Bridge Co., 130 Fed. 302 729
Hunt v. U. S., 166 U. S. 424, 17 Sup. Ct. 609, 41 L. Ed. 1063 335
Hunter v. Marlboro, 2 W. & M. 168, Fed. Cas. No. 6,908 991
Hutchinson v. Le Roy, 51 C. C. A. 159, 113 Fed. 202 ..... 123, 124
Hutchinson v. Otis, 59 C. C. A. 94, 123 Fed 14 124
Hutter v. Broome (C. C.) 114 Fed. 655 476

Ideal Stopper Co. v. Crown Cork & Seal Co., 48 C. C. A. 72, 108 Fed. 847 250
Improvement & R. R. Co. v. Munson, 14 Wall. 442, 20 L. Ed. 867 66
Insley v. U. S., 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163 ..... 334, 336
Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501 50
International, The (D. C.) 30 Fed. 375 30
Iron Silver Mining Co. v. Mining Co., 118 U. S. 196, 206, 6 Sup. Ct. 1177, 30 L. Ed. 98 589
Iroquois, The, 55 C. C. A. 497, 118 Fed. 1003; 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955 ..... 3, 588

Jabine v. Sparks (C. C. A.) 131 Fed. 440 .. 443, 451
Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249 810
Jacobs v. Insurance Co., 86 Iowa, 145, 53 N. W. 101 681
James v. Campbell, 104 U. S. 356, 26 L. Ed. 786 744

Page
James v. Gray (C. C. A.) 131 Fed. 401.... 647
James v. Trust Co., 39 C. C. A. 126, 98 Fed. 489 515
Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 37 L. Ed. 620..... 387
Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.... 983
Jencks v. Coleman, 2 Sumn. 221, 226, Fed. Cas. No. 7,258 .....168, 171
Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515 146
John G. Stevens, The, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969.....636, 642
Johnson v. Bradstreet, 77 Ga. 172, 4 Am. St. Rep. 77 814
Johnson v. F. C. Austin M. Co. (C. C.) 76 Fed. 616 810
Johnson v. Laflin, Fed. Cas. No. 7,393.... 364
Johnson v. McLaughlin (Ariz.) 4 Pac. 130 586
Johnston v. Pittsburg (C. C.) 106 Fed. 753 360
Jones, In re, 8 Am. Bankr. Rep. 626, 116 Fed. 431 523
Jones v. Graham, 77 N. Y. 628..... 949
Jones v. Green, 1 Wall. 330, 17 L. Ed. 553 24
Jones v. Hotel Co., 30 C. C. A. 108, 86 Fed. 370 909
Jones v. Hurlburt, 13 Neb. 125, 13 N. W. 5 914
Jones v. Luttledale, 6 Ad. & E. 486..... 521
Jones v. Simpson, 116 U. S. 609, 615, 6 Sup. Ct. 538, 29 L. Ed. 742..... 674
Jordan v. Duke (Ariz.) 53 Pac. 197..... 585
J. P. Donaldson, The, 167 U. S. 603, 17 Sup. Ct. 951, 42 L. Ed. 292..... 636
Juilliard v. Chaffee, 92 N. Y. 529..... 349
Julian v. Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629..... 538
Jupiter Mining Co. v. Mining Co. (C. C.) 11 Fed. 666 586

Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421..... 843
Kalorama, The, 10 Wall. 218, 19 L. Ed. 941 27, 28
Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62 820
Kane, In re (D. C.) 125 Fed. 984..... 645
Keet, In re, 11 Am. Bankr. Rep. 117, 128 Fed. 651 549
Keihl v. South Bend, 22 C. C. A. 618, 76 Fed. 921, 36 L. R. A. 228..... 903
Keller, In re, 6 Am. Bankr. Rep. 356, 109 Fed. 131 550
Kelley v. Boettcher, 29 C. C. A. 14, 21, 85 Fed. 55, 62..... 727
Kellogg, In re, 121 Fed. 333, 57 C. C. A. 547 123
Kelly v. Johnson (Ind. T.) 39 S. W. 352.. 805
Kelly v. Jutte & Foley Co., 44 C. C. A. 274, 104 Fed. 955 .....843, 844
Kelly v. Railroad Co., 81 N. Y. 233..... 991
Kelso v. Lorrillard, 85 N. Y. 177..... 951
Kendrick v. Tarbell, 26 Vt. 416..... 524
Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476 227
Kentucky v. Coulter (Ky.) 68 S. W. 873.. 312
Keokuk R. Co. v. Donnell, 77 Iowa, 221, 42 N. W. 176..... 621
Kerr v. Moon, 9 Wheat. 566, 6 L. Ed. 161 617
Keyser v. Farr, 105 U. S. 265, 26 L. Ed. 1025 146

Page
Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531..... 366
Keystone, The (D. C.) 31 Fed. 412..... 130
Keystone Mfg. Co. v. Adams, 151 U. S. 145, 14 Sup. Ct. 295, 38 L. Ed. 103.... 475
Kidd v. Johnson, 100 U. S. 619, 25 L. Ed. 769 362
Killman v. Shipbuilding & Marine R. Co., 102 Fed. 224, 42 C. C. A. 281..... 191
Kimberly v. Arms (C. C.) 40 Fed. 548, 550 432
King v. Altizer, 18 Sup. Ct. 925, 43 L. Ed. 214 795
King v. Asylum, 12 C. C. A. 145, 162, 64 Fed. 331 103
King v. Coleman, 98 Tenn. 562, 571, 40 S. W. 1082 668
King v. Hatfield (C. C.) 130 Fed. 564..... 792
King v. Mining Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419.....601, 604
King v. Mullins, 171 U. S. 436, 18 Sup. Ct. 925, 43 L. Ed. 214.....312, 793
King Case, 52 C. C. A. 219, 114 Fed. 417. 605
Kingman Co. v. Western M. Co., 170 U. S. 675, 678, 18 Sup. Ct. 786, 42 L. Ed. 1192 146
Kinney v. Ass'n, 191 U. S. 78, 82, 24 Sup. Ct. 30, 48 L. Ed. 103..... 810
Kinney Tobacco Co. v. Maller, 53 Hun, 344, 6 N. Y. Supp. 389..... 362
Kirby v. Railroad Co., 120 U. S. 130, 137, 138, 7 Sup. Ct. 430, 30 L. Ed. 569..... 408
Kirchberger v. Acetylene Burner Co., 128 Fed. 599 94
Kirk v. Blurton, 9 M. & W. 284..... 523
Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79 121
Kirk v. U. S. (C. C.) 124 Fed. 324..... 334
Kirtley v. Railroad Co. (C. C.) 65 Fed. 386 200
Kittell v. Railroad Co., 56 Vt. 96..... 996
Kittredge v. Race, 92 U. S. 116, 121, 23 L. Ed. 488 991
Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.....490, 762
Knickerbocker, In re (D. C.) 121 Fed. 1004 387
Knight, In re (D. C.) 125 Fed. 35..... 123
Knight v. Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692..... 700
Knight Case, 156 U. S. 16, 15 Sup. Ct. 255, 39 L. Ed. 325..... 187
Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150..... 847
Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689 762
Kollock, In re, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813..... 808
Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558.....475, 878
Krinsky, In re (D. C.) 112 Fed. 972..... 123
Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.....529, 536
Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458..... 102

Labette County v. Moulton, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698..... 451
Lacey, Ex parte, 6 Ves. 325..... 568
Lackawanna Iron & Steel Co. v. Ore Roaster Co., 128 Fed. 453..... 70
Lade Pike, The, 21 Wall. 1, 8, 24 L. Ed. 672 588

Page

Lady Wimett, The (D. C.) 92 Fed. 400... 636
Lake County v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 651, 652, 32 L. Ed. 1060, 328, 907, 910
Lake Merced Water Co. v. Cowles, 31 Cal. 215 666
Lanier v. McCabe, 2 Fla. 32, 48 Am. Dec. 173 429
Lanning v. Osborne (C. C.) 76 Fed. 319... 420
Lansing Boiler & Engine Works v. Ryerson & Son (C. C. A.) 128 Fed. 701..... 217
Lantry v. Wallace, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218..... 50
Last Chance M. Co. v. Mining Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859.. 588, 590, 604, 605
Last Chance Min. Co. v. Mining & Concentrating Co., 131 Fed. 579.....596, 605
Law v. People, 87 Ill 385..... 908
Lawson v. Gee, 57 S. C. 502, 35 S. E. 759. 119
L. B. Snow, The (D. C.) 15 Fed. 282..... 377
Lea v. Copper Co., 62 U. S. 493, 498, 16 L. Ed. 203 678
Leavenworth & Galveston Railroad v. U. S., 92 U. S. 733, 23 L. Ed. 634..... 42
Lehigh Water Co. v. Easton, 121 U. S. 388-390, 7 Sup. Ct. 916, 30 L. Ed. 1059. 899
Leonard v. Wiseman, 31 Md. 201, 204.... 908
Lepper v. Randall, 51 C. C. A. 337, 113 Fed. 627 476
Le Vay, In re, 11 Am. Bankr. Rep. 114, 125 Fed. 990..... 551
Lever Bros. v. Pasfield (C. C.) 88 Fed. 484 362
Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70 621
Lewis v. Com'rs, 12 Kan. 186..... 914
List v. Keller (C. C.) 30 Fed. 772..... 566
List v. Wheeling, 7 W. Va. 501..... 912
Loan Ass'n v. Topeka, 20 Wall. 660, 22 L. Ed. 455 903
Lockard Case, 123 Fed. 480..... 695
Lockwood v. Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061..... 994
Loew Filter Co. v. Filter Co., 47 C. C. A. 94, 107 Fed. 949, 950..... 732
Logan Gas Co. v. Gas Co. (C. C. A.) 126 Fed. 623, 626.....700, 701
Lombard v. Morse, 155 Mass. 136, 140, 29 N. E. 205, 14 L. R. A. 273..... 405
Long v. Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547..... 901
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165 901
Loom v. Higgins, 105 U. S. 580, 26 L. Ed. 1177 475
Loom Co. v. Higgins, 105 U. S. 580, 594, 26 L. Ed. 1177.....277, 739
Lottawanna, The, 20 Wall. 201, 225, 22 L. Ed. 259 431
Louisiana v. New Orleans, 102 U. S. 206, 26 L. Ed. 132..... 503
Louisville v. Bank, 104 U. S. 469, 26 L. Ed. 775 42
Louisville R. Co. v. Com. (Ky.) 49 S. W. 486 288
Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 76 Fed. 296..... 909
Louisville Trust Co. v. Comingor. 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413... 123, 124, 387

Page

Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305.....288, 309
Louisville & N. R. Co. v. Conner, 2 Baxt. 385 710
Louisville & N. R. R. Co. v. County Court, 1 Sneed, 639, 696, 62 Am. Dec. 424..... 709
Louisville & N. R. Co. v. Miller, 43 C. C. A. 436, 104 Fed. 124..... 848
Low v. Welch, 139 Mass. 33, 29 N. E. 216 994
Lucas v. Coe (C. C.) 86 Fed. 972..... 965
Lucas v. Lucas, 1 Atk. 270..... 648
Ludlow v. Szold, 90 Iowa, 179, 57 N. W. 676 823
Ludwig v. Glaessel, 34 Hun, 412..... 831
Lukens v. Katz, 12 Pa. Dist. R. 604..... 549
Luse v. Deitz, 46 Iowa, 205..... 617
Lusk v. Hastings, 1 Hill, 659, 662..... 726
Lynch v. Murphy, 161 U. S. 247, 250, 251, 252, 16 Sup. Ct. 523, 40 L. Ed. 688.... 984
Lyon v. Railroad Co. (C. C.) 107 Fed. 386 154

McAuley v. Railroad Co., 33 Vt. 311, 78 Am. Dec. 627..... 996
McBryde v. Montesano (Wash.) 34 Pac. 559 914
McClain v. Ortmayer, 141 U. S. 419-425, 12 Sup. Ct. 76, 35 L. Ed. 800.....752, 878
McCormick v. Sullivant, 10 Wheat, 192, 6 L. Ed. 300..... 617
McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930 762
McCracken v. Ref. Con., 111 Pa. 106, 2 Atl. 94 561
McCrary v. Beaudry, 67 Cal. 120, 121, 7 Pac. 265 420
McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794 177
McCullough v. Hicks, 63 S. C. 542, 41 S. E. 761 499
McCune v. Essig (C. C.) 118 Fed. 273; 59 C. C. A. 429, 122 Fed. 588..... 108
McElwain v. Willis, 9 Wend. 548, 556.... 24
McEvoy v. Hyman, 25 Fed. 596..... 604
McFadden v. Mining & Milling Co., 38 C. C. A. 354, 97 Fed. 670..... 41
McGarrity v. Byington, 12 Cal. 426..... 586
McGinty v. Reservoir Co., 155 Mass. 183, 29 N. E. 510..... 843
McGorty v. Tel. Co., 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62..... 846
McGough v. Ropner (D. C.) 87 Fed. 534.. 564
McGovern, The Ellen (D. C.) 27 Fed. 868 636
McGuire v. Bell Telephone Co., 167 N. Y. 208, 209, 212, 60 N. E. 433, 52 L. R. A. 437 847
McIsaac v. Electric Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244..... 846
McIsaac v. Telephone Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244..... 847
McLish v. Roff, 141 U. S. 663, 12 Sup. Ct. 118, 35 L. Ed. 893..... 23
McMillan v. Rees (C. C.) 1 Fed. 722..... 881
McNair v. Platt, 46 Ill. 211, 213..... 428
McNamara v. Land & Cattle Co. (C. C.) 105 Fed. 202..... 620
McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796..... 515
McRae v. Mattoon, 13 Pick. 53..... 336
Magowan v. Packing Co., 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781..... 475

Page

Magruder v. Armes, 180 U. S. 496, 21 Sup. Ct. 454, 45 L. Ed. 638..... 982
Mallach v. Ridley (Sup.) 9 N. Y. Supp. 922, 2 Abb. N. C. 181..... 164
Mann v. Taylor, 78 Iowa, 355, 43 N. W. 220..... 823
Manning Case, 110 Fed. 206..258, 259, 262–264
Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532..... 110
Manufacturers' National Bank, In re, 5 Biss. 499, Fed. Cas. No. 9,051..... 227
Margaret, The, 94 U. S. 494, 24 L. Ed. 146..... 636
Marion v. City Council (S. C.) 47 S. E. 140 120
Marsh v. Herman, 47 Minn. 537, 50 N. W. 611..... 843
Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870..... 339
Martin v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051.... 180, 660, 661
Marvel Co. v. Pearl (C. C.) 114 Fed. 946.. 270, 480
Marye v. Strouse (C. C.) 5 Fed. 483, 496.. 688
Mary Morgan, The (D. C.) 28 Fed. 196–202..... 28
Mason v. Sergent, 104 U. S. 689, 26 L. Ed. 894..... 652
Masterton v. The Mayor, 7 Hill, 61, 71, 42 Am. Dec. 38..... 55
Maxfield v. Graveson, 131 Fed. 841..... 845
Mayor, etc., of Morristown, Tenn., v. Telephone Co., 53 C. C. A. 132, 115 Fed. 304 941
Mayumba, The (D. C.) 21 Fed. 476..... 631
Mead v. Bunn, 32 N. Y. 275..... 51
Meade v. Beale, Taney, 339, 361, Fed. Cas. No. 9,371..... 409
Medlicott v. O'Donel, 1 Ball. & Beatty, 156, 171..... 678
Meehan v. Williams, 48 Pa. 238, 241..... 675
Meekin v. Railroad Co. (N. Y.) 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635 831
Memphis, etc., Co. v. Memphis, 4 Cold. 406, 424..... 664
Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197..... 791
Meriwether v. Muhlenberg County Court, 120 U. S. 354, 7 Sup. Ct. 563, 30 L. Ed. 653..... 446, 450
Merkle v. Bennington, 68 Mich. 134, 146, 35 N. W. 846..... 831
Merrill Railway & Lighting Co. v. Merrill, 80 Wis. 358, 49 N. W. 965..... 903
Merrimac, The, 14 Wall. 199, 20 L. Ed. 873..... 642
Merz Capsule Co. v. Capsule Co. (C. C.) 67 Fed. 414; 71 Fed. 787..... 37
Meydenbauer v. Stevens (D. C.) 78 Fed. 787..... 585
Michigan Cent. R. R. Co. v. Car Heating Co., 14 C. C. A. 232, 240, 67 Fed. 121, 125–130..... 749, 857
Military Parade Grounds, Matter of, 60 N. Y. 319..... 666
Miller v. Brass Co., 104 U. S. 352, 26 L. Ed. 783..... 751
Miller v. Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121..... 744, 858
Miller v. Stewart, 9 Wheat. 680, 6 L. Ed. 189..... 209

Page

Miller Co. v. Bronze Co. (C. C.) 80 Fed. 523..... 261
Millingar v. Hartupee, 6 Wall. 258, 262, 18 L. Ed. 829..... 982
Milner v. Meek, 95 U. S. 252, 24 L. Ed. 444..... 124
Miner, In re (D. C.) 114 Fed. 998; 117 Fed. 953..... 567
Mining Co. v. Tarbet, 98 U. S. 463, 469, 25 L. Ed. 253..... 589, 600
Minneapolis & St. P. R. Co. v. Railroad Co., 116 Iowa, 681, 88 N. W. 1082..... 667
Minnesota Tribune Co. v. Associated Press, 27 C. C. A. 542, 83 Fed. 350..... 612
Minor v. Tillotson, 1 Pet. 99, 8 L. Ed. 621 66
Mitchell v. Lippincott, 17 Fed. Cas. 503, 506, 94 U. S. 767, 770, 24 L. Ed. 315; 1 Cent. Law J. 265..... 413, 414
Mitchell v. Winslow, 2 Story, 630, 644, Fed. Cas. No. 9,673..... 113
Mitchell's Case, L. R. 9 Eq. 363..... 364
Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620..... 506
Moch v. Market Bank, 47 C. C. A. 49, 107 Fed. 897..... 151
Moline Plow Co. v. Braden, 71 Iowa, 141, 32 N. W. 247..... 357
Monarch Cycle Co. v. Royer Wheel Co., 44 C. C. A. 523, 526, 105 Fed. 324, 328..... 718
Montana Cent. R. Co. v. Migeon (C. C.) 68 Fed. 811..... 586
Montgomery v. Railroad Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287..... 200
Moore v. Littel, 41 N. Y. 66..... 951
Moors v. Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460..... 323
Moran v. Sturges, 154 U. S. 277, 14 Sup. Ct. 1025, 38 L. Ed. 981..... 28
More v. Freeman, Bunb. 205, 207..... 404
Morgan Envelope Co. v. Paper Co., 152 U. S. 430, 14 Sup. Ct. 627, 38 L. Ed. 500.. 732
Morgan's Louisiana R. R. Co. v. Railroad Co. (C. C.) 32 Fed. 525, 530..... 432
Morrin v. Lawler (C. C.) 91 Fed. 693..146, 432
Morris v. Telegraph Co., 38 N. J. Eq. 301 991
Morrison v. Regan (Idaho) 67 Pac. 955... 604
Moulton v. Mfg. Co., 81 Minn. 259, 83 N. W. 1082..... 619
Mt. Hope, The, 29 C. C. A. 365, 84 Fed. 910, 912..... 434
Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699..... 504
Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405, 7 Am. Bankr. R. 224, 234..... 123, 124, 358 387, 515, 516, 528
Murphy v. Eastham, 5 Fish. Pat. Cas. 306, 17 Fed. Cas. 1034, No. 9,949..... 490

Narramore v. Railroad Co., 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68..... 847
Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527 521, 522
National Folding Box & Paper Co. v. Brown (C. C.) 106 Fed. 189..... 476
National Hollow B. B. Co. v. Interchangeable B. B. Co., 45 C. C. A. 544, 106 Fed. 693..... 588
National Nickel Co. v. Nickel Syndicate, 50 C. C. A. 113, 112 Fed. 46..... 121

Page

National Steel Co. v. Lowe (C. C. A.) 127 Fed. 311, 315 843
Nelson v. Police Jury of St. Martin's Parish, 111 U. S. 720, 4 Sup. Ct. 648, 28 L. Ed. 574 503
Nesbitt v. Turner, 155 Pa. 431, 26 Atl. 750 209
Neves v. Scott, 13 How. 268, 271, 14 L. Ed. 140 ..... 408, 413
New Brunswick & Canada R. Co. v. E. S. Wheeler & Co. (C. C.) 12 Fed. 377 542
New Departure Bell Co. v. Mfg. Co., 19 C. C. A. 534, 73 Fed. 469 261
Newell v. People, 7 N. Y. 9, 97 908
New Home Sewing Machine Co. v. Bloomingdale (C. C.) 59 Fed. 284 362
N. J. Steam Nav. Co. v. Bank, 6 How. 381, 12 L. Ed. 465 521
Newman v. Arthur, 109 U. S. 132, 3 Sup. Ct. 88, 27 L. Ed. 883 835
Newman v. Schwerin, 10 C. C. A. 129, 61 Fed. 865 661
Newton v. Allis, 12 Wis. 378 682
New York Filter Mfg. Co. v. Filter Co., 91 Fed. 422 89
New York Guaranty Co. v. Water Co., 107 U. S. 314, 2 Sup. Ct. 286, 27 L. Ed. 484 618
New York Printing Co., In re, 49 C. C. A. 133, 110 Fed. 514 994
Nickalls v. Merry, L. R. 7 H. L. 530 364
Nickels v. Com., 64 S. W. 448, 449, 23 Ky. Law Rep. 778, 780 ..... 691, 695
Nickerson v. Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355, 32 L. Ed. 314 612
Nims, In re, Fed. Cas. Nos. 10,268, 10,269 518
Ninety-Six Township v. Folsom, 30 C. C. A. 657, 87 Fed. 304 498
Nisbit v. Trust Co. (C. C.) 12 Fed. 686 323
N. K. Fairbank Co. v. Soap Co., 42 C. C. A. 376, 102 Fed. 327 362
Norcross v. James, 140 Mass. 188, 2 N. E. 946 36
Norcross v. Norcross, 53 Me. 163, 169 171
North American Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061. 982
North American Exploration Co. v. Adams, 45 C. C. A. 185, 104 Fed. 404 588
North Chicago Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565 329
Northern Assur. Co. v. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213 60
Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999 .. 180
Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009 180
Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994 .. 180
Northern Pac. R. Co. v. Sanders, 1 C. C. A. 192, 49 Fed. 129 109
Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679 188
North Springs Water Co. v. Tacoma, 68 Pac. 773, 47 L. R. A. 214 901
Norton v. Brownsville, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. Ed. 774 911
Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178 912
Norwegian Plow Co. v. Clark, 102 Iowa, 31, 70 N. W. 808 357

Page

Norwich Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585 374
Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168 110

Ober, The Samuel (D. C.) 15 Fed. 621 ... 377
Occidental, The (D. C.) 87 Fed. 485 376
O'Connor v. Rich, 164 Mass. 560, 42 N. E. 111, 49 Am. St. Rep. 483 844
Oelricks v. Ford, 23 How. 63, 16 L. Ed. 534 521
Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277 725
Olcott v. Supervisors, 16 Wall. 689, 21 L. Ed. 382 178
Old Colony R. R. v. Wilder, 137 Mass. 536 239
Olin v. Timken, 155 U. S. 141, 15 Sup. Ct. 49, 39 L. Ed. 100 878
Olive Mount, The (D. C.) 50 Fed. 563 30
Olympia, The, 9 C. C. A. 393, 61 Fed. 120 191
One Pearl Chain v. U. S., 123 Fed. 371 .. 852
Orange County Case, 119 Fed. 365 87
Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737 676
Oregon, The, 158 U. S. 186, 200, 201, 202, 203, 15 Sup. Ct. 804, 39 L. Ed. 943 ... 437
Osborn v. Bank, 9 Wheat. 739, 6 L. Ed. 204 794
Osborne, The S. S., 105 U. S. 447, 450, 26 L. Ed. 1065 431
Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586 456
Ott v. Sweatmann, 166 Pa. 217, 31 Atl. 102 373
Ottawa, The, 3 Wall. 269, 18 L. Ed. 165 .. 631
Overstreet v. Moser, 88 Mo. App. 72, 75 .. 164
Owen v. Brien, 2 Tenn. Ch. 295 662
Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837 336
Owensboro v. Waterworks Co., 191 U. S. 358, 24 Sup. Ct. 82, 48 L. Ed. 217 421

Pacific R. R. Co. v. Railroad Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498 .. 536
Pahquioque Bank v. Bank, 36 Conn. 325, 4 Am. Rep. 80 227
Paine v. Snowden, 1 C. C. A. 661, 50 Fed. 776 ..... 480, 481
Palmer v. Lozier, 33 C. C. A. 255, 90 Fed. 734 858
Parham v. Machine Co., 4 Fish. P. C. 468, 482, Fed. Cas. No. 10,713 459
Park Bros., etc., Co. v. City Boiler Works, 204 Pa. 453, 54 Atl. 334 135
Parker v. McKee (C. C.) 24 Fed. 808 270
Parker v. Mfg. Co., 2 Black, 545, 17 L. Ed. 333 ..... 618, 621
Parker v. Phetteplace, 2 Cliff. 70, Fed. Cas. No. 10,746 414
Parker v. Railroad, 13 Lea, 669 665
Parsons v. Venzke, 164 U. S. 89, 91, 17 Sup. Ct. 27, 41 L. Ed. 360 676
Passaic Print Works v. Ely & Walker D. C. Co., 44 C. C. A. 426, 105 Fed. 165, 62 L. R. A. 673 900
Patillo v. Com. Co., 47 C. C. A. 637, 644, 645, 108 Fed. 723, 730, 731 683
Patton v. Railroad, 89 Tenn. 372, 15 S. W. 919, 12 L. R. A. 184; 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361 ..... 710, 713

Page

Pearsall v. Railroad, 161 U. S. 646, 671, 16 Sup. Ct. 705, 40 L. Ed. 838.....308, 912
Peck v. Elliott, 24 C. C. A. 425, 79 Fed. 10, 38 L. R. A. 616..... 538
Peck v. Jones, 70 Pa. 83..... 561
Peck v. Knickerbocker Ice Co., 18 Hun, 186 949
Pekin Plow Co., In re, 50 C. C. A. 257, 112 Fed. 308 .....358, 1005
Pendleton v. Kinsley, 3 Cliff. 416, 427, 428, Fed. Cas. No. 10,922.....167, 173
Pennington v. Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589, 24 Am. St. Rep. 419 128
Pennoyer v. Neff, 95 U. S. 727, 732, 24 L. Ed. 565 .....177, 337
Pennsylvania R. Co. v. Com. (Pa.) 7 Atl. 368, 371 308
Pennsylvania R. Co. v. Knight, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325..... 456
Pennypacker v. Jones, 106 Pa. 237..... 54
People v. Bartels, 138 Ill. 322, 332, 27 N. E. 1091 221
People v. Bennett, 136 N. Y. 484, 32 N. E. 1044 336
People v. City Council (Utah) 64 Pac. 460 908
People v. May, 9 Colo. 80, 10 Pac. 641.... 909
People v. Porter, 47 N. Y. 375..... 908
People v. Quigg, 59 N. Y. 83.....335, 336
People v. Tazewell, 22 Ill. 147..... 914
People ex rel. v. Trust Co., 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319..... 308
People's Savings Bank v. Smith & Co., 114 Ga. 185, 188, 39 S. E. 920..... 429
Perry v. Thompson, 98 Mass. 249..... 239
Persian Monarch, The, 5 C. C. A. 117, 55 Fed. 333 844
Peschel v. Railroad Co., 62 Wis. 338, 21 N. W. 269 843
Petigry v. Ferguson, 6 Rich. Eq. 380..... 177
Petroleum Co. v. Coal & Coke Co., 89 Tenn. 381, 18 S. W. 65.....700, 702
Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419..... 138
Phillips v. Kimmons, 94 Tenn. 562, 29 S. W. 965 668
Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749 261
Pickhardt v. U. S., 14 C. C. A. 341, 67 Fed. 111 979
Pierce v. Plumb, 74 Ill. 326..... 619
Pietro G., The (D. C.) 39 Fed. 366..... 231
Pilot Boy, The, 53 C. C. A. 329, 115 Fed. 873 631
Pinkerton v. Woodward, 33 Cal. 557, 585, 91 Am. Dec. 657..... 172
Pitcairn v. Hiss (C. C. A.) 125 Fed. 110... 133
Pleasant Township v. Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864..... 909
Polk's Lessee v. Wendal, 9 Cranch, 87, 95, 97, 3 L. Ed. 665.....690, 691, 695
Pooler v. U. S. (C. C. A.) 127 Fed. 509.. 139
Pooley v. Quilter, 2 De Gex & J. 327..... 568
Porter v. Labin, 149 U. S. 479, 13 Sup. Ct. 1008, 37 L. Ed. 815..... 538
Porter v. Parmley, 52 N. Y. 185..... 323
Porter v. Price, 26 C. C. A. 70, 72–74, 80 Fed. 655, 657–660; 33 C. C. A. 196–198, 90 Fed. 631, 632.....683, 688
Potter v. Hopkins, 25 Wend. 417..... 349

Page

Potts v. Creager, 155 U. S. 606, 15 Sup. Ct. 194, 39 L. Ed. 275..... 72
Poulston, Ex parte, 19 Fed. Cas. 1206.... 96
Powell v. Mills Co., 47 C. C. A. 416, 108 Fed. 386 476
Powers v. Leach, 22 Vt. 226..... 991
Powers v. Railway, 169 U. S. 93, 101, 18 Sup. Ct. 264, 42 L. Ed. 673..... 811
Powers Dry Goods Co. v. Nelson (N. D.) 88 N. W. 703, 58 L. R. A. 770..... 994
Price v. Abbott (C. C.) 17 Fed. 506.... 538
Prince v. Quincy, 105 Ill. 138, 44 Am. Rep. 785 903
Providence & N. Y. S. S. Co. v. Mfg. Co., 109 U. S. 578, 593, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038 374
Publishing Co. v. Smythe (C. C.) 27 Fed. 914 532
Pullman Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499.....307, 308
Pullman Co. v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877..... 456
Pulsifer v. Hussey (Me.) 54 Atl. 1076, 9 Am. Bankr. R. 657..... 976
Purcell v. Miner, 4 Wall. 513, 514, 18 L. Ed. 435 612
Purdy v. Wallace Muller Co. (C. C.) 81 Fed. 513 663
Putnam v. Stopper Co. (C. C.) 38 Fed. 235 268
Putney v. Whitmire (C. C.) 66 Fed. 388.. 25
Pyle v. Clark, 25 C. C. A. 190, 79 Fed. 744 .....840, 841

Quin v. Moore, 15 N. Y. 432..... 831

Ragsdale v. Railroad Co., 60 S. C. 381, 38 S. E. 609 120
Rahmel v. Lehndorff (Cal.) 76 Pac. 659.... 171
Railroad Co. v. Campbell, 170 Ill. 163, 167, 49 N. E. 314..... 682
Railroad Co. v. Cox, 145 U. S. 593, 601, 606, 12 Sup. Ct. 905, 36 L. Ed. 829.... 681
Railroad v. Dies, 98 Tenn. 655, 41 S. W. 860 .....707, 708, 709
Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278 682
Railroad Co. v. McDonough, 97 Tenn. 255, 37 S. W. 15 711
Railroad Co. v. Pratt, 85 Tenn. 9, 1 S. W. 618 711
Railroad Co. v. Pugh, 95 Tenn. 419, 32 S. W. 311 710
Railroad Co. v. Sayles, 97 U. S. 563, 24 L. Ed. 1053 .....748, 749, 750
Railroad Co. v. Scales, 2 Lea, 688..... 710
Railroad Co. v. Smith, 81 Ala. 229, 1 South. 723; 6 Heisk. 174.....682, 708
Railroad Co. v. Swaney, 5 Lea, 119, 121.. 710
Railroad Co. v. Telford, 89 Tenn. 293, 14 S. W. 776 665
Railroad Co. v. Troxlee, 1 Lea, 520..... 710
Railroad Co. v. Twitchell, 8 C. C. A. 237, 59 Fed. 727 810
Railroad Co. v. Wilson, 90 Tenn. 271, 16 S. W. 613, 13 L. R. A. 364, 25 Am. St. Rep. 693 708
Railroad Co. v. Wyler, 158 U. S. 285, 289, 298, 15 Sup. Ct. 877, 39 L. Ed. 983.... 681

Page

Railroad & Telephone Co. v. Board of Equalizers (C. C.) 85 Fed. 311..... 303
Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742..... 642
Randall v. Railroad Co., 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003.... 847
Rann v. Hughs, 7 T. R. 350..... 522
Redburn, In re, 59 C. C. A. 388, 124 Fed. 182 123
Reed, Ex parte, 100 U. S. 13, 25 L. Ed. 538 99
Reese v. U. S., 9 Wall. 14, 19 L. Ed. 541.. 208
Register v. Reid, 72 Ky. 103, 105, 106; 60 S. W. 391, 22 Ky. Law Rep. 1201; 64 S. W. 503, 504, 23 Ky. Law Rep. 767, 769 ..... 690, 691, 692, 693, 694
Removal Cases, 100 U. S. 457, 473, 25 L. Ed. 593 661
Renard v. Sampson, 12 N. Y. 561..... 349
Renner v. Bank, 9 Wheat. 581, 682, 6 L. Ed. 166 66
Resolute, The, 168 U. S. 441, 18 Sup. Ct. 112, 42 L. Ed. 533..... 28
Resurrection Gold Min. Co. v. Gold Min. Co. (C. C. A.) 129 Fed. 668..... 839
Reubin v. Cohen, 48 Cal. 545..... 429
Rex v. Bond, 1 B. & Ald. 392..... 141
Reynolds, In re (D. C.) 127 Fed. 760.... 123
Rheinstrom v. U. S. (C. C.) 118 Fed. 303.. 654
Rheola, The (C. C.) 19 Fed. 926..... 384
Richards v. Rough, 53 Mich. 212, 18 N. W. 785 847
Richardson v. Miller, 3 Law & Eq. Rep. 614, Fed. Cas. No. 11,791..... 545
Richardson v. Winsor, 3 Cliff. 405, Fed. Cas. No. 11,795 130
Richmond, The, 103 U. S. 540, 3 L. Ed. 670 588
Richmond v. Railroad Co., 33 Iowa, 480.. 619
Rider v. Railroad Co. (N. Y.) 63 N. E. 836, 58 L. R. A. 125..... 200
Riggs v. Tayloe, 4 Wheat. 486, 6 L. Ed. 141 66
Ripon Knitting Works v. Schrieber (D. C.) 101 Fed. 810; 43 C. C. A. 682, 104 Fed. 1006 645
Risdon Iron & Locomotive Works v. Medart, 158 U. S. 77–79, 15 Sup. Ct. 745, 39 L. Ed. 899..... 743
Roach v. Summers, 20 Wall. 169, 22 L. Ed. 252 209
Robertson v. Downing, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269..... 574
Robertson v. Edelhoff, 132 U. S. 614, 10 Sup. Ct. 186, 33 L. Ed. 477..... 575
Robinson, Ex parte, 19 Wall. 510, 22 L. Ed. 205 96
Robinson v. Lee (C. C.) 122 Fed. 1012.... 797
Robinson v. Sugar Refining Co. (D. C.) 70 Fed. 792 130
Robinson v. U. S. (C. C.) 121 Fed. 204... 575
Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 209, 31 N. E. 1018.. 55
Rochford, Ex parte (C. C. A.) 124 Fed. 182, 187, 59 C. C. A. 388..... 123, 527–529, 1006
Rockwood, In re (D. C.) 91 Fed. 363..... 527
Roddin, In re, Fed. Cas. No. 11,989.... 518
Rodgers, In re, 60 C. C. A. 567, 125 Fed. 169 323

Page

Roemer v. Simon, 95 U. S. 214, 220, 24 L. Ed. 384..... 739
Rogers v. Durant, 106 U. S. 644, 1 Sup. Ct. 623, 27 L. Ed. 303..... 66
Rogers v. Hill (Ind. T.) 64 S. W. 536..... 805
Rogers v. McGregor, 4 Cow. 531..... 991
Rogers v. Rathbun, 1 Johns. Ch. 367..... 317
Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732..... 168
Root v. Railroad Co., 105 U. S. 189, 212, 26 L. Ed. 975 618
Root v. Woolworth, 150 U. S. 413, 14 Sup. Ct. 136, 37 L. Ed. 1123..... 536
Rose & Ganss v. Bevan, 10 Md. 466, 69 Am. Dec. 170..... 113
Rosser, In re, 41 C. C. A. 497, 101 Fed. 562, 4 Am. Bankr. R. 153..... 826
Rouse, Hazard & Co., In re, 33 C. C. A. 356, 91 Fed. 96..... 433
Routledge v. Worthington Co., 119 N. Y. 592, 23 N. E. 1111..... 349
Routon v. Railroad Co., 1 Tenn. Cas. 528 710
Rowe v. Blodgett & Clapp Co. (C. C.) 103 Fed. 873; 50 C. C. A. 120, 112 Fed. 61.. 480
Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906..... 751
Rowland, Ex parte, 104 U. S. 604, 26 L. Ed. 861 99
Rush v. French (Ariz.) 25 Pac. 816..... 586
Russell, In re, 41 C. C. A. 323, 101 Fed. 248 123
Russell v. Clark, 7 Cranch, 69, 3 L. Ed. 271 50
Russell v. Myers, 32 Mich. 522..... 675
Russell v. Southard, 12 How. 138, 147, 13 L. Ed. 927..... 408
Rutledge v. Waldo (C. C.) 94 Fed. 265.... 797

St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222..... 134
St. Johnsbury v. Morrill, 55 Vt. 165, 169.. 678
St. Louis Mining Co. v. Mining Co., 24 Sup. Ct. 654, 48 L. Ed. 953..... 586
St. Louis M. & M. Co. v. Mining Co., 44 C. C. A. 120, 104 Fed. 664, 56 L. R. A. 725 ..... 588, 605
St. Louis R. Co. v. Shumacher, 152 U. S. 77, 81, 14 Sup. Ct. 479, 38 L. Ed. 361... 200
Samuel Dillaway, The, 38 C. C. A. 675, 98 Fed. 138, 141 434
Samuel Ober, The (D. C.) 15 Fed. 621.... 377
San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 23 Sup. Ct. 571, 47 L. Ed. 892 422
San Diego, etc., Co. v. National City (C. C.) 74 Fed. 79; 174 U. S. 739, 753, 19 Sup. Ct. 804, 810, 43 L. Ed. 1154.....420, 421
Sands v. Taylor, 5 Johns. 395, 410, 4 Am. Dec. 374 46
Sandys v. Florence, 47 L. J. C. P. L. 598, 600 ..... 165, 169, 174
Saratoga, The, 36 C. C. A. 208, 94 Fed. 221 383
Saunders v. Allen, 9 C. C. A. 157, 60 Fed. 610 271
Saunderson v. Jackson, 3 Esp. 180 (2 B. & R. 238) 349
Savin, Case of, 131 U. S. 274, 9 Sup. Ct. 701, 33 L. Ed. 150..... 96
Saxlehener v. Eisner & Mendelson Co., 179 U. S. 33, 21 Sup. Ct. 7, 45 L. Ed. 60... 362
S. B. Wheeler, The, 20 Wall. 385, 22 L. Ed. 385 588

Page
Scarritt Furniture Co. v. Moser, 48 Mo. App. 543, 548 725
Schneider v. Norris, 2 M. & S. 286..... 349
Schreiber v. Railroad Co., 115 Ill. 340, 3 N. E. 427 666
Schuff v. Pflanz, 99 Ky. 97, 35 S. W. 132 451
Scotland, The, 105 U. S. 24, 28, 26 L. Ed. 1001 374
Scott v. Deweese, 181 U. S. 220, 21 Sup. Ct. 585, 45 L. Ed. 822..... 365
Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358..... 24
Scott v. Oil Co. (C. C.) 120 Fed. 698; 122 Fed. 835 135
Scovill v. Glasner, 79 Mo. 449, 453..... 682
Seeberger v. Hardy, 150 U. S. 420, 14 Sup. Ct. 170, 37 L. Ed. 1129.....570, 571
Seminole, The (D. C.) 42 Fed. 924..... 29
Servia, The, 149 U. S. 144, 153, 13 Sup. Ct. 817, 37 L. Ed. 681..... 439
Sexton v. The Troy, 1 Newb. Adm. 176, Fed. Cas. No. 4,115..... 28
Shachter, In re (D. C.) 119 Fed. 1010–1015 644–646
Shankland v. Washington, 5 Pet. 390, 8 L. Ed. 166 60
Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768..... 153
Sheffer v. Willoughby, 163 Ill. 518, 521, 522, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483.....164, 169
Shelton v. Surety Co., 127 Fed. 736..133, 210
Shetland, The, v. Johnson, 31 Wash. Law Rep. 411 377
Shields v. Thomas, 18 How. 253, 259, 15 L. Ed. 368 999
Shirley v. Mayer, 25 Fed. Cas. 39..... 389
Shirley v. Watts, 3 Atk. 200..... 24
Shirreff v. Wilks, 1 East, 48..... 429
Sias v. Lighting Co. (Vt.) 50 Atl. 554.... 847
Sicard v. Davis, 6 Pet. 124, 8 L. Ed. 342.. 681
Sidway v. Land Co. (C. C.) 116 Fed. 382.. 663
Siffkin v. Walker, 2 Camp. 550..... 521
Simmons v. Saul, 138 U. S. 439, 448, 11 Sup. Ct. 369, 34 L. Ed. 1054.....59, 178
Simms v. Railroad, 12 Heisk. 621..... 665
Simonson v. Sinheimer, 37 C. C. A. 337, 95 Fed. 948 203
Simpson v. Dall, 3 Wall. 460, 18 L. Ed. 265 66
Sims, In re (D. C.) 118 Fed. 356..... 550
Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437..... 280
Singleton v. Felton, 42 C. C. A. 57, 101 Fed. 526 588
Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354–367, 22 Sup. Ct. 400, 46 L. Ed. 585..... 899
Slayton, Ex parte, 105 U. S. 451, 26 L. Ed. 1066 374
Slingluff, In re, 106 Fed. 154, 5 Am. Bankr. R. 76 975
Slingsby, The, 57 C. C. A. 52, 120 Fed. 748 .....383, 564
Smeeth v. Perkins & Co., 60 C. C. A. 199, 125 Fed. 285 476
Smelting Co. v. Kemp, 104 U. S. 636, 648, 653, 26 L. Ed. 875.....691, 695
Smith v. Brown, 23 Sup. Ct. 845, 47 L. Ed. 344 726
Smith v. Burnett, 173 U. S. 430, 436, 19 Sup. Ct. 442, 43 L. Ed. 756..... 588

Page
Smith v. Dedham, 144 Mass. 177, 10 N. E. 782 903
Smith v. Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810..... 660
Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637 114
Smith v. People, 47 N. Y. 330..... 449
Smith v. Railroad Co., 79 Minn. 254, 82 N. W. 577; 99 U. S. 398, 401, 25 L. Ed. 437 24, 841
Smith v. Saddle Co., 148 U. S. 679, 13 Sup. Ct. 768, 37 L. Ed. 606..... 480
Smith v. Seattle (Wash.) 65 Pac. 612..... 908
Smith v. Shriver, 3 Wall. Jr. 219, Fed. Cas. No. 13,108 414
Smith v. U. S., 2 Wall. 219, 17 L. Ed. 788 209
Smith & Co. v. McLean, 24 Iowa, 322... 824
Smyth v. Ames, 169 U. S. 466, 524, 18 Sup. Ct. 418, 42 L. Ed. 819..... 422
Smythe v. Sprague, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822..... 994
Sneed v. Morehead, 70 Miss. 690, 13 South. 235 164
Snow, The L. B. (D. C.) 15 Fed. 282.... 377
Solvay Process Co. v. Alkali Co., 33 C. C. A. 285, 90 Fed. 818 739
Somers v. Keliher, 115 Mass. 165..... 150
Southern Pac. Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485..686, 713
Southern Pac. Co. v. Schoer, 52 C. C. A. 268, 275, 114 Fed. 466, 473..... 717
Southern R. Co. v. Edwards, 42 S. E. 375 988
Southern R. Co. v. Elder, 26 C. C. A. 615, 81 Fed. 791 711
Spalding v. Hill, 86 Ky. 656, 7 S. W. 27.. 286, 295
Speer v. Com'rs, 32 C. C. A. 101, 88 Fed. 760 909
Spohn v. Railroad Co., 87 Mo. 74, 80.... 173
Springfield Milling Co. v. Mfg. Co., 26 C. C. A. 389, 393, 81 Fed. 261, 265..... 727
Springfield & Illinois South Eastern R. Co. v. County Clerk of Wayne County, 74 Ill. 27 914
S. S. Osborne, The, 105 U. S. 447, 450, 26 L. Ed. 1065 431
Stacey v. Railroad, 27 Vt. 39..... 666
Stadlemann v. White Line Towing Co. (C. C.) 92 Fed. 209 810
Stadtfelt v. Huntsman, 92 Pa. 53, 37 Am. Rep. 661 373
Standard Caster Wheel Co. v. Caster Socket Co., 51 C. C. A. 109, 113 Fed. 162... 878
Stanley v. Bircher's Ex'rs, 78 Mo. 245, 246, 248 .....164, 169
Stanton v. Small, 3 Sandf. 230..... 46
Stapp v. Steamboat Swallow, 1 Bond, 190, Fed. Cas. No. 13,305..... 28
Star Brass Works v. Electric Co., 49 C. C. A. 409, 111 Fed. 398, 400..... 79
State v. Caldwell, 124 Mo. 513, 28 S. W. 4 336
State v. Harper, 30 S. C. 586, 9 S. E. 664. 498
State v. Neely, 30 S. C. 587, 9 S. E. 664, 3 L. R. A. 672..... 498
State v. Randolph, 22 Mo. 482..... 335
State v. Rotwitt, 17 Mont. 41, 41 Pac. 1004 449
State v. Stoll, 17 Wall. 425, 21 L. Ed. 650 449
State v. Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777..... 498

Page

State ex rel. Hamilton Gas & Coke Co. v. Hamilton, 47 Ohio St. 52, 23 N. E. 935.. 901
State ex rel. Wilson v. Garroutte, 67 Mo. 445 912
Stebbins v. Duncan, 105 U. S. 43, 27 L. Ed. 641 67
Steele, In re, 98 Fed. 78, 3 Am. Bankr. R. 549 975
Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107..... 700
Stein v. Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622..... 901
Stem-Winder Min. Co. v. Mining Co., 21 Pac. 1040; 13 Sup. Ct. 1052..... 595
Stephens v. Cherokee Nation, 174 U. S. 448, 19 Sup. Ct. 722, 43 L. Ed. 1041.... 801
Steuer, In re (D. C.) 104 Fed. 976..... 123
Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914..... 810
Stewart v. Ferguson, 34 App. Div. 515, 54 N. Y. Supp. 615..... 180
Stewart v. Platt, 101 U. S. 731, 737, 25 L. Ed. 816.....552, 821, 823
Stewart v. Railroad Co., 90 N. Y. 588, 591, 43 Am. Rep. 185; 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537.....154, 166, 173
Stickney v. Wilt, 23 Wall. 150, 23 L. Ed. 50 .....124, 432
Stiles v. Seaton, 200 Pa. 114, 49 Atl. 774.. 373
Stone v. Bank, 174 U. S. 412, 422, 19 Sup. Ct. 747, 43 L. Ed. 1028..... 725
Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102 414
Stott v. Churchill (Com. Pl.) 36 N. Y. Supp. 476, 477 164
Strause v. Hooper, 5 Am. Bankr. Rep. 225, 105 Fed. 590 523
Studebaker v. Perry, 184 U. S. 263, 22 Sup. Ct. 463, 46 L. Ed. 528..... 365
Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591 623
Sugar Co. v. Mfg. Co. (C. C.) 43 Fed. 140 858
Sugg v. Thornton, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. Ed. 447..... 984
Supervisors of Fulton County v. Railroad Co., 21 Ill. 338..... 914
Supreme Council v. Black, 59 C. C. A. 414, 123 Fed. 650..... 539
Susquehanna Mutual Fire Ins. Co. v. Oberholtzer, 172 Pa. 223, 32 Atl. 1105, 1108 541
Sutherland Innes Co. v. Evart, 30 C. C. A. 305, 86 Fed. 597 903
Sutliff v. Com'rs, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145..... 909
Swan, In re, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207..... 99
Swarts v. Hammer, 56 C. C. A. 92, 120 Fed. 256; 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060 550
Swarts v. Siegel, 117 Fed. 13, 17, 18, 54 C. C. A. 399, 404, 405..... 151
Swift v. Meyers (C. C.) 37 Fed. 43..... 177
Sykes v. Chadwick, 18 Wall. 141, 146–148, 21 L. Ed. 824, 826.....406, 407
Symonds v. Greene (C. C.) 28 Fed. 834.... 360
Symons' Case, 5 Ch. App. 298..... 364
Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546..... 901

Talbot, In re (D. C.) 110 Fed. 924.... 401, 415, 648

Page

Tampa R. Co., In re, 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589..... 660
Tannage Patent Co. v. Zahn, 17 C. C. A. 552, 70 Fed. 1003 72
Tappan v. Beardsley, 10 Wall. 427–435, 19 L. Ed. 974..... 827
Taylor v. Railroad Co., 31 C. C. A. 537, 88 Fed. 350 309
Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287 368
Tebo, In re (D. C.) 101 Fed. 419..... 552
Tedesco v. Oppenheimer, 15 Misc. Rep. 522, 37 N. Y. Supp. 1073..... 323
Temple Emery, The (D. C.) 122 Fed. 180 636
Terre Haute & Indianapolis R. Co. v. Jackson, 81 Ind. 19, 22.....167, 173
Terry, Ex parte, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405..... 99
Teschmacher, In re (D. C.) 127 Fed. 728.. 123
Texas & P. R. Co. v. Archibald, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188 847
Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829..... 538
Texas & P. Ry. v. Interstate Commerce Commission, 162 U. S. 197, 212, 16 Sup. Ct. 666, 672, 40 L. Ed. 940..... 454
Thallman v. Thomas, 49 C. C. A. 317, 111 Fed. 277 588
Thomas, In re, Fed. Cas. No. 13,886..... 523
Thomas v. Davenport, 9 Barn. & C. 78... 521
Thomas v. Gay, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740..... 801
Thomas v. Scotland, 3 Dill. 7, Fed. Cas. No. 13,909 414
Thomas v. Stetson, 62 Ill. 537..... 429
Thomas v. Wanamaker (C. C. A.) 129 Fed. 92 649
Thomas Wilson, In re (D. C.) 124 Fed. 653 636
Thompson, In re (C. C. A.) 128 Fed. 575.. 123
Thompson v. Allen County, 115 U. S. 550, 554, 6 Sup. Ct. 140, 142, 29 L. Ed. 472.. 789, 790
Thompson v. Railroad Co. (N. Y.) 70 N. E. 213 579
Thompson v. Spray, 72 Cal. 528, 14 Pac. 182 604
Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897..... 178
Thomson-Houston Electric Co. v. Brass Co., 26 C. C. A. 107, 116, 80 Fed. 712, 721, 722.....732, 734, 858, 859
Thomson-Houston Electric Co. v. Newton (C. C.) 42 Fed. 723..... 901
Thomson-Houston Electric Co. v. Railroad Co., 22 C. C. A. 1, 75 Fed. 1005, 1008.. 734
Tiffany v. U. S., 50 C. C. A. 419, 112 Fed. 672 .....978, 1002
Timolat v. Fairbanks (not reported)..... 258
Timolat v. Franklin Co., 118 Fed. 852; 58 C. C. A. 405, 122 Fed. 69; 123 Fed. 899 258
Timolat v. Manning (C. C.) 110 Fed. 206. 258
Titus v. Kyle, 10 Ohio St. 444..... 521
Tompkins v. Catawba Mills (C. C.) 82 Fed. 782, 783 25
Topliff v. Topliff, 145 U. S. 156, 163, 12 Sup. Ct. 825, 36 L. Ed. 658.....277, 475
Town of Concord v. Bank, 92 U. S. 625, 23 L. Ed. 628..... 912
Townsend v. Little, 109 U. S. 504, 511, 3 Sup. Ct. 357, 27 L. Ed. 1012..... 675

Page

Townsend v. Todd, 91 U. S. 452, 23 L. Ed. 413 414
Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597 588
Tracy v. Waters, 162 Mass. 562, 39 N. E. 190 150
Trader, The (D. C.) 129 Fed. 462, 471 375
Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160 637
Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477 635
Trow Directory Co. v. Directory Co. (C. C.) 122 Fed. 191 566
Troy & Boston R. R. Co. v. Potter, 42 Vt. 265, 1 Am. Rep. 325 996
Trussell v. Scarlett (C. C.) 18 Fed. 214... 814
Trust Co. v. Wallis, 126 Fed. 464 645
Trustees v. Greenough, 105 U. S. 535, 26 L. Ed. 1157 967
Tubular Rivet & Stud Co. v. O'Brien (C. C.) 93 Fed. 200 731
Tune, In re (D. C.) 115 Fed. 906 123
Turner v. Malone, 24 S. C. 398 177
Tuttle v. Railway, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114 847
Tyler, In re, 149 U. S. 181, 13 Sup. Ct. 785, 37 L. Ed. 689 536
Tyler v. Sweeney, 24 C. C. A. 578, 79 Fed. 277 588
Tyler Min. Co. v. Mining Co. (C. C.) 71 Fed. 849 588
Tyler Mining Co. v. Sweeney, 4 C. C. A. 329, 54 Fed. 284 604

Uhl v. Reynolds, 64 S. W. 498, 499, 23 Ky. Law Rep. 759, 761 .....691, 693, 695
Umbria, The, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053 437
Union Pac. R. Co. v. McDonald, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434 686
Union Pac. R. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983 711
United Blue Flame Oil Stove Co. v. Glazier, 55 C. C. A. 553, 119 Fed. 160 751
U. S. v. Albert, 9 C. C. A. 332, 60 Fed. 1012 650
U. S. v. Ass'n, 166 U. S. 328, 17 Sup. Ct. 554, 41 L. Ed. 1007; 171 U. S. 558, 568, 19 Sup. Ct. 25, 31, 43 L. Ed. 259...185, 188
U. S. v. Bailey, 17 Land. Dec. 468 676
U. S. v. Bowen, 100 U. S. 513, 25 L. Ed. 631 328
U. S. v. Budd, 144 U. S. 154, 163, 12 Sup. Ct. 575, 36 L. Ed. 384 674
U. S. v. Campbell (D. C.) 10 Fed. 816.... 979
U. S. v. Clark (C. C.) 125 Fed. 774, 776.. 677
U. S. v. Comarota (D. C.) 2 Fed. 145..... 979
U. S. v. Crosby, 7 Cranch, 115, 3 L. Ed. 287 617
U. S. v. Dana, 39 C. C. A. 590, 99 Fed. 433 576
U. S. v. De Rivera (C. C.) 73 Fed. 679.... 979
U. S. v. Dickson, 19 C. C. A. 428, 73 Fed. 195 574
U. S. v. Dominici, 24 C. C. A. 116, 78 Fed. 334 889
U. S. v. Dunbar, 27 C. C. A. 488, 83 Fed. 151 335
U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591..... 808

Page

U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325..... 36
U. S. v. Fisher, 2 Cranch, 358, 399, 2 L. Ed. 304 908
U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192. 618
U. S. v. Goldenberg, 168 U. S. 95, 102, 18 Sup. Ct. 3, 42 L. Ed. 394..... 327
U. S. v. Harper (C. C.) 33 Fed. 474–476.. 919
U. S. v. Harris, 177 U. S. 309, 20 Sup. Ct. 611, 44 L. Ed. 780..... 328
U. S. v. Hough, 103 U. S. 71, 72, 73, 26 L. Ed. 305..... 718
U. S. v. Insley, 4 C. C. A. 296, 54 Fed. 221 335
U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87..... 23
U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228..... 800
U. S. v. Land Co., 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354..... 677
U. S. v. Leathers, 6 Sawy. 17, Fed. Cas. No. 15,581 41
U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171..... 339
U. S. v. McBratney, 45 C. C. A. 37, 105 Fed. 767 650
U. S. v. McGlashen (C. C.) 66 Fed. 537.. 335
U. S. v. McLaughlin (C. C.) 24 Fed. 823.. 653
U. S. v. McLemore, 4 How. 287, 11 L. Ed. 977 339
U. S. v. Mining Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571..... 586
U. S. v. Morrison, 4 Pet. 124, 7 L. Ed. 804 414
U. S. v. One Pearl Necklace, 105 Fed. 359; 49 C. C. A. 287, 111 Fed. 164, 56 L. R. A. 130.....850, 888
U. S. v. Payne, 8 Fed. 883; 147 U. S. 692, 13 Sup. Ct. 442, 37 L. Ed. 332.....42, 334
U. S. v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039 979
U. S. v. Pipe & Steel Co., 29 C. C. A. 141, 85 Fed. 271, 46 L. Ed. 122..... 38
U. S. v. Radford, 129 Fed. 49..... 379
U. S. v. Railroad Co., 15 C. C. A. 96, 109, 67 Fed. 948, 961, 98 U. S. 334, 342, 25 L. Ed. 198..... 677
U. S. v. Salambier, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167..... 397
U. S. v. Securities Co. (C. C.) 120 Fed. 721 308
U. S. v. Shea, Smith & Co., 51 C. C. A. 664, 114 Fed. 39..... 397
U. S. v. Steenerson, 1 C. C. A. 552, 50 Fed. 504 676
U. S. v. Sturgeon, 6 Sawy. 29, Fed. Cas. No. 16,412 41
U. S. v. Swift & Co. (C. C.) 122 Fed. 534.. 188
U. S. v. Telephone Co. (C. C.) 29 Fed. 17.. 493
U. S. v. Van Blankensteyn, 5 C. C. A. 579, 56 Fed. 474 979
U. S. v. Van Fossen, 1 Dill. 406, Fed. Cas. No. 16,607 335
U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37 328
U. S. v. Winstead (D. C.) 12 Fed. 50..... 335
United States Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791..... 430
United States Bank v. Lyman, 20 Vt. 666, Fed. Cas. No. 924..... 520
Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800 51

Page

Van De Haar v. Van Domseler, 56 Iowa, 671, 676, 10 N. W. 227 681
Van Eyken v. Railroad Co. (D. C.) 117 Fed. 717 637
Veitch, In re, 4 Am. Bankr. Rep. 112, 101 Fed. 251 549
Victor Talking Machine Co. v. The Fair (C. C. A.) 123 Fed. 424, 426.....92, 731, 732
Victory and The Plymothian, The, 168 U. S. 411, 426, 18 Sup. Ct. 149, 42 L. Ed. 519 439
Vietor v. Arthur, 104 U. S. 498, 26 L. Ed. 633 329
Vigilancia, The, 19 C. C. A. 528, 73 Fed. 455 965
Village of North Tonawanda v. Transportation Co., 1 Sheld. 371 914
Vindomera, The [1891] A. C. 1 438
Von Hoffman v. Quincy, 4 Wall. 553, 18 L. Ed. 403 504

Wade v. Oakmont (Pa.) 30 Atl. 959 903
Wadsworth v. Sup'rs, 102 U. S. 534, 26 L. Ed. 221 912
Wagner v. Meety, 69 Mo. 150 912
Wales v. Waterbury, 11 C. C. A. 528, 63 Fed. 962 607
Walker v. Cronin, 107 Mass. 555 899
Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729 999
Walker v. Seeberger, 149 U. S. 541, 13 Sup. Ct. 981, 37 L. Ed. 839 575
Walker v. Walker, 9 Wall. 743, 754, 19 L. Ed. 814 415
Walker v. Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357.....226, 503
Walkley v. Muscatine, 6 Wall. 481, 483, 484, 18 L. Ed. 930 790
Wall v. Railroad Co., 37 C. C. A. 129, 95 Fed. 398 135
Wallace v. Holmes, 29 Fed. Cas. 79 734
Walla Walla City v. Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341 898
Wallingsford v. Allen, 10 Pet. 583, 593, 594, 9 L. Ed. 542.....403, 404, 648
Ware v. Lord Egmont, 4 D. M. & G. 460, 473 675
Warren, In re, Fed. Cas. No. 17,191 523
Warren v. Keep, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144 588
Washington Gas Co. v. District of Columbia, 161 U. S. 329, 16 Sup. Ct. 564, 40 L. Ed. 712 149
Washington Nat. Bank v. Eckels (C. C.) 57 Fed. 870 227
Watkins v. King, 55 C. C. A. 290, 118 Fed. 531 23
Waukesha Water Co., In re (D. C.) 116 Fed. 1009 .....123, 825
Weatherhead's Lessee v. Baskerville, 11 How. 360, 13 L. Ed. 730 66
Webb, In re, Fed. Cas. No. 17,313 518
Webb, The, 14 Wall. 406, 20 L. Ed. 774 ... 636
Weeks v. McNulty, 101 Tenn. 496, 499, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693 .....163, 169
Weinger, In re (D. C.) 126 Fed. 875 123
Welling, In re, 113 Fed. 189, 51 C. C. A. 151 .....975, 976
Wells, Ex parte, 2 M., D. & De G. 504 ... 402
Wells v. Sioux Falls (S. D.) 94 N. W. 425 908

Page

Wesley v. Eells, 177 U. S. 370, 20 Sup. Ct. 661, 44 L. Ed. 810 612
West v. Chamberlain, 58 S. W. 584, 22 Ky. Law Rep. 687.....691, 693
West v. U. S. (C. C.) 119 Fed. 495 574
Westerly Waterworks Co. v. Westerly (C. C.) 80 Fed. 611 901
Western Electric Co. v. Electric Co., 7 C. C. A. 164, 58 Fed. 186 858
Western Union Tel. Co. v. Telegraph Co. (C. C.) 105 Fed. 684 588
Western Union Tel. Co. v. Tracy, 52 C. C. A. 168, 114 Fed. 282 847
Western W. S. Co. v. Drinnen (C. C.) 79 Fed. 820 432
Western & A. R. Co. v. Roberson, 9 C. C. A. 646, 61 Fed. 592, 604.....709, 711
Westheimer v. Peacock, 2 Iowa, 528 617
Westinghouse v. Powder Co., 170 U. S. 537–558, 18 Sup. Ct. 707, 42 L. Ed. 1136 743, 754
Weston, Ex parte, 12 Metc. 1 520
Weston Electrical Instrument Co. v. Electrical Instrument Co., 128 Fed. 939.... 49, 280, 494
Weston's Case, 5 Ch. App. 614, 620 364
Whalen v. Gordon, 37 C. C. A. 70, 74, 95 Fed. 305, 309 681
Whallon v. Sprague Co., 1 App. Div. 264, 37 N. Y. Supp. 174 180
Wheeler, The S. B., 20 Wall. 385, 22 L. Ed. 385 588
Wheelock v. Lee, 64 N. Y. 242 317
Whelton v. Railroad Co., 172 Mass. 555, 52 N. E. 1072 847
White, In re (C. C.) 53 Fed. 787 979
White v. Dunbar, 119 U. S. 47–52, 7 Sup. Ct. 72, 30 L. Ed. 303.....744, 749
White v. Ewing, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 40 L. Ed. 67.....124, 536
White v. Foster, 102 Mass. 375 675
White v. Meadville, 177 Pa. 643, 35 Atl. 695, 34 L. R. A. 567 900
White v. Railroad, 7 Heisk. 518 665
White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183 123
White, Corbin & Co. v. Jones, 86 Hun, 57, 34 N. Y. Supp. 203 803
Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630 .....803, 804
Whitener, In re, 44 C. C. A. 434, 105 Fed. 180 124
White's Bank v. Smith, 7 Wall. 646, 19 L. Ed. 211 965
Whitley v. Malleable Castings Co. (C. C.) 83 Fed. 853 663
Whitney, The H. M., 30 C. C. A. 343, 86 Fed. 697, 700, 701.....434, 439
Whittemore v. Patten (C. C.) 81 Fed. 527.. 653
Wiggins v. Armstrong, 2 Johns. Ch. 144.. 24
Wilcox, In re, 94 Fed. 84; 48 C. C. A. 567, 109 Fed. 628, 6 Am. Bankr. R. 362.... 196, 826, 827
Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264 42
Wilder S. S. Co. v. Low, 50 C. C. A. 473, 112 Fed. 161 631
Wilkins v. McCorkle (Tenn.) 80 S. W. 834 667
Willamette Valley, The (D. C.) 76 Fed. 841 965, 967

Page

Willard v. Eastham, 15 Gray, 328, 335, 79 Am. Dec. 366 405
Willard v. Tayloe, 8 Wall. 557-565, 19 L. Ed. 501 621
Williams, In re, 10 Am. Bankr. R. 538, 123 Fed. 321 655
Williams v. Car Co., 40 La. Ann. 421, 4 South. 85, 8 Am. St. Rep. 538 167
Williams v. Morris, 95 U. S. 444-455, 456, 24 L. Ed. 360 618
Williams v. U. S., 1 How. 299, 11 L. Ed. 135 67
Williscroft v. Cargo of Cyrenian (D. C.) 123 Fed. 169 390
Wilson, Ex parte, 8 Ch. App. 45; 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89..99, 364
Wilson v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650 927
Wilson v. Wall, 73 U. S. 83, 91, 18 L. Ed. 727 675
Wilson v. Wilson, 37 Md. 1, 11 Am. Rep. 518 113
Winans v. Denmead, 15 How. 330, 14 L. Ed. 717 ..... 476, 490
Winder v. Caldwell, 14 How. 442, 14 L. Ed. 487 334
Wing v. Anthony, 106 U. S. 142, 1 Sup. Ct. 93, 27 L. Ed. 110 744

Page

Wisconsin v. Insurance Co., 127 U. S. 265-300, 8 Sup. Ct. 1370, 1375, 1376, 32 L. Ed. 239 105
Witters v. Sowles (C. C.) 32 Fed. 767 365
Wood v. Railroad (C. C.) 61 Fed. 236 536
Wood v. U. S., 16 Pet. 342, 10 L. Ed. 987.. 924
Woodward v. Mach. Co., 8 C. C. A. 622, 60 Fed. 283 270
Woodward v. Spurr, 141 Mass. 283, 286, 287, 6 N. E. 521 ..... 401, 403, 410, 412
Woodward v. Woodward, 3 DeG., J. & S. 671, 674 403
Worland, In re (D. C.) 92 Fed. 893 1006
Worley v. Tobacco Co., 104 U. S. 340, 342, 26 L. Ed. 821 738
Wright, In re (D. C.) 96 Fed. 820 432
Wright v. Barnard, 89 Iowa, 166, 56 N. W. 424 357
W. W. Montague & Co. v. Lowry, 24 Sup. Ct. 307, 48 L. Ed. 608 186

Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220 944
Young v. Hill, 6 Hun, 613 688

Zack Chandler, The (D. C.) 7 Fed. 684 377
Zeigler v. Hallahan, 131 Fed. 205 210
Zollman v. Moore, 21 Grat. 313, 321 678

CASES

ARGUED AND DETERMINED

IN THE

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

THE ERSKINE M. PHELPS.

(Circuit Court of Appeals, Ninth Circuit. May 31, 1904.)

No. 1,014.

1. SEAMEN—INJURY IN SERVICE—DUTY OF SHIP TO MAKE NEAREST PORT.
The master of a sailing ship on a voyage to Honolulu was not chargeable with a neglect of duty which renders the ship liable in damages because he did not return from the vicinity of Cape Horn to Port Stanley, Falkland Islands, which was the nearest port, and 540 miles distant, with a seaman who received an injury in which both bones of his leg below the knee were broken, where the mate, who had some surgical skill and experience, took charge of the injured man, and set the bones, which united firmly, but, by reason of the fracture being oblique, overlapped, producing a shortening of the leg, and where, while the ship could probably have made the islands in two or three days, the season was midwinter, when the days were short and cold and storms prevailed, and it was further shown without contradiction that the entrance of the harbor at Port Stanley by a ship of her size was very dangerous, and likely to take several days at that season, and that vessels went there only as a last resort, and in cases of dire necessity.

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

R. W. Breckons and Holmes & Stanley (Milton Andros, of counsel), for appellants.

T. McCants Stewart and J. J. Dunne, for appellee.

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

GILBERT, Circuit Judge. The appellee was an able-bodied seaman on the Erskine M. Phelps, a full-rigged four-masted ship of 2,715 registered tons, which sailed on May 1, 1903, from the port of Norfolk, Va., bound for the port of Honolulu, Hawaiian Islands. On July 15, 1903, while in latitude 58° 29′ south, longitude 65° 30′ west, a little to the southward and westward of Cape Horn, the ship encountered

very heavy gales, and was laboring heavily. About 6 o'clock in the evening, when the ship had just come about, and while the men were hauling at the forebraces, a large wave came over the port bow and completely buried the fore part of the ship. The appellee, who was hauling at the forebraces, was struck by the wave and thrown against the rail, and thereby sustained a fracture of both bones of the right leg at a point nearly midway between the ankle and the knee. The captain, knowing that the first mate had some medical skill, directed him to set the broken leg. The first mate accordingly did so. He testified, and it is not disputed, that he had served from 1894 to 1897 in the United States navy, and had received instruction in "first aid to the wounded," and had served 270 days in the Boer War, in which he said he had had plenty of experience, for the small commandoes had no surgeons, and the men had to help one another. The first mate, after setting the fractured bones, placed the appellee's leg in splints, bandaged it, and suspended it in a swing. The appellee was confined to his bunk until August 23, 1903, when he was carried out on the deck. Four days later, while walking on the deck with the support of a crutch and a cane, he slipped and fell, and his leg was again injured, probably broken. It was again bandaged and placed in a sling, and the appellee was confined to his bunk until about four days before September 15, 1903, the date of the arrival of the ship at Honolulu. On September 17, 1903, at his request, the appellee was taken to a hospital at Honolulu. It was there ascertained that the bones of the leg, which had been obliquely fractured, had firmly united, but that they overlapped, producing a shortening of the leg. The trial court found that the appellee was permanently injured and incapacitated from performing hard labor, but that there was no proof of the failure of the ship in its duty to him, except in the neglect to provide proper care and medical attention, which should have been done by putting into some convenient port for surgical treatment, and that the failure of the master so to deviate from his course constituted negligence for which the ship was liable in the sum of $1,800.

The accident occurred in the middle of the winter season. Eight others of the crew were injured at the same time, leaving nine men on duty. Of these nine men, the captain testified—and it is not denied—that two or three were useless on account of saltwater boils and ulcers. The same sea that caused the accident washed overboard the fore and main braces. Some of the braces were cut in twain by the iron shutters of the ports; some of them had to be spliced, and others replaced. Under these circumstances the captain was confronted with the question whether his duty to the injured seaman required him to take the appellee back to Port Stanley, in the Falkland Islands, for surgical treatment. The lower court held that it was his duty to have put into the nearest port to obtain such aid, "if it was reasonably possible for him to do so," and that he should have sailed for Port Stanley. At the time of the accident, as shown by computations made from the log of the first officer, the ship was 484 miles in a direct line from that port, and 540 miles as the ship would sail. The wind was favorable for sailing in that direction. The ship, with all sails set, and under favorable conditions, could make 288 miles per day. The captain, in giving his

reasons for not putting back to that port, said that he considered it sheer madness to attempt to enter the harbor of Port Stanley with the ship and crew in the condition in which they were. He testified that he was a master mariner of experience, and had sailed 35 times around the Horn. He admitted that he could very easily have gone back to the region of the Falkland Islands, but he testified that it was a stormy region, subject to continual sleet, hail, and snowstorms at that time of the year; that there was very little daylight, dark coming on at 4 o'clock in the afternoon and lasting until 8 o'clock in the morning, so that it was next to impossible to get a reliable observation from the sun; that if he had attempted Port Stanley with his ship and crew crippled as they were, he would have been in serious danger of running ashore and losing his ship; that the entrance to the harbor is less than one-half a mile wide; that there is no tug there; that there would have been great difficulty in working so long a ship into the entrance, since, even with a favorable wind, there is scarcely sufficient room to clear the entrance, and that with so long a ship half a mile is very scant room for sailing; that after entering the outer harbor it is dangerous to remain there, and it is necessary to proceed on into the inner harbor, for the reason that the water is from 36 to 38 fathoms deep, so as to make the anchorage insecure, and that in the outer harbor there was the further and probable danger of easterly gales; that the entrance to the inner harbor is but 250 yards in width. His evidence as to the hazardous nature of the entrance to Port Stanley was corroborated by five other witnesses, master mariners of experience, one of whom testified that in 1889 he had sailed into Port Stanley for repairs, and that he was 24 days outside the harbor before he could get in, and that in the outer harbor he paid out both anchors to the last fathom, but that the ship dragged her anchors, and went within 20 yards of the rocks, and that he remained in the outer harbor from 14 to 16 days. The testimony of all these witnesses was that no one would come to Port Stanley except as a last resort, or in a case of dire necessity. There was no evidence even tending to contradict this testimony, except an extract from the Encyclopedia Britannica, which, after referring to the establishment of stores and workshops at Port Stanley, said:

"And now ships can be repaired and provided in every way much better and more cheaply there than at any of the South American ports; a matter of much importance, seeing that a greater amount of injury is done annually to shipping passing near Cape Horn by severe weather than in any other locality in the world. The average number of ships entering Stanley Harbor in a year is about fifty, with an average tonnage of 20,000 tons."

Even if this extract be given the force of evidence, it goes no further than to show that a considerable number of ships do at some season of the year put into Port Stanley for repairs. But that is a statement not incompatible with the testimony of the witnesses that the entrance is extremely hazardous for a large ship, and that the port is only to be availed of in case of dire necessity.

In the case of The Iroquois, 118 Fed. 1003, 55 C. C. A. 497—a case in which a seaman was injured while at sea at a distance of 480 miles from Port Stanley—we held that the master should have either taken him into that port or to Valparaiso for treatment. But in that case the

injury was more severe than in the present case. The seaman sustained a fracture of two ribs as well as of both bones of his leg below the knee. There was no one on board who possessed any surgical knowledge or experience, and the bones of the leg never united. In that case, moreover, there was no evidence before the court of any difficulty in entering Port Stanley, and the accident occurred in the summer, instead of the winter, of that region. The Supreme Court, on appeal, with some hesitation affirmed our judgment, but only on the ground that the captain might have been negligent in not putting into Valparaiso. Said Mr. Justice Brown, speaking for the court:

"Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind, and the probability of its continuing in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one. Accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

The court, in conclusion, said:

"As the decision of the District Court was unanimously affirmed by the Circuit Court of Appeals, we do not think there is any such preponderance of evidence as would justify us in disturbing their conclusions."

In view of that expression of the opinion of the Supreme Court and the circumstances of the present case, we do not think that the captain of the Erskine M. Phelps was negligent in not putting back to Port Stanley. But the trial court found, further, that the captain was negligent at a later date in not deviating from his course on August 6th, and putting into Valparaiso, which he could have reached by sailing nine days from that date. The captain testified that his reason for not going to Valparaiso was that at that time the weather was fine, and he had reason to believe that the bones of the appellee's leg had united, and that he was doing well. Three surgeons testified in the case—one for the appellee and two for the appellants. There is no substantial variance in their testimony. Their opinion was that, so far as the ultimate recovery of the appellee was concerned, nothing could have been done surgically after August 6th, and that from that time the conditions were as favorable on the ship as they would have been on land; that the motion of the ship would have no effect on the setting of the leg and its recovery if the leg were set and placed in a position where it could swing; that the best time to set it was as soon as possible after the fracture; and that, unless land could have been reached within two or three days from the time of the fracture, the appellee was practically as well off on board the ship as in a hospital. One of the surgeons testified that he found the appellee's right leg one

and one-quarter inches shorter than the other, but that he made no measurement. The other two measured it, and found it half an inch shorter than the other. But they all agreed that nature compensates, and in a measure corrects, such a shortening, and that an operation could be performed by breaking and resetting the bones, but that this could have been done as well on the arrival of the vessel in Honolulu as at Valparaiso or at Valdevia, three weeks after the accident. There was some difference of opinion as to the question of the permanence of the injury to the appellee by reason of the fracture of his leg if not further operated upon. Dr. Herbert testified that the appellee would ultimately have perfect use of his leg. Dr. Day thought that he would be able to follow his occupation, but that he would have to favor himself a little; that he would not be as nimble as he had been. Dr. Cooper considered the mending of the leg "a good job," and thought that the appellee would have a good leg—a leg that would enable him to earn a livelihood in any walk of life. When, on August 23d, the appellee was injured the second time by falling on the deck, the ship was as near to her port of destination as to any other. So far as the evidence goes, the shortening of the appellee's leg may have been caused by a second fracture sustained at that time. If that be true, the ship could not, in any view of the case, have been responsible for that injury. Considering the whole of the evidence as it is presented here, we think that the captain was not negligent at any point in the history of the case, and that the ship is not liable, therefore, in damages.

The decree is reversed, and the cause is remanded to the District Court, with instructions to dismiss the libel.

SPRIGG v. COMMONWEALTH TITLE INS. & TRUST CO.

(Circuit Court of Appeals, Third Circuit. June 24, 1904.)

No. 4.

1. DECEIT—FALSE REPRESENTATIONS—CONSTRUCTIVE FRAUD.

A mortgage to defendant, as trustee, securing bonds executed by a timber company, provided that the bonds should not be valid until certified by the defendant, and that before issuing any of the bonds there should be deposited with defendant, by the mortgagor, a sum of money sufficient to pay off the first four coupons (two years' interest) on the bonds. The mortgagor, after defendant had accepted the trust, pledged 100 of the bonds to plaintiff, and gave plaintiff an order on defendant therefor, whereupon defendant delivered to plaintiff a letter reciting receipt of the order; that the bonds were part of an issue described on the mortgagor's property, the title to which, etc., had been examined and approved by defendant; and that the papers were then in its possession, and stating, "We will hold the one hundred bonds subject to your order." *Held*, that defendant's promise to hold such "bonds" constituted a representation that defendant had certified the bonds, and received the money in compliance with the conditions precedent to their validity, the falsity of which representation was sufficient to entitle plaintiff to recover damages suffered by its having acted on the faith thereof, in an action against defendant for deceit.

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

For opinion below, see 119 Fed. 434.

Thomas Leaming, for plaintiff in error.

J. Hazleton Mirkel, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

GRAY, Circuit Judge. The record brought up by the writ of error in this case discloses testimony tending to prove the following facts:

In the spring of 1893, the firm of Rice Bros., of Providence, R. I., had dealings with the Standard Coal & Timber Company, a corporation then recently organized and doing business under the laws of the state of West Virginia, which resulted in a contract arrangement between them, by which Rice Bros. purchased a large quantity of timber, upwards of ten millions of feet, to be delivered, with freight and other charges paid, at Boston, Mass., at a price agreed upon. In pursuance of said contract, Rice Bros. were to advance to the timber company $15,000 to enable the company to proceed with the delivery of the timber. As security for the performance on their part of the contract, the timber company agreed to deliver to Rice Bros. 100 of their first mortgage coupon bonds, for $1,000 each. By an indenture dated the 2d of May, 1892, the said Standard Coal & Timber Company had executed a mortgage to the defendant, the Commonwealth Title, Insurance & Trust Company, which, after stating that certain bonds were to be executed and issued by said company for the aggregate amount of $1,000,000, and to be secured by said mortgage, conveyed to the said defendant as mortgagee, in trust, all its property, corporate rights, privileges and franchises in connection with the land and premises therein more particularly described, and comprising a tract of land in the state of West Virginia, of 204,000 acres. By a covenant contained in said mortgage, it was stipulated that the bonds issued to the said defendant company, in trust, should not be valid until certified by the said trust company, and further, that "before issuing any of the bonds herein described, there shall be deposited by the party of the first part, with the said trustee, a sum of money sufficient to pay off the first four coupons (two years' interest) on said bonds." The Commonwealth Title, Insurance & Trust Company, the defendant, was incorporated for the purpose, among other things, of accepting and executing trusts of this character, and was entitled to receive compensation therefor. The trust was duly accepted by the said company, as appears by the following acceptance upon said mortgage, and duly recorded therewith:

"The Commonwealth Title, Insurance and Trust Co. accepts the Trust mentioned in the foregoing instrument on the terms, conditions and limitations therein prescribed.

By Henry M. Dechert, President.

Witness: A. A. Stull, Secretary."

[Seal of Incorporation]

Prior to April 29, 1893, the whole number of bonds executed, so far as the timber company was concerned, were in the hands of the defend-

ant company, as trustee, and some had been issued prior to that date by the said trust company, certified by it as required by the stipulation in the mortgage above referred to, and for the four coupons (two years' interest) on which there had been deposited with the said trustee, a sum sufficient to pay the same. On the date last mentioned, and pursuant to the dealings between Rice Bros. and the defendant, the following order was issued in favor of the Rice Bros. to the defendant:

"Philadelphia, April 29th, 1893.

A. A. Stull, Esq., Secy. Commonwealth Title Insurance & Trust Company, Philadelphia, Pa.

Dear Sir:—You will please hold in trust or deliver to the order of Rice Brothers, lumber dealers of Providence, R. I., one hundred (100) first mortgage one thousand dollar ($1,000) bonds of the Standard Coal and Timber Company, in accordance with the terms of mortgage or trust deed held by you to secure said bonds.

Respectfully yours, Standard Coal and Timber Company.
By C. C. Cokefair, Secy."

Rice Bros. then deposited with their counsel, Carroll Sprigg, the contract they had with the timber company, and six promissory notes, aggregating in amount $15,000, which represented the advance they were to make to the timber company, to be held in escrow by him until the defendant, the Commonwealth Title, Insurance & Trust Company, should acknowledge the receipt of the above order, and deliver the bonds, or hold them for the benefit of Rice Bros., his clients. He accordingly drafted a letter, which was taken to Philadelphia by the timber company's assistant secretary, and a letter copied therefrom was signed by the defendant and brought back to New York, whereupon Mr. Sprigg delivered the contract and notes to the timber company. These notes were afterwards paid in full, at maturity. The letter referred to, and which is the foundation of the suit in the court below, is as follows:

"Philadelphia, April 29th, 1893.

Messrs. Rice Brothers, Providence, R. I.

Gentlemen:—We are in receipt of an order from the Standard Coal and Timber Co., of West Virginia, instructing us to hold in trust for you one hundred, first mortgage, $1,000 bonds of said Company; the same being part of an issue of 1,000 bonds, $1,000,000, all of which are equally secured by a first mortgage or deed of trust dated May 2nd, 1892, made to the Commonwealth Title, Insurance and Trust Company of Philadelphia as Trustee by the said Standard Coal & Timber Company of West Virginia, covering 204,000 acres of mineral and timber lands located in McDowell County, in said State of West Virginia.

The Company is incorporated under the laws of the state of West Virginia, and the bonds are secured by the first mortgage or deed of trust now held by us as Trustee. Said mortgage or deed of trust together with certified abstract of title, opinions as to value of property covered by said mortgage or deed of trust, maps, surveys, and other papers relating to the same have been carefully examined and approved by us and are now in our possession.

We will hold the one hundred (100) bonds subject to your order.

Respectfully yours, A. A. Stull, Treasurer."

It was testified that, at the date of this letter, a decree of the court of last resort in West Virginia had been entered, declaring the title of the 204,000 acres of land mortgaged, absolutely void. It was also in testimony that the Rice Bros. lost their advances of $15,000 and also about $40,000 on the timber contract. On November 6, 1893, Rice

Bros. demanded delivery of the bonds, pursuant to defendant's undertaking, in the following letter:

"Providence, R. I., November 6th, 1893.

To the Commonwealth Title, Insurance & Trust Company, 813 Chestnut street, Philadelphia, Pa.

Gentlemen:—Please send us by express the one hundred first mortgage one thousand dollar bonds of the Standard Coal & Timber Company, held subject to our order, pursuant to the terms of your letter to us, dated April 29th, 1893. We will pay the express charges at this end of the line.

Yours truly, Rice Bros."

In response to that letter, Rice Bros. received a letter, dated November 8, 1893, as follows:

"Philadelphia, November 8th, 1893.

Messrs. Rice Bros., Providence, R. I.

Gentlemen:—Replying to your favor of the 6th, since writing you on April 29th, we have declined to act as Trustee for the bonds, and have so notified the company.

Very truly yours, A. A. Stull, Treas."

To this letter, the following answer was returned:

"Providence, R. I., November 11, 1893.

A. A. Stull, Esq., Treasurer, Commonwealth Title, Insurance & Trust Co., Philadelphia, Pa.

Dear Sir:—Our request to you under date of the 6th instant was addressed to you for the purpose of securing the possession of the bonds as contemplated under the terms of our arrangement with you. As we understand your reply, coupled with the information that has come to us from the officers of the Standard Coal & Timber Company, it indicates that you propose a resignation of your Trusteeship under the mortgage or deed of trust securing the bonds you now hold subject to our order. To this we of course have decided objection until we shall have at least had an opportunity of ascertaining the responsibility, pecuniary and otherwise, of the company, which may act as your successor, and therefore, we do now respectfully enter our protest against any such change of Trusteeship. Our letter was written to you for the purpose of obtaining the bonds mentioned, and we hereby again respectfully request their delivery to us, for we fail to see what right you have to withhold them from us for any such reason as that alleged in your letter. We write this letter because we think from your reply that you may not have lately read your letter to us of April 29th, which has no bearing upon any rights or purposes the Standard Company and your company may have for a change of Trusteeship under the mortgage. We shall expect you to forward the bonds at once, as their non-delivery to us as requested herein may cause us serious damage.

Yours respectfully, Rice Brothers.

Dictated by A. B. R."

As no reply was received to this letter, the matter was taken up, for Rice Bros., by their counsel, Mr. Sprigg, who received the following letter from Mr. Dechert, president of the defendant company:

"Philadelphia, December 4, 1893.

Carroll Sprigg, Esq., 29 Broadway, New York.

Dear Sir:—Since the receipt of your letter of the 24th ult. we have been definitely notified that the Standard Coal and Timber Co. would within a few days elect a new trustee in the place of this Company, resigned. We find that in September last this Company duly resigned by letter of resignation sent to that Company and that a few days afterwards that Company by its Asst. Secretary and Treasurer duly notified this Company that all of the officers and directors agreed that our resignation should be accepted and likewise accepted the notice previously sent to them that pending this election of a new trustee

we would deliver no more bonds or do any other act as trustee. You will see that under this state of facts, and as we are again informed that at an early date. a corporation meeting will be called for the election of a new trustee, this Company should not at present intermeddle by the delivery of bonds. We will keep you advised of the election of such new trustee, so that your interest may be protected.

Yours respectfully, Henry M. Dechert, President."

Four months thereafter, there was a letter from F. Carroll Brewster, as counsel for the defendant company, to Carroll Sprigg, as counsel for the Rice Bros., in which the writer, among other things, says:

"1. No bonds now in the possession of the Trustees have been certified by signature endorsed thereon—as required—to give them validity. If this be so—the delivery to your Clients would only be of pieces of paper.

2. Not one dollar has been deposited by the mortgagors—by your clients or by any person to pay the first four coupons on the bonds you claim."

Suit was brought in the name of the Rice Bros., Carroll Sprigg being the use plaintiff, and testimony tending to show the facts herein recited was given at the trial. In the pleadings, the action was stated to be one of trespass on the case, and the statement of claim, as first filed, set forth specially, as negligence on the part of the defendant, the statement, "that the mortgage or deed of trust, maps, surveys and other papers relating to the same have been carefully examined and approved by us and are now in our possession," and that, in reliance upon such statement, the promissory notes, contract and other papers were delivered to the timber company. At the trial, the statement of claim was amended, so that the learned judge of the court below approved it as a proper declaration in an action for deceit, based upon the declaration of the defendant in his letter of April 29, 1893, after reciting the order of the Standard Coal & Timber Company, of the same date, that it would hold the 100 bonds therein referred to, subject to the order of Rice Bros. This, the amended statement of claim averred to be an undertaking to hold valid bonds secured by a first mortgage, when in fact defendant had not certified such bonds, and knew it had not certified the same and that the money required to pay for the first four coupons had not been deposited with it, and that said bonds, without such certification and deposit, were expressly not valid.

It was testified by Rice, that in making the advance of $15,000, and entering into the obligations of the contract, he relied absolutely upon the declaration that these bonds were held for them, and that he fully understood there should be $10,000 (two years' interest) deposited before the bonds could be issued. Sprigg, who was acting as counsel for the Rice Bros., testified as follows:

"I knew that the mortgage required certain conditions precedent to be performed, as well as the bonds. I advised Mr. Rice, in view of the high standing of the trust company, that any letter they would write would be perfectly satisfactory to me as his adviser, and on the strength of such letter from the trust company, I would advise the turning over of the contracts and notes, and papers, and pursuant to his agreement to that effect, I turned over the papers. * * * Mr. Cokefair told me the money was deposited for the coupons at the time I got the first bond from him, and on the 29th of April, the statement was reiterated in my office. Then I knew the bonds could not have been valid without the terms of the mortgage were complied with and the certificate at-

tached. * * * Q. You say on the 28th or 29th, at an interview at which Rice and Cokefair were present, you were told by Mr. Cokefair what? A. He said they had title to 204,000 acres of land down there, and they had the money deposited for the first four coupons—in other words, the bonds Mr. Rice was to get were in the same condition of my one bond. Q. The one bond that you got—did that have the coupons stamped and guarantied on the back? A. It had a rubber stamp impression on the back, the exact language of which I have forgotten, but it was the same in substance as that on the back of those. Q. You do not know the exact language, but what was the effect of it? A. Guarantying it. Q. By whom? A. By the trust company. Q. As a matter of fact were the first four coupons on your bond duly paid? A. They were. Q. And you had that knowledge of your own individual experience at the time you were representing Mr. Rice in this transaction? A. I did, and advised Mr. Rice of that fact. Q. Did you know other people who had these bonds? A. Yes, I knew them personally, and know them to-day. Q. Did you ever know of any trouble in the payment of interest on other bonds the first two years? A. They were all paid."

On the face of the bonds or writings executed by the timber company, and deposited with the defendant company, was the following:

"This bond shall not become obligatory unless it shall have been certified by the signature of the Trustee, endorsed thereon."

There were also offered in evidence, three of the coupons attached to bonds that had been issued by the defendant to show the language of the guaranty, which was stamped on the backs of the coupons, when the bonds were issued to other persons. It reads:

"Payment of this coupon guaranteed by the Commonwealth Title, Insurance and Trust Company of Philadelphia, A. A. Stull, Treasurer."

It was agreed at the trial, that this was the form used upon the first four coupons of all bonds that were issued. At the conclusion of plaintiff's testimony, a motion for nonsuit was granted by the learned judge of the court below, and judgment accordingly entered.

Upon the pleadings, and upon the testimony adduced by the plaintiff, we think the case should have gone to the jury. The question is, whether, when the defendant agreed to deliver or hold in trust 100 bonds to or for the plaintiff, they did not undertake to deliver or hold in trust bonds such as they were authorized to issue, that is, bonds which were certified by the trustee, and for the two-years interest on which, there had been deposited with the trustee a sum sufficient to pay the same. The representation made by the defendant company, in its letter of April 29th, was not that of an irresponsible or indifferent person, but of one charged with a special duty toward the one to whom the representation was made. The Commonwealth Title, Insurance & Trust Company, the defendant, was the trustee of the mortgage made by the timber company, to secure bonds to be issued by said timber company. These bonds, also, were issued to the defendant, as trustee, and it had specifically and in writing accepted the trust "on the terms, conditions and limitations" prescribed in the mortgage. The order given by the timber company, in favor of Rice Bros., expressly required that the 100 bonds mentioned in the order should be delivered to or be held in trust for Rice Bros., in accordance with the terms of the mortgage or trust deed given to secure said bonds. This order was

expressly accepted in the letter of the defendant, of the same date, as follows:

"Messrs. Rice Brothers, Providence, R. I.

Gentlemen:—We are in receipt of an order from the Standard Coal & Timber Company of West Virginia, instructing us to hold in trust for you one hundred, first mortgage, $1,000 bonds of said Company; the same being part of an issue of 1,000 bonds, $1,000,000, all of which are equally secured by a first mortgage or deed of trust, dated May 2nd, 1892, made to the Commonwealth Title, Insurance and Trust Company of Philadelphia, as Trustee. * * * We will hold the one hundred (100) bonds subject to your order.

Respectfully yours, A. A. Stull, Treasurer."

Surely, under the circumstances appearing in this case, this was not an idle representation that they held 100 pieces of paper that were clearly, by the stipulation of the mortgage, repeated on the face thereof, not valid as bonds, and which, by another stipulation in said mortgage, could not be issued by said trustee until there had been deposited with the said trustee an amount sufficient to pay the interest coupons for two years. It was in testimony that these stipulations and conditions were understood by Rice Bros. and by Sprigg, their counsel. If this were not so, the clear and unequivocal declaration of the trustee, in the letter of April 29th, had no meaning, and amounted to nothing, though made deliberately under the circumstances set forth in the testimony, with full knowledge on the part of the declarant, that important action on the part of the plaintiff, involving pecuniary risk, was to be based thereon. We may assume the exercise of ordinary intelligence in the transaction of human affairs. We cannot, therefore, gratuitously impute to the parties to this transaction, such a want of ordinary intelligence, as would be implied by the contention, that the carefully worded order of the timber company, to the defendant, to deliver or hold in trust the 100 bonds, and the written acceptance by the defendant, that it would hold the same on the "terms, conditions and limitations" of the mortgage, meant to those parties only, that 100 worthless bits of paper were to be so delivered or held. We think that Rice Bros., and those acting for them, had a right to rely upon this declaration, as one importing that these bonds had been duly certified, and that two years' interest ($10,000) had been deposited with the trustee, and to that extent guarantied, when the promissory notes and written contract were delivered. It is in testimony, that the trustee had already issued bonds properly certified, and containing a guaranty that money sufficient to pay two years' coupons had been deposited. There is nothing in the case made by the plaintiff, to indicate that the trustee had any reason to think that it was authorized, either to deliver or hold in trust, bonds or paper writings, invalid for want of compliance with the stipulated conditions, or that it was truthful to say that it held bonds pursuant to the said order, when they had neither the certification nor the deposit of money requisite to their validity. The defendant was made the mortgagee in the trust mortgage, as also the obligee in the bonds, which were to be deposited in trust, to be disposed of by the obligor for its own purposes. No bonds could, therefore, be issued or delivered, except by the trustee at the order of the timber company. We think that, by the acceptance of the trust under the,

mortgage, the defendant trustee undertook, and had imposed upon it, the legal duty to see that no bonds were issued or held pursuant to the orders of the obligor, unless the conditions prescribed in the mortgage were complied with.

The declaration by the trustee, that it held in trust the 100 bonds, pursuant to the order to hold in trust or deliver these bonds, was equivalent to a delivery, so far as the rights of Rice Bros. were concerned. The order of the trustee was to "hold in trust" or "deliver." The declaration of the trustee was, that it held in trust the 100 bonds subject to the order of Rice Bros. It is no refinement of reasoning to say that these bonds could be no more held in trust by the trustee under this declaration, without complying with the stipulations of the mortgage, than they could be delivered without such compliance. The testimony is such, that the jury might well draw the inference, that this representation that it held bonds valid under the requirements of the mortgage, was not only false, but that the defendant alone knew that it was false. There was also testimony which would warrant a jury in finding that money had been advanced, and loss incurred to a serious amount by the plaintiff, by reason of its acting upon the faith of the representation thus made by the trustee.

We have here testimony tending to show all the elements necessary to an actionable misrepresentation, to wit, a false representation; knowledge of its falsity by the party who made it; ignorance of its falsity by the party to whom it was made; intention that it should be acted upon, and an actual acting upon it by the plaintiff, with resulting damage to it in consequence thereof. We cannot say that there was no evidence to go to the jury, in support of such a case as is claimed to have been made out by the plaintiff. The suggestion, that because the draft of the letter, written by the defendant company, was made by the plaintiff's attorney, its terms imposed a duty upon the defendant less exacting than if the letter had been voluntarily framed by it, does not appeal to us. The proposal of such a letter by plaintiffs, prior to their assuming grave pecuniary responsibility, might well have emphasized the caution with which the defendant should act in the execution of its responsible office. We cannot hold that the defendant should be released from all responsibility in the important relation it held towards the plaintiff, for a representation which it either knew to be false, or made with reckless disregard as to its truth, and upon the faith of which, the plaintiff so acted as to incur serious pecuniary loss, or that a jury should not consider, upon the evidence before it, whether, to the extent of $10,000 at least, defendant should not recoup the plaintiff for that loss.

We have examined carefully all the cases cited by the counsel for both the plaintiff in error and defendant in error, but it is only necessary to say, that the current of decisions, both federal and state, abundantly support the conclusion at which we have arrived. We do not think the case was one which should have been taken from the jury.

The judgment of nonsuit is therefore reversed, and a venire de novo awarded.

ASTRICH v. GERMAN-AMERICAN INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Third Circuit. July 5, 1904.)

No. 61.

1. FIRE INSURANCE—CONDITIONS—VIOLATION AFTER LOSS—UNDESTROYED PROPERTY—SALE.

One of several policies insuring plaintiff's merchandise to the extent of actual loss provided that in case of disagreement as to the amount of loss the same should be ascertained by an appraisement, and that the loss should not be payable, or an action maintained to recover the same, until after 60 days after due notice, ascertainment, estimate, and satisfactory proof of loss had been received by the company in accordance with the terms of the policy; that the insured, as often as required, should exhibit to any person designated by the company all that remained of any property described in the policy, and should submit to examinations under oath, and produce books of account, etc., and that it should be optional with the company to take all or any part of the articles at such ascertained or appraised value, and to replace the property lost or damaged with other of like kind or quality at any reasonable time within 30 days after the receipt of proofs of loss or the giving notice of his intention to do so. After loss the property was separated as required, and, the parties failing to agree, insured, after filing, but before the receipt of proofs of loss by the insurers, and over their protest, advertised and sold the property remaining. *Held*, that such sale deprived the insurers of their substantial rights to further examination of the goods after proof of loss furnished, to adjust the loss by appraisement, and to replace the goods damaged with other goods of like character, and therefore precluded a recovery on the policy.

2. SAME—WAIVER—APPRAISERS—AUTHORITY.

Where plaintiff, having several policies, some of which insured both merchandise and fixtures and others insured fixtures only, had a conversation with one of the adjusters of the companies in interest after loss and after a forfeiture as to the merchandise had been incurred, in which such adjuster requested plaintiff to furnish proofs of loss as to the fixtures and furniture, such request, though complied with by plaintiff's sending such proof to all of the insurers, did not operate as a waiver of the forfeiture as to the merchandise insured by an insurer whose policy covered merchandise only.

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

For opinion below, see 128 Fed. 477.

C. H. Bergner, for plaintiff in error.

Cyrus G. Derr, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The suit in the court below was an action of assumpsit, on a policy of fire insurance. The plaintiff in error, who was the plaintiff below, was the proprietor of a large store in the city of Harrisburg, Pa., wherein he conducted a retail business in ladies' millinery, coats, furs, and furnishing goods. His stock of merchandise was insured for $22,000, in 13 companies, and his fixtures and furniture for $2,500 in certain of the said 13 companies. The German-American Insurance Company, the defendant, was one

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1292.

of the companies which insured merchandise, and the amount of its policy was $4,500. Some of the other companies insured both merchandise and furniture and fixtures, the latter being contained in a clause in the policy separate from the clause by which the merchandise was insured. A fire occurred in the storeroom of the plaintiff, December 16, 1902, by which the building was considerably burned, and the entire stock of merchandise was either destroyed or injured, and the furniture and fixtures damaged.

The policy of insurance, upon which suit was brought in the court below, was issued by the defendant company to the plaintiff. It is in the usual form, and insured the plaintiff in the sum of $4,500, for the term of one year, against all direct loss or damage by fire, except as therein provided. Among the exceptions, stipulations and conditions attached to said policy, those having any bearing on the present case are as follows:

"1. This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for (2) depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company, to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do.

* * * * * * * * *

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged goods, personal property, put it in the best possible order, make a complete inventory of the same, stating the quality and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless the time is extended, in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon," etc.

* * * * * * * * *

The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the

parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

* * * * * * * * *

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

* * * * * * * * *

This policy is made and accepted subject to the foregoing conditions and stipulations, together with such other provisions, agreements, or conditions as may be indorsed hereon and 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 the subject of agreement indorsed 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."

At the trial, after testimony on both sides had been submitted to the jury, the court instructed the jury that its verdict should be taken, subject to a reserved point, which was read. Accordingly, the verdict of the jury was rendered in favor of the plaintiff for $4,300, with interest, subject to the point reserved, which was as follows:

"It being the undisputed evidence that the plaintiff's stock of goods was insured to the extent of twenty-two thousand dollars ($22,000) in thirteen (13) different companies, of which the defendant was one, the insurance in such company being $4,500; that a fire occurred on December 16, 1902, during the life of the said policy, by which a large part of the said stock was entirely consumed and other parts damaged by fire, smoke and water; that immediately after the fire the plaintiff put in order the stock that was left, separating the damaged from the undamaged goods; that on December 29th and 30th, after due notice, agents and adjusters representing the said several insurance companies, including the defendant, went upon the premises and investigated the loss, and, for the purpose of ascertaining the extent of the same, examined the books, bills and accounts of the plaintiff, carefully and thoroughly, and inspected the damaged and undamaged stock, being occupied in such examination more or less for two (2) days; that as a result of the same they collectively offered, on behalf of all the said companies, to pay the plaintiff in settlement of his said loss the sum of twenty-two thousand dollars, the aggregate amount of his insurance, the said companies to take the stock which remained and wreck the same—that is to say, ship it to New York or some other general market and there have it put in order by persons experienced in such business, and then and there sell it by auction or otherwise for such price as it would bring, the plaintiff to receive all that it brought up to five thousand dollars, after deducting expenses, and the insurance companies to receive the excess above that sum; which offer the plaintiff refused; and that the said agents then and there made a further offer to pay the plaintiff in settlement of his said loss, the sum of $17,500, he retaining for his own benefit the said stock on hand; which offer the plaintiff also refused; that thereupon he was told by the said agents to read his policy and observe its terms, on which the parties then and there separated; that, afterwards, the plaintiff made out due proofs

of loss, which he forwarded to the defendant company on January 9th following, which were duly received by said company; that on January 8th, the day before he furnished said proofs, after first having advertised the stock for sale, the plaintiff, without notice to said companies, began to make private sale thereof and continued to sell the same for the three days next following, until the said goods were disposed of, realizing therefrom the gross sum of about sixty-two hundred dollars ($6,200) and being at the expense of about two thousand dollars ($2,000) in so selling them; that the insurance companies, including the defendant, having learned that such sale was about to be made, notified the plaintiff, by telegram and letter, that he should not dispose of the said goods, that they desired to exercise the rights given them by the policies of insurance which he held of further examining said goods to determine their value and the loss or damage sustained thereon, and calling attention to the fact that the said companies had the right if they desired to, to take the stock, or in case of disagreement as to the extent of the loss to have the same determined by appraisement; and thereupon notifying plaintiff that if he proceeded with the sale, his policies would be rendered null and void; and that notwithstanding such notice the said plaintiff proceeded to make sale of the said goods.

Whereupon, in view of the provisions of the policy in suit, a copy of which is attached to plaintiff's declaration of statement, and is made a part of this point, the question of law is reserved.

Whether the policy, by reason of the said sale so made by the plaintiff, was avoided and whether the plaintiff is entitled to recover thereon in this action; with leave to the Court to enter judgment in favor of the defendant, notwithstanding the verdict if it be found that such is the law."

Motion for judgment for defendant, non obstante veredicto, was accordingly made, and after argument, the court granted said motion, and gave judgment in favor of the defendant on the point reserved.

In considering the questions raised upon the assignments of error, we first advert to the general contention of the defendant, that the insured, by his conduct in advertising and effecting a sale of the damaged goods before the proofs of loss required by the policy of insurance, which he had made out and forwarded to the defendant company, had been received by it, forfeited his right to claim indemnity under said policy. It will be seen, by reference to the paragraphs of the policy heretofore quoted, that there is an express stipulation between the insurer and insured, that in case of disagreement between them, as to the amount of the loss, the same should be ascertained by an appraisement of disinterested appraisers, selected by the parties respectively, and that the loss shall not become payable until sixty days after the same shall have been so ascertained. There is also a stipulation that the insured, as often as required, shall exhibit to any person designated by the company, all that remains of any property described in the policy, as well as submit to examinations under oath, and produce books of account, etc. The insurance contract also provides that it shall be optional with the company to take all or any part of the articles at such ascertained or appraised value, and also to replace the property lost or damaged with other of like kind and quality, at any reasonable time within thirty days after the receipt of proof of loss, on giving notice of his intention to do so.

We agree with the court below, that the right under this policy to an appraisement was absolute, if the insurers found that they

desired it. It was essential to the enjoyment of this right that the damaged stock should be retained by the insured, where it could be examined for the purpose of appraisement. It was in evidence, and not disputed, that there had been, a short time prior to the sale, an effort of the parties to ascertain and amicably settle the loss between them, and that serious differences had existed while this attempt to settle was in progress, and that it had finally been abandoned, with a notice to the insured, that the company would stand upon the terms of its policy. The provisions of the policy, repeated in two different places, are express, to the effect that, in the event of disagreement, and failure amicably to settle the loss between the parties, the right to an appraisement shall accrue, and we fail to see anything in what occurred between the parties, while the efforts to settle were in progress, to impair or at all affect the right of the insurer in this respect. The fire occurred on December 16, 1902. It is true, that due notice of the same was given by the insured to the company; that the insured, under the direction of the agents of the insurance companies, had separated and arranged the goods that were not totally destroyed, for quick and careful examination; that the adjusters of the insurance companies came to the insured premises, and examined the damaged goods on the 29th and 30th of December, and after an examination of the said goods and books of the insured, and making inquiry of the insured himself, made three offers to pay certain sums of money, in full settlement of liability; that on making the last offer to settle the liability of all the companies, by the payment of a lump sum of $17,500, it was said by the adjusters that such offer was the last and final one, and that, it being refused, the adjusters departed. It is true, also, that there was testimony that the goods damaged were deteriorating in value and condition, and that after the final offer on December 30th, the insured expended money and trouble in preparing and advertising the goods for sale, and that the season in which a large number of the goods which had been damaged could be used, or were salable, was nearly ended.

There is nothing, however, in any of these facts, taken singly or together, that in our opinion, has any bearing upon the right of the insuring company, under the circumstances, to an appraisement. They disclose only what seems to be the not unusual situation, when such a settlement between the parties is attempted. Three several offers of payment, in full settlement of the companies' liability, were made and rejected. The statement, that the offer last made was a final one, seems to us only to have made clear the necessity for an appraisement. The fact that the goods were deteriorating, and that the time in which they were salable was passing by, are circumstances inhering in the situation, but of no possible effect as to the right to an appraisement, and could in no way justify the action of the assured in destroying all opportunity for the enjoyment of that right. Nor does the fact, if fact it be, that one of the adjusters told the insured, in the presence of the other adjusters, that there was no use in making the appraisement of the damaged goods, because the in-

sured would not fix the value of the goods burned out of sight, have any such relation to the right of appraisement, as to have made it necessary or proper for the court to have incorporated the same in the statement of the point reserved. It is in evidence that there had been an effort on the part of the adjusters to induce the insured to value the goods burned out of sight, as a basis for their adjustment, and the remark of the adjuster, that without such valuation, there was no use in appraisement, was persuasive to that end. There is no evidence, however, that the one making the remark was authorized by the defendant to dispense with an appraisement, or to forego any right in that respect possessed by it. Nor could the fact, that the damaged goods were inspected by the adjusters on December 29th and 30th, have warranted the insured in considering an appraisement to have been dispensed with by the company. This inspection was a usual precaution taken by the agents of insuring companies, to ascertain facts for themselves connected with the loss, and in this case, was expressly preliminary to the effort made to reach an amicable adjustment. As said by the court below:

"When it failed, and the parties fell apart, they were remitted to their several rights, which each side was bound to respect and observe. Recognizing this, the plaintiff drew up and forwarded his proofs of loss, on the receipt of which the insurers were entitled, if they found it necessary, to require a new exhibition of the damaged goods, just as they had the right to call for his books and papers, or to demand that he should submit to an examination under oath."

Founded upon this right to an appraisement, there was another right of the insurer under the policy, and of which it was deprived by the action of the defendant in the sale and dispersion of the damaged goods. This was the option already alluded to, reserved to the company, "to take all or any part of the articles at such ascertained or appraised value * * * or replace the property lost or damaged with other of like kind and quality, within a reasonable time, on giving notice within thirty days after the receipt of the proof herein required, of its intention so to do." Clearly this right could only be enjoyed, where there had been, either an amicable ascertainment of loss or an appraisement, as provided for in the policy, and where opportunity was given within thirty days after the receipt of the proof, to examine the goods damaged. The plaintiff made out due proofs of loss, and forwarded the same to the defendant company, on January 9th. This notice could not have been received until the day following, when all the goods had been sold at private sale and irretrievably dispersed. The plaintiff, having by his own act destroyed those unequivocal rights reserved in the policy to the insurer, cannot now be heard to complain of a forfeiture of his own claims under a policy containing the express stipulation, that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements." Nor can the plaintiff allege that he was suffered to rest under any misunderstanding as to the attitude of the company, as evidenced by what took place on the 29th and 30th of December, when the goods were being

examined by the adjusters and efforts were being made to amicably settle the loss, or that there was a silence on the part of the insurers, when they ought to have spoken. In regard to this point, the record discloses, that on January 6, 1903, plaintiff advertised his damaged goods for sale on the 8th, 9th and 10th of said month, and on January 7, 1903, the adjusters for the companies in interest, wrote the following letter, received by the plaintiff before the said sale commenced:

"Philadelphia, January 7, 1903.

Mr. Herman Astrich, Harrisburg, Pa.

Dear Sir: From information received, we believe that you have by public advertisement, and otherwise, stated your intention to dispose of by sale, commencing January 8, 1903, stock damaged by fire December 16, insured in this and other companies. We desire to call your particular attention to the conditions contained in your policies of insurance which constitutes the contract between said companies and yourself. Under the same it is the right of said companies to continue to make an examination of said property, with the privilege on their part, if they desire, to exercise the option, to take said stock, and also by reason of disagreement between you and said companies as to the amount of loss and damage sustained, to have that matter determined by appraisement. We now notify you that we have arranged to examine said stock Monday, January 12, to determine, if possible, the value, or damage, sustained, and if the contemplated action on your part is effected, it will be in direct violation of the rights possessed by said insurance companies, and the said policies of insurance will be thereby rendered null and void by you.

Reserving all legal rights and waiving none, we are,

Yours truly,

G. A. Russell,
William H. Whitall,
Adjusters for Companies in Interest."

We think, therefore, that under the facts shown, there was clearly a forfeiture of the plaintiff's right to claim indemnity under the policy sued upon.

But the plaintiff contends, that, granting forfeiture, testimony was offered by him, tending to show conduct on the part of the insurer, from which the jury would be justified in inferring a waiver of the said forfeiture. The rejection of this testimony is the ground of the first assignment of error, which is as follows:

"(1) The court erred in the rejection of the evidence of Herman Astrich, a witness for the plaintiff, contained in the offer made by the plaintiff, as follows:

By Mr. Bergner: Mr. Derr, are you claiming that this policy was forfeited because of the sale of the goods?

By Mr. Derr: Yes.

By Mr. Bergner: I propose to show by the witness upon the stand that there was an insurance upon the merchandise and also upon the fixtures, cases, etc., in this building; that by certain policies the fixtures and merchandise were insured in separate items; that on the 12th day of January, Mr. W. H. Whitall, an admitted agent of the defendant company, came to Mr. Astrich's place of buiness, and, after inquiry of him concerning the sale of goods referred to, demanded that he furnish proofs of loss and schedules of the furniture and fixtures destroyed in this case; this for the purpose of showing waiver of the alleged forfeiture claimed by defendant; to be followed by evidence that Mr. Astrich complied with the demand at considerable expense and sent the proofs of loss."

It is true that courts do not favor forfeitures, and are liberal, according to circumstances, in finding a waiver. This is true especially where

there is ground for imputing bad faith in the conduct of one party towards the other, who has incurred the forfeiture. In the case before us, there is no question of bad faith. It is solely a question of fact. Did the evidence offered tend to show satisfactorily that the defendant company intended to waive the forfeiture incurred by the plaintiff, through his noncompliance with the conditions of the policy? If it did not, there was no waiver, and the plaintiff was not justified in acting upon it as if it were a waiver. A waiver is a voluntary relinquishment of the right that one party has in his relations to another. Such waiver may be either express or implied. An express waiver is governed by its own terms, takes care of itself, and is not often the occasion of dispute or litigation. An implied waiver, of a forfeiture for instance, is where one party has pursued such a course of conduct, with reference to the other party who has incurred the forfeiture, as to evidence an intention to waive the same, or where the conduct pursued is inconsistent with any other honest intention, than an intention to waive the forfeiture, and the one who has incurred the forfeiture has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble and expense thereby. There is no confusion about the rules of law, applicable to this question. They are founded upon fundamental rules of evidence, and upon the obligations of morality obtaining in human affairs. It is essentially a matter of intention, though circumstances may sometimes be such that the real intention is immaterial, and the question is, whether a party is not estopped by conduct evidencing an intention upon which another has acted, to say what his true intention really was. In such cases, the ordinary and well-understood doctrines of estoppel by conduct is applicable. We think, in the case before us, the learned judge of the court below was right in rejecting the offer of testimony above stated. Whitall, the adjuster who made the request that the plaintiff should send in proofs as to the loss of furniture and fixtures to all the thirteen companies, was not the special agent of the defendant company. He had appeared as one of the adjusters representing all the companies at the first investigation of the loss, and there was no offer of testimony to enlarge his agency for the defendant company, "so as to make it include so extraordinary an act as that of demanding proofs as to property not embraced in the defendant company's contract, and in which the defendant was not concerned." Some of the 13 companies represented by the adjusters, had included in their policies a separate insurance on furniture and fixtures, and some did not. In the latter class was the defendant company. This the plaintiff was bound to know, and therefore bound to know that the request by Whitall, for a statement of loss as to furniture and fixtures for the defendant company, was that he should do a thing totally unrelated to his contract with that company, and one that could have no possible bearing upon the attitude of that company, with reference to the loss on the merchandise, or its liability therefor. The request, therefore, was not only unauthorized, but was totally irrelevant to the business in hand between the plaintiff and defendant. How, then, could an intention to waive, be inferred from such a request, and how could the plaintiff

have been induced to believe, by such request, that the defendant company intended to waive the forfeiture it had the right to claim? What actually happened, doubtless, was that the adjuster, in asking for a statement of loss as to fixtures and furniture to be sent to the companies insuring the same, by mistake included the defendant company with the other insuring companies, most of whom had insured furniture and fixtures. It would work injustice, and not justice, to hold that this mistake, for which the company was in no way responsible, and by reason of which the plaintiff is alleged to have incurred the trifling trouble and expense of sending a copy of its statement of loss on fixtures and furniture to the defendant company, who it was bound to know had no insurance thereon, relieved the insured from a forfeiture occasioned by his disregard of the stipulations of the insurance contract. It is to be noted, that the offer was, not that the defendant company demanded the proof as to furniture and fixtures, nor that Whitall, an agent authorized by the defendant to demand proofs as to furniture and fixtures, had demanded such proofs, but, simply that Whitall, "an admitted agent of the defendant company," made the demand. The fact that the defendant company had made no such demand, and that Whitall was not authorized by the defendant company to make such a demand on its behalf, being uncontroverted, we think the learned judge of the court below was right in rejecting this offer of testimony, and also in deciding the point reserved in favor of the defendant.

The judgment of the court below is therefore affirmed.

VIQUESNEY et al. v. ALLEN.

(Circuit Court of Appeals, Fourth Circuit. May 27, 1904.)

No. 510.

1. APPEAL—JUDGMENT—DEMURRER.
   Where an order sustaining a demurrer to a bill for want of jurisdiction was in favor of appellants, who appealed from other orders and a final decree, appellee could not object that the Circuit Court of Appeals had no jurisdiction of the appeal, on the ground that the question of jurisdiction could only be reviewed by the Supreme Court.

2. SAME—FINAL DECREE.
   Where a bill in equity was dismissed, and an order entered discharging a receiver and providing for the payment of costs, every question having been disposed of in so far as the trial court was concerned, it was a final decree, and therefore appealable.

3. FRAUDULENT CONVEYANCES—EQUITY—SIMPLE-CONTRACT CREDITOR—RIGHT TO SUE.
   A simple-contract creditor cannot maintain a bill in equity in the federal Circuit Court to set aside fraudulent conveyances of his debtor's property, and to have the same administered by a receiver.

4. SAME—BANKRUPT ACT—CONSTRUCTION.
   Bankr. Act, § 23a (Act July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]), providing that suits may be prosecuted in the federal

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¶ 2. What decrees are final, see note to Brush Electric Co. v. Electric Imp. Co. of San Jose, 2 C. C. A. 379.

or state courts to determine adverse claims to the property of the bankrupt, and section 23b, providing that suits by a trustee in bankruptcy shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, relate only to suits brought by trustees in bankruptcy, and do not authorize the maintenance of a bill by a simple-contract creditor to set aside alleged fraudulent conveyances in aid of a bankruptcy proceeding against the grantor.

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

V. B. Archer, for appellants.

W. T. George, for appellee.

Before GOFF, Circuit Judge, and PURNELL and McDOWELL, District Judges.

McDOWELL, District Judge. The appellee (complainant below) on March 7, 1903, filed in the court below his bill in equity against one Latham and the appellants. The bill, setting out requisite diversity of citizenship, alleges that complainant is a simple-contract creditor of the defendant Latham to an amount exceeding $2,000, and that Latham, who had been doing business as a general merchant, had, with intent to defraud his creditors, on January 29, 1903, transferred and delivered all of his property, consisting chiefly of his stock of merchandise, to the Viquesneys. It is further averred that complainant had contemplated filing a petition in the bankrupt court against said Latham, but "learned that such proceedings were being instituted by other creditors of said Latham." The prayer is that an injunction be granted, that a receiver be appointed to take charge of the stock of merchandise and other property, that this proceeding "be treated as an ancillary proceeding to the bankruptcy proceeding which has been instituted," that the sale by Latham to the appellants be set aside, and that the property be sold, and the proceeds be turned over to the trustee in the bankruptcy proceeding. On the day the bill was filed, a decree was entered appointing L. V. Holsberry as receiver, and directing him to take charge of the property and to carry on the business. The marshal was by this decree directed to put the receiver in full possession and control. Bond was required of the receiver, and, conditioned upon the execution of an injunction bond by the complainant, the Viquesneys were enjoined from in any manner interfering with the receiver. Both of these bonds were executed and filed on the day this decree was entered (March 7, 1903), and subpœnas, returnable to the first Monday in April, 1903, were issued against the defendants. It appears that the receiver took possession very shortly after his appointment. On March 20, 1903, notice was given by the Viquesneys that they would on March 24th move for the dissolution of the injunction, for the discharge of the receiver, and the substitution therefor of a bond. On March 24, 1903, an order was entered reciting that the Viquesneys then tendered their answer, which was ordered filed; that said defendants moved as set out in said notice, and filed affidavits in support of said motion; and that the complainant filed counter affidavits. The decree then directed the receiver to

cease making sales, and directed that he make and report an inventory. Except that the parties are given leave to file additional affidavits, no further action was then taken. On June 19, 1903, a decree was entered allowing the Viquesneys to withdraw their answer and file a demurrer. This was done, joinder in demurrer was filed, and the issue set down for argument. On July 8, 1903, an order was entered, which, after reciting that bankruptcy proceedings had been, since the institution of this suit, "taken" against Latham in the District Court for the Northern District of West Virginia, and that the court is of opinion that the bankruptcy court should settle all matters as to the title of the property, discharges the receiver, and directs him to turn over all the property and the proceeds of sales thereof to G. C. Holdsberry, trustee in the bankruptcy case. This decree also modifies the injunction to the extent of directing the receiver to surrender the property to the trustee in bankruptcy. On August 5, 1903, a decree was entered, which, without stating the grounds therefor, sustains the demurrer and dismisses the cause at the cost of complainant. This decree also makes an allowance to the receiver for necessary expenses incurred by him of $394.36, and, it being recited that the receiver had, under the decree of July 8th, delivered all the property and funds to the trustee in bankruptcy, directs the trustee in bankruptcy to pay to the receiver the said sum, if the trustee still has the money in his hands, or, if he has already paid the fund over to the Viquesneys, that they shall pay to the receiver the said sum. An appeal was prayed and allowed to the decrees of March 7th, July 8th, and August 5th. The errors assigned are, in brief, that the court below erred in appointing the receiver and directing him to take the property of the defendants, in directing the receiver to deliver the property to the trustee in bankruptcy, and in directing that the receiver's expenses should be paid either out of the proceeds of sales of the property, or by the trustee in bankruptcy out of such proceeds, or by the defendants.

We are met at the outset of our consideration of this cause by an objection on behalf of the appellee that this court has no jurisdiction of this appeal. It is said that the jurisdiction of the court below is in issue, and that only the Supreme Court has jurisdiction of this appeal. We assume that the court below sustained the demurrer because there was no jurisdiction. But this decision is not appealed from. It was in favor of the appellants. We find nothing here to support the view that this court is without jurisdiction of this appeal. McLish v. Roff, 141 U. S. 663, 12 Sup. Ct. 118, 35 L. Ed. 893; Carey v. Houston R. Co., 150 U. S. 170–179, 14 Sup. Ct. 63, 37 L. Ed. 1041; U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Green v. Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90; Evans v. McCaskill, 101 Fed. 658, 41 C. C. A. 577; Dudley v. Board, 103 Fed. 209, 43 C. C. A. 184; Watkins v. King, 118 Fed. 531, 55 C. C. A. 290.

There is also no question of the finality of the last decree rendered by the court below. Every question has been disposed of, so far as that court is concerned. The cause has been dismissed, and orders made for the payment of the receiver. Nothing except to execute that decree remains to be done by the trial court.

We are satisfied that the bill did not show a cause of equitable cognizance. The complainant was a mere simple-contract creditor. In Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, the facts were closely similar to the facts in the case at bar. There a simple-contract creditor filed a bill in equity in the federal Circuit Court to have set aside a fraudulent conveyance of real estate made by his debtor, and to have the land sold for the satisfaction of the complainant's debt. The court said:

"In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property, or a lien thereon created by contract or by some distinct legal proceeding. Smith v. Railroad Co., 99 U. S. 398, 401 [25 L. Ed. 437]; Angell v. Draper, 1 Vern. 398, 399; Shirley v. Watts, 3 Atk. 200; Wiggins v. Armstrong, 2 Johns. Ch. 144; McElwain v. Willis, 9 Wend. 548, 556; Crippen v. Hudson, 3 Kern. 161; Jones v. Green, 1 Wall. 330 [17 L. Ed. 553]. In Wiggins v. Armstrong, Chancellor Kent held that a creditor at large, or before judgment, was not entitled to the interference of a court of equity by injunction to prevent the debtor from disposing of his property in fraud of the creditor; citing some of the above authorities, and stating that the reason of the rule seemed to be that, until the creditor had established his title, he had no right to interfere, and it would lead to unnecessary and perhaps a fruitless and oppressive interruption of the debtor's rights; adding, 'Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds.' It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract or by contribution to its value by labor or material, or by judicial proceedings had, which distinguishes cases for the enforcement of such lien or interest from the case at bar."

In Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804, the facts were essentially the same as in the case at bar. Simple-contract creditors filed a bill in equity in the federal court, alleging a fraudulent assignment by the debtor; praying for an injunction, for the appointment of a receiver, and that the assigned property be subjected to complainants' debts. The court said at page 457, 149 U. S., and page 884, 13 Sup. Ct., 37 L. Ed. 804:

"The principle that a general creditor cannot assail, as fraudulent against creditors, an assignment or transfer of property made by his debtor, until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon the property, or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer, is elementary. Waite on Fraud. Con. § 73, and cases cited. The existence of judgment, or of judgment and execution, is necessary, first, as adjudicating and definitely establishing the legal demand; and, second, as exhausting the legal remedy."

In Hollins v. Brierfield Co., 150 U. S. 371–378, 14 Sup. Ct. 127–130, 37 L. Ed. 1113, it is said:

"The plaintiffs were simple-contract creditors of the company. Their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims."

See, also, Putney v. Whitmire (C. C.) 66 Fed. 388; Tompkins v. Catawba Mills (C. C.) 82 Fed. 782, 783; First National Bank v. Prager, 91 Fed. 692, 34 C. C. A. 51.

It is seemingly contended by the appellee that the bankruptcy act gave jurisdiction of this cause to the Circuit Court. But we find nothing there which can avail the appellee. It is doubtful, from this record, whether the bankruptcy proceeding had been instituted before the amendment to the act took effect. But the question is of no importance. Neither the original bankruptcy act nor the amendment seems to us to afford any ground for the contention of the appellee. The original act (section 23a, Act July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]) relates only to controversies between the trustee in bankruptcy and adverse claimants to property acquired or claimed by the trustee. So, also, 23b relates only to suits brought by trustees in bankruptcy. And the amendment, if applicable here, likewise only applies to suits by trustees in bankruptcy.

The court below was plainly right in sustaining the demurrer and in dismissing the cause. We are of opinion, however, that the learned trial court inadvertently erred in decreeing that the expenses of the receiver should be paid out of the proceeds of sales, and also in directing that the property and funds in controversy be put into the possession of the trustee in bankruptcy. We are of opinion that the court below should have decreed the restoration of the property and funds to the Viquesneys, and should have directed that the expenses of the receiver be paid by the complainant below.

The decrees appealed from will be reversed in the respects above mentioned, and the cause remanded. Reversed.

NORTHWESTERN COMMERCIAL CO. v. BARTELS.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1904.)

No. 1,001.

1. MARITIME LIENS—LOSS BY LACHES—SALE IN PROCEEDINGS IN STATE COURT.
   It seems that under the admiralty law applicable to the enforcement of liens the holder of a maritime lien, who participates in a proceeding in a state court which results in a sale of the vessel at his instance, loses his lien, if not by estoppel, at least by laches.

2. SAME—ESTOPPEL TO ENFORCE.
   Libelant, who was entitled to a lien on a schooner for salvage services and wages as master, filed his claim in receivership proceedings in a state court, and it was allowed. He consented to a sale of the vessel, and urged a corporation to bid, giving its officers to understand that his claim would be settled from the proceeds. He acquiesced in the sale to such corporation, and in the delivery of the vessel thereunder, and after the sale was confirmed asserted the priority of his claim to the proceeds, and only withdrew his claim after another lien, which exhausted the fund, had been given preference. *Held*, that he was estopped by his conduct to enforce his lien against the vessel in admiralty as against the purchaser.

¶ 1. Waiver and extinguishment of maritime liens, see note to The Nebraska, 17 C. C. A. 102.

See Maritime Liens, vol. 34, Cent. Dig. § 87.

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

On April 5, 1902, the appellee filed his libel against the schooner Lilly L. to subject her to his claim of lien for services performed in Grantly Harbor in the summer of 1901, at the request of the managing owner thereof, in getting said vessel off the beach and afloat, and for services rendered as master and navigator in bringing her from Port Grantly to Seattle in the fall of that year, all of which services were claimed to have been rendered under an oral agreement with said managing owner, by which the appellee was to be paid at the rate of $100 per month, amounting in all to $786.60, and to have a lien on said vessel therefor. The appellant, as claimant of the schooner, answered, denying some of the material allegations of the libel, and alleging that in December, 1901, an action was instituted in the superior court of Washington for King county by the copartners and owners of said schooner, alleging that the schooner was out of commission, and depreciating in value, and praying that a receiver be appointed to sell her and to wind up the partnership affairs; that on December 20, 1901, a receiver was duly appointed for said vessel; that he gave due and proper notice of his appointment to all creditors and claimants; that on February 1, 1902, the appellee filed with said receiver his claim for services as it is now set forth in his libel; that the claim of the appellee was received by the receiver, and by him filed and allowed; that on February 8, 1902, with the consent of all parties to that action and of the appellee and his attorneys, an order was made directing the sale at public auction of the said vessel, and on March 1, 1902, it was sold to the appellant herein, who was the highest bidder therefor; that said sale was made without protest on the part of the appellee or any person, the said appellee being then and there informed of the sale, and approving and ratifying the same, and that at the time of the sale he informed the appellant that, if it would buy said vessel, he would not claim, and did not claim, any lien against the same for wages or otherwise; that the said appellant purchased said vessel without the knowledge or information that the appellee claimed or expected to claim any lien against the same for work done and performed previous to the sale of said vessel at the receiver's sale, and under the distinct understanding and statement from him that he did not have, nor would he attempt to enforce, any claim or lien against said vessel; that said sale was afterwards confirmed and approved, and that upon a hearing had in said superior court on April 2, 1902, at which hearing the appellee was represented by his attorneys, it was adjudged that the claim of one J. Clark of $476.40 for services performed in repairing said vessel while she was lying on the ways should be allowed as a first lien on the fund derived from the sale; that on April 5, 1902, after the state court had directed the entry of an order in accordance with its judgment, but before the order was signed, the appellee appeared by his attorneys, and upon motion, by leave of the court, withdrew his claim. Exceptions to this answer were filed by the appellee, and they were overruled. Thereafter testimony was taken, and the court adjudged that the appellee had alleged and proved facts sufficient to entitle him to salvage compensation in the sum of $400, with interest, and that the vessel be sold to satisfy the same.

The following facts are established by the evidence: The vessel arrived at Seattle in the latter part of October, 1901. In December following the receiver was appointed in the suit in the state court. At that time, and until after the sale of the vessel, she was lying out of the water, and on the marine ways. The appellee's claim was filed with the receiver on February 1, 1902, and was thereupon allowed. The order of sale was made on February 8th. On March 1st the vessel was sold at public auction to the appellant for $502, and on March 8th the sale was confirmed. On April 2, 1902, the question of the priority of liens upon the fund in the hands of the court for distribution was heard before the superior court. The appellee was present, and testified before the court concerning his services and the items of his claim. His attorneys urged that his claim was a first lien upon the fund after payment of the receiver's costs and expenses. Clark, who made the last repairs on the vessel, contended that his claim was superior to that of the appellee. The court, at the conclusion of the hearing, rendered an oral decision adjudging the lien of

Clark to be superior, and the claim of the appellee to be second thereto, and directed that a judgment order be made accordingly. On April 5th, and before the judgment order was presented to the court for signature, the appellee, by his attorneys, upon an ex parte application, obtained leave of the court to withdraw his claim, and thereupon withdrew it. The testimony pertaining to the defense pleaded by the appellant is, in substance, as follows: John Rosene, president of the appellant, testified that the appellee came to his office in Seattle several times after it had been decreed that the schooner be sold, requested him to become a bidder, and gave him to understand that he had a claim against the schooner, and that he desired to have the sale made, and to have some person bid in competition with Clark, who also had a lien; that at the day of the sale the witness was present, and had bid $400, and had decided to make no further bid, when the appellee urged him to bid more, whereupon he bid $502, and the vessel was struck off to him. He further testified that at the time of the sale, before buying, in the presence of the appellee, he made inquiry of the receiver concerning the condition of the vessel as to liens or claims against it, and whether or not all parties who had or claimed to have such liens or claims were included in the proceedings, and that the receiver answered him that, so far as he knew, all claims against the vessel were included in the proceedings. The appellee testified that before the sale he had a conversation with Mr. Williams, an officer of the appellant company, in which he told Williams that he thought the vessel would sell for about a thousand dollars, and that Williams said, "Then you will get all the money," and that the witness answered: "Pretty close to that besides what the receiver will get. * * * I stated to him that I calculated to get my money out of that vessel, no matter what became of her, or who would buy her; and I told him if they would buy her the money would come to me—what she was sold for; and he was satisfied to that effect." He testified further that on the day of the sale he informed Mr. Rosene that he had a $786 bill against the vessel, and that Rosene said, "This will come out of this sale when they sell her," and that he replied, "I don't know where it is going to come out, but that is the claim that I have against the vessel." The receiver testified that he did not hear the conversation between the appellee and Rosene at the time of the sale, but that they were there together, and during the bidding the appellee "frequently spoke, or rather whispered, to Rosene—spoke low." Trenholme, the secretary of the appellant, testified that some time prior to the sale the appellee came to the office of his company to induce the company to buy the boat, and stated that liens had been filed with the receiver, and that she was going to be sold, and that among other claims was his own; that he came in repeatedly to induce the company to bid; that he stated that Mr. Clark "had trumped up a claim for repairs that was not done, and for the use of the ways at Ballard, and that he would like to see Mr. Clark beaten out of his claim." There was no denial of any of the foregoing testimony. The only evidence concerning the value of the schooner was that of the appellee, who estimated it at $1,000, and that of Trenholme, who testified that it was of no value whatever.

John P. Hartman, for appellant.

Greene & Griffiths, for appellee.

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

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

The contention that the proceedings in the state court and the sale thereunder bar the present suit presents a question that has not been directly met by any decision of the Supreme Court. It is undoubtedly true that the fact that a libelant has already brought suit in a state court for the same claim is no bar to a subsequent proceeding in admiralty. The Highlander, 1 Sprague, 510, Fed. Cas. No. 6,476; The Kalorama,

10 Wall. 218, 19 L. Ed. 941. But it would seem that, if the proceedings in the state court have proceeded so far that a sale has been had upon its judgment, it would operate as a waiver of the lien, provided that the court assumed to sell the entire vessel and all rights and interests therein. In The Kalorama, the court, referring to the suggestion that the lien was waived by the commencement of an action for the same claim in the state court, said:

"But the record shows that the action is still pending, and it is well-settled law that the pendency of such an action is no bar to a suit in a federal court. Had the judgment been rendered, it might have been different."

In Moran v. Sturges, 154 U. S. 277, 14 Sup. Ct. 1025, 38 L. Ed. 981, the court said:

"If, then, the receiver had first taken actual possession of these vessels and sold them, such sale would not have cut off maritime liens and the right to have them enforced; and while it may be true that the state courts exercising equitable jurisdiction might undertake in the distribution of property to save the rights of holders of maritime liens, yet it is certain that those courts would have no power by a sale under statute to destroy their liens, unless they had voluntarily submitted themselves to that jurisdiction."

The inference to be drawn from this language of the opinion is that, if the lienholders had submitted themselves to the jurisdiction of the state court, the sale would have divested the vessel of their liens. In The Resolute, 168 U. S. 441, 18 Sup. Ct. 112, 42 L. Ed. 533, Mr. Justice Brown said:

"Did the order direct these vessels to be sold free of maritime liens or subject to them, or was it silent in this particular? Were the lienholders upon these vessels paid from the purchase money according to their relative rank as they would have been had the sale been conducted by a court of admiralty? If they were, that would amount to very strong, if not conclusive, evidence against the subsequent endeavor to enforce the liens in a court of admiralty."

In Dudley v. The Superior and Sexton v. The Troy, 1 Newb. Adm. 176, Fed. Cas. No. 4,115, certain holders of maritime liens and nonmaritime liens seized the vessels subject thereto by process from the state courts. Afterwards the boats were sold under the order of the court of admiralty, and the proceeds paid into the registry thereof. Holders of the nonmaritime liens asserted the right to share equally in the funds with those who held liens originally maritime, and who had not made seizures under the state law. The court expressed the view that a party who has voluntarily waived his admiralty lien and resorted to the local law for his indemnity and protection could not resume his lien at his pleasure, and thereby be reinstated in his original rights. So, in Stapp v. Steamboat Swallow, 1 Bond, 190, Fed. Cas. No. 13,305, it was said:

"It is, however, clearly consonant with reason and the analogies of law that if a party having an undisputed maritime lien voluntarily waives it by seeking another remedy he cannot be reinstated in his original right."

A case directly in point is The Mary Morgan (D. C.) 28 Fed. 196–202, in which the court said:

"I can recall no instance in which a creditor may sell his debtor's property a second time for the same debt. He invites the public to purchase, proposing

to take the proceeds while the purchaser takes the property. How can he afterwards, in effect, claim the property also?"

It would seem, in view of these decisions and expressions of the court, that under the admiralty law applicable to the enforcement of liens one who participates in such a proceeding in a state court resulting in a sale at his instance, loses his lien, if not by estoppel, at least by laches. The Seminole (D. C.) 42 Fed. 924.

But aside from the question of estoppel by the judgment and sale under the proceedings of the state court or the laches of the appellee, we think his conduct and representations to the appellant estop him now to assert a lien against the vessel. He duly presented his claim to the receiver in the state court, and his claim was allowed. After that court had ordered the sale of the vessel, he went to the officers of the appellant, and urged them to become purchasers at the sale. At the time of the sale he was present, conferring with the president of the appellant; and when the latter inquired of the receiver if all claims against the vessel were included in the proceedings, and the receiver replied that they were, the appellee made no denial of that statement. A month later, and after the sale had been confirmed, he appeared with his attorneys before the state court, and he testified concerning his claim and the items thereof. It was not until the court had announced its decision adjudging Clark's lien to be prior to his that the appellee withdrew his claim. He testified in the present case that prior to the sale he stated to Williams, the treasurer of the appellant, that he thought the vessel would sell for about a thousand dollars, and that he would get practically all the proceeds after payment of the receiver, and that he further said that, if the appellant would buy her, the money that she was sold for would come to him, and that Williams "was satisfied to that effect." In what plainer language could he have informed the appellant that his claim was included among those for the satisfaction of which the vessel was to be sold? The force of his statement to Williams is not modified by the fact that he testified that he further said that he calculated to get his money out of that vessel, no matter what became of her, or who would buy her. The plain inference to be drawn from all that he said was that he looked to the proceeds of that sale to satisfy his lien, and that Williams was satisfied to that effect. He does not deny that he told the secretary of the appellant that liens had been filed with the receiver, and that the schooner was going to be sold, and that among other claims was his own. The learned judge of the District Court was of the opinion that, if the proof showed that the appellee induced the claimant to purchase the vessel by making a verbal agreement to relinquish his claim and to look to the purchase money, and that the amount bid was sufficient to pay him any considerable part of the amount which he was justly entitled to receive, there would be substantial ground for an estoppel, but that there could be no estoppel from the facts proved for the reason that the amount bid was not sufficient to pay him anything. We think that the fact that the amount bid was not sufficient under the order of distribution made by the state court to pay the appellee anything is wholly immaterial to

the question under discussion. The estoppel consists in the appellee's conduct and representations and the act of the appellant thereby induced. It is in no way affected by the subsequent disposition of the money, or by the fact that the expectation of the appellee was not realized. The appellant had the right to rely on his representations. It became the purchaser at his instance, and upon his assurance that his claim was one for the payment of which the vessel was being sold.

We are not unmindful of the general rule that the lien of a seaman for his wages is under the protection of courts of admiralty, and that nothing short of absolute payment, or some act on his part showing an intelligent intention to waive his lien, shall be construed as a waiver thereof, and that courts of admiralty take notice of the improvidence, the ignorance, and the guilelessness of seamen, and protect their interests. But we see no place for the application of the rule to the present case. A mariner who for 15 years has had experience as a master and navigator of vessels can hardly be said to come into court in the attitude of a ward of the admiralty. There is nothing in this case to show that the appellee was overreached, or unjustly dealt with. He was represented in the proceedings in the state court by able counsel, and he appears to have been fully capable of taking care of himself. His chief solicitude seems to have been to obtain a bidder upon the vessel for his own benefit, and to exclude the claim of the other lienholder. There can be no doubt of the power of a seaman to release his claim of lien if the release is made upon adequate consideration, or upon some corresponding benefit resulting to him. The International (D. C.) 30 Fed. 375. In the Olive Mount (D. C.) 50 Fed. 563, Nelson, District Judge, held that seamen who had authorized the owner of their vessels to make settlement in their behalf of all claims for salvage could not, after such settlement, collect against the salved property. Said the court:

"They all had knowledge of the negotiations going on between the owners of the vessel and the company for the settlement, but they made no objections, set up no separate claim, nor asked nor expected to be consulted. The vessel also was delivered up to the owners without objections from them. They claimed their share after the money was paid, and it was only after their failure to come to an agreement with the company that they brought this suit. Their demand on the company ratified the settlement even if no previous authority had been given."

So in the present case it appears that the appellee participated in the proceedings in the state court, consented to the sale of the vessel, urged the appellant to become a purchaser, gave it to understand that his claim was to be settled by the purchase money, acquiesced in the sale after it was made and in the delivery of the vessel to the appellant, and made no objection to any of the proceedings until he found that the claim of Clark, whom he specially desired to exclude from participation in the fund, had been adjudged to be superior to his own. Every consideration of justice and fair dealing leads to the conclusion that these facts constitute an estoppel in pais.

The objection is made that the answer is not so framed as to present the defense of estoppel. No objection was interposed to the testimony on that ground. The court below considered it as one of

the defenses in the case, and we are justified in so regarding it here. It is the facts pleaded that constitute an estoppel in any given case, and not the term by which the defense may be designated.

The decree of the District Court is reversed, and the cause is remanded, with instruction to dismiss the libel.

DAVIS et al. v. A. BOOTH & CO.

(Circuit Court of Appeals, Sixth Circuit. August 2, 1904.)

No. 1,310.

1. SALES—GOOD WILL—EQUITY—JURISDICTION—MULTIPLICITY OF SUITS.
Equity has jurisdiction to restrain the violation of an agreement entered into as a part of the sale of a business, by which the persons interested therein agreed not to again engage in business in certain localities for a definite time, because of the difficulty in estimating the damages accruing, and to prevent a multiplicity of suits.

2. SAME—VALIDITY OF CONTRACT—PUBLIC POLICY.
An agreement by which the stockholders of a corporation, on selling its assets to complainant's assignor, agreed not to again engage in a similar business in specified localities for a period of 10 years, or do any act tending to impair the good will of the business sold, was not contrary to public policy.

3. SAME—ANTI-TRUST ACT.
Where a corporation engaged in the business of buying and selling fish sold out its assets and good will to plaintiff's assignor, and the seller no longer retained any interest in the property, so that the sale was not a mere combination of owners and properties under one management, the sale was not in violation of the federal anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting contracts in restraint of trade, though the contract might incidentally or in some remote degree injuriously affect interstate commerce.

4. SAME—STATE STATUTES—CONSTRUCTION.
3 How. Ann. St. § 9354j, denominated an act prohibiting certain trust combinations, and providing that all contracts, the purpose or intent of which shall be in any manner to prevent or restrict free competition in the sale of any article or commodity, or in any other branch of business or labor, shall be utterly illegal and void, provided that it shall not invalidate or affect contracts for the sale of the good will of a trade or business, does not prohibit a contract for the sale of a business where it was not intended that the seller should thereafter have any interest in the property, or an agreement by which the seller's stockholders contracted not to again engage in a similar business in competition with the buyer in certain places for a specified time.

5. SAME—RESTRAINT OF COMPETITION.
An agreement ancillary to a sale of a corporation's business, by which the stockholders, who received the purchase price, agreed that, in order to protect the good will of the business so sold, they would not either directly or indirectly engage in the same business within certain distinct limits for a period of 10 years, was not void, as an unreasonable restraint of competition in trade, at common law.

6. SAME—CONSTRUCTION.
Where a contract ancillary to the sale of a business provided that the stockholders of the seller would not again engage in a similar business

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¶ 1. See Injunction, vol. 27, Cent. Dig. § 121.

for a period of 10 years in the territory, or the immediate vicinity of the territory, dealt in by the corporation, or operated in by it or its agents, or the immediate vicinity of such territory, the localities guarded against were restricted to those in which the selling company had establishments for doing business, and the immediate vicinity thereof, and did not include all parts or every one of the United States in which a former customer resided, or into which the corporation's correspondence had extended, or through which an agent of the company had traveled.

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

For opinion below, see 127 Fed. 875.

Edward E. Kane and Fred A. Baker, for appellants.

Henry M. Duffield and Charles S. Thornton, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The object of this bill filed in the Circuit Court by the appellee, A. Booth & Co., was to obtain an injunction against the appellants to restrain them from violating an agreement made by them with William Vernon Booth, to the benefits of which the appellee claimed to be entitled. It states: That the complainant is a corporation organized under the laws of Illinois on August 1, 1898, with a capital of $5,500,000, for the purpose of buying, catching, and selling fish, and having its general office at Chicago. That the Davis Fresh & Salt Fish Company was a corporation organized under the laws of Michigan for a similar business, with headquarters at Detroit. That on or about August 14, 1898, the last-named company, for the consideration of $17,473.14, sold all its properties, including the good will of its business conducted at Detroit, and gave a bill of sale, with warranty of title, to William Vernon Booth, on September 14, 1898, and Davis gave a personal guaranty of the contract of sale. That, as an inducement to the sale, Davis and the other stockholders of the selling company entered into the following agreement:

"This instrument witnesseth, that William Vernon Booth has purchased the plant, business and good will of the business of the Davis Fresh & Salt Fish Co., and has paid therefor the sum of $17,473.14; that in making said transfer, and as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid for the same, we each have agreed that we would not, and we now do agree, each for himself, jointly and severally with him, the said William Vernon Booth, his heirs and assigns, forever, that we will not, during the next ten years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employees of the company engage or in any manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, its officers, agents, employees and assigns, and that we will not, during the said period of ten (10) years, either directly or indirectly, be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same; and we will not, jointly or severally either in firms or corporations, or as individuals or in any other way, directly or indirectly interfere with the said trade or business, or do any act prejudicial to the same or any part thereof, or interfere with the persons employed therein; the meaning hereof being that the said William Vernon Booth is buying and paying for the good will of the business in the largest and fullest scope of the term; and that we will not, and each agrees that he will not, do anything to interfere

with or injure the said business, but will, during said period, lend his aid and best influence to the promotion and advancement of the same.

"In witness whereof, we hereunto subscribe our names and affix our seals, jointly and severally, this first day of August, A. D. 1898.

"Edgar A. Davis.
James T. Donaldson.
Belle R. Harper.
Ed. E. Kane.
Belle B. Davis."

—Which agreement was delivered and the consideration of $17,473.14 paid on September 14, 1898, and said consideration was then distributed among the stockholders of the selling company. That on September 27, 1898, said William Vernon Booth, for a valuable consideration, sold to the complainant all the properties so purchased of the Davis Fresh & Salt Fish Company, including the good will of the business, and assigned to said complainant the above-quoted agreement of the stockholders of said last-mentioned company. That at the time of its sale to William Vernon Booth the Davis Fresh & Salt Fish Company was conducting its business not only at Detroit, but in the following named places—either selling to regular customers, or having established agencies there—namely: "Cincinnati, Cleveland, Columbus, and Dayton, in the state of Ohio; Louisville, Kentucky; Nashville, Tennessee; St. Louis and Kansas City, Missouri; Buffalo and New York City, in the state of New York; Grand Rapids, Jackson, East Saginaw, Battle Creek, Lansing, and Port Huron, in the state of Michigan." That Davis became an employé of the complainant, but after a time withdrew, and with Delos Cook, Michael J. Dee, and Alva M. Hungerford organized a limited partnership under the laws of Michigan, and filed a certificate thereof in the office of the clerk of the county of Wayne, in that state. That on August 26, 1898, the complainant made a similar purchase of the E. A. Edson Company, an Ohio corporation doing a similar business at Cleveland, and also at Detroit, and that Edson, its president, made a similar agreement with that of the stockholders of the Davis Fresh & Salt Fish Company, and that it made a like purchase of the Buffalo Fish Company, a New York corporation, and obtained a similar agreement form its stockholders. That Davis, after leaving complainant, organized the Gopher Fish Company in opposition to complainant, at St. Paul, Minn., and induced Donaldson, who was one of the signers of the agreement of the Davis Fresh & Salt Fish Company stockholders, who was subsequently in the employment of the complainant, to take charge of the said Gopher Fish Company, and also induced Hungerford, another of said signers, to leave complainant and become bookkeeper of the Wolverine Fish Company. That Davis and Edson made public announcement that they intended to "fight complainant in a business way," and intended to organize corporations in Detroit, Cleveland, New York and other places, which should be under one control, and act together in business policy, and fix prices for the purchase and sale of fish, whereby they could better promote the interests of the public, and that they caused to be published in leading journals articles (which are copied into the bill) indicating that they intended to carry on, or cause to be carried on, a strong competition with the complainant in

the fish business. That they characterized the complainant as a "trust," the contrary of which the complainant avers to be the fact, and it vouches a decision of the Supreme Court of New York to that effect. That Davis, Edson, and another have entered actively into the fish business in the territory, and the vicinity of the territory, dealt in by their respective corporations, in violation of their agreements, and organized companies to prosecute said business at New York, Cleveland, and Detroit. That the Wolverine Fish Company was organized by Davis to more conveniently violate his agreement, and has been and now is conducting and threatens to conduct its business in a manner calculated to injure the complainant, and render the good will purchased of his company valueless. That he interferes with its business, trade, and customers. That he solicits consignments of fish and makes purchases thereof from the former customers of his company, and has in many instances drawn away such customers to the Wolverine Fish Company, and that Edson, Hungerford, and Dee are assisting him. That Davis is sending out to the former customers of his company false statements injurious to the complainant's reputation for honesty and fair dealing, which tend to the loss of complainant's business, and that Davis is insolvent, and a judgment against him would be uncollectible; and a considerable number of the statements referred to are set out, the truth of which is denied. And the complainant says it has been greatly injured by this conduct of the defendants, and has sustained already the loss of more than $100,000, and will continue to suffer further irreparable loss unless the defendants are enjoined, etc.

The prayer is that the defendant Davis be compelled to perform his agreement made with William Vernon Booth, and that he—

"And his agents and employés be enjoined during the full term of ten years from August 1, 1898, from engaging or in any manner being interested, directly or indirectly, for themselves or for others, in the city of Detroit, or in the immediate vicinity of any territory dealt in on or prior to August 1, 1898, or operated by the said Davis Fresh & Salt Fish Company, or the defendant Davis, or the agents or employés of the Davis Fresh & Salt Fish Company, in catching, buying, selling, handling, or dealing in any kind of fish or other salt or fresh water food products, in the storage thereof, the manufacture of, or dealing in any manner in fish products, and from engaging in or in any manner being interested in, in the territory aforesaid, any other kind or character of business, the same as or like that conducted and carried on by the Davis Fresh & Salt Fish Company on and prior to August 1, 1898, or by its officers, agents, employés, or assigns, and from soliciting or inviting, in the territory aforesaid, other persons to buy from or sell to or otherwise deal with them, or either of them, in said business aforesaid, and from interfering with the business formerly transacted by the Davis Fresh & Salt Fish Company, and by it sold, assigned, and transferred to William Vernon Booth, its good will, its trade, or its customers, and from coming into competition with this complainant's business in the city of Detroit and vicinity, and wherever the business of the Davis Fresh & Salt Fish Company extended at the time of its sale to and contract with said Booth, and from interfering in any way, directly or indirectly, with the said trade or business, and from doing any act prejudicial to the same, or any part thereof, and from interfering with the persons employed in the service of this complainant, and from using their aid or influence in regard to this complainant's trade or business, otherwise than for the promotion and advancement of the same, and that the said defendants Eugene R. Edson, Alva M. Hungerford, Michael J. Dee, and Wolverine Fish Company, Limited, their agents, servants, and employés, be enjoined during the full period of ten years from August 1, 1898, from aiding the said Edgar

A. Davis or participating with said Davis in and otherwise, directly or indirectly, interfering with the business of the complainant, or with the persons employed therein, and from using their aid and influence in connection with the said Davis, otherwise in regard to complainant's trade or business, otherwise than for the promotion and advancement of the same, and that the said Edgar A. Davis, Eugene R. Edson, Alva M. Hungerford, Michael J. Dee, and the Wolverine Fish Company, Limited, be so enjoined and restrained during the pendency of this action; and that this complainant recover from the said defendants such sum as, upon a proper accounting, the complainant may show it has been damaged by reason of the wrongful action of the said defendants, and for such other and further relief as to the court may seem fit."

Many affidavits and exhibits were attached to the bill in support thereof. We have stated the contents of the bill with considerable fullness, in order to show the scope of the controversy.

The complainant moved for a preliminary injunction. All the defendants except Edson, who was not served or did not appear, answered the bill, and filed a large number of affidavits of other persons in opposition to the motion—so many that we cannot take space to array them. It is sufficient to say that the answers and affidavits raise a conflict of proof in reference to several of the matters stated in the bill and the affidavits accompanying it. The arguments made here, in the main, proceeded upon the broader aspects of the controversy. Besides, having regard to the practice which obtains in this class of appellate proceedings, we should not go into a nice balancing of proof or estimate of particulars. This being an appeal from an order granting a preliminary injunction, unless we should see that the court below had fallen into a positive mistake in regard to some important fact, we should not disturb its findings, and it is not claimed that such a mistake has happened. The court below granted this preliminary injunction by the order following:

"Now, therefore, we strictly command and enjoin you, the said Edgar A. Davis, your attorneys, solicitors, clerks, servants, and agents, under the penalties that may follow on you in case of disobedience, that you forthwith, and until the further order of this court, desist from engaging or in any manner being interested, directly or indirectly, for yourself and for others, in the city of Detroit, or in the immediate vicinity of any territory on or prior to August 1, 1898, dealt in or operated by the Davis Fresh & Salt Fish Company, described in the bill of complaint in this cause, or the defendant Davis, or the agents or the employés of the said Davis Fresh & Salt Fish Company, in catching, buying, selling, handling, or dealing in any kind of fish, or other salt or fresh water food products, in the storage thereof, the manufacture of or dealing in any manner in fish products, and from engaging in, or in any manner being interested in, in the territory aforesaid, any other kind or character of business, the same as or like that conducted and carried on by the Davis Fresh & Salt Fish Company on and prior to August 1, 1898, or by its officers, agents, employés, or assigns, and from soliciting or inviting, in the territory aforesaid, other persons to buy from or sell to or otherwise deal with you or the Wolverine Fish Company, Limited, or either of them, in said business aforesaid, and from interfering with the business formerly transacted by the Davis Fresh & Salt Fish Company, and by it sold, assigned, and transferred to William Vernon Booth, its good will, its trade, or its customers, and from coming into competition with this complainant's business in the city of Detroit and vicinity, and wherever the business of the Davis Fresh & Salt Fish Company extended at the time of its sale to and contract with said Booth, and from interfering in any way, directly or indirectly, with the said trade or business, and from doing any act prejudicial to the same or any part thereof, and from interfering with the persons employed in the service of this complainant, and

from using your aid or influence in regard to this complainant's trade or business, otherwise than for the promotion and advancement of the same. And now, therefore, we strictly command and enjoin you, the said Alva M. Hungerford, Michael J. Dee, and the Wolverine Fish Company, Limited, your attorneys, solicitors, clerks, servants, and agents, under the penalty that may follow in case of disobedience, that you are forthwith and until the further order of this court to desist from aiding the said Edgar A. Davis, or participating with said Davis in, directly or indirectly, interfering with the business of the complainant, or with the persons employed therein, and from using your aid and influence in connection with the said Davis or otherwise in regard to complainant's trade or business acquired under the said contract, otherwise than for the promotion and advancement of the same."

The defendants appeal from this order.

1. It is assigned as error that the court held the bill of complaint to state a case entitling the complainant to relief by injunction; and it is argued that the proper remedy is by an action at law, and further that public policy is opposed to the enforcement of such contracts. With regard to the objection that there is a remedy at law, it is quite clear that the difficulty in estimating the damages in such a case, and the succession of causes of action and the multiplicity of suits likely to ensue, furnish ample reasons for the exercise by a court of equity of its power to restrain the continuance of the supposed wrongdoing. And if the contract is not one which should be held by the court unlawful as opposed to public policy, there is no sufficient reason for withholding relief. We are referred to the case of Bensley v. Texas & Pac. Ry. Co., 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274, as conclusive of the validity of this objection. A railroad company had entered into a contract that it would not establish another depot within three miles of one agreed to be built upon the plaintiff's land. Upon a bill filed to restrain the company from establishing a depot within that distance, as ordered by the State Railroad Commission, it was held that the injunction should not be allowed. The decision was rested upon the ground that the railroad company was by reason of its charter bound by a public duty in regard to the location of its depots, which it ought not to be permitted to disable itself from performing. In the present case the parties to the contract were private parties, upon whom no public duty was imposed, other than such as rest upon all private individuals. The ground upon which the decision cited was based is wholly absent here. In the case of Norcross v. James, 140 Mass. 188, 2 N. E. 946, the contract sought to be enforced was a merely personal covenant, and did not run with the land subsequently conveyed to the defendant. Whether the contract in question is void in law, upon the ground that it is in restraint of trade or competition in trade, is a question which will be discussed further on.

2. One of the principal grounds upon which it is urged for the appellants that the agreement in question is void is that it was an agreement in restraint of trade, in violation of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. But that act, as was held in United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, is leveled against contracts which have a direct relation to interstate commerce, and does not extend to contracts which may incidentally or in some remote way come into relation with, or become the source of, interstate traffic. In that case a New Jersey

corporation, being already in control of a large majority of the sugar refineries in the United States, acquired the control, by a purchase of their stock, of four Philadelphia refineries, and the question was whether such an acquisition was a violation of the anti-trust act. It was not doubted that the sugar refined there would, to a large extent, at least, become the subject of interstate traffic, but such traffic was not the subject directly involved. We think there is nothing in the anti-trust act which rendered unlawful the purchase by William Vernon Booth and his transfer, to A. Booth & Co., of the plant of the Davis Fresh & Salt Fish Company, or which necessarily rendered invalid the agreement of the stockholders of the latter company, which was ancillary to the contract of sale. Nor can this conclusion be affected by the fact that A. Booth & Co. also purchased other plants and stocks to an extent that tended to create a power to monopolize the fish market. There is a clear distinction, which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. To this latter class belongs the case of Merz Capsule Co. v. United States Capsule Co. (C. C.) 67 Fed. 414, affirmed in 71 Fed. 787. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete. It is possible that it may be developed at the final hearing that interstate traffic may be directly involved in this agreement. But if so, it will be prudent to postpone final decision in respect to the consequences thereof upon the validity of the agreement until the case is presented upon full proof, rather than by ex parte affidavits as now.

3. It is further contended that the contract was rendered void by the statute of Michigan of 1889, which enacted that:

"All contracts * * * the purpose, object or intent of which shall be * * * in any manner to prevent or restrict free competition in the sale of any article or commodity produced by mining, manufacture, agriculture or any other branch of business or labor, shall be utterly illegal and void * * * provided, however, that this section shall in no manner invalidate or affect contracts for what is known and recognized at common law and in equity as contracts for the good will of a trade or business."

But that act contained a proviso excepting certain classes and subjects which rendered it of doubtful constitutionality. Such legislation was held void in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and the Michigan statute was amended in 1899, which was after this transaction, so as to remove the objection. The act of 1889 is denominated in 3 How. Ann. St. § 9354j, as one prohibiting "certain trust combinations," and we have no doubt it was intended for such cases. We think that the intent which made the contract or combination unlawful was one in which both parties participated, and that the act was not intended to comprise a case where there was a sale

and purchase of property, after which the seller should have no interest in the property, and therefore would have no intent as to its further use. The act of 1899 is subject to the same construction, but, as it would not render unlawful a contract which had been lawfully made, we need not consider it further.

4. But finally it is insisted that the stipulation in question contained in the agreement of date August 1, 1898, is void at common law, for the reason that it is an unreasonable restraint of competition in trade. The agreement was ancillary to the contract of sale made by the Davis Fresh & Salt Fish Company, in which these stockholders had the entire interest, and of the fruits of which sale they were the beneficiaries. That contract expressly included the good will of the business of the seller, and the stipulation of the stockholders was made, as it recites, to induce the sale; and it was for the protection of the vendee in the enjoyment of it, and, as it seems to us, would pass by the transfer of the property, business, and good will to William Vernon Booth's vendee, to whom the agreement was also assigned. The question of the reasonableness of such a stipulation is one which was elaborately discussed by Judge Taft in delivering the opinion of this court in United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122. It would be useless to reiterate the grounds and reasons upon which it was held that such a stipulation is valid if it goes no farther than to support and protect the interests transferred by the contract of sale. If tested by this rule alone, we think this stipulation should be held valid and obligatory.

But referring again to the distinction already alluded to between an aggregation effected by purchase, and a combination of several owners to pool their business and eliminate competition, it is to be observed that in the present instance it appears that the purchase price paid to the Davis Fresh & Salt Fish Company consisted partly of cash and partly of stock in the corporation of A. Booth & Co., and that therefore the transaction was of a mixed character. This is an aspect of the case which has given us most concern, and in respect of which we are not aware of any decision precisely in point. We are unwilling to decide a matter of so much importance at this preliminary stage of the case, and especially so because no particular attention has been given to it in the briefs and argument of counsel. We purpose, therefore, to give such directions in regard to the continuance of the injunction as will preserve the rights of parties from serious impairment in the interim, and reserve this and another question reserved in another part of this opinion until final hearing.

There are no other questions which seem to require independent discussion, except one which relates to the scope of the injunction awarded by the court below. We are of opinion that the proper construction of the agreement given by the stockholders of the Davis Fresh & Salt Fish Company requires that the description of the localities in which their stipulations should be operative, stated in the writing at the beginning of said stipulations, extends to and qualifies all of them, and that such localities are restricted to those in which the company had establishments for doing business, and the immediate vicinity thereof. It could not mean all parts or every one of the United States in

which a former customer resided, or into which its correspondence had extended, or through which some agent of the company had traveled. No definite or reasonable bounds are indicated by the contract, other than those which we have indicated. Besides, the inclusion made by the words "or the immediate vicinity of the territory," etc., implies some place from which the "immediate vicinity" is to be estimated, and excludes the idea of reckoning from some indefinite point. The ordering part of the injunction directed to the Wolverine Fish Company is also too broad, when, in addition to forbidding certain conduct in conjunction with Davis, it proceeds to forbid that company from doing such things "otherwise." The Wolverine Fish Company was a stranger to the Davis agreement, and, as to anything in which he should not participate, it was not affected thereby. The injunction should be modified accordingly. We think, also, that the complainant should be required to give bond to indemnify the defendants from damages arising from the issuance of the writ, in case the bill should not be finally sustained, as a condition to the continuance of the injunction.

With these modifications, the order of the Circuit Court is affirmed. The costs of this appeal will be divided.

GIBSON v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1904.)

1. PUBLIC LANDS—INDIAN RESERVATION—AUTHORITY OF PRESIDENT.
   The President of the United States, by proclamation, has power to reserve a portion of the unoccupied public lands of the United States for an Indian reservation, notwithstanding Rev. St. § 2319 [U. S. Comp. St. 1901, p. 1424], declaring all mineral deposits in the public lands of the United States and the lands containing the same open to exploration and purchase.

2. SAME—MINERAL LANDS—ENTRY.
   Where complainant made certain mining locations on an Indian reservation on May 27, 1902, on which day an act of Congress subjecting mineral lands in the reservation to mineral entry was passed (Act May 27, 1902, c. 888, 32 Stat. 245), but on the same day two joint resolutions (32 Stat. pt. 1, 742, 744) were passed postponing the operation of the act until December 31, 1902, such joint resolutions suspended complainant's right to locate mineral claims on the land under such act.

3. SAME—STATUTES—ENACTMENT—PUBLISHED RECORD—IMPEACHMENT.
   Where the published record of joint resolutions of Congress, duly authenticated, showed that the resolutions were approved by the President on May 27, 1902, such record could not be impeached by proof showing that they were not in fact approved until a later date.

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

The appellant, M. F. Gibson, was the complainant in a suit in equity brought to enjoin A. M. Anderson, the appellee, who is the Indian agent in charge of the Spokane Indian reservation in Stevens county, in the state of Washington, from interfering with certain mining locations situate within the Indian reservation, and located on May 27, 1902. The bill alleges that the locations were made in due compliance with the laws of Congress and the statutes of the state of Washington, but that the appellee claims and maintains that the land whereon they are located was created an Indian reservation by virtue of

an executive order of the President of the United States made on January 18, 1881, ordering that the said land be, "and the same is hereby, set aside and reserved for the use and occupation of the Spokane Indians." The bill alleges: That the executive order does not have the effect, as claimed by the appellee, to withdraw the mineral lands within the territory therein described from mineral locations, but that the same remained subject to the provisions of and locations under section 2319 of the Revised Statutes, and that if, by said executive order, any such rights as are contended for by the appellee were established, the same were surrendered by virtue of a treaty stipulation entered into between the United States and the Spokane Indians on March 18, 1887, and ratified by Congress on July 13, 1892, whereby the said Indians, in consideration of the sum of $95,000, agreed to remove to the Coeur d'Alene reservation, there to take allotments in severalty. That, after the making of said treaty and the ratification of the same, the further and continued occupancy of said territory by the Spokane Indians was merely as tenants or occupants at sufferance or at will. That afterwards, in May, 1902, Congress passed an act entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1903, and for other purposes" (Act May 27, 1902, c. 888, 32 Stat. 245), which act was signed by the President of the United States, and on May 27, 1902, became a law. That said act contains the following provision: "That the mineral lands only in the Spokane Indian reservation in the state of Washington shall be subject to entry under the laws of the United States in relation to the entry of mineral lands: provided, that lands allotted to the Indians, or used by the government for any purpose, or by any school, shall not be subject to entry under this provision." That subsequently Congress passed joint resolution No. 24 (32 Stat. pt. 1, 742), fixing July 1, 1902, as the time when said act should take effect, except as otherwise specially provided therein, and passed also joint resolution No. 25 (32 Stat. pt. 1, 742), fixing December 31, 1902, as the time when that provision in said act which relates to the subjecting to entry under the mining laws of the United States lands in said Indian reservation, should take effect and be operative, and passed also Joint Resolution No. 31 (32 Stat. pt. 1, 744), which contains the following provision: "The Secretary of the Interior is directed to make allotments in severalty to the Indians of the Spokane Indian reservation in the state of Washington, and upon the completion of such allotments, the President shall by proclamation give public notice thereof, whereupon the lands in said reservation not allotted to Indians, or used and reserved by the government or occupied for school purposes, shall be opened to exploration, location, occupation and purchase under the mining laws." That said last-mentioned resolution purports to have been approved on June 19, 1902. That while joint resolutions 24 and 25 purport to have been approved on May 27, 1902, they were not, nor was either of them, actually approved by the President of the United States until after June 1, 1902. That said mining locations were made upon information received from Washington, D. C., immediately following the approval of said act of May 27, 1902. The bill proceeds to set forth the acts and threats of the Indian commissioner hostile to the appellant's possession of said mining claims, and as to which injunctive relief is sought. The appellee interposed a general demurrer to the bill for want of equity. The court sustained the demurrer, and thereupon rendered a decree dismissing the bill. From that decree the appeal is taken.

H. N. Martin and Happy & Hindman, for appellant.

Jesse A. Frye and Edward E. Cushman, for appellee.

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

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

To show that there was equity in the bill, the appellant advances the proposition that the act of Congress embodied in section 2319 of

the Revised Statutes [U. S. Comp. St. 1901, p. 1424], declaring all mineral deposits in the public lands of the United States open to exploration and purchase, and the lands containing the same to occupation and purchase, cannot be repealed or suspended by a proclamation of the President. But there is no question here of repealing or suspending the operation of an act of Congress. The question is whether the President could, by proclamation, reserve a portion of the unoccupied public lands of the United States for an Indian reservation. In McFadden v. Mountain View Mining & Milling Company, 97 Fed. 670, 38 C. C. A. 354, this court said:

"There can be no doubt of the power of the President to reserve those lands of the United States for the use of the Indians. The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person other than the Indians for whose benefit the reservation was made for mining as well as other purposes."

The appellant seeks to distinguish that case from the case at bar by referring to the fact that the proclamation setting aside the Colville reservation, which was under consideration in that case, was made before the enactment of section 2319 of the Revised Statutes. But, if the President had the power to set aside a portion of the public domain for an Indian reservation, it is clear that the power was not abridged by the enactment of that statute. Congress did not thereby dispose of any estate in the public lands, or create any burden thereon, or establish any right therein until the actual inception and assertion of mining rights thereunder. Statutory license to locate mining claims has never been held, prior to the acquisition of a vested right, to be an obstacle to either the disposition or the reservation of the public lands. We entertain no doubt of the correctness of our ruling in the McFadden Case. The power of the President to create a reservation of public lands for the use and benefit of the Indians and for other purposes has been recognized both by Congress and by the courts—by Congress in enacting subsequent appropriation acts, appropriating money therefor, or other acts, as in this particular case by the act of May 27, 1902, and by the joint resolution No. 24 (32 Stat. pt. 1, 245–277), and joint resolutions Nos. 25 and 31 (32 Stat. pt. 1, 742, 744). In Grisar v. McDowell, 6 Wall. 363, 18 L. Ed. 863, the court, referring to the power of the President to reserve from sale and set apart for public uses portions of the public domain, said: "The authority of the President in this respect is recognized in numerous acts of Congress. Thus, in the pre-emption act of May 29, 1830, it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever;'" and the court alluded to other acts in which Congress had recognized reservations made by the proclamation of the President or by the authority of the President or officers acting under his direction. The same was held of an Indian reservation created by executive order in United States v. Leathers, 6 Sawy. 17, Fed. Cas. No. 15,581, United States v. Sturgeon, 6 Sawy. 29, Fed. Cas. No. 16,412, and United States v. Payne

(D. C.) 8 Fed. 883. There can be no doubt that such a reservation by proclamation of the executive stands upon the same plane as a reservation made by treaty or by act of Congress. In Bardon v. Northern Pacific Railroad, 145 U. S. 535–543, 12 Sup. Ct. 856, 36 L. Ed. 806, the Supreme Court affirmed the doctrine expressed in Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264, that land once legally appropriated to any purpose was thereby severed from the public domain; and the ruling in Leavenworth & Galveston Railroad v. United States, 92 U. S. 733, 23 L. Ed. 634, in which it was said of the Indians' right of occupancy that the legislation which reserved it for any purpose excluded it from disposal as the public lands are usually disposed of, and in which the court said: "For all practical purposes they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty until they should elect to surrender it to the United States." The treaty stipulation with the Spokane Indians of March 18, 1887, referred to in the complaint, did not relate to that portion of the reservation occupied by the Lower Band of the Spokane Indians which was reserved by the proclamation of January 18, 1881. The appellant, in his bill, makes no claim to have acquired a right in these lands prior to the time when they were so reserved; on the contrary, he alleges that his mining locations were made on May 27, 1902, the day on which the act of Congress was approved subjecting the mineral lands in the reservation to entry under the laws of the United States in relation to the entry of mineral lands, and after the information had come to him that the act had been so approved. But it appears also from the bill that by joint resolution 24 it was enacted that the aforesaid act should take effect, except as otherwise provided, from and after July 1, 1902, and that by joint resolution 25 the time when it should take effect and be operative was postponed until December 31, 1902. Both of these joint resolutions purport to have been approved on May 27, 1902, and, if so, they had the effect to suspend all rights to locate mineral claims granted by the act approved on that date.

But the appellant contends, and so alleges in his bill, that while it appears from the published statutes of the United States that the joint resolutions were approved by the President on May 27, 1902, they were not in fact approved until after June 1, 1902, and therefore after his locations were made, and he urges that this allegation of the bill presents an issue of fact to be determined by evidence. But the published record of the joint resolutions and their approval is unimpeachable. The appellant cannot go behind the authenticated published statutes of the United States, and show that an act which purports to have been approved on a certain date was in fact approved on a different date. Said Mr. Justice Harlan in Field v. Clark, 143 U. S. 649–672, 12 Sup. Ct. 495, 36 L. Ed. 294: "When a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." See, also, Harwood v. Wentworth, 162 U. S. 547, 16 Sup. Ct. 890, 40 L. Ed. 1069. The appellant cites authorities such as Burgess v. Salmon, 97 U. S. 384, 24 L. Ed. 1104, and Louisville v. Savings Bank, 104 U. S. 469, 26

L. Ed. 775, to the effect that, where it need and can be done, the very hour when a bill became a law may be shown; but that is a proposition not involved in the present inquiry. Here the offer of the appellant is not to show the precise time at which on May 27, 1902, the act and the joint resolutions were relatively approved, but to contradict the published record of the statute, and to show that the joint resolutions were not in fact approved on the day on which they purport to have been approved, but on a later date, and to deduce therefrom the conclusion that, the locations having been made on the 27th, and after the receipt of the news of the approval of the act, they must consequently necessarily have been made before the approval of the joint resolutions. There is no averment that the mining locations were made in an interval of time between the approval of the act and the approval of the joint resolutions, if the latter were, as we must assume they were, approved on May 27th. The assertion of the validity of the locations rests wholly on the allegation that the joint resolutions were not approved on that day, but at a later date.

In view of these considerations it is apparent that the circuit court did not err in holding that there was no equity in the bill, and it becomes unnecessary to consider the further contention of the appellant that Congress could not, by joint resolutions 24, 25, and 31, deprive him of vested rights.

The decree will be affirmed.

HABELER et al. v. ROGERS et al.

(Circuit Court of Appeals, Second Circuit. June 2, 1904.)

No. 205.

1. SALES—BREACH OF CONTRACT BY BUYER—SELLER'S REMEDIES.

On breach of a contract of sale by the buyer, the seller is entitled, after everything necessary to vest title in the buyer has been done, to store or retain the goods for the buyer's benefit, and recover the contract price; to sell the goods, after notice to the buyer, for the latter's account, and recover the difference between the contract price and the net proceeds of the sale; or, without doing either, to recover the difference between the contract price and the market value of the goods at the time and place of delivery.

2. SAME—TENDER.

Where a buyer notified the seller of goods that he would not accept the same, the seller was not required to make a formal tender of the goods in order to sustain an action for breach of contract.

3. SAME—ABILITY TO PERFORM—EVIDENCE.

Where, in an action for breach of a contract to purchase 5,000 tons of phosphate rock, to be delivered between February 1 and June 1, 1900, at the buyer's option, at the rate of not more than 2,500 tons in a month, the sellers proved that they were selling agents of an association of phosphate rock miners in Tennessee, and exclusive selling agents of another mining concern in that state, and had a contract with each to deliver in April and May, 1900, as much as 2,500 tons per month of such rock as

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¶ 2. See Sales, vol. 43, Cent. Dig. § 1087.

was called for in the contract, and that each had the requisite quantity of rock on hand to supply the contract, the evidence was sufficient to establish the sellers' ability to perform.

4. SAME—ELECTION OF REMEDIES.

Where, after defendants notified plaintiffs that they would not accept phosphate rock contracted for, plaintiffs gave notice of their intention to store or resell such rock, such notice did not constitute such an election by plaintiffs to treat the contract as still subsisting for the benefit of the defendants as precluded plaintiffs from maintaining an action to recover damages for breach of the contract, on the theory that it was terminated by defendants' notice of their refusal to accept.

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

R. B. Honeyman, for plaintiffs in error.
H. A. Forster, for defendants in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendants in the court below to review a judgment for the plaintiffs entered upon a verdict of a jury.

The action was brought to recover damages for the breach by the defendants of a contract with the plaintiffs made August 9, 1899, whereby the defendants agreed to buy 5,000 tons of phosphate rock of the plaintiffs at the price of $4 per ton, "delivery to be completed when loaded on cars at Mt. Pleasant, Tennessee, and sampling to be done at time of loading." By the terms of the contract, the rock was to be shipped to the defendants at any time between February 1 and June 1, 1900, at buyers' option, "but seller to have at least fifteen days' notice before goods are required, and goods to be loaded at the rate of 200 tons for each working day, not more than 2,500 tons in one month." It was proved upon the trial that the plaintiffs were the selling agents of an association of phosphate rock miners in Tennessee, and the exclusive selling agents for another mining concern there, and had a contract with each to deliver as much as 2,500 tons of rock per month in April and May, 1900, such as was called for by the contract with the defendants, and that each had the requisite quantity of rock on hand to supply the contract. It was also proved that on April 19th the defendants wrote the plaintiffs as follows:

"We have delayed answering your letters with reference to the 5,000 tons phosphate rock, hoping that we might be able to give shipping directions. * * * The war in South Africa has caused an absolute dearth of vessels and it is impossible for us to get anything to enable us to carry out the contract. * * * We can only say that we are forced to accept your proposition to hold us liable for your loss, if any, and we hope you will make your loss as little as possible."

April 30th the plaintiffs wrote the defendants, inclosing an invoice for 2,500 tons of rock, and stating:

"Goods not moved according to contract, therefore at your risk, and any and all expenses and losses for your account, storage charges for your account."

On May 7th the defendants again notified the plaintiffs as follows:

"Replying to your favor of the 4th inst., we beg to say that we intended by our letter of the 10th ult., to notify you of the fact that we were not going to take the phosphate called for by the contract, and our subsequent letters are quite sufficiently positive upon that point we think. We will of course be glad to meet you with a view of adjusting any losses."

May 11th the plaintiffs wrote to the defendants as follows:

"In view of your positive notice that you will not accept delivery, we notify you herewith of our intention to sell the phosphate on your account for the best price obtainable in open market, and will look to you for any loss which we may sustain."

May 14th, answering this letter, the defendants wrote to plaintiffs:

"We must request you not to sell any phosphate rock on our account."

Evidence was given upon the trial tending to show that the market price for phosphate rock of the contract kind in Tennessee during the months of April and May was as low as $2.50 per ton, that there was little or no sale for it during those months, and that the price declined from about $4 per ton in 1899 to $2.75 in the spring of 1900. The jury found a verdict for the plaintiff for $3,750.

The principal question raised by the assignments of error is whether the trial judge was correct in refusing to direct a verdict for the defendants. The defendants requested such a direction upon the ground that the plaintiffs had not shown that they were ready, able, and willing to deliver the phosphate, and it was obligatory upon them to show that they were ready to make tender.

The law applicable to actions for a breach of contract of sale of goods is so familiar that it almost seems superfluous to repeat the settled rules which obtain. Upon a breach by the vendee the vendor is at liberty to fully perform upon his own part, and, when he has done all that is necessary to effect a delivery of the goods, so as to pass the title to the vendee, he may store or retain them for the vendee, or give the vendee notice and resell them. If he pursues the former course, he is entitled to maintain an action for the contract price of the goods. If he pursues the latter, his recovery will be the difference between that price and the net proceeds of the resale. But it is not obligatory upon him to adopt either of these courses, and, if he does not care to do so, he is entitled to recover the difference between the contract price and the market price or value at the time and place of delivery fixed by the contract. Where a vendee explicitly refuses to perform his part of an executory contract before the time for performance by the vendor has arrived, no tender of performance on the part of the latter is necessary to entitle him to recover damages for the breach.

The defendants having explicitly renounced fulfillment of the contract, proof of the formal requirements to pass title, or to place the phosphate at the risk of the defendants, was not necessary, to entitle the plaintiffs to maintain the action. It would have been an idle ceremony for the plaintiffs to collect together the contract quantity of phosphate in order to make a formal tender of it to the defendants, and neither good faith towards the defendants, nor good sense, nor any technical rule of law, required them to do so. It was necessary for them to

show upon the trial that they could have procured it—in other words, that they were in a situation to perform the contract if the defendants had not repudiated it—because otherwise it would not have appeared that they had sustained any substantial damage from the breach. Bigler v. Morgan, 77 N. Y. 312, 319. The evidence introduced was sufficient for that purpose. Stanton v. Small, 3 Sandf. 230. The contention for the defendants that the plaintiffs, by giving notice of their intention to store or resell the phosphate, elected to treat the contract as still subsisting for the benefit of the defendants, and became thereby subject to the performance of all its obligations on their own part, is without any foundation. The authorities cited in its support are those like Frost v. Knight, L. R. 7 Exch. 111, where an action is brought before the time for performance on the part of the defendant has expired, upon the theory of an anticipatory breach on his part, and those like Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255, which do not proceed upon the theory of an anticipatory breach, but after the breach the promisee has elected to keep the contract alive, and the promisor has acted in reliance upon such election. In such cases the effect of the election to treat the contract as still subsisting is to permit the other party to fulfill it and obtain its benefits, notwithstanding his previous breach. The election is a waiver of the breach. The authorities cited have no application to the present case. There having been no tender of the phosphate, and the title not having passed, the notices which were given by the plaintiffs proceeded upon a mistaken notion of their rights. The notices, however, in no way altered the situation of the defendants, or imposed any new obligations upon themselves. Their only effect was to evoke counter notices from the defendants that they would not consent to the course proposed. Neither party was influenced by them. Even if the plaintiffs had acted upon the notices and resold the phosphate, this would not have been a waiver of their claim for damages for nonperformance of the contract. Sands v. Taylor, 5 Johns. 395, 410, 4 Am. Dec. 374. The trial judge was correct in refusing to direct a verdict for the defendants.

The rulings of which error is assigned upon the question of damages, and in respect to the admission and exclusion of evidence, have been examined, and we do not find that any of them require detailed consideration or afford any substantial ground of complaint.

The judgment is affirmed.

AMERICAN ALKALI CO. v. SALOM.

(Circuit Court of Appeals, Third Circuit. June 29, 1904.)

No. 57.

1. CORPORATIONS—SUBSCRIPTION CONTRACT—FRAUD—INTENT—CURING ERROR.
Where a subscriber to the stock of a corporation defended on the ground that he was induced to subscribe by fraudulent representations, an objection that an offer of evidence was not complete in that it did not propose to show that the statements of fact alleged to be untrue were made with a fraudulent intent, was cured by an instruction that it was necessary for defendant to show not only that the statements complained of were false, but that they were made with a fraudulent intent.

2. SAME—STATEMENT OF FACT.
Statements in a stock subscription contract that certain patents owned by persons designated were the basic patents under which the manufactured article was to be produced, and that it was proposed by the corporation to be formed, to acquire such patents and improvements for the United States, and to pay therefor 480,000 shares of the full-paid common stock of the company and $1,000,000 in cash, were statements of fact on which it was intended that subscribers should rely, and were, therefore, the proper subjects of false representations.

3. SAME—RESCISSION—TENDER OF STOCK.
Where, in an action on a stock subscription contract, defendant pleaded a rescission of the contract for false representations and fraud, and in his affidavit of defense tendered a return of his stock, such tender was sufficient, though prior to his discovery of the fraud he had sold certain of his shares, which, however, he could replace at any time by purchase in the open market.

4. SAME—RESCISSION—DEFENSE AT LAW.
A subscriber to the stock of a corporation is entitled to plead a rescission of the sale for fraud as a defense to an action at law to recover assessments on the subscription contract.

5. SAME—FALSE REPRESENTATIONS—RELIANCE.
Where misrepresentations of fact were contained in a corporate stock subscription contract itself, and were held out as material inducements to persons who were solicited to subscribe for stock, a subscriber's signature to the contract, in the absence of evidence to the contrary, was sufficient proof that he relied and acted on the faith of such representations.

6. SAME—LACHES—ESTOPPEL.
Where defendant was induced to subscribe for stock in a corporation on the faith of false representations made by the corporation itself and contained in the subscription contract, the corporation was estopped to claim that defendant was bound to investigate the truth of such statements, and was guilty of laches in failing to make any inquiry to ascertain the truth of such representations until shortly before defendant filed his affidavit of defense in a suit by the corporation to recover assessments levied on the stock.

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

See 125 Fed. 1006.

Reynold D. Brown, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. This was an action by the American Alkali Company, a corporation organized under the laws of the state of New Jersey, against Pedro G. Salom, to recover an assessment of $2.50 per share upon 1,000 shares of the plaintiff company's capital stock subscribed for by the defendant. The written subscription contract, which is the foundation of the claim in suit, contains the following statements on the part of the plaintiff corporation:

"Whereas, the Commercial Development Corporation of England owns for the United States the patent rights of Mess. Hermite and Dubosc and John G. A. Rodden, together with the further improvements that may be made by these patentees for the electrolytic production of caustic soda and bleaching powder. The patents of Mess. Hermite and Dubosc are the basic patents and

that of Mr. John G. A. Rodden, by far the most efficient and economical invention yet made for the production of these important chemical products;

"And whereas, it is proposed to establish in this country at some important water power, either Niagara or Sault Ste. Marie or other advantageous point a large plant for the production of these products and for that purpose to acquire the aforesaid patents with all improvements, etc., for the United States, and to pay therefor 480,000 shares of the full paid common stock of the company and $1,000,000 in cash."

The defense rested upon the ground that these were material statements, and that they were false, and were fraudulently made. There was a verdict for the defendant, and, judgment in his favor having been entered on the verdict, the plaintiff brought this writ of error.

We will follow the groupings and order of the assignments of error presented in the brief of the counsel for the plaintiff in error in our treatment of the case.

1. The assignments of error Nos. 1–4, as to necessity of fraudulent intent.

If the offer of evidence was incomplete in that it did not propose to show that the statements of fact alleged to be untrue were made with fraudulent intent, such omission in the offer was cured subsequently. The trial judge distinctly charged the jury that it was necessary for the defendant to show not only that the statements complained of were false, but also that they were made with fraudulent intent. The instructions of the court upon this branch of the case, we think, were unobjectionable.

Even if we assume that the point was distinctly made in the court below, or is involved in any of the assignments, we cannot agree to the proposition that the defendant was absolutely concluded by reason of his negative response to the single question whether he now had any reason to doubt that Mr. Gibbs believed the statements to be true. That one answer of the witness was to be considered in connection with his entire testimony. It was for the jury to determine the question of fraudulent intent from the whole evidence in the case. That question was fairly submitted to the jury.

2. Assignments of error Nos. 5, 6.

The main question raised by these assignments is whether the statement that the patents of Hermite and Dubosc are the basic patents for the electrolytic production of caustic soda and bleaching powder was the assertion of a fact or a mere expression of opinion. The learned trial judge charged the jury that this statement was the affirmation of a fact, and he distinguished it from the statement that the Rodden patent "is by far the most efficient and economical invention yet made for the production of these important chemical products," which latter representation, he instructed the jury, was an expression of opinion. Having regard to the circumstances, namely, that the proposed enterprise was the production of caustic soda and bleaching powder by the electrolytic method, and that the statement that the patents of Hermite and Dubosc were the basic patents—that is, fundamental patents—in the production of those substances appeared in the subscription paper presented to persons who were solicited to subscribe for stock in the company, we cannot doubt that the statement was intended as an affirmation of a fact, and to be so accepted by subscribers.

The statement was not in form the expression of an opinion, but was positively made. It related to a matter of prime importance, and was apparently based on actual knowledge. Undoubtedly, it was intended that persons who were solicited to subscribe for stock should rely upon the statement as true, and act upon it. We think that the court below was quite right in charging the jury that the statement that these patents were "the basic patents" for the purpose named was the affirmation of a fact.

We are not able to give assent to the suggestion that there was no evidence tending to show fraudulent intent in making the statement that the patents were the basic patents. That the letter of Mr. Bennett, the patent lawyer, furnished a justification for that statement, we cannot affirm. The question of fraudulent intent was for the jury under all the evidence.

3. Assignment of error No. 7, as to statement of price proposed to be paid for patents.

This assignment reads thus:

"The learned judge who tried the cause erred in charging the jury as follows: 'I say, therefore, that is a statement not of what had been done, but what was proposed to be done; but that it was none the less, for that reason, a statement of fact.'"

This assignment, we think, is not well founded. The statement that it was proposed to pay for the patents 480,000 shares of the full-paid common stock of the company (equal to $24,000,000 of stock at par value) and $1,000,000 in cash was not a mere promissory statement as to future plans or expectations. The statement, especially when read in connection with the context, imported a present determination—a fixed purpose. The stated price was part and parcel of the enterprise disclosed in the subscription paper. A subscriber had a right to regard the named price to be paid for the patents as a statement of fact. That the statement was intended to be the representation of a fact is plain to us. The plaintiff company, having adopted the subscription contract, is bound by the statements of fact therein contained.

A recital of the evidence upon this branch of the case would be unprofitable, and is not called for by this assignment. We then content ourselves with saying that we think the evidence fully justified the court in submitting to the jury the question whether or not the statement as to the price to be paid for the patents was false, and, if false, whether or not the statement was fraudulently made.

4. Assignment of error No. 8.

This assignment is to the refusal of the court below to affirm the plaintiff's first point, namely, "Under all the evidence your verdict should be for the plaintiff." It is urged in support of this assignment that it appears from the testimony of the defendant upon the trial of the case that before his rescission he had sold some of the shares of common stock he had received in the transaction, but that he could at any time replace these shares by purchase in the open market. No point on this score was made upon the trial below, and we think it is hardly open to the plaintiff in error to raise the question here under the assignment to the refusal of the court to grant his general prayer

for binding instructions. But, aside from that view, the position is without merit. The defendant, in his affidavit of defense, tendered a return both of his common and preferred stock, and this was a continuing tender. We think it was a good tender, notwithstanding his sale of the few shares before his discovery of the fraud, for he could replace these shares, and make his tender effective, by purchase in the open market, and under the circumstances that was sufficient.

Under the eighth assignment the plaintiff in error contends further that the defense that the defendant's subscription was procured by fraudulent representation cannot be set up in this action at law. To sustain this position the case of Lantry v. Wallace, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218, is cited. But that was an action by a receiver of a national bank to enforce the statutory liability of a stockholder to pay an additional 100 per centum for the benefit of creditors, and the ruling was that, if the defendant was entitled, by reason of the fraud practiced upon him by the bank, to a rescission of his contract of purchase of stock and to a cancellation of his stock certificate, and consequently to be relieved from his statutory responsibility as a shareholder of the bank, he could obtain such relief only by a suit in equity to which the bank and the receiver were parties. In the present case, however, the action is by the corporation itself, and is brought to enforce the subscription contract. We think it very clear that in an action at law to enforce a contractual demand such as is involved here, fraud is an available defense. Russell v. Clark, 7 Cranch, 69, 3 L. Ed. 271; Insurance Company v. Bailey, 13 Wall. 616, 20 L. Ed. 501. In the case last cited equitable jurisdiction was denied upon the ground that the fraud alleged was available as a defense at law in a suit upon a policy of insurance.

5. Assignment of error No. 9, as to proof that defendant relied upon the alleged misrepresentations.

It is enough to say that the misrepresentations complained of were not statements made merely by an agent, but were contained in the subscription contract itself. Manifestly, they were material inducements held out to persons who were solicited to subscribe for stock. They were the very ground upon which subscriptions were to be made. The signature of the defendant (in the absence of evidence to the contrary) was positive proof that he relied on these representations and acted on the faith of them.

6. Assignment of error No. 10.

The plaintiff, in his fourth point, requested the court to charge that:

"If defendant was induced in May, 1899, to become a holder of the preferred stock of the plaintiff company by the misrepresentations alleged in the affidavit of defense, or any of them, then it was the duty of the defendant to use reasonable diligence to ascertain the truth of such representations. If he did not do so within a reasonable time, and did not ascertain the truth of said matter until more than two years later, then he cannot maintain any defense by means of such misrepresentations."

In response to this request the court instructed the jury that the obligation upon the defendant "was with reasonable promptness, upon being informed or in any manner learning that either of the alleged misstatements contained in this paper existed to repudiate—or, as

lawyers say, rescind—the contract"; but as to there being an obligation upon the defendant to make inquiry to find out whether the paper was true or false within any period of time, and before the question was in any manner brought to his attention, the court answered the point negatively. Under the facts of the case, these instructions, we think, were entirely right. The defendant signed the subscription contract in May, 1899. The assessment sued for was made in September, 1901. The call therefor was by the corporation itself, then a solvent and going concern, and was for the purpose, as expressed in the resolution, of "providing funds for the completion of the present works, the building of additional works, and providing working capital." This action was brought and has been prosecuted by the corporation itself. The date of the institution of this suit was December 17, 1901. The affidavit of defense, which sets up the misrepresentations complained of, was filed January 3, 1902. Information as to the falsity of the representations was not received by the defendant until very shortly before he made his affidavit of defense. We see nothing in this case which made it the duty of the defendant to make earlier inquiry to ascertain the truth of the representations contained in the subscription contract and upon the faith of which the defendant entered into the contract. In the absence of knowledge or any information as to the untruthfulness of the representations, the defendant had a right to rest upon them. Certainly it does not lie in the mouth of the plaintiff to charge the defendant with lack of diligence in discovering the fraud of which he complains. We think it may be affirmed confidently that as against the corporation itself a subscriber for stock is not bound to investigate the truth of statements upon the strength of which he subscribed. The Directors, etc., of the Central Railway of Venezuela v. Kisch, Law Rep. 2 H. L. 99; Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800; Mead v. Bunn, 32 N. Y. 275.

The appointment of a receiver for the company since suit brought cannot affect the rights of the parties which had become fixed.

We are of opinion that this record is free from error, and accordingly the judgment is affirmed.

E. W. BLISS CO. v. BUFFALO TIN CAN CO.

(Circuit Court of Appeals, Second Circuit. June 1, 1904.)

No. 190.

1. MANUFACTURE AND SALE OF MACHINERY—CONTRACTS—BREACH—MEASURE OF DAMAGES.

In an action for breach of a contract for the manufacture and sale of machinery, the buyer's measure of damages was the difference between the contract price and the market value of the machinery at the time and place where it was to be delivered, or, if there was no market value, then the difference between the contract price and what it would have cost the buyer to have the machinery manufactured; and this though plaintiff did not attempt to have equivalent machinery made.

¶ 1. Contracts for sale of things to be produced or manufactured, see note to Star Brewery Co. v. Horst, 58 C. C. A. 363.

2. SAME—LOST PROFITS.

Where, at the time a contract for the manufacture and sale of machinery was made, no notice was given to the seller that the machinery was to be used by a corporation to supply tin cans under an existing contract, the seller, on a breach of the contract, was not liable for alleged lost profits, based on the opinion and estimates of experts respecting the producing capacity of the contract machinery, and the probable output of the factory in which it was to be used, if the factory had been supplied with such machinery, properly installed, and operated to its capacity, etc.; such profits being speculative and uncertain.

3. SAME—DEFENSES.

Where defendant contracted to manufacture and sell to plaintiff certain machinery, defendant was not entitled to refuse performance on the ground that the machinery contracted for would infringe outstanding patents.

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

See 118 Fed. 106.

P. G. Bartlett, for plaintiff in error.

Chas. J. Bissell, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The action was brought to recover damages for the breach of a written contract between the defendant and the Erie Preserving Company, dated April 3, 1901, whereby the defendant undertook to build and deliver to that company certain described machinery for making tin cans, and the Erie Preserving Company agreed to pay therefor the sum of $21,678. The contract provided that the machinery should be completed and ready for delivery to the Erie Preserving Company within 18 months from the date of the contract; that the quality of the machinery should be first-class, as to workmanship and material; that it should be inspected and accepted at the shop of the defendant; and that, upon a demonstration of the successful working of the machines, tested singly by the defendant, the defendant should be considered as having carried out its part of the contract.

The complaint alleged, and it was proved upon the trial, that on May 10, 1901, the defendant rescinded the contract, and, by a written notice, refused to deliver the machinery to the Erie Preserving Company. On July 10, 1901, the Erie Preserving Company assigned the contract and its right of action for damages to the plaintiff, a corporation organized shortly after the date of the contract.

Of the numerous assignments of error, those only need be considered which challenge the rulings of the trial judge in admitting evidence, and his instructions to the jury upon the question of damages. In consequence of these rulings and instructions, the jury were led to award a recovery to the plaintiff of $75,000.

The plaintiff was permitted to give evidence tending to show that, after the defendant had refused to deliver the machinery, the plaintiff diligently endeavored to purchase similar machinery from other sources,

but was unable to do so, and that as soon as practicable it installed in its factory the best machinery for making tin cans which it was able to purchase in the market (the MacDonald machinery), and had used this machinery for its manufacturing purposes ever since. The plaintiff was also permitted to give evidence tending to show how many cans it could have made in its factory, and with its facilities, and at what cost per thousand, if it had been supplied with the contract machinery, and the market prices for such cans in the years 1901 and 1902. The plaintiff was also permitted to give evidence tending to show that, about the time the Erie Preserving Company assigned to it the contract with the defendant, it made a contract with that company to sell to it during the year 1901 12,300,000 cans at specified prices; that in 1902 it also made a contract with that company to sell to it during that year 14,000,000 cans at the ruling market prices; that during the year 1901 that company actually used over 8,000,000 cans, and during the year 1902 over 9,000,000 cans, such as the plaintiff had contracted to sell to it; that with the contract machinery the plaintiff could have produced the whole number of cans called for by its contracts with the Erie Preserving Company; and that, using the MacDonald machinery, it had only been able to make about 9,000,000 cans in 1901 and 1902. The defendant duly objected to the admission of this evidence, and excepted to the rulings of the trial judge in receiving it.

The trial judge instructed the jury that they were to take the foregoing evidence into consideration in ascertaining what damages had accrued to the plaintiff for the breach of the defendant's contract during the years 1901 and 1902. He also instructed the jury as follows:

"Whether damages should be awarded to the plaintiff because of future losses—losses for the year 1903 and future years—that is entirely in your discretion. Such discretion, however, must, of necessity, be based upon the evidence and the circumstances in the case. If such damages should be very problematical, and hinge upon extreme uncertainty, you should not award any damages. * * * The question submitted to you upon this subject is whether the damages sought to be recovered for losses of gains or profits in the future are such as can with reasonable certainty be ascertained. Before awarding prospective damages, as distinguished from actual damages, you should take into consideration that corporations may default in their commercial undertakings; that machinery of the kind in controversy, or the equivalent of such machinery, may in future years be improved; that combinations now alleged to control the market may not continue; that the ingredients of manufacture may have a different value; and doubtless many other speculative considerations would enter into an award for future losses. Should you, however, with reasonable certainty, be able to say, because of the circumstances of this case, that the plaintiff will sustain damages in future years, including the year 1903, you may render an award for such prospective damages."

The defendant duly excepted to these instructions.

That the assignments of error based upon the exceptions to these rulings and instructions are well founded is hardly a debatable proposition. The evidence which was submitted to the consideration of the jury was mainly, and of necessity, based upon opinions and estimates respecting the producing capacity of the contract machinery, and respecting the probable output of the plaintiff's factory during the period beginning at the inception of its business, if the factory had been supplied with the machinery, if the machinery had been properly installed, if it

had proved equal to its expected capacity, and if it had been efficiently operated. The normal producing capacity of machinery which has been adequately tested is susceptible of proof, and such proof can be safely accepted as the standard for similar machinery; but the probable producing capacity of a manufacturing concern which is about to enter upon a new business depends upon so many considerations, irrespective of the machinery which it is to employ, that opinions and estimates about it are little more than guesses. But the objection to the evidence is not that it is unreliable. It does not go to the weight or value of the testimony. The objection is that the evidence bears upon an inquiry which the courts ought not to entertain.

In actions for breach of contract, like the present, the measure of damages is usually the difference between the contract price of the things which are to be made and delivered, and their market value at the time and place where they should have been delivered. In exceptional cases this rule of damages is extended to include other losses occasioned by the breach; but never, according to the best-considered authorities, is it extended to include the loss of general profits which the injured party might have been able to realize from using them in his business for manufacturing purposes, and disposing of the products. The cardinal rule is familiar that only such damages are recoverable as follow directly and naturally from the breach of contract—such as it may be fairly supposed the parties contemplated when contracting as the natural sequence of its breach—and these must be certain, as distinguished from speculative or contingent, damages. The application of this rule to the present case is best illustrated by reference to a few of the adjudications. Howard v. Stillwell, etc., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, was a case where the contract broken was one for the reconstruction of a mill by placing certain specified machinery therein within a specified time, guarantied to have a specified capacity; and the mill owner sought to prove, as damages for the breach, the profits which would have been realized from the use of the mill during the period of delay in performing the contract. The court held that the evidence of such damages was inadmissible. Pennypacker v. Jones, 106 Pa. 237, was a case where a mill owner had made a contract with machinists to place in his mill within a specified time machinery of a certain capacity to make high-grade flour. The machines furnished were incapable of making high-grade flour, and of producing the stipulated number of barrels per day. In an action for damages by the mill owner for breach of the contract, the court held that the loss of possible profits which might have been made if the mill had run properly was not a proper subject of damages, and for the reason that such damages were too remote and speculative. In Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718, the plaintiff agreed to build a steam engine and boilers for the defendants, and to deliver it to them on a day certain. He failed to do so, and a delay of one week occurred, during which the defendants lost the use of the machinery for the sawing and planing of lumber which the steam engine was intended to drive, and which plaintiff knew it was intended to drive. The court held that the defendants, in recouping damages, were not entitled to measure their loss by a breach of the contract by estimating what they might have

made by the use of the engine and their other machinery, had the contract been complied with, and decided that they were entitled to recover the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the engine. In Rochester Lantern Company v. The Stiles & Parker Press Co., 135 N. Y. 209, 31 N. E. 1018, the defendant entered into a contract with one Kelly to make and deliver to him within a reasonable time certain dies to be used by him in the manufacture of lanterns. Before the breach, Kelly assigned his contract to the plaintiff; and the plaintiff sought, as damages for the breach, to recover rent of premises, and wages of employés, paid during the time in which, in consequence of not being supplied with the dies, he was unable to manufacture any lanterns. The court held such damages were not recoverable, and said:

"The natural and obvious consequence of a breach of this contract on the part of the defendant would be to compel Kelly or his assignee to procure the dies from some other manufacturer, and the increased cost of the dies, if any, would be the natural and ordinary measure of damages; and such would be the damages which it could be fairly supposed the parties expected, when they made the contract, would flow from a breach thereof."

Although it is unnecessary for present purposes to consider any of the other assignments of error, it is proper that we should make some further observations for the guidance of any future trial of the cause. The voluminous record before us presents the proceedings of a very protracted trial, and exhibits an accumulation of evidence upon matters which had no legitimate bearing upon the real controversy between the parties. The making of the contract was not disputed. The breach was not disputed. The alleged justification for the breach put forth by the defendant—that it had discovered that the machinery would infringe outstanding patents—hardly merited serious consideration, and was properly excluded by the trial judge. The evidence offered by the plaintiff bearing upon the defendant's motive or inducement for the breach was wholly immaterial. The real controversy between the parties resolved itself merely and simply into an inquiry as to damages. This inquiry should have been limited to ascertaining the difference between the contract price of the machinery which the defendant undertook to furnish, and the cost to the plaintiff of procuring similar machinery from some other source. If, as was suggested by the evidence, the machinery could not have been bought from other vendors, it was open to the plaintiff to have it made, and in this behalf to employ draftsmen and mechanics competent to make it; and, notwithstanding plaintiff did not attempt to have equivalent machinery made, if it had shown upon the trial that the reasonable expense of procuring such machinery would have exceeded the contract price, the plaintiff would have been entitled to recover the excess. When an article has no market value, an investigation into the constituent elements of the cost to the party who is entitled to be furnished with it becomes necessary; and that, compared with the contract price, will afford the measure of damages. Masterton v. The Mayor, 7 Hill, 61, 71, 42 Am. Dec. 38. The evidence did not suggest that the defendant was aware when the contract was made that the Erie Preserving Company proposed to use the machinery in any particular factory, or

install it as a part of any particular plant. That company was at the time engaged in the business of preserving fruits and vegetables, and, instead of buying its cans in the market, as it had done previously, proposed to manufacture them itself. According to the testimony for the plaintiff, the defendant was aware that the plaintiff intended to go into the business of making its own cans, and that it proposed to organize a subordinate or auxiliary corporation to carry on the canmaking business. At that time, however, the plans of the Erie Preserving Company were inchoate. It had not rented any factory building or purchased any auxiliary plant. Indeed, it would seem that this was not done until after the defendant had repudiated its contract and notified the Erie Preserving Company. Under these circumstances, it cannot be said with any color of reason that the parties to the contract contemplated when it was made any liability of the defendant, in the event of a breach, beyond the usual consequences of the failure of a vendor to deliver property which he had agreed to sell. In the language of the court in Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 545, 23 Sup. Ct. 754, 47 L. Ed. 1171:

"It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough, necessarily and as a matter of law, to charge the seller with special damage on that account if he fails to deliver the goods."

As was said by the Supreme Court of Massachusetts in Harvey v. Conn., etc., R. R. Co., 124 Mass. 424, 26 Am. Rep. 673:

"The mere knowledge on the part of the defendant that the plaintiff intended to make contracts for the sale of the ties to be transported cannot impose a liability upon the defendant for the loss of profits of such contracts. Whether there would be a loss of profits, it was, of course, then impossible to tell, and probable profits would be incapable of estimation."

If at the time of the making of the contract with the defendant the Erie Preserving Company had acquired and installed a manufacturing plant, and the contract had contemplated the use of the machinery as an indispensable part of the plant, the case would have been one, according to some of the authorities which have been referred to, in which the rental value of the plant during the time required to supply equivalent machinery would have been an element of damages, in addition to the difference in cost

The judgment is reversed.

LACOMBE, Circuit Judge. I concur fully in this opinion. The proposition advanced in argument, that plaintiff would have been enjoined by the owner of outstanding patents from using equivalent machinery, even if he had had it built, is of no weight. That circumstance would not modify the rule of damages laid down in the opinion for breach of a contract to make and deliver machinery. The contract sued upon is not one to save plaintiff harmless from all suits for infringement of patents.

BLUE MOUNTAIN IRON & STEEL CO. v. PORTNER et al.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1904.)

No. 544.

1. BANKRUPTCY—ADJUDICATION—SUBMISSION OF QUESTIONS.
On the hearing of an involuntary bankruptcy petition, where the appointment of a receiver by the state court was claimed to constitute the act of bankruptcy charged, questions submitted to the jury as to whether on the date the receivers were appointed, and at the date of filing the bankruptcy petition, the aggregate of the property of the alleged bankrupt, at a fair valuation, was sufficient to pay its debts; whether, because of the insolvency of the alleged bankrupt, receivers were put in charge of its property under the state laws; and whether such receivers took charge and possession of the property, and have since so remained—were proper.

2. SAME—RECEIVERS—STATE COURTS—JURISDICTION—COLLUSION.
Where it was claimed that a state court had no jurisdiction to appoint receivers for an alleged bankrupt corporation, for the reason that, prior to the filing of the bill under which the appointment was made, another bill was filed in another court for the same purpose, but it appeared that the prior proceeding was collusive, and that nothing was done or intended to be done therein except to file the bill, such proceeding was ineffective to prevent the appointment of receivers in the subsequent suit constituting an act of bankruptcy.

3. SAME—STATE COURTS—GENERAL JURISDICTION—JUDGMENT—COLLATERAL ATTACK.
The appointment of receivers for a corporation by a state court of general jurisdiction was not subject to collateral attack on the ground that the court did not have jurisdiction of the corporation's person.

4. SAME—JUDICIAL PROCEEDINGS—BEST EVIDENCE—RECORDS.
Where an order of court appointing receivers for a corporation was in writing, parol evidence of the judge who made the order was inadmissible to show the grounds thereof.

5. SAME—ADMISSIBILITY.
On an issue as to whether defendant had committed an act of bankruptcy by reason of the appointment of receivers to administer its assets in a state court, the record was admissible to show the appointment of such receivers, and that they were appointed because of defendants' insolvency.

6. SAME—TEMPORARY RECEIVERS.
Under Bankr. Act 1898, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410], declaring that the appointment of a receiver for an alleged bankrupt, while insolvent, shall constitute an act of bankruptcy, it was immaterial that receivers appointed for an alleged bankrupt corporation were temporary, and not permanent.

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

In Bankruptcy.

Henry C. Terry (Abraham Sharp and Hammond Urner, on the brief), for plaintiff in error.

Bernard Carter and C. Andrade, Jr. (Jacob Rohrback, L. B. Keene Clagett, and J. Kemp Bartlett, on the brief), for defendants in error.

¶ 3. See Corporations, vol. 12, Cent. Dig. § 2241.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PURNELL, District Judge. Upon petition filed by defendant in error, after answer filed thereto, and a jury trial of the issues raised, the plaintiff in error, a corporation, was by the court adjudicated a bankrupt on the 17th day of December, 1903. This writ of error was thereupon granted to the plaintiff in error, and presents for revision the correctness of certain rulings on questions of law made by the judge of the District Court during the trial.

The said petition was filed in the District Court August 3, 1903, averments of which are, in substance: (1) That there is owing to the petitioners by the bankrupt, plaintiff in error here, in the aggregate, more than $1,000; specifying the amount owing to each of petitioners. (2) That the Blue Mountain Iron & Steel Company was on or about May 13th or 12th insolvent, and, because of its insolvency, in a proceeding theretofore instituted against it in the circuit court of Frederick county, Md., by certain named creditors thereof, receivers were appointed by an order of said state circuit court passed on the 15th day of May, 1903, and said receivers put in charge of the property of said company. (3) That the said company belongs to one of the classes named in section 4, subsec. "b" of the bankrupt act, as amended (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), wherein it is provided that any corporation engaged principally in mining or mercantile pursuits, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt, and shall be subject to the provisions and entitled to the benefits of the bankrupt act; (4) that the Blue Mountain Iron & Steel Company was then and had been engaged principally in mining at its furnaces at Catocton, Frederick county, Md., and the court has full power to adjudge the said company bankrupt.

After service of process the Blue Mountain Iron & Steel Company answered, denying it had committed the act of bankruptcy alleged, and that it was insolvent; setting up that the receivers were unlawfully appointed without notice.

A replication to the answer was filed, and, the defendant (plaintiff in error here) having demanded a jury trial, a jury was impaneled, and, after hearing the evidence, the court submitted to the jury three issues of fact, and gave in connection therewith certain instructions. The jury by their verdict answered the questions submitted, and the court signed an adjudication of bankruptcy.

After testimony had been offered both in behalf of petitioning creditors and defendants, the following are the questions which were submitted to the jury, and the responses thereto in the verdict:

(1) Whether on the 12th day of May the date of the appointment of Leonard R. Waesch and others as receivers of the Blue Mountain Iron & Steel Company of Baltimore City, by the circuit court of Frederick county, Maryland, sitting in equity in the case of the Maryland Casualty Company et al. v. the said Blue Mountain Iron & Steel Company of Baltimore City, the aggregate of the property of the said Blue Mountain Iron & Steel Company of Baltimore City was, at a fair valuation, sufficient in amount to pay its debts? A. No; it was not.

(2) Whether on the 3d day of August, 1903, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the property of said Blue Mountain Iron & Steel Company of Baltimore City was, at a fair valuation, sufficient in amount to pay its debts? A. No; it was not.

(3) Whether, because of insolvency of the Blue Mountain Iron & Steel Company of Baltimore City, Leonard R. Waesch and others, as receivers, on the 12th day of May, 1903, were put in charge of the property of the Blue Mountain Iron & Steel Company of Baltimore City, under the laws of the state of Maryland, and whether said receivers forthwith took charge and possession of said property under said order, and have so remained in charge of said property ever since so taking charge and possession of the same? A. Yes; they were and have so remained.

Thereupon the order adjudicating defendant a bankrupt was entered.

The questions submitted to the jury were proper, under the provisions of Bankr. Act, § 19a (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), and the adjudication followed as a consequence, unless there was error in the trial of the issues, in the instructions, or in the rulings of the court, to which the exceptions point.

In the first assignment of error the plaintiff in error asserts that the circuit court of Frederick county had no jurisdiction to appoint the receivers for the Blue Mountain Steel & Iron Company, because, (1) a few days before the bill was filed under which the appointment was made, another bill was filed by Ernest Sharp in the circuit court of the city of Baltimore; (2) because the principal office of the defendant corporation, as set out in the articles of incorporation, was to be in the city of Baltimore. Answer to this alleges, for reasons stated, that the bill by Ernest Sharp was collusive, and nothing more was done in the suit than the filing of the bill, nor was anything more intended to be done. We do not, for obvious reasons, discuss this question, though the facts stated in the answer, which seem to be well founded, would be a complete answer, and prevent this first suit having any effect on the decision of this court.

The second proposition is an attack on the jurisdiction of a state court of general jurisdiction (Const. Md. art. 4, § 20), and that its action cannot be thus collaterally attacked is well settled. In Grignon v. Astor, 2 How. 319, 11 L. Ed. 283, it was held that it was for the state court to decide upon the existence of facts which gave jurisdiction, and the exercise of the jurisdiction warrants the presumption that the facts which were necessary to be proved were proved. In courts of general jurisdiction, it is presumed that the jurisdiction existed. This case has been cited with approval by the Supreme Court in a great number of cases, notably, Applegate v. Lexington Min. Co., 117 U. S. 269, 6 Sup. Ct. 742, 29 L. Ed. 892; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Evers v. Watson, 156 U. S. 527, 532, 15 Sup. Ct. 430, 39 L. Ed. 520. In this last case the court, in the course of its opinion by Mr. Justice Brown, says:

"Even upon the theory of the plaintiff, to authorize the court to hold the decree in that case void in a collateral proceeding, it was necessary to show beyond any controversy that, upon the record, the court could not have had jurisdiction. This the pleader has failed to do."

Under all the authorities, the presumption is that all the facts necessary to give the state court jurisdiction were presented to that court; and, in the absence of proof beyond controversy to the contrary, which

the plaintiff in error in this case failed to set up, every presumption is in favor of the jurisdiction of the state court.

Pending the trial, defendants below tendered one of the judges of the circuit court of Frederick county, Md., as a witness, who testified that he entered the decree of May 12, 1903, appointing the receivers in the case of The Maryland Casualty Company et al. v. Blue Mountain Iron & Steel Company, and proposed to ask him: (1) "Will you state on what grounds you entered said decree?" and (2) "Did you enter said decree on the ground of insolvency?" To which questions petitioning creditors objected, and the court sustained the objection, to which ruling the defendants below excepted, and their bills of exception were allowed in due form.

No authority is cited to sustain these bills of exception, and it is doubted if any can be cited. It does not require argument to sustain the position that the order appointing the receivers, being in writing, must speak for itself, and no declaration of the judge who signed it can be given as grounds on which he entered the order. Public records can neither be explained nor varied by parol testimony. They are conclusive, speak for themselves, and imply absolute verity. Shankland v. Washington, 5 Pet. 390, 8 L. Ed. 166.

It is a fundamental rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, unless in cases where contracts are vitiated by fraud or mutual mistake, but this rule is too well understood and recognized to admit of doubt. Northern Assurance Co. v. Grand View Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

Another exception found in the record as having been signed and sealed by the District Judge is in the following bill of exceptions. After stating that, to maintain the issues on their part, the plaintiffs proved by competent witnesses that, after filing in this court the petition praying that the Blue Mountain Iron & Steel Company of Baltimore be adjudged bankrupt, there was due and owing by said defendant to each of said creditors, respectively, the amounts of money alleged to be due, and that no part of said moneys had been paid; and testimony by competent witnesses legally sufficient to prove that on the 12th of May and 3d of August, 1903, the aggregate of the property of the Blue Mountain Iron & Steel Company was not, at a fair valuation, sufficient in amount to pay its debts, to which no exception was taken, it proceeds:

"And the plaintiffs, further to maintain the issues on their part, then offered in evidence the record of the proceedings in the case No. 7,627, in equity, in the circuit court for Frederick county, Maryland, wherein the Maryland Casualty Company and others are complainants, and the Blue Mountain Iron & Steel Company of Baltimore City et al. are defendants, to the admission of which record the defendant objected, but the court overruled said objection, and admitted the record in evidence, to which action of the court the defendant excepted."

The allegations in the petition in bankruptcy are that the Blue Mountain Iron & Steel Company committed an act of bankruptcy on May 13, 1903, while insolvent, and "because of its insolvency," in a proceeding theretofore instituted in the circuit court of Frederick county by the American Casualty Company and other creditors of the Blue Mountain

Iron & Steel Company, receivers were appointed by an order of said court, and that this was an act of bankruptcy, under Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409], amending the act of Congress of July, 1898.

The defendant corporation denied by its answer that it is insolvent, and alleges the receivers were unlawfully appointed, without notice to respondents, and required proof of the facts alleged in the petition. This made the issue for the trial of which a trial by jury was demanded. The answers of some of the parties—notably, that of Ernest Sharp, who intervened—admitted the insolvency. At all events, the issue was made and submitted in the bankrupt court, and the best evidence of the appointment of the receivers was the record of the proceedings in equity in the court which made the appointment. It was the basis of the issue, and could have been proved in no other way. The record was competent for this purpose, and no authority is cited holding that the best evidence of a proceeding in a court of equity is not the record of the proceeding. Petitioners had proved, as stated in the exceptions, that the company was insolvent, according to the definition of insolvency in the bankrupt act, both on the 12th of May, the date receivers were appointed, and on the 3d of August, the day on which the petition in bankruptcy was filed. Then the question arose, was it on this account the receivers were appointed? The record of the proceedings in court was the best evidence, and there was no error in admitting it. As to the effect of this evidence, that was a question for the jury under the instructions of the court, and the only question presented by this exception is the competency of the evidence. There was no error in admitting this record.

The language of the amendatory act of February, 1903, and the act of bankruptcy alleged in the petition, is "because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, or a territory, or of the United States." The essential element in the alleged act of bankruptcy is insolvency. As stated, the petitioning creditors have alleged, and the jury found by the verdict, the defendant corporation was insolvent on the day the receivers were appointed, and on the day the petition in bankruptcy filed. The jury found as a fact that it was "because of insolvency" the receivers were put in charge of the company's property. The record was competent as a link in the evidence on this issue. But it is insisted on the argument and in the brief that the receivers were temporary and not permanent. To hold with this position that the bankrupt act requires permanent receivers to be appointed would be to read into the statute something the lawmaking department, Congress, did not see proper to put there. The language of the statute is has been "put in charge of his [its] property." In the case at bar the receivers were in charge of the property from May to August without anything being done on behalf of the corporation, except to lodge a motion. This did not vacate the order or affect it in any way. It is presumed the courts of equity in Maryland, like most others, are always open, and, at least to have any effect, it should be shown some effort was made to have this motion heard. The facts stated appear in the record, and the appointment of the receivers was in the discretion of the court, which cannot be re-

viewed in this court, if it could have been so reviewed by the state Court of Appeals. The property was in the hands of receivers, and the jury found it was because of insolvency shown to exist at the time said receivers were appointed. The discussion of the distinction between permanent and temporary receivers is therefore, in our opinion, unnecessary.

The other exceptions and assignments of error are to the refusal of the court to give special prayers for instructions to the jury, and are without merit.

Upon a thorough and careful examination of the record, we find no error, and the judgment of the District Court adjudicating the Blue Mountain Iron & Steel Company bankrupt is affirmed.

BRITAIN S. S. CO. v. J. B. KING TRANSP. CO.

(Circuit Court of Appeals, Second Circuit. April 6, 1904.)

No. 155.

1. COLLISION—STEAMSHIP AT REST—PASSING TUG WITH TOW.

A steamship which, while not anchored, was about to anchor, and had stopped her engines, and was moving very little with the tide, if at all, had the rights of a vessel at rest with respect to passing vessels; and a tug with a tow on a long line, which saw and knew the situation of the ship, was solely in fault for a collision between her and the tow, due to the failure to allow sufficient room in passing.

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding the tug Gypsum King solely in fault for a collision between barge No. 19, in tow of the Gypsum King, on a hawser, and the S. S. Woodford. The collision occurred on the anchorage off Clifton, Staten Island, from which the tug was taking the barge, and where the steamer was anchoring. At the time of the collision, a fog which had theretofore prevailed had begun to lighten up, and both vessels took advantage of the change; the tug starting on her voyage to Newport News, and the steamer shifting her anchorage some 600 or 800 feet.

The following is the opinion of the District Court, by HOLT, District Judge: "I think, on the evidence, that, although there was heavy fog at times on the day of the collision, during the period immediately preceding the collision there was only a light fog, and vessels and objects could be seen a quarter of a mile away. The Woodford was not at anchor. She was, therefore, under the preliminary inland rules, technically under way. If the ordinary rules of navigation apply, I think that the Gypsum King with her tow was an overtaking vessel under rule 24, and was in fault for not keeping out of the way of the Woodford. The evidence, however, is clear that the Woodford was almost, if not quite, at a standstill, preparing to anchor, and the men on the Gypsum King testify, in substance, that they thought at first that the Woodford was at anchor, and then that they saw that, although not anchored, she was about to anchor. I think that, in fact, she was probably still forging ahead very slightly, and drifting up a little with the flood tide, but her propeller was reversed, and she was doing all she could to entirely stop or make sternway, and she may have been entirely stopped. Under these circumstances, if she is to be regarded as a vessel substantially not under way, I think the Gypsum King was in fault for running into her. There is a presumption of fault when a vessel under way and under control runs into a vessel not

under way. The Gypsum King should have borne off longer to starboard, until her tow had passed the Woodford, and should have originally given the Woodford a wider berth. She was taking a course too near the Woodford for a tug having a tow on so long a hawser. I think the Woodford was not in fault for not blowing fog signals. She was not bound to blow fog signals because the Gypsum King did. The real test is whether it was foggy enough to require them. I think it was not. In any event, the only object of fog signals is to let other ships know that the one blowing them is there. The Gypsum King saw the Woodford 1,000 feet away, and that was an ample distance to permit the Gypsum King and her tow to pass the Woodford in safety. In my opinion, therefore, the omission of fog signals on the Woodford had nothing to do with the collision. My conclusion is that there should be a decree for the libelant, with a reference to ascertain the damage."

Chas. C. Burlingham, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The controlling question in the case is whether or not the steamer was substantially in motion. The district judge found that, although probably still forging ahead very slightly, and drifting up a little with the flood tide, she was almost, if not quite, at a standstill, preparing to anchor, and not under way. He heard some of the important witnesses, and there is no evidence presented sufficient to warrant a reversal of that finding. The witnesses for the steamer testify that she was not in motion. The respondent's witnesses testified that when they first saw her she was apparently at anchor, and, although subsequently they state she was in motion, they yet admit that they did not see her moving through the water, and apparently infer merely that she must have been in motion because collision ensued. The steamer was practically a vessel not under way, was seen to be such by the navigators of the tug, and was so seen at a distance amply sufficient to enable the latter to avoid collision, had they not undertaken to shave too close.

The decree is affirmed, with interest and costs.

BROWN v. HARKINS, Collector.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1904.)

No. 505.

1. DOCUMENTS—SECONDARY EVIDENCE—PROOF OF LOSS.

Rev. St. § 3303 [U. S. Comp. St. 1901, p. 2157], requires every distiller to keep a book in which shall be recorded certain facts specified with reference to his business; and section 3318 [U. S. Comp. St. 1901, p. 2164], after providing for the books to be so kept, declares that every person required to keep the books prescribed by such section shall on or before the 10th day of each month make a full and complete transcript of all the entries made therein during the month preceding, and, after verifying the same by oath, shall forward it to the collector of the district in which he resides. *Held*, in an action by a distiller to recover internal revenue taxes alleged to have been wrongfully imposed, that evidence that plaintiff's record book had been taken from him and carried to a certain collector's office, after which it was taken to the revenue agent's office at

G., and was last seen in 1893 or 1894, three years after the final disposition of a criminal case against plaintiff, and that search had been made in the office of the revenue agent, where it had last been seen, without proof that a search had been made in the collector's office for the transcript on which the assessment made was required to be filed, nor in the office of the clerk where the original record had been used in evidence in the criminal proceeding, was insufficient to justify the admission of oral evidence of contents of such record.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

E. J. Justice (D. E. Hudgins, on the brief), for plaintiff in error.
A. E. Holton, for defendant in error.

Before BRAWLEY, PURNELL, and McDOWELL, District Judges.

PURNELL, District Judge. The exceptions raise the question whether it is competent to prove by parol the contents of a record, which a distiller is required by act of Congress (section 3303, Rev. St. [U. S. Comp. St. 1901, p. 2157]), to keep, when it is not shown that proper search has been made for the record, and that the same cannot be found by an insufficient search.

One of the exceptions appearing in the record is to allowing a question as to the contents of this record, and the other to allowing the answer to this question.

The printed record discloses that the controversy was as to whether the tax had been paid on certain distilled spirits shipped in packages numbered as alleged in the complaint. The tax was paid by the plaintiff on certain alleged irregularities, which were reported by a revenue agent, which he contended appeared from the said record, and which he alleged tended to show that the packages had been refilled and reshipped. The Commissioner of Internal Revenue assessed a further tax against the plaintiff in respect to this property. Plaintiff paid the tax under protest, and brought this action to recover the amount he had so paid.

It was material upon the trial to know what the said record so kept by the distiller contained. The defendant showed, as a basis for offering parol testimony as to the contents of the said record, (1) that the record was taken from the plaintiff and brought to the office of the collector of internal revenue in Statesville in 1890; (2) that it was later taken to the office of the revenue agent at Greensboro; (3) that the book had not been seen in the office of the revenue agent since 1893 or 1894; (4) that the criminal case against plaintiff growing out of this matter was disposed of in 1890; (5) that the revenue agent's office was not the proper place for this book to be kept after this criminal case was disposed of; (6) that the book should be in the office of the collector of internal revenue, or in possession of the court; (7) that careful search had been made for the book by the witnesses Patterson and Kirkpatrick in the office of the revenue agent, and the book had not been found. There was no evidence that search had been made in the collector's office or in the office of the clerk of the court, or that it was not in one of those offices.

The court erred in overruling the objection of the plaintiff in error to the question asked by the attorney for the defendant of the witness Kirkpatrick respecting the contents of the records kept by the plaintiff as a distiller, when said records were not shown to have been lost in the manner necessary before parol proof of their contents can be heard.

The court erred in overruling the objection of the plaintiff to the answer and testimony of the witness Kirkpatrick respecting the contents of the distillery books kept by the plaintiff as distiller, which said testimony, it is believed, tended to bar the plaintiff's recovery, when said books had not been shown to have been lost, and due search was not shown to have been made for them in their proper repository.

The statute (section 3318, Rev. St.), after providing for the books to be kept—the record referred to—also provides, section 5, Act March 1, 1879 [U. S. Comp. St. 1901, p. 2164], "that every person required to keep the books prescribed by this section, shall on or before the tenth day of each month make a full and complete transcript of all entries made in such book during the month preceding, and after verifying the same by oath, shall forward the same to the collector of the district in which he resides." A penalty is imposed for failure to comply with the statute. There is no evidence of a failure to make or file the transcript, which the collector is required to preserve until authorized by the Commissioner of Internal Revenue to destroy the same.

The law then requires two records to be kept: One by the distiller or rectifier, which he is required to preserve for two years. This was taken from him by the revenue officers. The other, a verified transcript, which was filed in the office of the collector of the district. The first was the best evidence, and the transcript the second best evidence, if, indeed, it was not of equal dignity as evidence. Both of these records were in the hands of officers of the government, and at least one in the custody of the defendant himself. It is not necessary to cite authority for the proposition that the best evidence must be produced, or an inability to produce it satisfactorily shown before secondary evidence can be permitted. No search was made. The evidence establishes the fact that the record was taken from the plaintiff and carried to the collector's office at Statesville in 1889. Shortly thereafter it was taken to the revenue agent's office at Greensboro, and there it was last seen in 1893 or 1894, three years after the final disposition of the criminal case against the plaintiff. It was further in evidence that search had been made in the office of the revenue agent, where this book was last seen. This the court held sufficient evidence of its loss to authorize secondary evidence to be introduced as to its contents. No search was made in the collector's office where the transcript—the one on which the assessment is made—is required to be filed, nor in the office of the clerk, where the original had been used as evidence in a criminal proceeding against the plaintiff. The revenue agent told the counsel his office was not the place where the record would be found, and intimated search should be made in the collector's or clerk's office. This is called flippant by counsel for the United States, but it seems to be good law.

The counsel for defendant in error cite and rely on Minor v. Tillotson, 1 Pet. 99, 8 L. Ed. 621, which has no application. In that case plaintiff offered to show a copy of a grant to Gen. Wade Hampton, under which the plaintiff claimed title to certain lands, which was excluded by the court on the ground that the plaintiff had not accounted for the loss of the original. It was in evidence that search had been made among the papers of Gen. Wade Hampton. Mr. Justice Thompson, in commenting upon this case, says:

"The presumption of the law, therefore, is that the original deed was in possession of Gen. Wade Hampton, and the plaintiff could not be bound to search for it elsewhere; there being no law in Louisiana requiring deeds to be recorded. And it was proved, as a matter of fact, that it was once in his possession—at what time, however, is not stated—and the question is whether such search was made for it as to justify the admission of secondary evidence. The rules of evidence are adopted for practical purposes in the administration of justice, and although it is laid down in the books as a general rule that the best evidence the nature of the case will admit of must be given, yet it is not understood that this rule requires the strongest possible assurance of the matter in question. The extent to which the rule is to be pushed in a case like the present is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reason for its nonproduction. But when there is no suspicion, all that ought to be required is reasonable diligence to obtain the original."

Here there was other evidence, better evidence, record evidence, which could have been, and should in all fairness have been, produced. A more rigid inquiry should be made into the reason for its nonproduction. When a record is required by law to be kept, oral evidence of its contents cannot be offered unless the loss of the record is shown. Greenleaf on Evidence, § 86. The same is true of all writings, whether required to be kept or not, where the contents are material to the issue.

It is well settled that the loss of a writing must be proved, and that diligent search has been made therefor, before secondary evidence will be allowed for the purpose of proving its contents—"that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof." As to the degree of diligence required, "the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." Greenleaf on Evidence, § 558; Simpson v. Dall, 3 Wall. 460, 18 L. Ed. 265; Improvement & R. R. Co. v. Munson, 14 Wall. 442, 20 L. Ed. 867; Weatherhead's Lessee v. Baskerville et al., 11 How. 360, 13 L. Ed. 730; Bouldin and wife v. Massie's Heirs and others, 7 Wheat. 122, 5 L. Ed. 414; Rogers v. Durant, 106 U. S. 644, 1 Sup. Ct. 623, 27 L. Ed. 303; Renner v. The Bank of Columbia, 9 Wheat. 581, 682, 6 L. Ed. 166.

In Riggs v. Tayloe, 4 Wheat. 486, 6 L. Ed. 141, the Supreme Court lays down the rule:

"If a party intended to use a deed or any other instrument in evidence, he ought to produce the original if he has it in his possession, or, if the original is lost or destroyed, secondary evidence, which is the best the nature of the case allows, will then be admitted. The party, after proving any of these cir-

cumstances, to account for the absence of the original, may read a counterpart, or, if there is no counterpart, an examined copy, or, if there is no examined copy, he may give parol evidence of its contents."

This rule has been often cited with approval—notably in Williams v. United States, 1 How. 299, 11 L. Ed. 135; Burton v. Driggs, 20 Wall. 134, 22 L. Ed. 299; Stebbins v. Duncan, 105 U. S. 43, 27 L. Ed. 641.

In the case at bar there was a counterpart which was not looked for, and all the sources of information had not been exhausted; hence there was error in admitting parol testimony as to the contents of the record. The plaintiff in error is therefore entitled to a new trial.

Reversed.

VICTOR TALKING MACH. CO. v. AMERICAN GRAPHOPHONE CO.

(Circuit Court of Appeals, Second Circuit. April 21, 1904.)

No. 158.

1. PATENTS—INFRINGEMENT—TALKING MACHINES.
The Johnson patent, No. 679,896, for a sound box for talking machines, *held* not infringed, as to claims 7, 11, and 16.

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

For opinion below, see 125 Fed. 30.

This cause comes here upon appeal from a decree of the United States Circuit Court for the District of Connecticut dismissing a bill alleging infringement of complainant's patent No. 679,896, granted August 6, 1901, to Eldridge R. Johnson, for a sound box for talking machines.

Horace Pettitt, for appellant.

Philip Manro, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The single question herein is that of infringement of claims 7, 11, and 16. Each of these claims is limited to a construction comprising "a tempered steel spring," or "a thin, twisted spring," having twisted ends. The essential element of the invention claimed in the patent in suit is the provision of means for "a very delicate connection between the diaphragm and the stylus-bar; also to provide an extremely sensitive mounting for the stylus-bar"; said means comprising a spring "made of finely tempered steel," each end being "twisted or bent in opposite directions," so as to secure a balance by the resultant high tension of the spring. The defendant does not use a finely tempered steel for said connection and mounting. Its attaching piece is made of low-grade sheet steel, soldered to the bar by a process which would necessarily destroy the temper, if any, in said piece. It clearly appears from the evidence, and was shown by a practical demonstration upon the hearing, that these attaching pieces were not resilient, but that

they remained in any position in which they might be bent or twisted. It further appears that defendant's attachment is not twisted, but is inserted as nearly flat as is practicable, in order to avoid all tension on the stylus-bar. Hence result two radically different constructions, based on opposing theories as to the effect of high tension as contrasted with low tension or no tension. These conclusions dispose of the contention of infringement as to all of said claims.

Claim 16 also covers "yielding gaskets, adjusted so as to prevent the said diaphragm from rattling, yet leaving it free to vibrate throughout its entire area." Such gaskets were old. The patentee, in a prior patent, had described and claimed a construction for so mounting the diaphragm that it would vibrate "practically evenly throughout its entire area," and the specifications and said claim of the patent in suit fail to suggest any definite degree of pressure, except such as may, in the judgment of the constructor, be best adapted to secure the best results. The patentee says:

"While I have described the diaphram as being practically free at its edges, it is clear that, while this construction of adjustment is preferable, my improvements herein described and claimed are applicable to constructions wherein the diaphram may be clamped at its edges."

The decree is affirmed, with costs.

LACKAWANNA IRON & STEEL CO. et al. v. DAVIS-COLBY ORE ROASTER CO.

(Circuit Court of Appeals, Third Circuit. July 5, 1904.)

No. 62.

1. PATENTS—CONSTRUCTION OF CLAIMS—ORE ROASTING FURNACES.

The Greer patent, No. 508,542, claims 3 and 8, for an ore roasting furnace, consisting of three vertical chambers, a combustion chamber, a stack, and an ore chamber between the other two, and communicating with each "at different points in its height," "substantially as described," "the combustion and ore roasting chambers being of substantially the same height," require all three chambers to be substantially coextensive, as shown in the drawings.

2. SAME—INFRINGEMENT.

The Greer patents, Nos. 495,883 and 508,542, for an ore roasting furnace, made up of three vertical chambers, each coextensive with the other two, the center one being a roasting chamber to hold the ore, and having openings at several points into each of the others, a combustion chamber on one side, fed from below by fuel gas intermixed with air, and a stack chamber on the other side, the draught created by which draws the flames from the combustion through the roasting chamber, were not anticipated, and are valid. Claims 3 and 8 of patent No. 508,542, covering the combination of the three chambers, and claims 3 and 4 of No. 495,883 and 4 and 5 of No. 508,542, covering a gas chamber in the base of the combustion chamber, having in its top exit openings for gas and air ports adjacent, construed, and *held* infringed.

Appeal from the Circuit Court of the United States for the Middle District of Pennsylvania.

For opinion below, see 128 Fed. 453.

Percy B. Hills, for appellants.
Henry N. Paul, Jr., and Joseph C. Fraley, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Middle District of Pennsylvania, sustaining certain claims in two patents, granted to Robson C. Greer, for ore roasting and calcining furnaces, and assigned to the appellee, and decreeing an injunction and an accounting against the appellants, for an infringement thereof by an ore roaster first erected and operated at Scranton, Pa., and afterwards removed to Lebanon, Pa., where it now stands.

The Davis-Colby Ore Roaster Company, the appellee, is engaged in the business of erecting ore roasters, which are large furnaces in which iron ore (which is to be subsequently smelted or reduced in a blast furnace) is given a preparatory moderate heating in a draught of oxygen, for the purpose of expelling sulphur contained in the ore. Appellee's principal place of business is in Philadelphia, and the appellant, the Lackawanna Iron & Steel Company, is a large manufacturer of steel, having its main works, which were formerly at Scranton, Pa., in Buffalo, N. Y. Henry Wehrum, manager of the appellant company, is joined as a codefendant in the court below.

The bill of complaint charges the defendant with having built at Scranton, Pa., an ore roaster which infringes upon three of complainant's patents, covering what is known as the "Davis-Colby Ore Roaster." These three patents comprise the two Greer patents, above mentioned, and a patent granted to Owen W. Davis, also assigned to the appellee. Upon final hearing, the court below dismissed the bill as to the Davis patent, but sustained the two Greer patents, and found that they had both been infringed. The usual injunction and accounting was accordingly decreed upon these two patents, and from this decree the defendant has appealed.

The patents, therefore, brought before us upon this appeal are: No. 495,883, dated April 18, 1893, granted to Robson C. Greer, and as to which infringement is held as to claims 3 and 4 thereof; No. 508,542, dated November 14, 1893, to Robson C. Greer, infringement of which is held as to claims 3, 4, 5 and 8 thereof.

Infringement of the third and eighth claim of the Greer patent, No. 508,542, is admitted by the appellant, who claims, however, that the said claims are invalid by reason of anticipation. These claims are dominant and controlling in the structure of the Davis-Colby Ore Roaster, covering as they do the three coextensive vertical chambers, to wit, the combustion chamber, the air chamber and the draught equalizing chamber. The other claims involved are the third and fourth claims of Greer patent No. 495,883, and the fourth and fifth claims of Greer patent No. 508,542. These claims cover the gas and air inlets for the combustion chamber.

The discussion of the prior art, by appellant's counsel, in support of the defense of anticipation, is confined to the patent granted in 1870 to Knox and Osborn, No. 104,323, and to the patent to Valentine, No. 459,799, granted in 1891, and to the patent to Kleeman, No. 399,995,

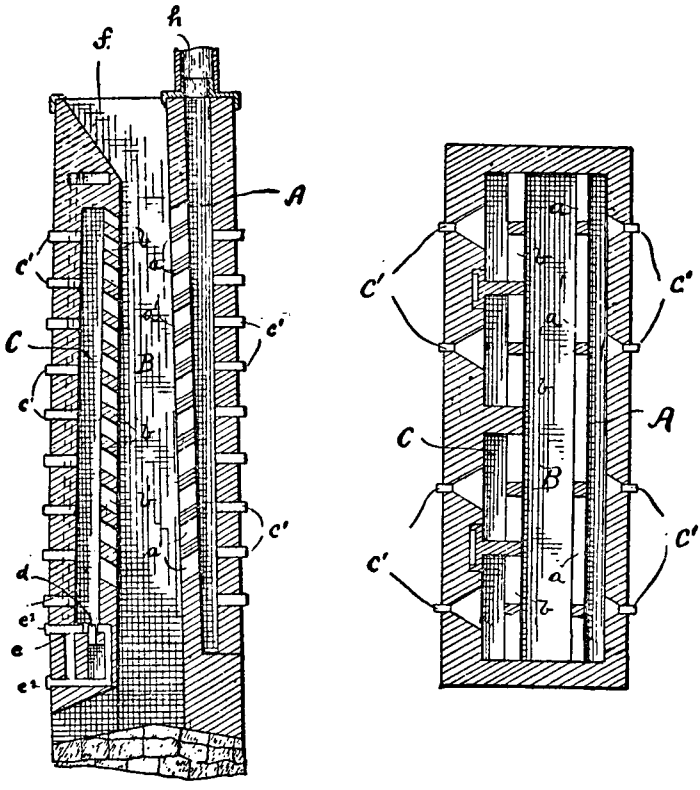
granted in 1889. This latter reference, counsel for appellant speaks of as the one "most nearly in point," and practically confines his agument to a discussion of its features with relation to those of the Greer patents in suit.

The very full and exhaustive discussion by the learned judge of the court below of the claims of the two Greer patents, and of the prior art, especially with reference to the alleged anticipation of the Kleeman patent, would render a separate opinion by this court a mere paraphrase of what has been sufficiently said by the court below. We therefore content ourselves with adopting the opinion of the learned judge of the circuit court (reported in 128 Fed. 453), and we quote the same, omitting only those parts thereof referring to the Owen W. Davis patent, as to which there was a decree of no infringement, and to the Valentine and Sibley patents, which are so dissimilar, both in their object and in the structure claimed in them, as to require no further mention. In fact, none of them, except the Kleeman patent, seems to have been thought worthy of serious discussion by appellant's counsel. The opinion, with the exceptions noted, is as follows:

"The structure which is the subject of this litigation is what is known as an ore roaster, designed for expelling the sulphur from iron ore preliminary to smelting. Some ores have no sulphur but others are seriously impregnated with it, and this is particularly true of that obtained from the famous Cornwall banks near Lebanon, Pa., from which it has been the problem of a hundred years to successfully eliminate it. The complainants are the owners of three patents which are concerned with this subject, two issued to R. C. Greer —in April and November, 1893—and one to O. W. Davis, Jr., in May, 1894. Under these patents they undertook to erect at Lebanon in 1895 for the defendant company, who were operating the Colebrook furnaces there, an ore roaster with a capacity of one hundred tons daily, guarantied to roast down the sulphur to six-tenths of one per cent. This roaster did not work successfully at first, but was made to do so in the end, although there is some question whether this was not the result of favoring it with large sized ore. In order to overcome, however, existing difficulties permission was obtained to rebuild certain parts of it and plans for this purpose were submitted; and whatever lack of success there was or whatever was the cause of it the defendant company appear to have been sufficiently satisfied to ask for a proposition looking to the erection of a plant of five roasters at Scranton, Pa., where their principal works then were, in response to which the complainants made suggestion as to further changes which seemed desirable. But when it was found that a royalty of $1,200 for each roaster would be required Mr. Wehrum, the general manager of the defendants, refused to pay it and broke off the negotiations declaring he had never seen a patent which he could not get around. Immediately following this a roaster was put up by the defendants themselves under the direction of Mr. Wehrum, at Scranton, closely following in general design the plans and suggestions submitted by the complainants, certain changes however in matters of detail being introduced on which Mr. Wehrum at a later date applied for and obtained two several patents. This roaster was subsequently taken down and removed to Lebanon where it is now in use. The facts with regard to the original relations of the parties while given at this length, are not very material except as they go to show that infringement, if found to exist, is deliberate, and that Mr. Wehrum is properly joined as a defendant on account of his individual participation in it.

"The roasting furnace which is the subject of the two Greer patents is made up of three vertical chambers, each coextensive with the other two, the center one being designed to hold the ore to be roasted and having openings at several points into each of the others, a combustion chamber on the one side being fed from below by fuel gas intermixed with air to insure combustion and the heat and flame being drawn therefrom through the ore by means of the open-

ings provided for the purpose and the draft obtained from the stack chamber, the sulphur being expelled from the ore and carried off in the process. In the first Greer the form of furnace shown—although none is specified—is circular and the chambers annular; but in the second Greer, as in the defendants' structure, the chambers are rectangular. The latter construction is shown in the following diagrams taken from the second patent, one being an elevation in section and the other a ground plan.



"It will be noted that the several chambers referred to are made high and narrow, and set side by side, the object being to present to the flame from the combustion chamber a thin body of ore, through which it can effectively penetrate, gradually calcining and desulphurizing it as it descends. The Greer invention is in some respects expressed in its broadest terms in the third and eighth claims of the second patent, as follows:

"'3. An ore roasting or calcining furnace, having a rectangular stack, a rectangular combustion chamber, and a rectangular ore roasting chamber, said roasting chamber being located between said combustion chamber and stack and communicating on one side at different points in its height with said stack and on its opposite side at different points in its height with the combustion chamber, said combustion and ore roasting chambers being of substantially the same height, substantially as set forth.'

"'(8) In an ore roasting and calcining furnace, the combination of the rectangular stack and the rectangular combustion chamber, located at opposite sides of the furnace, with the rectangular roasting chamber between said stack and combustion chamber, said combustion and roasting chambers being of

substantially the same height and said roasting chamber having communication on one side at different points in its height with said combustion chamber and on its opposite side at different points in its height with said stack, substantially as described.'

"Infringement of these claims is conceded but their validity is denied the defense being that they have been anticipated by other existing devices. The prior art is unusually free from anything that can be called an anticipation. The very primitive arrangement known as the Gjers kiln, which is nothing more than a great open bottom pot with alternate layers of ore and fuel, was still in use at the time the Greer roaster was patented and there is very little to fill in the intervening gap. The Knox and Osborn (1870) which is cited as a reference is a reducing furnace for the treatment of cinnabar and other volatile ores. It has, like the Greer, an ore chamber designed to hold a vertical body of ore, which is "roasted"—as it is said—as it passes downwards by the process of fuel combustion drawn into and through it from a fire-place adjoining by force of a draft chamber on the opposite side, the metallic vapors expelled from the ore being caught and condensed in appliances beyond. Passing by the fact that this is found in the reducing and not in the roasting art (notwithstanding the term applied to the process by the inventor) and that it relates to a volatile metal such as mercury, which is reduced from its fumes, broadly speaking the same elements which are found in the plaintiffs' structure may be said to be employed. But it is conceded that it does not anticipate the particular claims under discussion which require the combustion and the stack chamber to be of equal height with the ore chamber and rectangular in shape; and neither can it the other claims relied upon, to be presently mentioned, in view of the specific combinations there found. The suggestion of counsel that the operation on the ore is the same—which may well be doubted—loses sight of the fact that we are dealing with a structure and not a process, a point that is made per contra to sustain the Kleeman patent as an anticipation, of which more later.

* * * * * * * * * *

"This brings us to the Kleeman which is confidently relied on by the defendants, and is the only device that approaches structurally to anything like the one in suit. It is designed for the reducing or smelting of zinc ore and was patented in England in 1885, in Germany in 1887 (being allowed to lapse there, however, in 1891 for nonpayment of dues) and in the United States in 1889. Like the Knox and Osborn it is found in the reducing and not the roasting art, processes which are said to be metallurgically antithetical. It is not necessary, however, to go into the distinction between them, nor to determine how far on the strength of it the perception of the availability of the Kleeman structure for roasting purposes could be regarded as a transfer and adaptation to a nonanalogous art involving the exercise of invention. Instructive examples, where this has been held to be the case are to be found in Potts v. Creager, 155 U. S. 606 [15 Sup. Ct. 194, 39 L. Ed. 275]; Carnegie Steel Company v. Cambria Iron Company, 185 U. S. 403 [22 Sup. Ct. 698, 46 L. Ed. 968], and Tannage Patent Company v. Zahn, 70 Fed. 1003 [17 C. C. A. 552]; but I shall not stop to discuss them. Adhering strictly to the position that equivalency of structure is to control, the lacking feature of the Kleeman is a stack chamber. It has an ore or reducing chamber and a combustion chamber adjoining, and both are rectangular and vertically coextensive, with openings between to permit the ore in the one to be acted upon by the combustion proceeding from the other. So far there is a similarity which is not disturbed by the fact, that the two chambers are set end to end instead of side by side as in the Greer, the result of which is that the ore body is presented to the flame in its thickest direction instead of in a thin layer, this being a feature which cannot be relied upon under the terms of the patent, however important to the roasting process. But distinctly and positively the third member of the combination—an adjoining stack chamber—is wanting. In its place is an extension of the reducing chamber through which in flues or retorts the zinc fumes are conducted to a tubular recipient beyond, and then by tortuous passages to where they are condensed and reclaimed. Neither structurally nor as a matter of process is there any resemblance in this to the stack chamber found in the Greer. Whether the latter be regarded as a draft producing or

simply as a draft equalizing chamber auxiliary and leading on to the actual chimney or stack at a greater or less distance beyond, the material thing is that the roasting is complete when it is reached; while in the Kleeman the reducing process is continued on through the extension chamber, with its flues and retorts, into still other and ulterior parts. Differing in both function and structure as they do, the two chambers are in no sense equivalent; and there is nothing therefore in this reference on which to predicate an anticipation of what we have here. This disposes of everything that is cited against the claims under discussion and their novelty and validity being thus established and infringement conceded the bill to that extent at least must be sustained.

"But there are other important elements which it is claimed that the defendants have appropriated. Underneath the combustion chamber, for the purpose of supplying fuel, is a gas chamber with exits from it and air ports adjoining, to insure combustion; and opening into the combustion chamber at various points above are other inlets for a similar purpose. The object of this arrangement is to secure a suitable supply and admixture of gas and air and to secure it at the proper place. Bearing as this does on the efficiency of the furnace the devices employed must be regarded as patentable elements in the combination in which they are found. They are embodied in the third and fourth claims of the first Greer patent and the fourth and fifth claims of the second as follows:

"Patent 495,883.

" '(3) In an ore roasting or calcining furnace, the combination with the stack and an ore roasting chamber, of a combustion chamber having communication with said roasting chamber, said combustion chamber having in its base a gas chamber D formed in its top with exit openings d, and also having air ports e e' opening into it adjacent to the gas exits d.

" '(4) In an ore roasting or calcining furnace the combination with the stack and an ore roasting chamber, of a combustion chamber having communication with said roasting chamber, said combustion chamber having in its base a gas chamber D formed in its top with exit openings d and also having air ports e and e' opening into it adjacent to the gas exits d, and holes c' opening into it at various points, and means for closing said holes, c'.'

"Patent 508,542.

" '(4) In an ore roasting or calcining furnace, the combination with the rectangular stack and rectangular ore roasting chamber, of a rectangular combustion chamber having communication with said roasting chamber, said combustion chamber having in its base a gas chamber D with gas exists in the top of same and also having air ports adjacent to said gas exits, substantially as set forth.'

" '(5) In an ore roasting or calcining furnace, the combination of the rectangular stack, the rectangular ore roasting chamber communicating therewith, and the rectangular combustion chamber communicating with said ore roasting chamber, said ore roasting chamber being located between said combustion chamber and stack, and said combustion chamber having in its base a gas chamber D with gas exits in the top of same and also air inlet opening into it adjacent to said gas exits and air inlets opening into it at various points, substantially as set forth.'

"The same references as before are brought forward to invalidate these claims, but with no better success. It is true that in the Kleeman furnace, air inlets are shown on either side of the gas flue leading up into the combustion chamber from the gas chamber below; and there are openings in the outer wall of the combustion chamber similarly located to those of the Greer. So far as these particular features of the combination are concerned this might affect the novelty of the fourth and fifth claims of the second patent which are in general terms; but in the third and fourth claims of the first, which are narrower, one of the air inlets into the combustion chamber being specifically located between the gas exit and the ore chamber insuring the presence of a suitable supply of oxygen at this point. But it is not material to insist on any such saving distinction. It is to be remembered that in each of these claims we are dealing with a combination from which it does not in the least detract,

that certain of its features are not new; we are not concerned therefore, whether the air inlets in juxtaposition to the gas flue in the Kleeman furnace are duplicated in the claims of the second Greer or not. Novelty is to be predicated upon the combination found in each as a whole, and this includes the three co-ordinate, combustion, ore, and stack chambers, as to which in correlation, the prior art, as we have seen, has nothing to suggest.

"As to the infringement of these claims it seems to me there can be no serious question. So far, in either, as there is a reference by letter to the accompanying diagrams they are, of course, confined to the specific combination thus shown; but even on that basis the defendants' structure offends. A gas chamber at the base of the combustion chamber is employed, opening up from which into the combustion chamber is a set of exits and adjacent to them, that is to say between them and the ore chamber, is a corresponding set of air inlets. Leading in also through the outer wall of the combustion chamber, on the opposite of the gas exits are passages which have the same relative position as the second air inlet specified in the claims of the first Greer; while similar inlets or passages open into it at various points in tiers up to the top of the furnace. It is said that these inlets are merely dust holes for cleaning out the furnace, and that the gas from the combustion chamber forces its way out through them to such an extent as to require that they shall be kept permanently closed. But in one of the Wehrum patents—according to which the defendants' structure is supposed to be built—they are described as affording communication with the outer air, and in the other are said to furnish means for inspecting the ores in process of roasting, and while their use for cleaning purposes is also declared, this additional function does not do away with the others mentioned, which are the same as specified in the patents in suit. It is true that these openings in the defendants' roaster are closed with doors; but this is specified in the fourth claim of the first Greer as to the so-called 'peep holes'; and is shown as to the second air inlet in the other. But the variance, if any, is not material. The openings are none the less ports or inlets within the terms of the patents because means are provided for opening and closing them. Nor in judging of their equivalency is the particular use which may be made of them to govern. Structure, as has been observed, is what we are especially to look to and while the function to which a particular part is devoted is not to be altogether lost sight of, where the form is practically the same as in the case before us, the possible rather than the accidental use must decide.

* * * * * * * * * *

"As the result of the views so expressed the bill must be sustained as to the third and fourth claims of the first Greer and the third, fourth, fifth and eighth claims of the second."

Granting that the learned judge was mistaken, when discussing the structure of the Knox and Osborn patents, in saying that it was "conceded" that "it does not anticipate the particular claims under discussion, which require the combustion and the stack chamber to be of equal height with the ore chamber," it is clear to us, that though not conceded by the appellant, the learned judge was right in his opinion, that claims 3 and 8 of the second Greer patent, require all the chambers to be substantially coextensive. They expressly require that the ore chamber shall communicate "on one side at different points in its height with said stack, and on its opposite side at different points in its height with the combustion chamber." Substantial similarity between the extent of communication on the one side and on the other, is essential to this requirement. The drawings of the patents show the three chambers to be coextensive, and the expert testimony draws the inference of coextensiveness from the claims and specifications, the claims 3 and 8 closing with the words, "substantially as set forth," and "substantially as described," respectively. This language brings into the claim the par-

ticular description of the structure contained in the specifications, and the drawings to which they refer, and that description, as we read it, is of a structure containing a combustion chamber and an ore chamber of equal height, and a stack or draught producing chamber, coextensive therewith.

The decree of the court below is affirmed.

WESTERN TELEPHONE MFG. CO. v. AMERICAN ELECTRIC TELEPHONE CO. et al.*

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 976.

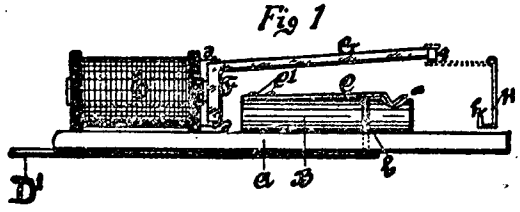
1. PATENTS—INFRINGEMENT—TELEPHONE SWITCH BOARDS.

The Fisk patent, No. 521,461, for a telephone switch board, in which the fallen annunciator or drop is restored to its latched position automatically by the insertion of the connecting plug into the jack, was not anticipated in the prior art, and discloses invention. Also *held* infringed by the device of the Overshiner patents, Nos. 617,691 and 617,692.

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

Appellant, owner of letters patent No. 521,461, June 14, 1894, to Fisk, for a combined annunciator and spring jack for use in telephone switch boards, failed in its suit to hold appellees as infringers. In the earlier form of switch boards a bank of annunciators or drops, serially numbered, was placed above a bank of spring jacks, similarly numbered, so that any drop was distant, say, two feet from the correspondingly numbered jack. When a subscriber called, the operator's attention was attracted by the falling of the drop. The operator thereupon established communication with the calling subscriber by inserting a connecting plug in the jack that bore the same number as the fallen drop. At the same time the operator manually restored the drop.

Figure 1 of the Fisk patent and the description and claims are as follows:



"My invention relates to switch boards for telephone exchanges and will be fully described hereinafter.

"In the drawings Figure 1 is a side elevation of a portion of a switch board embodying my invention. Fig. 2 is a top view of the same. Fig. 3 is a broken perspective, and Fig. 4 a detail. Figs. 5, 6, and 7, respectively, are side, top, and perspective views of a modification, and Figs. 8 and 9, respectively, side and top views of still another modification.

"A is the bottom of a compartment containing the spring jack B, which latter is hollow and notched as at a, to receive the bent end of a superimposed spring, C, the rivets, C', securing the spring, C, to the jack passing down to

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* Rehearing denied May 27, 1904.

the compartment and securing a strip, D, to it, while at the same time making a metallic connection between the spring and the strip. The spring is also formed with an arm or offset, c, that normally rests upon a pin, b, which passing through the bottom, A, connects strip D' to it. A spool, E, is secured to the bottom at the rear of the jack, and from the head of the spool are projected lugs, d, d, to which one edge of an armature, F, is pivoted, and from the upper portion of the opposite edge of this armature an arm, G, projects forward and at an acute angle to the width of the armature, and the outer end of this arm is formed with a lip, g, for engagement at the proper time with the bent flange, h, of a drop, H, to hold the drop up when the core of the spool is de-energized.

"The operation is as follows: When a call is made, the current from line goes through strip D, spring C, pin b, strip D', into the spool, and thence to the battery, thus energizing the core and causing the armature to be attracted and to pull the support from under the drop. The plug, K, is then inserted by the operator, and connection between spring C and strip D' broken, and the party called connected with the party calling through spring C, strip D, and plug. As the drop is released by the spool operating on the armature, it is lifted by the plug as it is inserted in the jack, for the drop hangs directly in front of the mouth of the jack, and is caught in its raised position and held up until another call is made, and the operator accomplishes in one motion what has hitherto required two motions.

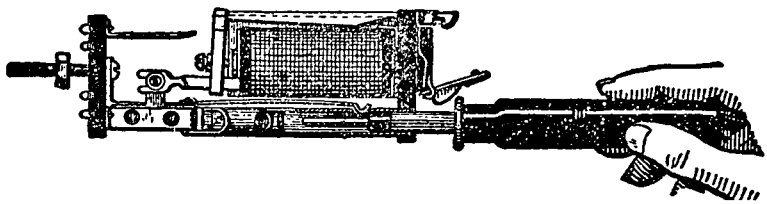
"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is:

"(1) The combination in a switch board of a jack, and a drop adapted to swing in front of it, an electro-magnet located in the rear of a jack, and an armature having a connection for catching and supporting the drop when it is raised by the entrance of the connecting plug as set forth.

"(2) The combination in a switch board of an annunciator drop adapted to hang in front of the jack and be lifted by the operator's plug as it is thrust into the jack, and a trigger or arm for catching it when so raised, and an electro-magnet and its armature and connections whereby the support is drawn from engagement with the drop when the magnet is energized as set forth.

"(3) The combination in a switch board of an electro-magnet, a jack located in front of it, and a drop hung in front of the jack, with a support for the drop when raised, and a connection between the support and armature for drawing the support from engagement with the drop when the magnet is energized as set forth."

Appellees' device is manufactured according to letters patent Nos. 617,691 and 617,692, January 10, 1899, to Overshiner, and is illustrated by the following drawing:



The record contains the following reference patents: 240,182, April 12, 1881, to Rein; 279,946, June 26, 1883, to Hazlet; 339,627, April 13, 1886, to Doolittle; 392,326, November 6, 1888, to Gould; and British 3,930, October 5, 1878, to McClure.

Josiah McRoberts and Charles C. Linthicum, for appellant.

Charles C. Bulkley, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The main divide in this case, as presented in argument, lies along the line whether, as appellees insist, Fisk in-

tended the operator to use the plug as a tool with which to restore the drop while the operator was moving the plug to the mouth of the jack, or, as appellant contends, he conceived the idea of having the plug automatically and inevitably restore the drop by the plug's insertion into the jack. The expressions in the patent, "the drop * * * is lifted by the plug as it is inserted in the jack," "the drop * * * is raised by the entrance of the connecting plug [into the jack]," "the drop * * * to hang in front of the jack and be lifted by the plug as it is thrust into the jack, [and be held by] a trigger or arm * * * when so raised," leave no doubt in our minds that Fisk contemplated automatic restoration of the drop by the action of the plug during its insertion into the jack.

Did he disclose a practicable means for carrying this idea into effect? "Plug K" of the patent is nowhere specifically described or pictured. This omission and a comparison of the size of the jack opening with the distance through which the drop must be raised to reach the catch as exhibited in Figure 1, have led appellees to assert that the patent shows no way of restoring the drop through the action of the plug except by using the end of the plug to poke (as one might with his finger) the drop into its latched position before inserting the plug into the mouth of the jack. But the drawings are not required to be working plans. They must be read in connection with the description and claims, and any inferences arising from omissions or inconsistencies in the drawings must yield to a legally sufficient specification. "Many material objects and operations," says Robinson (vol. 2, § 491), "are so familiar to the inventor and his readers that their specific description, or even an allusion to them, would be superfluous. The law recognizes these difficulties in the way of an absolutely complete description, and overlooks the defects which they occasion, * * * though it omits appliances, modifications, or processes which persons skilled in the art would know were necessary and would themselves supply. Though it fails to describe implements and materials that are common in use, or methods of construction generally practiced in the arts, it may be complete enough to put before the already trained and informed intelligence of the reader an accurate and entire picture of the invention, from which he can understand it, construct it, and use it as easily as if all these familiar acts and objects were particularly described." The specification calls for a plug of such a form in relation to the form and location of the drop and jack that the mere act of inserting the plug into the jack will restore the drop to its latched position. Plugs with hafts to limit the thrust were common. It seems clear to us that any one who was familiar with existing switch boards and plugs, and who, on reading Fisk's patent, desired to embody the invention in the specific form of Figure 1, would see that the blade of the plug as it was thrust into the jack would not lift the drop into its latched position unless the bent portion of the drop were extended to equal the distance between the latch and the mouth of the jack, and that, if the drop were not so extended, the haft of the plug should be of a form and size to lift the drop into its latched position. That is, it would be purely a matter of the particular builder's choice whether he used the extension on the drop or on the plug or on both.

It is not denied that Fisk's device is useful and novel, and that the exercise of the inventive faculty was required in its production. The reference patents are claimed by appellees to limit the scope of the invention so as to save their device from infringing. Inasmuch as Fisk was the originator of the principle of restoring the drop by the contact therewith of the plug as it enters the associated jack, and the deviser of a practical embodiment of that principle, we deem the prior exhibitions of automatic restorations of the drop when dissociated from the jack, and accomplished by means dissimilar to the contact of the plug with the drop as the plug enters the jack, to be utterly irrelevant to the question of infringement, as they are confessedly insufficient as anticipations. If appellees are using Fisk's invention as it is defined in the patent, it is immaterial how much of the prior art they also employ. Appellees' drop is restored from a horizontal to a vertical position; Fisk's from a vertical to a horizontal, according to Figure 1 of the drawings. But in the description and claims there is no limitation upon the position of the drop except that it must be in front of the jack to the extent that the plug will lift it to its latched position as the plug enters the jack. Appellees' drop contacts with the plug through the cam projection on the drop. We have already stated that we regard it as immaterial whether the contact is effected through having the plug reach up or the drop reach down or both. We therefore find that appellees' device responds to the claims of the Fisk patent as we read it.

That Overshiner improved upon Fisk, and, indeed, developed an idea that never occurred to Fisk, is no warrant for using appellant's property without leave.

The decree is reversed, with the direction to enter a decree in appellant's favor for an injunction and an accounting.

STAR BRASS WORKS v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1904.)

No. 1,317.

1. PATENTS—INFRINGEMENT—ELECTRIC RAILWAY TROLLEYS.

The Anderson patent, No. 412,155, for an improvement in electric railway trolleys, claim 8, which covers the combination with a trolley frame and wheel of metallic conducting brushes or contact springs between the hubs of the trolley wheel and the frame does not make the copper washer mentioned in the specification and optionally used on the end of the hub a part of the contact spring, but it is merely an extension of the hub. An essential feature of the claim is the placing of the spring or brush inside the frame for protection, and it is not infringed by the device of the Crockett and Johnson patent, No. 690,639, in which the spring is placed in a recess on the outside of the frame, making contact with the hub through heavy washers having lugs extending through the frame.

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

See 109 Fed. 950; 129 Fed. 102.

Fred L. Chappell, for appellant.
Betts, Betts, Sheffield & Betts, for appellee.
Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit for an infringement of the eighth claim of the Anderson patent, No. 412,155, for an improvement in trolleys for electric railway service. It comes here on appeal from a decree holding there was an infringement, granting an injunction, and directing an accounting.

The claim involved is for "the combination, with a trolley frame and trolley wheel, of metallic conducting brushes, g^2, between the hubs of the trolley wheel and the said frame, to operate substantially as described." It has already been twice before this court. Its validity was sustained in Star Brass Works v. General Electric Co., 111 Fed. 398, 49 C. C. A. 409, and it was further construed and enforced in General Electric Co. v. International Specialty Co. (C. C. A.) 126 Fed. 755. In the opinions in these cases the invention is described, and its patentable merits indicated. In both cases the metallic conducting brushes mentioned in the claim were presented by counsel and treated by the court as the contact springs, placed between the hub and the frame, which, bearing upon the former and attached to the latter, serve to conduct the electric current from one to the other. It was the location of these contact springs, inside the frame, and pressing upon the ends of the hub, which gave merit to the claim. So placed, they were not exposed to arcs, were protected from mechanical injury, and served the purpose of conducting brushes with the least possible friction. In the first case we said:

"Anderson, using a brush in common use in electrical appliances, places it entirely within the frame, where it is protected, serving the purpose intended with the least possible friction as the spring bears upon the end of the hub, and not upon the wheel or the periphery of the hub. * * * It may be true that Anderson has only taken the familiar contact spring or brush, and placed it in a protected position, but this change seems to have made the difference between a defective mechanism and a practical method of attaining the desired end. * * * The Anderson patent is not for the form of the brush, but is a combination patent, in which the location of the brush is the leading conception." 111 Fed. 398, 400, 49 C. C. A. 409.

In the second case we said:

"Contact springs or brushes had been used in the electric art before Anderson took out his patent. We held in the Star Brass Works Case that the merit of Anderson's invention consisted in taking this familiar contact spring or brush and placing it in a protected position, where it was secure from injury through the operation of the trolley, and, by bearing upon the ends of the hub instead of the periphery of the hub or wheel, materially reduced the friction in operation." 126 Fed. 755, 758.

The same view was taken by Judge Kirpatrick in General Electric Co. v. Rahway Electric Light & Power Co. (C. C.) 96 Fed. 563, in which, after describing the necessity of protecting the contact device against stray arcs and against mechanical injury during shipment or while in operation, he says (page 567):

"How does Anderson's apparatus eliminate these defects in prior machines? First, the spring, g^2, is held in place by the rivet at one end and by the eye

embracing the spindle at the other. Hence there is no danger of these springs being bent outwardly, and thereby fail to bear on hub of the trolley, or so as to come in contact with a switch box, or any external object. It is confined simply and securely in its proper position between the hub of the trolley and the frame. Moreover, the spring contact does not bear on the periphery of the wheel, nor yet on the periphery of the hub, but on the end of the hub, whereby there is a minimum of speed of the wheel on the brush and a minimum degree of retarding action of the brush on the wheel."

It does not appear that in either of these cases any attention was paid by counsel or court to the copper discs or washers, which, for the apparent purpose of reducing the friction and wear on the contact spring or conducting brush, it is stated in the specification the applicant prefers to add "at the ends of the hubs." The patent itself treats these copper discs or washers as quite distinct from the metallic conducting brushes. The copper discs are marked "g," the metallic conducting brushes "g^2," and it is stated in the specification that "the copper or other equivalent brushes, g^2," bear against the outer sides of the copper discs when these are added at the ends of the hubs. The copper discs may or may not be used, and, if used, are treated as added at the ends of the hubs; in other words, as an addition to the hubs. The conducting brushes bear either against the ends of the hubs or against the outer sides of the washers when these are added to the hubs.

In the former cases in this court counsel for the patent treated the metallic conducting brushes as the patent does—as contact springs, bearing against the ends of the hub or the washers (if they are used), and protected by being placed between the hub and the frame. The leading expert for the patent said in the first case: "It is beyond question that for many years such brushes, g^2, have been given a uniform pressure upon the hub of the trolley wheel or the copper washer, g, sufficient for all practical purposes." And counsel themselves stated in their brief that the testimony proved beyond doubt that the conducting brushes of complainant's device were spring brushes; that they bore evenly, and for all practical purposes, over substantially the whole surface of the washer of [or] the ends of the trolley wheel hub. In their brief in the second case they submitted an illustration of a view in perspective of the second form of the Star Brass trolley harp and contact brushes held to infringe in the first case, which was reproduced in the opinion in the second case. 126 Fed. 756. In this the washer and conducting brush are designated as separate and distinct pieces. The brush is marked "Spring Conducting Brush," the top of the brush is marked "Top of Brush Bearing on Washer," while the washer is marked "Washer Bearing on End of Hub." In both the former cases the contact or "business end" of the conducting brush or contact spring was placed between the hub and the frame, and bore either against the end of the hub or the washer. The alleged infringing device contains no contact spring located between the hub and the frame. The contact spring is forked, and is placed on the outside of the frame or harp, being countersunk or recessed therein. Connection with the hub is secured through a "massive" washer having lugs which extend through slots in the frame. The forked spring outside the frame presses upon these lugs, forcing the

washer against the hub inside. The court below took the view that the defendant had taken the conducting brush of the Anderson patent and divided it into two parts, a spring and a washer; the spring technically outside the frame, but really protected by it, and the washer, which constituted the contact part or "business end" of the brush, located between the hubs and the frame, constituting a mere colorable modification of Anderson's device.

It is no doubt true that when a washer is placed between the hub and the spring, the current must pass from the hub through the washer before it reaches the spring, and therefore in one sense the washer is a part of the conducting device; but in another it is a mere addition to or extension of the hub, and the patent so treated it. The claim was not based upon the location of the washer. The washer might or might not be used. It was based upon the location of the brush or spring which pressed against the hub or washer and carried the electricity to the frame. The washer needed no protection, but the brush or spring did. Judge Kirkpatrick, in his opinion, pointed out the need of protecting the contact end of the brush, which bore either upon the washer or the hub. This spring, a delicate thing, placed outside, was liable not only to be injured by violent contact with other objects, but to be destroyed by stray arcs, and Anderson therefore placed it inside.

The defendant's device, which is covered by a patent to F. P. Crockett and O. P. Johnson, being No. 690,639, places the spring on the outside of the harp. It is protected against injury from without by being placed in a deep recess, and against injury from within by the intervening frame. A patent for protecting a spring by locating it on the inside of the trolley harp is not infringed by placing it in a recess on the outside, any more than a patent for protecting it by countersinking it on the outside is infringed by locating it wholly on the inside. Although the result may be the same, the device is different, and the patent covers only the device.

If the contact spring in the defendant's device, corresponding with the metallic brush of the complainant, is not located between the hubs and the frame and protected by being entirely within the latter, is the fact that the spring presses upon the lugs of the washer, which contacts with the hub inside the frame, in itself sufficient to constitute an infringement? The eighth claim of the Anderson patent was a narrow one, and we sustained it not simply upon the ground that the electric current was taken from the wheel at the hub, but upon the ground that the metallic conducting brush, which pressed against the hub or washer, was a spring requiring protection, and was protected by being placed between the hub and the frame, inside the latter. The defendant uses another method of protecting the spring. In our opinion, there is no infringement.

The judgment of the court below is therefore reversed.

WESTON ELECTRICAL INSTRUMENT CO. v. EMPIRE ELECTRICAL INSTRUMENT CO. et al.

(Circuit Court, S. D. New York. June 10, 1904.)

No. 4.

1. PATENTS—INVENTION—ELECTRIC SHUNT.

The Weston patent, No. 497,482, for a shunt for electric light and power stations, specially adapted to the measuring of very strong electric currents, and in making which short plates of metal of high resistance are used, with air spaces between them, and connected with massive terminals of metal having a lower resistance, was not anticipated, and discloses invention of high order. Evidence also considered, and *held* not to show prior use by defendants. The patent also *held* infringed.

In Equity. Suit for infringement of letters patent No. 497,482, for a shunt for electric light and power stations, granted to Edward Weston May 16, 1893. On final hearing.

William Houston Kenyon and Richard Eyre, for complainant.
Philip Mauro and C. A. L. Massie, for defendants.

HOLT, District Judge. This is a suit to restrain the infringement of a patent, No. 497,482, dated May 16, 1893, issued to Edward Weston, and now owned by the complainant, for a shunt for electric light and power stations. There are no questions as to jurisdiction, parties, or title. The proof of infringement is conclusive, and is not controverted. The substantial defenses relied on are that the patent in suit is invalid for lack of invention, for insufficient disclosure in the patent, and for public use more than two years before the application. An electric shunt is an additional course or side track established for the passage of part of an electric current. The use of a shunt for the measurement of small or ordinary currents of electricity was well known long before the Weston patent. The usual method of construction was to introduce into the wire or vehicle carrying the electric current a metal of greater electrical resistance, and to connect the two terminal portions of such metal by wires with a measuring instrument. A portion of the current was thus shunted off and passed through the measuring instrument. The portion of electricity flowing over the shunt, as compared with the portion flowing over the main current, being ascertained, the force of the entire current could be computed by the measurement of the shunted current, and for the purposes of measurement the use of such a comparatively small current was found more convenient than to undertake to apply a measuring instrument to the entire current. The great difficulty was in applying a shunt to a very large and powerful current of electricity, owing to the fact that the metal of higher resistance constituting the shunt would become so heated by the resistance of so large a current as to become redhot or fused. With the gradual development of the commercial use of electric power, it became necessary to employ currents, particularly at electric light and power stations, of constantly increasing strength, and it became of great importance to devise accurate measuring instruments for such large currents. Prior to Weston's patent in 1893, no practical method for the

use of a shunt in connection with the measuring instruments for such large currents had been found, although the necessity for such an instrument was thoroughly appreciated, and many electricians all over the world attempted to invent one. In actual practice, no shunt at that time was used. The measuring instrument was applied to the entire current, but the result was unsatisfactory. The measuring instruments were complicated, inconvenient, and expensive, and the measurements which could be made by them were inaccurate and unsatisfactory. The essential problem in discovering a shunt which could be used with a powerful current was not electrical, but thermal. The question was how to avoid excessive heat at the shunt. The efforts, previous to Weston's, to solve the problem, consisted substantially in attempts to construct a shunt which should have a sufficiently large resisting mass to heat slowly, with various appliances or methods for keeping it cool. Weston's invention consisted in constructing a shunt consisting of short plates of high resistance, arranged with air spaces between them, and directly connected with massive terminals, the object being to have the heat generated in the short plates of high resistance rapidly removed by the joint action of radiation through the massive terminals and the cooling influence of the air. Instead of making the plates of high resistance long, so that they would heat slowly, they were made short, so that they would heat quickly, but, being inserted in massive terminals at each end, consisting of a metal of less resistance, and being surrounded by air, the heat was dissipated quickly. The heat generated in the short plates of high resistance reached a certain degree of temperature very quickly, and thereupon substantially all further heat was effectively dissipated, so that the degree of heat in the plate of high resistance quickly became and remained substantially uniform. The result was a shunt capable of successfully measuring an electric current of enormous power. The instruments manufactured under Weston's patent immediately entered into substantially universal use in all large central electric power and light stations, and have ever since been used almost exclusively as ammeters of large electric currents.

The defendants claim that Weston's patent was invalid for want of invention, claiming that he borrowed all the ideas in his shunt from shunts previously patented or described. The defendants pleaded in their answer that the invention had already been disclosed and patented in certain patents, naming about 70 United States patents and 13 French patents previously issued to Weston, and 98 American patents, 41 English patents, 22 French patents, and 4 German patents previously issued to other persons. The answer also alleged that the invention was described in about 50 enumerated publications. The defendants have given in evidence a few of these patents and publications, and in their brief rely upon a previous patent for a shunt issued to Weston, and other shunts known as the Queen shunt, the Edison Shunt, the Anderson shunt, the Franklin Institute shunt, the La Roche shunt, and the Vienna and Munich shunts. An elaborate argument has been made that Weston's shunt in suit is the same in principle as all the other shunts, but, in my opinion, it is radically different in principle. The basic idea of a shunt, of course, is fundamentally the same; that is, some metal of higher resistance than the conducting metal is inserted

for the purpose of shunting off a portion of the current. But all the shunts relied upon by the defendants were shunts which made no use of the methods which Weston used to dissipate the heat in the case of a large current. None of them had struck upon the idea of making the plates of high resistance short, so that the heat in them would be rapidly absorbed by the terminals, and none of them had hit upon the idea of making the terminals massive, so that they would radiate a large amount of heat rapidly from the plates of high resistance. I think that Weston's patent not only embodies invention, but that it embodies invention of a very high and superior order. It adopted a method of dissipating heat which was not only novel, but was in a line entirely opposite to the direction in which all other electricians had been working. The defendants lay especial stress upon the case of the Weston patent, No. 496,501, for a shunt. This patent was applied for on the same day as the patent in suit, but was issued about two weeks earlier. The defendants contend that it is, therefore, an underlying patent, which claim, under the authorities, I think is correct; and that it is a patent for the same invention as the patent in suit, which claim, in my opinion, is entirely incorrect. The earlier patent makes no claim for short plates of high resistance joined with massive terminals as a method of dissipating heat. The defendants also seem to place great reliance on the Franklin Institute shunt as having anticipated Weston's invention, but I cannot see that it anticipated it at all. It was a shunt; but its plates of high resistance were long, not short, and its terminals were not massive. It was an instrument designed for laboratory use. It was not calculated for commercial use, and was never in fact employed, and is impracticable to be employed, for practical commercial purposes. The so-called La Roche shunt is admitted by the defendants' counsel to be further from Weston's invention than the Franklin Institute shunt; and, in my opinion, the so-called La Roche shunt and all the others that have been referred to have nothing in common with the Weston shunt in suit.

The defendants allege that Weston did not comply with the statute requiring his invention to be described in such full, clear, concise, and exact terms as to enable any person skilled in the art to make it. Great stress is laid on the fact that the claims of the patent do not specifically state that the plates of high resistance should be short, or designate the exact length or size of the parts of the shunt. It is true that the invention must be stated in the claim, and must be fairly included within it. But the claim must be read in the light of the specifications and drawings; and if the invention, as a whole, is fairly stated in the claim, and the claims, with the specifications and drawings, enable a person skillful in the art to construct the thing invented, the patent is sufficient. In my opinion, the claims in this patent sufficiently describe the invention, and all the parts of the patent read together afford a sufficiently clear and exact description of the thing invented to enable a person skilled in the art to construct it. The fact that no precise dimensions of the short plates or the massive terminals are given is certainly immaterial. The length of the plates of high resistance and the size of the metal terminals must necessarily vary to some extent with the size and force of the current and the circumstances under which

the shunt is to be used. Under such circumstances, absolute precision was not feasible or necessary.

The defendants allege that La Roche, the president of the defendant F. A. La Roche Company, made public use of the invention more than two years before Weston's patent was applied for. La Roche testified that he constructed in or about 1884 an instrument called a "voltmeter" and a shunt, and that from about 1884 until about 1888 or 1889 he used this shunt in connection with this voltmeter as a measuring instrument, for the purpose particularly of testing storage batteries, at his workshop in Germantown or Philadelphia. In my opinion, the shunt in question does not embody Weston's invention, and, even if La Roche's testimony as to the use of this shunt in 1884 and afterwards were true, it would not prove a prior use of Weston's invention. But if the shunt produced by La Roche embodied the principle of Weston's invention, I am entirely convinced that La Roche's entire testimony as to the use at any time between 1884 and 1893 of the shunt which he produces is incorrect. A very large amount of testimony has been taken bearing upon the accuracy of La Roche's testimony, which it is unnecessary and impracticable to consider in detail. The evidence establishes, in my opinion, that the instrument called a "voltmeter" was formed by putting together a number of instruments or parts embodying different inventions, none of which had been made or was known to electricians before Weston applied for his patent; that it would have been a marvelous and almost impossible thing for the most skillful electrical inventor at that time to have devised such an instrument; that La Roche is a man not only without any scientific education, but without even the ordinary electrical knowledge of a skillful electrical mechanic; that his reputation for veracity is bad; that his shunt never was used as a measuring instrument in connection with his voltmeter between 1884 and 1889; that the various pieces of apparatus constituting the voltmeter were put together by La Roche after the issue of the patent in suit to Weston, with the object of being used in support of his own untruthful testimony to be given in this and other suits for the purpose of attempting to invalidate this and other patents issued to Weston; that a part of the apparatus contained in the said voltmeter are two magnets, which are so arranged that their poles neutralize each other; that, as a result, it is impossible for a current of electricity, in passing through the instrument, to move the coil; that therefore the instrument is, and always has been, entirely inoperative, and the shunt could not have been used as a measuring instrument in connection with it. In short, I cannot avoid the conclusion that the testimony of La Roche in this case was deliberately and intentionally untruthful, and that to support it he deliberately fabricated an instrument to be used upon this trial and other trials involving Weston's patents. It was a careful, premeditated, and elaborate attempt by untruthful testimony, fortified by fabricated exhibits, to deprive Weston of his just rights in his inventions, to impose upon this court, and to pervert the course of justice. I direct that the evidence and exhibits in this case be submitted to the District Attorney, in order that he may take under consideration the question whether a prosecution should be brought against La Roche for perjury.

The evidence of La Roche as to the use of this shunt in the 80's is corroborated by two witnesses—Toplis and Hanks. I am satisfied that their evidence is incorrect, but I am not satisfied that it was willfully untruthful. It may have been mistaken. I think it is proper, however, that the question of their truthfulness should also be submitted to the District Attorney.

Complainant's counsel claims that the damages in this case should be increased under the statute on the ground that the defense has been unconscionable. I think that that question will properly arise on the coming in of the report on the accounting.

My conclusion is that there should be a decree for the complainant, granting a perpetual injunction, with costs and disbursements, and a reference to take an account of the damages and profits.

WESTINGHOUSE ELECTRIC & MFG. CO. v. MONTGOMERY ELECTRIC LIGHT & POWER CO.

(Circuit Court, N. D. New York. June 18, 1904.)

1. PATENTS—INFRINGEMENT—ELECTRICAL CONVERTERS.

The Stanley patent, No. 469,809, for a system of electrical distribution, is infringed by a converter in which the length of the primary coil is substantially that of the converter of the patent, and required by the so called "Stanley Rule," although the length is not ascertained by the use of such rule, which is not a part of the claims of the patent.

In Equity. Motion for a Preliminary Injunction.

The patent in suit, No. 469,809, was granted to William Stanley, Jr., March 1, 1892, for improvements in systems of electrical distribution. The patent has been considered and sustained in this circuit in the so-called "Saranac Case" (C. C.) 108 Fed. 221, affirmed in 113 Fed. 884, 51 C. C. A. 514. The patent was also considered by the Circuit Court for the District of Massachusetts in 117 Fed. 309, and by the Circuit Court for the Southern District of New York in 119 Fed. 365.

J. Edgar Bull, for complainant.
A. C. Fowler, for defendant.

COXE, Circuit Judge. To what was said at the close of the argument but little need be added. It is agreed by counsel that the only question to be decided on this motion is the following: Does the defendant use a length of wire substantially equal to the length of wire prescribed by the Stanley patent? In other words, it was admitted at the argument that in this circuit the question of infringement is the only one left open for discussion and that it must be determined in favor of the complainant if the foregoing question be answered in the affirmative.

The specification of the Stanley patent says:

"The first thing to be determined is the length of the primary wire. This should be of such length that reacting self-inductively upon its own magnetic current the average counter-potential so produced approximately equals the potential applied to the primary circuit. When so constructed, an ammeter will practically show no current when the secondary circuit is opened."

It was conceded by counsel for the defendant, in response to a question by the court, that if this direction were followed the correct length of wire would be obtained. In other words, if wire be wound on the primary coil until the ammeter practically shows no current when the secondary current is opened the result will be the invention of the Stanley patent. But counsel insists that this method was previously shown by Zipernowski and Deri and, therefore, that the patent is anticipated.

Several answers suggest themselves but at the present time it is sufficient to say that the courts of this circuit have decided that the patent is not anticipated by the Zipernowski and Deri publication. The Circuit Court says:

"The article in question imparts no information upon the one subject which is the all essential feature of the Stanley invention, namely, the length of the primary wire and the method of determining the same."

The Circuit Court of Appeals says:

"Concededly the man skilled in the art would not have found in that art anything which would have told him precisely what that length of wire should be. * * * But when the patentee in his claim enumerates as one element of his combination a wire of a length which will accomplish the result sought to be achieved, and his patent discloses a method for determining that length with mathematical exactness, his claim may be fairly sustained for the length thus shown."

It would seem, therefore, that the argument that the method for ascertaining the length of the primary wire as pointed out in the specification is vague, uncertain and indeterminate, cannot be maintained. We have, then, a clear statement that existing difficulties can be remedied by regulating the length of the wire on the primary coil and a simple method of ascertaining that length. In view of all that has been decided by the courts of this circuit it cannot be contended that the so-called "Stanley Rule" is a part of the claims involved. The essence of the invention is the length of the wire on the primary coil and not the instrument or method by which that length is determined. If this were otherwise any one who reaches the same result by a different method will escape infringement. The court is not prepared to say that a combination can be appropriated by one who adopts a different rule for the measurement of one of its elements from that pointed out in the patent. As was said by the court in the Orange County Case, 119 Fed. 365:

"It seems to this court that the Court of Appeals found that the claims of the patent were for a combination of the elements therein set forth, of which one element was a primary coil having a length of wire equal to what would be found to produce the indicated results when applying the Stanley rule; and that the claims were sustained for a combination of the enumerated elements into a converter, not merely for a process of determining one of those elements."

Coming now to the question of fact, as indicated above, the court cannot resist the conclusion that it must be answered in favor of the complainant. It is not pretended that the length of wire on defendant's coil was ascertained by an application in each instance of the Stanley rule, but it is established that the length required by that rule

is, approximately, used by defendant. The tremendous advance in the electrical art during the eighteen years since Stanley's invention has placed in the hands of electricians means for ascertaining the correct length of the wire on the primary coil more expeditiously and accurately than those pointed out in the patent, but this does not enable them to appropriate the invention. They cannot use the Stanley length of wire because modern methods have enabled them to secure that length without applying the tedious and comparatively primitive method of the patent. The defendant's transformers are automatically self-regulating and possess all the characteristics of the transformers held to infringe in the Saranac Case. They have substantially the same length of wire measured in feet as the complainant's transformers, which appear to be constructed in accordance with the provisions of the patent. This is shown by the following table:

	Westinghouse.	Wagner.
1½ k. w. size	1,490 feet.	1,480 feet.
2 k. w. size	1,400 "	1,416 "
3 k. w. size	1,235 "	1,296 "
5 k. w. size	1,095 "	1,130 "

From the maze of contradiction and dispute presented by these papers the court is enabled to extract a few fundamental propositions.

First. Stanley made a valuable invention.

Second. The patent describes the invention with sufficient clearness to enable skilled electricians to practice it without difficulty.

Third. The defendant has appropriated the invention although its transformers were not designed in the manner pointed out by Stanley.

These conclusions render it unnecessary to follow the experts into the realm of speculation, even if the court were sufficiently versed in electrical science to enable it to reconcile their numerous disagreements.

The other questions mooted in defendant's brief were either disposed of at the argument or by the decisions of this circuit in previous litigations.

Stanley's contribution to the art should be judged by the conditions existing when he made his invention over 18 years ago. It is unfair to belittle that invention by comparing his crude recommendations with the scientific methods which have been discovered since that time. His invention remains unchanged, but experience has substituted improved methods of carrying it out. The defendant uses transformers constructed by the improved methods, but they are none the less the transformers invented by Stanley.

The motion is granted.

DIAMOND DRILL & MACH. CO. v. KELLEY et al.

(Circuit Court, E. D. Pennsylvania. June 22, 1904.)

No. 4.

1. PATENTS—DAMAGES FOR INFRINGEMENT—ACCOUNTING.

On an accounting for damages and profits for infringement of a patent for a manufactured article, defendants cannot be required to account for the profits on machines manufactured and sold by them, to be used by others in making the infringing article, since, while they may be liable as contributory infringers on account of such sales, the infringement itself consisted in the manufacture and sale of the article made on such machines by the purchasers, and the damages recoverable therefor cannot be measured by the profits made on the machines.

In Equity. Suit for infringement of patent. On motion for instructions to the master.

Wm. C. Strawbridge, for complainant.
Horace Pettit, for respondents.

DALLAS, Circuit Judge. The master to whom this cause was referred by the interlocutory decree entered in favor of the complainant was asked, upon its behalf, to require an accounting not only with respect to the coiled clasps which had been adjudged to infringe the patent sued upon, but likewise, and in addition thereto, to require an account of the profit derived by the defendants, or any of them, from the manufacture and sale of machines and apparatus adapted for use, and which, with their knowledge and connivance, were used, in constructing the infringing articles. The master declined to comply with this request, and, upon careful and mature consideration, I have reached the conclusion that he was right in doing so. I have no doubt that where several persons co-operate in an infringement, as in committing any other tort, they are each and all liable therefor. Nor can it be doubted that all infringers are liable for the profits accruing to them from the infringement. But in what, in this case, does the infringement lie? Certainly not in making, using, or selling machines for manufacturing coiled clasps, but in making, using, or selling coiled clasps containing the patented invention. The two things are quite distinct, and while it is true that the manufacturer or vendor of a machine may, by supplying it for an infringing use, make himself a participant in the infringement, yet it is the thing which the machine contributes to produce, and not the machine itself, which concretely embodies the infringement, for which he who furnishes and he who wrongfully uses the machine are alike responsible.

The decree entered in another circuit in the case of New York Filter Manufacturing Company v. Jackson Filter Company, 91 Fed. 422, cannot be regarded as in any degree authoritative. It may not have been made by consent, but, at all events, it does not appear that the point now under consideration was brought to the attention of the learned judge who signed it, or was at all considered by him.

¶ 1. Accounting by infringer of patent for profits, see note to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8.

By agreement of counsel, the question which has been briefly discussed was argued as upon motion of the complainant for instructions to the master. Accordingly he is instructed to proceed in conformity with the views herein expressed, and all other questions, if any, arising in the master's office, will be considered, if need be, upon the coming in of his report.

WESTON ELECTRICAL INSTRUMENT CO. v. EMPIRE ELECTRICAL INSTRUMENT CO. et al.

(Circuit Court, S. D. New York. June 10, 1904.)

No. 9.

1. PATENTS—RENEWAL OF APPLICATION IN CASE OF FAILURE TO PAY FEES—CONSTRUCTION OF STATUTE.

   Under Rev. St. § 4897 [U. S. Comp. St. 1901, p. 3386], which authorizes any person having an interest in an invention for which a patent has been allowed, but who fails to make payment of the final fee within six months after notice of such allowance, to make another application, but provides that "such second application must be made within two years after the allowance of the original application," but one renewal application may be made; and, even if more are allowable, the final application must be made within two years after the allowance of the first, otherwise a valid patent cannot issue thereon.

2. SAME—VALIDITY OF REISSUE—ELECTRICAL CONDUCTOR.

   The Weston reissue patent No. 10,945 (original No. 381,305), for an electrical conductor, is void because the original was granted on a third application, filed more than two years after the first had been allowed, but which was not issued because of nonpayment of the fee therefor.

In Equity. Suit for infringement of reissued letters patent No. 10,945 (original No. 381,305), for an electrical conductor, granted to Edward Weston July 17, 1888. On final hearing.

William Houston Kenyon, William C. Witter, and Richard Eyre, for complainant.

Philip Mauro and C. A. L. Massie, for defendants.

HOLT, District Judge. This is a suit in equity for an injunction and an accounting for the alleged infringement of reissued letters patent No. 10,945, dated July 17, 1888, issued to Edward Weston, and subsequently assigned to the complainant, for an electrical conductor. In my opinion, the proof shows that the invention was novel and valuable, and that the defendants have infringed the patent. The serious question in the case is whether the original patent, of which the patent in suit is a reissue, was invalid because granted upon the third application for the patent, more than two years after the original application.

The first application for the patent was filed in the Patent Office October 13, 1885. The patent was allowed, and notice of the allowance given on November 21, 1885. Section 4885 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3382] provides that, if the final fee is not paid within six months from the time at which the patent was passed and allowed, and notice thereof sent to the applicant or

his agent, the patent shall be withheld. The final fee was not paid within said six months. Section 4897 of the United States Revised Statutes is as follows:

"Sec. 4897. Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact." [U. S. Comp. St. 1901, p. 3386.]

A renewal of the application for the same patent was made June 18, 1886, and it was allowed a second time on June 30, 1886. The final fee was not paid upon this new allowance within six months thereafter. A third renewal of the application for the same patent was made December 14, 1887, and the patent granted April 17, 1888. The patent was, therefore, granted more than two years after the first application, and less than two years after the second application. The defendants claim that the Commissioner of Patents had no authority to issue this patent under section 4897; that it was, therefore, void; and that, therefore, its reissue was void. The complainant claims that the true construction of section 4897 is that a party who has failed to pay the final fee within six months after the allowance of the patent can make a new application for the same patent within two years; that such new application then becomes an original application; that, if this second application is allowed, and default again made in the payment of the final fee within six months, the party can again make another application within two years, and so on indefinitely; that, therefore, Weston's third application was in time, and the patent granted on it valid. I think that the question of construction involved is a nice and difficult one, but my conclusion is that a party proceeding under section 4897 can only make one renewal application, and that, even if more than one application could be made, the final application must be made within two years after the allowance of the original application; the term "the original application," as used in this section, meaning the first application. This is the construction given to the section in an opinion of the Attorney General (69 Patent Office Official Gazette, 639; 70 Id. 493), which opinion has since been acted on by the Patent Office. In my opinion, this was a correct construction of the section. The fact that Mr. Weston might have made an application under section 4886 seems to me immaterial. He did not apply under that section, but under section 4897. If a patent had been issued, without the payment of the fee, after the expiration of six months after it had been first allowed, the patent would have been void. Walker on Pat. § 125. Section 4897 provided a remedy in such a case, and if an applicant proceeds under that section he must comply with its terms. I regret to hold a patent for a meritorious invention invalid for so technical a

cause, but I am unable to reach any other construction of section 4897.

My conclusion, therefore, is that the original patent was void, and therefore that the reissued patent was void. The bill, therefore, in my opinion, should be dismissed, with costs.

BRODRICK COPYGRAPH CO. OF NEW JERSEY et al. v. MAYHEW.

(Circuit Court, E. D. Wisconsin. May 10, 1904.)

1. PATENTS—LICENSE RESTRICTING USE—CONTRIBUTORY INFRINGEMENT.

It is within the right of the owner of a patent for a machine to sell the machines under a license containing a condition that they shall be used only in connection with patented materials, also made by such owner, and one who makes and sells to users other materials specially designed and intended to be used with such machines, and which are so used, is liable as a contributory infringer.

In Equity. Suit for infringement of patent. On demurrer to bill and motion to dissolve preliminary injunction.

S. O. Edmonds, for complainants.

Walter H. Chamberlain, for defendant.

SEAMAN, District Judge. The bill is founded on letters patent No. 584,787, issued to Lowe and Cortelyou, June 22, 1897, owned by the complainants, under which they manufacture a machine known as the "Rotary Neostyle." These machines are sold with the restriction that they are "licensed to be used only with stencil paper and ink (both of which are patented) made by the Neostyle Company," and the defendant is charged as a contributory infringer, with making a "Rotary Neostyle Ink" specially designed for use with such machines, and sold to the purchasers thus licensed, to be so used in derogation of the rights reserved to the patentees. On behalf of the defendant it is contended, in substance, that no such limitation of the use of the patented machine exists when thus sold, and none can be imposed by the patentee. Both demurrer and motion rest solely upon this view, notwithstanding the consensus of recent controlling decisions that it is untenable. In Victor Talking Machine Co. v. The Fair (C. C. A.) 123 Fed. 424, the general doctrine is settled, for this circuit at least, that the patentee is clearly within his right in imposing any terms, not unlawful per se; and his provision thus made by way of monopoly in any form will be enforced. In the Circuit Court of Appeals for the Second Circuit (Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671) and at the circuit (Id., 114 Fed. 1021) a like rule is adopted in respect of the present patent and "license agreement," wherein the present defendant was involved in the adjudged contributory infringement. Not only are these rulings controlling, and well supported by the cases there cited, but I

¶ 1. Power of patentee to control his invention, see note to Heaton-Peninsular Button Fast. Co. v. Eureka Specialty Co., 25 C. C. A. 280.

Contributory infringement of patents, see note to Edison Electric Light Co. et al. v. Peninsular Light, Power & Heat Co. et al., 43 C. C. A. 485.

See Patents, vol. 38, Cent. Dig. § 401.

am satisfied that the doctrine for which the defendant contends is inconsistent with the unlimited right of monopoly intended by the patent law. It rests with the patentee to determine the methods for its exercise, and he is at liberty to fix any price for the machine, and reserve as well benefit in its use. The sales in question are not unrestricted, but are plainly limited or conditional in use, and, if the allegations of the bill are sustained by proof, the complainant is entitled to the relief sought.

The demurrer is overruled, and the motion to dissolve the injunction is denied, in conformity with these views.

BRUNSWICK-BALKE-COLLENDER CO. v. KLUMP et al.

(Circuit Court, S. D. New York. May 19, 1904.)

1. PATENTS—SUIT FOR INFRINGEMENT—COSTS MADE AFTER OFFER TO CONSENT TO DECREE.

Where defendant in a suit for infringement, before any testimony has been taken, offers before the referee to consent to a decree as prayed in the bill, and his counsel makes no further appearance, no costs will be taxed against him for the subsequent taking of testimony, nor for the printing of the record, both of which the offer rendered unnecessary.

In Equity. Final hearing on pleadings and proofs. The suit is one for infringement of United States patent 623,933, April 25, 1899, to William H. Wiggins, for improvement in bowling alleys.

J. C. Clayton, for complainant.

LACOMBE, Circuit Judge. Issue was joined by service of an answer in November, 1903, and replication was filed. Subsequently defendants asked leave to withdraw their answer. This was denied in the following memorandum:

"No good reason for withdrawing the answer is shown. If defendants decide that further prosecution of the defense is not worth its cost to them, they may offer to submit to a decree in the usual form sustaining title and validity of patent, finding infringement, and for injunction and accounting. This will relieve them from liability for any subsequent costs for taking testimony and printing record. They cannot escape accounting by no longer litigating the main issues. But there seems no doubt, in view of what was said on the argument, that a fixed sum for each alley may be agreed upon, and possibly, also, the number of alleys made or sold which embody the device of the patent as found by the decree."

Thereafter, and on January 18, 1904, in the presence of the examiner, and before the taking of proofs had actually begun, counsel for the defendants announced that defendants had sold on or about January 1, 1904, all the alleys made or used by them containing the construction of the patent in suit, and therefore have no interest to carry on this suit. "They will therefore," he stated, "not contest the case further, and will consent and submit to a decree against them as prayed for in the bill of complaint." He also made an offer to pay $5 per pair of alleys as liquidated damages, stating that the only bowling alleys made or used by the defendants did not exceed eight

in number. Thereafter he did not attend or take any part in subsequent proceedings, nor did he appear at final hearing. Complainant's counsel declined to accept the offer, took testimony, and now presents the cause for disposition. In view of defendants' concession, it may be readily disposed of. Complainant may take a decree reciting that defendants interposed an answer, but did not attend at the taking of testimony, nor appear at the hearing before the court. Except for this recital, the decree will be in the usual form sustaining title and validity of the patent, finding defendants' device to be an infringement, and for injunction and accounting. The granting of this injunction will effectually overrule the order heretofore made denying preliminary injunction, and there is no necessity of going into an examination of proofs when defendants concede all that is prayed for except as to extent of infringement and damages, as to which no proofs are now presented. As indicated in the memorandum filed, when leave to withdraw the answer was refused, there should be no costs taxed against defendants for taking testimony subsequent to the offer to submit to decree, nor for printing of the record, both of which, as soon as offer was made, became unnecessary.

AMERICAN ACETYLENE BURNER CO. v. KIRCHBERGER.

(Circuit Court, S. D. New York. June 4, 1904.)

1. PATENTS—INFRINGEMENT—ACETYLENE GAS BURNERS.
The Shaffer patents, Nos. 617,942 and 634,838, for acetylene gas burners, if valid, can only be sustained as to minor details of construction shown. As so construed, *held* not infringed.

In Equity. Final hearing on pleadings and proofs of suit for injunction and accounting. The suit is for alleged infringement of two patents, No. 617,942, January 17, 1899, and No. 634,838, October 10, 1899, both granted to Henry E. Shaffer for improvements in acetylene gas burners.

Frederick F. Church, for complainant.
Louis C. Raegener and S. L. Moody, for defendant.

LACOMBE, Circuit Judge. A full discussion of the art of acetylene gas burners will be found in the opinion of the Circuit Court of Appeals, Second Circuit, sustaining patent No. 589,342, August 31, 1897, to E. J. Dolan, reported 128 Fed. 599. In that suit the present defendant was complainant, and the present complainant defendant.

The burners of the defendant are made under the Dolan patent, and burners made under the two patents in suit have been held to be infringements of the same patent. The only material changes suggested in the patents in suit are, first, to arrange the inlet and discharge passages at an angle with each other, instead of in a continuous curve; and, second, to make both tips and the branched burner which carries them of a single piece of refractory material. It is conceded that similar burners were made wholly of metal, and that the refractory material was well known in the art as a sub-

stance well adapted for gas tips. It is shown that so-called Napheys burners, made under the Dolan patent prior to complainant's date of invention, had the passages arranged at an angle, instead of in a curve. Under these circumstances there is found only the substitution of one well-known material for another, and the patents could be sustained, if at all, only for some minor details of construction (there seems to be an additional air passage provided), which defendant does not infringe.

The bill is dismissed.

CUYLER v. ATLANTIC & N. C. R. CO.

In re DANIELS.

(Circuit Court, E. D. North Carolina. July 23, 1904.)

1. FEDERAL COURTS — JURISDICTION — CONTEMPT—STATUTES — CONSTRUCTION—NEWSPAPER PUBLICATIONS.

   Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], provides that the federal courts shall have power to punish contempts by fine and imprisonment, provided that such power shall not extend to any case except misbehavior in the presence of or so near the court as to obstruct the administration of justice, the misbehavior of officers of the court, and the disobedience or resistance of any such officer, party, juror, witness, or other person to any lawful writ, process, order, decree, or command of the court. *Held*, that the jurisdiction prescribed by such act was exclusive, and deprived the court of power to punish a newspaper publisher for contempt consisting of an editorial in his paper criticizing the official conduct and integrity of the court.

2. SAME—IMPRISONMENT—VOID JUDGMENT—HABEAS CORPUS.

   Where a federal court rendered judgment against a newspaper publisher for contempt, which judgment was void as in excess of the court's jurisdiction, the publisher was entitled to discharge on habeas corpus.

In Equity.

James H. Pou, Thos. J. Jarvis, R. T. Gray, and R. W. Winston, for petitioner.

Harry Skinner, opposed.

PRITCHARD, Circuit Judge. In order to determine whether the petitioner is entitled to the relief prayed for in the petition upon which the writ of habeas corpus was issued, it is necessary to determine two questions: (1) Did the court which imposed the sentence in this case have jurisdiction? (2) Does this court have jurisdiction to hear and determine this case on a writ of habeas corpus?

The section under which the court based its action is 725 of the Revised Statutes [U. S. Comp. St. 1901, p. 583], which reads as follows:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration

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¶ 2. See Habeas Corpus, vol. 25, Cent. Dig. § 20.

of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

This act not only limits the power of the court, but employs language which clearly defines the power of the courts with respect to summary punishment for contempt, and applies to all courts, except perhaps the Supreme Court. It applies to the District and Circuit Courts, inasmuch as they were created by act of Congress, their powers and duties being granted by the act creating them and subsequent acts enlarging and diminishing their jurisdiction. The act of 1831 is a chart by which these courts are to be guided in cases where summary punishment for contempt is to be inflicted.

Justice Field, in Ex parte Robinson, 19 Wall., at page 510, 22 L. Ed. 205, in referring to the act of 1831, says:

"It limits the power of these courts, in this respect, to three classes of cases: First, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; second, where there has been misbehavior of any officer of the courts in his official transactions; and, third, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."

In Kent's Commentaries, volume 1, note on page 340, at bottom, it is said, in speaking of the act of 1831:

"That act had withdrawn from the courts of the United States the common-law power to protect their suitors, officers, witnesses, and themselves against the libels of the press, however atrocious, and though published and circulated pending the very trial of the cause."

In the Case of Savin, 131 U. S. 274, 9 Sup. Ct. 701, 33 L. Ed. 150, Justice Harlan, among other things, says:

"The act of 1789 did not define what were the contempts of the authority of the courts of the United States in any cause or hearing before them, nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation. The act of 1831, however, materially modified that of 1789, in that it restricted the power of the court to inflict summary punishment for contempt to certain specified cases, among which was misbehavior in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice."

In Ex parte Poulston, 19 Fed. Cas., on page 1206 (No. 11,350), Baldwin, J., says:

"On March 2, 1831 (4 Stat. 487, c. 99 [U. S. Comp. St. 1901, p. 583]), Congress passed an act declaratory of the law concerning contempt of court. * * * The history of this act, the time of its passage, its title and provisions, must be considered together, in order to ascertain its meaning and true construction. It was enacted shortly after the acquittal of Judge Peck, of Missouri, on an impeachment preferred against him for issuing an attachment against a member of the bar for making a publication in relation to a suit which had been decided by that judge. On the trial the law of contempt was elaborately

examined by the learned managers of the House of Representatives and the counsel for the judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause during its pendency, and all admitted its illegality when done while the cause was actually on trial. It had too often been exercised to entertain the slightest doubt that the courts had power, both by the common law and the express terms of Judiciary Act Sept. 24, 1789, c. 20, § 17, 1 Stat. 83, as declared by the Supreme Court, to protect their suitors by the process of attachment. With this distinct knowledge and recognition of the existing law, it cannot be doubted that the whole subject was within the view of the Legislature; nor that they acted most advisedly on the law of contempt, intending to define in what cases the summary power of the courts should be exercised and to confine it to the specified cases. From the title and phraseology of the act it would seem to have been their intention to declare that it never existed in any other cases than those enumerated. It is 'a declaratory act,' which is a declaration of what the law 'was, is, and shall be hereafter taken' when put into the form usual in statutes which operate to settle the law retrospectively. * * * The acts of 1831 must be taken to be the declared construction of this and all other laws limiting its operation in the manner prescribed, and, as generally considered, Congress is to this court what the Constitution is to the Supreme Court. * * * It is in the discretion of the legislative power to confer upon the courts a summary jurisdiction to protect their suitors or itself by summary process, or to deny it. It has been thought proper to do the latter in language too plain to doubt of the meaning of the law, or, if it could be doubted by any ordinary rule of construction, the occasion and circumstances of its enactment would most effectually remove them. It would ill become any court of the United States to make a struggle to retain any summary power the exercise of which is manifestly contrary to the declared will of the legislative power. * * * The law prohibits the issuing of an attachment except in certain cases, of which the present is not one. It would, therefore, be not only utterly useless, but place the court in a position beneath contempt, to grant a rule to show cause why an attachment should not issue, when an exhibition of the act of 1831 would show most conclusive cause. The court is disarmed in relation to the press. It can neither protect itself nor its suitors. Libels may be published upon either without stint. The merits of a cause depending for trial or judgment may be discussed at pleasure. Anything may be said to the jurors through the press, the most willful misrepresentations made of judicial proceedings, and any improper mode of influencing the decision of causes by out of door influence practiced with impunity."

Rapalje on Contempt, in section 56, says:

"But mere libels on the judge as a man and an officer, printed in a newspaper, are not contempts. Thus a newspaper article, published during the sitting of a court, pending the trial before that court of the prisoner indicted for murder, charging the presiding judge of being an abetter of the murderer, is not a contempt of the court, but a mere libel upon the functionary. * * * The force of public opinion in this country in favor of the freedom of the press has restrained the free exercise of the power to punish this class of contempts, and in many jurisdictions statutes have been enacted depriving the court of the power to punish them. It was taken from the federal courts by the act of Congress of 1831, which act deprives those courts of the common-law power to protect by this process their suitors, witnesses, officers, and themselves against the libel of the press, though published and circulated pending the trial of a cause therein. * * *"

Under the judiciary act of September 24, 1789, c. 20, § 17, courts of the United States were given "power to punish by fine or imprisonment, at the discretion of the said court, all contempts of authority in any cause or hearing before the same." The act of 1789 did not define or limit the power or authority of the court of the United States to inflict summary punishment in any cause or hearing before

them. It was also silent as to any rules of procedure for determining what constituted contempt. As to what particular acts constituted contempt, as well as the mode of procedure against the offender, was to be determined in accordance with the established rules and principles of the common law with reference to existing conditions. Under this act it was contended that the authority which the courts had to punish for contempt at their discretion had been greatly abused, and, in order that the citizen might not be subjected to annoyance on account of the commission of acts not contemplated by the law, and that the freedom of the press as well as the liberty of the individual might be preserved in the spirit guarantied by the Constitution, Congress defined the limit to which the courts could go in such cases. Section 725 of the Revised Statutes is in the nature of a limitation of the power of the court to punish for contempt.

An examination of the record discloses the fact that the petitioner is the editor of a daily newspaper published in the city of Raleigh, N. C., where the court was held. It also appears that on the 29th day of May a receiver was appointed for the Atlantic & North Carolina Railroad Company in a proceeding pending before the court for that purpose. That on Sunday after the receiver was appointed the petitioner published an editorial in his paper, in which the court was severely criticised for its conduct in appointing such receiver. It is alleged in the rule against the petitioner that divers other editorials reflecting on the official integrity of the court had been published in said paper. The record does not show that the alleged misbehavior of the petitioner was in the presence of the court, or so near thereto as to obstruct the administration of justice; nor is there anything to show that the alleged misbehavior of petitioner interfered with the court, or that it tended in the slightest degree to disturb the orderly proceedings of the court. The inherent power of the court to punish for contempt is based upon the theory that it is essential that the court should possess ample authority to secure the free and unobstructed exercise of its functions in the enforcement of the law. Therefore it is only such acts as tend to interfere with the orderly proceedings of the court or with the due administration of justice that can be properly punished as a contempt of court. Words written or spoken at a place other than where the court is held, and not so near thereto as to interfere with the proceeding of the court, do not render the author liable. Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for contempt. That newspapers sometimes engage in unwarranted criticism of the courts cannot be denied. In some instances they construe the liberty of the press as a license to authorize them to engage in a wholesale abuse of the court, but these instances are rare, and do not warrant a departure from the well-settled principles of the law as declared by Congress and construed by the courts. If judges charged with the administration of the law are not to be criticised on account of their official conduct, the lib-

erty of the press is abridged, and the rights of individuals imperiled. While all citizens should entertain due respect for the courts of the land, it does not follow that editors and public speakers are to refrain from legitimate criticism of the acts of any tribunal. Such criticism should be invited by public officials, in order that the people may fully understand what is being done by those who are acting as their agents in the administration of the law.

Public questions are generally settled in the right way, and the fact that such is the case is due in a large measure to their free and untrammeled discussion by the press of the country. The courts are constituted for the purpose of protecting the rights and liberties of the individual, and the enactment of any law which gives a judge the power to prevent the free and unrestrained discussion of questions which may come before the court for adjudication would in many instances defeat the very object for which the courts were established. There may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice. In order to determine whether this court has jurisdiction to hear this cause in the proceeding now instituted it is necessary to ascertain whether the court whose action is complained of had authority to impose the judgment. It appears that the distinguished judge who adjudged the petitioner to be in contempt of court exceeded the authority granted in the act of 1831, and that the court was without jurisdiction. Such being the case, the judgment of the court is void, and therefore a nullity.

In Ex parte Buskirk, 72 Fed. 21, 18 C. C. A. 410, the court, in considering the question of whether one committed for contempt might be discharged on a writ of habeas corpus, says:

"In the light of the recent decisions of the Supreme Court of the United States it is no longer an open question that, if the court whose action is complained of had no authority to pass the sentence imposed, the same is therefore void, for the reason that the court acted without jurisdiction, and, further, that in such cases the party seeking relief may be discharged on habeas corpus. Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; Ex parte Harding, 120 U. S. 782, 7 Sup. Ct. 780, 30 L. Ed. 824; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207. The proceedings of a court which has acted in excess of its jurisdiction are void, as much so as are the proceedings of a court which has acted without jurisdiction. In either its order of commitment is a nullity, and the party prejudiced may be discharged on a writ of habeas corpus."

Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861; Ex parte Curtis, 106 U. S. 371, 27 L. Ed. 232; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

In view of the foregoing the court finds that the petitioner is unlawfully restrained of his liberty, and it is therefore considered and ordered by the court that the said Josephus Daniels be discharged from the custody of the marshal of the United States, and that he go hence without day.

CLIFFORD v. WILLIAMS et ux.

(Circuit Court, D. Washington, N. D. June 28, 1904.)

No. 1,204.

1. FEDERAL COURTS—JURISDICTION—HABEAS CORPUS—CUSTODY OF CHILD.
Rev. St. tit. 13, c. 13, §§ 751–766 [U. S. Comp. St. 1901, pp. 592–597], authorizes federal courts and the justices thereof to issue writs of habeas corpus and dispose of persons restrained of liberty as law and justice require, but prohibits the use of such writ in behalf of prisoners in jail, except in the enumerated cases in which the national government may properly interfere. *Held*, that neither such chapter, nor the general law defining the jurisdiction of United States Circuit Courts, gives to such courts jurisdiction to issue a writ of habeas corpus to determine a controversy between persons who are residents of different states as to the right of custody of their infant child, who was neither restrained of her liberty nor imprisoned.

2. SAME—JUDICIAL PROCEEDINGS—STATES—FULL FAITH AND CREDIT.
Where, after the remarriage of plaintiff's divorced wife, and her removal to another state, taking with her an infant daughter awarded to her custody in divorce proceedings, another order was made in such proceedings awarding custody of the child to plaintiff, the refusal of his former wife to comply with such decree, and her obtaining a decree of adoption in the state of her domicile, without proof that the courts in such state had refused to recognize plaintiff's decree, did not confer jurisdiction on the federal Circuit Court in the state of the wife's domicile to issue a writ of habeas corpus to determine plaintiff's right to the custody of the child, on the ground that full faith and credit had been denied to plaintiff's decree awarding him the custody of the child.

Petition for a writ of habeas corpus by a citizen of California to obtain custody of his minor child. Heard on motion to dismiss for want of jurisdiction. Motion granted.

W. H. White and J. J. Burt, for petitioner.
Sweeney & Steiner, for respondents.

HANFORD, District Judge. This cause involves a controversy between divorced parents for the custody of their child. The petitioner is a citizen of California, in which state the parties were domiciled when they were divorced. The divorce was granted by a court of the state of California, and by its decree the custody of the child was awarded to the mother, in accordance with the laws of California, for the reason that, being a little girl, of tender years, it required the nurture of its mother, although the divorce was granted to the father on account of her fault. The decree, however, recognized the parental rights of the father by according to him the privilege of seeing the child peri-

¶ 1. Jurisdiction of federal courts in habeas corpus proceedings, see note to In re Huse, 25 C. C. A. 4.

odically. The mother, after being married to her co-respondent, Herbert O. Williams, removed from California to the state of Washington, bringing the child with her, without obtaining leave of the court to change the child's domicile, and the respondents are now citizens of the state of Washington. The court which granted the divorce subsequently made a new order, awarding the custody of the child to the father upon his application, of which notice was served upon the attorney of record for the mother. The respondents have, by formal proceedings in a court of the state of Washington, attempted to acquire a legal right to the custody of the child by adoption, which proceedings are alleged in the petition to be invalid, for the reason that the petitioner did not consent to such adoption of his child, and the court in which the proceedings were had did not have jurisdiction. The respondents deny the jurisdiction of this court to entertain the petition for a writ of habeas corpus, and on that ground have moved to dismiss the case.

I am impressed with the plausibility and force of the arguments made in behalf of the petitioner—that it is desirable that the national courts should have jurisdiction of controversies involving conflicting orders and judgments of courts of different states—but the court has no power to invest itself with jurisdiction, and cannot assume it unless jurisdiction has been conferred by an act of Congress. The Constitution of the United States establishes the range of the judicial power of the national government, and ordains that the judicial power shall be vested in a Supreme Court and such inferior courts as Congress may establish, and it makes a direct grant of jurisdiction to the Supreme Court, but makes no similar direct grant of jurisdiction to the inferior courts which Congress is authorized to create. Congress is intrusted with power to create tribunals inferior to the Supreme Court, and to define their jurisdiction, so as to make distribution of the limited powers which the judicial branch of the national government may exercise. Therefore, whenever one of the inferior courts contemplated by the Constitution is called upon to adjudicate a controversy, it must appear that the jurisdiction invoked has been conferred by an act of Congress. These principles are fundamental, and as incontrovertibly established by the often-repeated declarations of the courts as the fact of the distribution of the powers of the national government into three coordinate branches. The jurisdiction of this court to adjudicate the controversy between the parents of this child having been challenged by the respondents' motion, the court cannot consider any question touching the merits of the controversy until we find a particular statute which clearly confers jurisdiction to adjudicate such a controversy.

Where is the statute? In the prosecution of this inquiry, it is logically necessary to first ascertain the nature of the case and its object. Originally, in England, the great writ of habeas corpus ad subjiciendum was one of the high prerogative writs by which courts acquired jurisdiction of a person actually imprisoned or deprived of his liberty; but in this case the writ was issued as process of the court to acquire temporary custody of a child which has not been incarcerated in any prison, for the purpose of adjudicating a controversy between its parents as to their respective rights to its custody. The object sought by the liti-

gation is not to release the child from restraint, but to determine finally the legal rights of the parents. The case being a civil action at law, and the jurisdictional process being the writ of habeas corpus, two theories of jurisdiction must be canvassed; one requiring consideration of the general statute defining the jurisdiction of United States Circuit Courts, and the other the statutory provisions relating particularly to writs of habeas corpus.

Looking now to the statutes, we find that Congress, by the general law defining the jurisdiction of United States Circuit Courts, has conferred upon them jurisdiction inclusive of civil cases arising under the Constitution or laws of the United States, or treaties made under their authority, and cases in which there shall be a controversy between citizens of different states. If this grant of jurisdiction were absolute and unlimited, there would be no difficulty in resolving the question now under consideration in favor of the court's jurisdiction; but the statute does not give jurisdiction of all cases arising under the Constitution, laws, or treaties of the United States, nor of all cases involving controversies between citizens of different states, but limits the jurisdiction of all such cases by a prescribed amount of money or pecuniary value involved; and this case cannot be brought within the terms of that statute, because the right of a parent to have the custody of a minor child is priceless, and the value of a person's liberty cannot be estimated in money. Barry v. Mercein, 5 How. 118, 12 L. Ed. 70; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

Under this general law, Circuit Courts have jurisdiction of suits in which the litigants claim lands under grants from different states; and this case suggests the propriety of conferring jurisdiction of suits in which the rights claimed are based upon judgments or judicial orders of courts of different states, without regard to property as the subject of litigation, or the amount involved. This, however, is a matter proper for Congress to consider, and arguments in favor of such enlargement of jurisdiction can have no influence upon a court called upon to decide a question as to its jurisdiction under existing laws.

The special grant of power to issue writs of habeas corpus is contained in chapter 13 of title 13, including sections 751–766, Rev. St. [U. S. Comp. St. 1901, pp. 592–597]. As significance has been ascribed to the arrangement into sections of the different parts of the law, it is necessary for a correct analysis to consider the several sections separately, and also to treat the chapter in its entirety as one law. Sections 751 and 752 provide that the Supreme Court, Circuit Courts, and District Courts, and the justices and judges of said courts, within their respective jurisdictions, shall have power to issue writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty. Section 761 provides for a summary hearing, and authorizes the court or justice or judge to dispose of the party as law and justice require. These sections seem to contain the entire grant of power, and they do not contain any clause or sentence indicating limitations of the power. It is unnecessary to prove that the power given by this law is not without any limitation, because unlimited power is not contended for in the argument in behalf of the petitioner. The question is whether the power granted by these sections is coextensive with the judicial power

of the national government, as defined by the Constitution, so as to comprehend all cases within the jurisdiction conferable upon the federal courts, or whether the power is to be exercised only in cases within the limited jurisdiction conferred upon the courts by other acts of Congress. The argument in favor of construing the law liberally, as a grant of the whole power permissible to be granted, with respect to matters in which the writ of habeas corpus may be appropriately used as process by which to acquire jurisdiction of a particular person, is supported in an able decision of the Circuit Court of Appeals for the First Circuit in the case of King v. McLean Asylum, 64 Fed. 331, 12 C. C. A. 145, 162, in which that court announced its conclusion:

"That the power granted by the judiciary act of 1789, as remodeled by sections 751 and 752 of the Revised Statutes, goes to the entire extent of the jurisdiction which Congress could, under the Constitution, vest in the Supreme Court or the Circuit Courts, except as expressly excluded by other provisions of statute, and except as also necessarily excluded by the inherent nature of the courts themselves, and of the machinery given them by law with which to work out practical results."

I am unable, however, to follow that decision in this case, for the reason that the facts in this case do not afford any safe ground upon which to base a distinction between this case and the Burrus Case, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500, in which the Supreme Court was called upon to decide, and did decide, a controverted question as to the jurisdiction of a District Court of the United States, in a habeas corpus case, to award the custody of a child to its father, and denied the jurisdiction of the District Court on the ground that the writ of habeas corpus cannot be used by courts of the United States, except in cases where it is appropriate to their jurisdiction; and in that connection the court said:

"Of course, this does not mean that they have jurisdiction in all cases to issue the writ of habeas corpus, but that they have such jurisdiction when, by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ."

This is a solemn declaration, which cannot be brushed aside as mere dicta, and this court is necessarily bound by the determinations of the Supreme Court of questions affecting the extent of its powers. The only material differences between this case and the Burrus Case are in the facts that the question involved in that case had reference to the jurisdiction of a District Court, and no conflicting orders or judicial proceedings of courts of different states were set up as the basis of rights claimed, whereas this case is in a Circuit Court, and the petitioner claims an absolute right to the custody of his child by virtue of an order awarding the custody to him, made by a court of the state of California, and the petition attacks the validity of proceedings of a court of the state of Washington giving judicial sanction to the adoption of the child by the respondents; but such differences do not justify the application of any different principle or rule for construing the statute. Section 751 confers identically the same power to issue writs of habeas corpus upon the District Courts that it confers upon the Circuit Courts, and no differences in their capacity or functions, or the purposes for which they were established, distinguishing them from the Circuit

Courts, preclude the District Courts from taking the power granted by that section in all of its amplitude. Both are inferior to the Supreme Court, and established by laws enacted by Congress pursuant to authority given by the Constitution, and derive all of their powers and jurisdiction from the same source; and they are equally well equipped in their organization, with all the means requisite for exercising the functions of a court in taking into custody a person, and adjudicating all questions affecting that person's liberty, and all questions affecting the authority and rights of others with respect to the custody and control of infants. The facts that the litigants are citizens of different states, and that the case involves a controversy between citizens of different states, cannot be treated as a feature affecting the question as to the relative powers of the Circuit and District Courts, without conceding that the decision of the question must be controlled by the general statutes defining the jurisdiction of the different courts. Congress has conferred jurisdiction of civil actions at law and suits in equity arising under the Constitution, laws, and treaties of the United States, and of actions and suits of a civil nature presenting controversies between citizens of different states, upon the Circuit Courts, and has not authorized the District Courts to entertain jurisdiction upon those grounds, but it may do so; and it is not unlikely that, in the near future, agitation of the subject, which has been going on for many years, will result in constituting the District Courts the sole repositories of the original jurisdiction of the federal courts. A concession that section 751 is to be construed, for the purpose of determining the respective powers of the Circuit and District Courts, with reference to the general statutes defining their jurisdictions, is an abandonment of the entire argument based upon the special grant of powers contained in the habeas corpus law, because it takes us back to the question whether, under the general law, the case is cognizable in the Circuit Court, and leaves us there.

Section 753 contains no grant of power, but is a restriction upon the power of the federal courts, prohibiting the issuance of the writ of habeas corpus in behalf of a prisoner in jail, except under the prescribed conditions enumerated in that section. To meet the conditions existing at the time of South Carolina's attempt to nullify the laws of the United States, and deal with officers of the national government under its criminal laws for acts done in the performance of official duties, Congress enacted:

"That either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner, or prisoners in jail, or confinement, where he or they shall be committed or confined on, or by any authority of law, for any act done, or omitted to be done, in pursuance of a law of the United States. * * *" Act March 2, 1833, c. 57, § 7, 4 Stat. 634.

This law has been recast in the Revised Statutes, and the body of it, with changed phraseology, now constitutes section 753; and, as already indicated. there is in it no grant of power, so that it must now be construed with reference to its position, following sections 751 and 752, in order to give it any definite and clear meaning, unless we assume that by implication it confers power to grant writs of habeas corpus in the

excepted cases enumerated. Thus construed, the section, by implication, would confer jurisdiction upon the federal courts generally, without discriminating between Circuit and District Courts, to issue writs of habeas corpus in behalf of persons held in custody in violation of the Constitution of the United States. It is the main contention of the petitioner in this case that, as the respondents have refused to surrender the child in compliance with the order of a court of the state of California, they have failed to give full faith and credit in the state of Washington to a judgment of a court of the state of California, and that such refusal constitutes detention of the child in custody, in violation of section 1 of article 4 of the Constitution, and that the habeas corpus law does, expressly or by implication, confer jurisdiction upon this court, as a Circuit Court of the United States, to grant the relief which he seeks by the writ of habeas corpus. If the law by necessary implication does confer jurisdiction upon the federal courts to grant writs of habeas corpus in the particular cases enumerated in section 753, such implied jurisdiction is necessarily limited by the conditions to which the law is applicable, and does not include this case, for the reason that the child is not imprisoned in jail, and imprisonment in jail appears to be the first condition recited in that section, and is the controlling condition governing all of the cases which, by reason of the exceptions, the federal courts are permitted to take cognizance of.

There is another fatal objection to the petitioner's contention. That objection is grounded upon the difficulty of bringing the case within the purview of the full faith and credit clause of the Constitution. That section of the Constitution provides that Congress may by general laws prescribe the manner in which the public acts, records, and judicial proceedings of every state "shall be proved, and the effect thereof"; and, pursuant to that authority, congress has, by section 905, Rev. St. [U. S. Comp. St. 1901, p. 677], prescribed the manner in which public acts, records, and proceedings shall be proved, and the effect thereof, as follows:

"Sec. 905. * * * The records, and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the court of the state from which they are taken."

Under this law a judgment of a court of a state can only be made effective elsewhere within the United States through the instrumentality of a court having local jurisdiction. Section 905, and the provisions of the Constitution upon which it is based, establish a rule of evidence, rather than a ground of jurisdiction. Wisconsin v. Pelican Insurance Co., 127 U. S. 265–300, 8 Sup. Ct. 1370, 32 L. Ed. 239. See, especially, pages 291–293, 127 U. S., pages 1375, 1376, 8 Sup. Ct., 32 L. Ed. 239.

Applying this rule to the case in hand, a duly authenticated transcript of the judgment awarding to the petitioner custody of his child is competent evidence in this state, and, when so proved in a court of this state, the judgment itself will have the same validity, force, and virtue

in this state that it has by law or usage in the state of California. Unless it can be impeached for fraud or lack of jurisdiction in the court which rendered it, the parties and the court will be bound by it, so far that the controversy which it determined cannot be again litigated in this state. But until a court other than a court of the state of California refuses to give such faith and credit to that judgment, the refusal of the respondents to surrender the child will not constitute a violation of the Constitution. In this connection, it should be noted that the petition does not allege that, in the proceedings for legal adoption of the child by the respondents, the Washington court failed to give full faith and credit to the order of the California court awarding custody of the child to the petitioner, or acted with knowledge thereof. The duty of the respondents to obey the command which the judgment contains is not more imperative by reason of their presence in this state than if they had remained in California, and their custody of the child in this state is not in violation of the Constitution. It is not, because, according to the act of Congress, the judgment awarding the legal custody to the petitioner can have no other force or effect in this state than it has in California; and, until equal faith and credit has been refused by a court, there can be no ground for complaining of any violation of the Constitution, and no cause of action which will entitle the petitioner to invoke the jurisdiction of a national court for the preservation of a constitutional right.

I regard chapter 13 of title 13, Rev. St., as one law, intended to govern the practice of the federal courts in habeas corpus cases; the several sections thereof having relation to each other to constitute a complete, harmonious system. In general terms, it authorizes the courts, and the justices and judges thereof, to issue writs of habeas corpus, and dispose of persons restrained of liberty, as law and justice require; prohibiting, however, the use of the writ in behalf of prisoners in jail, except in the enumerated cases in which the national government, acting within its sphere, may properly interfere. And I am constrained by the decision of the Supreme Court in the case of Burrus, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500, to hold that the authority which the law gives does not enlarge the jurisdiction of this court, to embrace this case.

Motion to dismiss granted.

O'CONNELL et al. v. PINNACLE GOLD MINES CO.

(Circuit Court, D. Washington, N. D. June 13, 1904.)

No. 1,057.

1. MINING CLAIMS—LOCATION—LOCATOR'S ESTATE—STATUTES.

Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1425], declares that locators of mining locations on the public domain, their heirs and assigns, so long as they comply with the laws of the United States and with state, territorial, and local regulations not in conflict with the laws of the Unit-

¶ 1. See Executors and Administrators, vol. 22, Cent. Dig. § 289.

ed States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, etc. *Held*, that since the mining laws of the United States did not restrict discoverers to a single claim, nor require them to apply for patents within any specified time or at all, and such laws authorized the assignment and taxation of such claims, on the death of the locator his unpatented claims passed under the statute to his administrator, as a part of his estate, and not to his heirs, as grantees of the government.

Action at law to recover possession of unpatented mining claims from a defendant holding as owner by right of purchase from the administrator of the estate of the deceased locator of the claims; the plaintiffs being alleged heirs of the deceased, and claiming ownership as grantees of the government, under section 2322, Rev. St. [U. S. Comp. St. 1901, p. 1425]. Heard on motion for judgment on the pleadings. Motion granted.

Victor E. Palmer and G. Ward Kemp, for plaintiffs.
James B. Howe and Metcalfe & Jurey, for defendants.

HANFORD, District Judge. The property which is the subject of controversy in this case consists of several mining claims situated in Okanogan county, in this state. Said claims were discovered and located under the mining laws of the United States by James O'Connell, deceased, who thereby acquired the possessory rights defined by section 2322, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1425], and had possession at the time of his death, but made no application to the government for the issuance of patents, and the title to the property remains vested in the United States. O'Connell died intestate in the year 1899, and the plaintiffs claim to be lawful heirs of said deceased, and entitled by inheritance to five-sixths of his estate, and that a sister of the deceased, Alice O'Connell O'Neill, is the only other heir, her share of the estate being one-sixth. The superior court of the state of Washington for Okanogan county appointed an administrator of the estate, and in the course of proceedings made a decree and order of distribution, whereby it was adjudged that Alice O'Connell O'Neill is the sole heir of James O'Connell, and entitled to receive all the residue of his estate, after paying debts and expenses of administration. The mining claims were sold by the administrator under an order of the superior court, and the defendant claims ownership thereof, deraigning its title through conveyances from the administrator and from Alice O'Connell O'Neill. The plaintiffs claim ownership of five-sixths of the mining claims, not by inheritance from James O'Connell, but as donees of the United States government. Their claim is based upon the following proposition: Section 2322, Rev. St. U. S., is a congressional grant of portions of the public lands of the United States, including veins and lodes containing valuable mineral deposits, in the same sense that other acts of Congress have been construed as grants of portions of the public domain to settlers who establish homes thereon, and cultivate and improve their claims; the grant in each case being conditional, so that no title passes from the government until fulfillment of the conditions prescribed; that, upon

the death of the locator of a mining claim before performance of the conditions essential to the acquisition of title, his possessory rights do not pass by inheritance, but in that event his heirs occupy the position of designated successors entitled to acquire the property as grantees of the government. The plaintiffs base their whole contention upon their construction of section 2322, Rev. St. U. S., the material portion of which reads as follows:

"Sec. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. * * *"

The rights claimed by the respective parties above outlined are set forth in the pleadings, and the case has been argued and submitted upon a motion filed by the defendant to strike parts of the reply to the defendant's answer, and for a judgment in favor of the defendant upon the pleadings. As the case hinges upon a question of law, and as the plaintiffs must prevail, if at all, upon the validity of the claim which they assert, this motion appears to the court to be in accordance with good practice, and presents the issue of law fairly for the court's consideration.

It is certainly true that, if the mining claims in controversy were not part of the assets of the estate of James O'Connell, no rights with respect thereto were transferred by the administrator's sale, and the defendant has no interest therein greater than Mrs. O'Neill's share. Whether the defendant acquired by conveyance from her all or only an undivided share of the property involves an important question of fact put in issue by the pleadings—that is, whether the plaintiffs are lawful heirs of James O'Connell; but, for the purpose of deciding the question raised by the motion, it will be assumed that they are lawful heirs, as they have alleged.

In support of their position, counsel for the plaintiffs have cited and rely upon decisions of the courts in cases arising under the Oregon donation law, and the several acts of Congress prescribing the manner of acquiring titles to public land by settlers thereon. Hall v. Russell, 101 U. S. 503, 25 L. Ed. 829; Hershberger v. Blewett (C. C.) 55 Fed. 170; McCune v. Essig (C. C.) 118 Fed. 273; Id., 122 Fed. 588, 59 C. C. A. 429. But it is the opinion of the court that those decisions are not authorities in point, for the reason that there is a radical difference in phraseology and intent between the laws under which those cases arose and the mining laws. I can find in the case of Black v. Elkhorn Mining Co., 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221, cited by counsel for plaintiffs, no support whatever for their contention. In that case the Circuit Court for the District of

Montana, the Circuit Court of Appeals for the Ninth Circuit, and the Supreme Court, all agreed in deciding adversely to the plaintiff, a widow who sued to recover a dower interest in a mining claim which her husband had sold in his lifetime. The doctrine of that case seems to be that section 2322, Rev. St. U. S., grants no interest in a mining claim to the wife of the locator, and that, if he sells it, all rights which he acquired from the government are thereby transferred to his vendee, unincumbered by any possible future claim of the locator's wife to a dower interest therein, and that when the vendee of a locator obtains a patent the mere possessory right becomes merged in the paramount title.

The policy of the government has been to recognize the rights of discoverers of valuable mineral deposits to appropriate for mining purposes the ground embracing their discoveries, and to extract therefrom ores and precious metals without rendering any account to the government therefor. A great deal of valuable mining ground was appropriated and exhausted, without interference by the government, before Congress enacted any law granting mining privileges, or providing for the acquisition of titles to mining ground. The failure of the government to prohibit mining operations on the public domain was understood as an implied license, and the miners were not treated as trespassers. Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; Northern Pacific R. Co. v. Sanders, 49 Fed. 129, 1 C. C. A. 192.

The rights which miners exercised under the implied license prior to the year 1872 were exactly analogous to the rights which they now have under sections 2319, 2324, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 1424, 1426], except that the acts of Congress are more specific in defining the limitations as to the quantity of ground which may be appropriated, and the manner of defining boundaries of mining claims, and the giving and recording of notices of the rights claimed. The mining laws do not restrict discoverers to a single claim, nor require them to apply for patents conveying the title to any claim within any specified time, or at all, and mining claims may be assigned, taxed, and sold under state laws for nonpayment of taxes, and transfers are not only permitted, but are legalized, so that the vendees succeed to all the rights of the original locators, and controversies with respect to possessory rights may be litigated in the courts while the government retains the original title, but all such controversies must be determined by the law of possession. See section 910, Rev. St. U. S. [U. S. Comp. St. 1901, p. 679].

In the opinion of the Supreme Court, by Justice Miller, in the case of Forbes v. Gracey, it is declared that the mineral land act embraced in sections 2318, 2352, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 1423, 1441], is a recognition by Congress of the possessory rights of miners, "as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. * * * Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the states and the federal government." And in that case it

was further declared that a mining claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States, and, further, that such a claim may also be subjected to a lien for taxes, and sold to enforce the lien. The doctrine of that decision has been reaffirmed by the Supreme Court in a number of cases. See Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168; Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532.

In the case of Benson Mining Company v. Alta Mining Company, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762, Justice Brewer, in delivering the opinion of the Supreme Court, quoted with approval an opinion of the Secretary of the Interior, in which that officer classified rights under the mining laws of the United States as follows:

"(1) Title in fee simple. (2) Title by possession. (3) The complete equitable title. The first vests in the grantee of the government an indefeasible title, while the second vests a title in the nature of an easement only. The first, being an absolute grant by purchase and patent, without condition, is not defeasible, while the second, being a mere right of possession and enjoyment of profits without purchase, and upon condition, may be defeated at any time by the failure of the party in possession to complete the condition, viz., to perform the labor or make the annual improvements required by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."

These decisions of the highest court are plain and emphatic, and conclusively settle the question as to the nature and extent of the rights acquired by a valid location of a mining claim pursuant to the laws of the United States. The law severs the right of possession and enjoyment from the title. Until the right to a patent has been perfected, and an equitable title acquired by full compliance with the laws on that subject, the government retains the title to all mines within the public domain. But while retaining the title and authority to make other disposition of the property, it allows discoverers to locate claims, and grants to locators, their heirs and assigns, the right to have exclusive possession of the surface within the boundaries of their claims, and to retain possession so long as work in developing the mine and making improvements thereon to the value of $100 shall be done annually upon each claim. The words of the grant, in so far as section 2322 is a grant, are comprehensive and technical, and are the words habitually used in conveyancing to convey to the grantee immediately all the rights intended to be conveyed. If the act granted a life estate to the locator, with remainder to his heirs generally, under the rule in Shelley's Case, the word "heirs" would be construed as a limitation of the estate granted, and not as a word of purchase, and the locator would take to himself the entire estate granted. A fortiori, that must be the effect of a grant in general terms to locators, their heirs and assigns.

Section 2322, Rev. St. U. S., does not purport to grant a fee-simple estate, nor any title whatever. It relates to the right of possession only, and it grants nothing to the heirs except the right to inherit, and they can only inherit the identical interests and rights

which shall have become vested in the deceased during his lifetime. Heirs are not designated as a class entitled to a first exclusive right to acquire the title to mining property from the government. Such a right would be incompatible with the locator's right of alienation, and incompatible with the rights of the several states to tax mining claims within their boundaries, and enforce payment of taxes by selling such claims. The sections of the law which provide for the acquisition of the titles to mining claims by patents contain no provisions similar to the provisions of other laws giving to widows and children of deceased settlers preferred rights to obtain patents.

It is the opinion of the court that the mining claims in controversy, and all the rights with respect thereto granted by section 2322, Rev. St. U. S., were fully vested in James O'Connell, and were his property during his lifetime, and said claims were a part of the assets of the estate of James O'Connell, which the administrator of said estate could lawfully take into his possession and dispose of in the administration of the estate, the same as any other assets, and that, as against the purchaser of said claims at a lawful judicial sale by the administrator, the plaintiffs have no legal or equitable rights. They have no rights to nor interest in the mining claims as donees or grantees of the government of the United States, and therefore they cannot maintain this action.

MALLORY et al. v. MARYLAND GLASS CO.

(Circuit Court, D. Maryland. July 6, 1904.)

1. MORTGAGES—MANUFACTURING PLANTS—AFTER-ACQUIRED PROPERTY.

A mortgage on the plant of a glass factory covered the plant, together with all improvements, extensions, enlargements, and additions constructed or required by the company, and all appurtenances, machinery, appliances, piers, wharves, tanks, pipes, etc., now or hereafter to be erected and contructed, "and also all the property, real, personal, and mixed, * * * now owned by [the mortgagor] or hereafter to be acquired by it, together with all improvements thereon and all rights and appurtenances appertaining thereto." *Held*, that the quoted clause should be construed to refer only to personal property appurtenant to the fixed property of the mortgagor, and did not cover after-acquired merchandise manufactured by the mortgagor for sale in the ordinary course of business.

In Equity.

Ritchie & Janney, for Bernard N. Baker.

William Reynolds, Francis K. Carey, Benzinger & Calwell, and Foster & Foster, for exceptants.

MORRIS, District Judge. All the exceptions to the master's report were disposed of orally at the hearing, except as to the claim urged on behalf of Mr. Baker to have the fund arising from the sale of the merchandise which had been produced at the glass factory, and was sold by the receiver, awarded to him by reason of his mortgage.

The defendant corporation was incorporated under the laws of New Jersey, and erected a factory near Annapolis, Md., for the purpose of

manufacturing glass bottles. On April 25, 1903, the complainants, who are creditors of the corporation, filed their bill of complaint in this cause, alleging the inability of the company to pay its debts; that it was doing business at a loss, and was threatened with suits; and that the interest of all its creditors required that receivers should be appointed to preserve its property, and realize as much as possible from its assets for the benefit of its creditors. The company answered, consenting, and receivers were appointed.

Under orders of court, all the property has been sold and debts collected. The real estate and plant was sold subject to mechanic's lien claims for considerable amounts, and subject to Mr. Baker's mortgage of $50,000, and brought only a nominal sum, as it was not worth the incumbrances. From the proceeds of other assets, labor claims amounting to about $1,900, which by statute have priority, have been paid; and, after deducting expenses, there remains, principally from the sales of glass bottles which had been manufactured by the company, and were at the factory when the receivers were appointed, and were sold by them, a fund of about $2,000, now to be dealt with.

The general creditors, some of whose claims are for material supplied to the factory, out of which the bottles were made, amount to about $14,000, and they have excepted to the master's report and account, which awards the balance of the funds to Mr. Baker on account of his mortgage claim. At the receiver's public sale of the real estate and plant the property was knocked down to Mr. Baker for $10, subject to the liens and subject to his mortgage. It has been shown to have been worth not over $31,000, so that there is a large deficiency due Mr. Baker in respect of his mortgage for $50,000; and I do not doubt that, if his mortgage gives him a lien, as against the general creditors, on the merchandise which produced the fund now in the hands of the receivers, he is entitled to have the fund awarded to him. The merchandise in question was the product of the factory manufactured after the date of Mr. Baker's mortgage, and the question is as to his mortgage lien on this after-acquired merchandise. The mortgage was, in substance, in the general form, and was not in default in any way at the time the bill of complaint was filed. After describing the real estate, it contains the following:

"And all and singular the plant of the Maryland Glass Company now erected and located on the lots of ground above mentioned, or either of them, together with all improvements, extensions, enlargements and additions thereto now or hereafter to be owned, constructed or acquired by said company, and all the appurtenances, machinery and appliances, piers, wharves, tanks, pipes, boilers, sheds, boiler houses, and structures of every kind and description now erected and constructed, or hereafter to be erected and constructed on said lots or either of them.

"*And also all the property, real, personal and mixed, of the said Maryland Glass Company now owned by said company, or hereafter to be acquired by it, together with all improvements thereon, and all rights and appurtenances appertaining thereto.*"

It is under the clause last above quoted, and which I have underlined, that it is claimed the mortgagee is entitled to the aforesaid fund.

The First National Bank v. Lindenstruth, 79 Md. 136–140, 28 Atl. 807, 47 Am. St. Rep. 366, was a case of a mortgage of a stock in trade,

in which provision was made that all stocks of goods replacing any of the granted goods should be substituted for those granted, and that the debt intended to be secured should be a lien upon all the goods then on hand and on those substituted for them. Speaking of this mortgage as to the after-acquired goods, the Court of Appeals of Maryland said:

"Such a provision, whilst not of itself rendering the mortgage void, as fraudulent, is at law simply a nullity. It is the settled doctrine of the Maryland courts that a provision such as this in an ordinary mortgage creates no lien at law on after-acquired property. Hamilton v. Rogers, 8 Md. 301; Rose & Ganss v. Bevan et al., 10 Md. 466 [69 Am. Dec. 170]; Wilson v. Wilson, 37 Md. 1 [11 Am. Rep. 518]; Crocker v. Hopps, 78 Md. 260 [28 Atl. 99]. There are conditions under which a covenant like this would be held valid in equity, but they are not presented here. Butler v. Rahm, 46 Md. 541."

The ground upon which a recorded mortgage of after-acquired property is held effective in equity, although a nullity at law, has been stated to be:

"That whenever the parties by their contract intend to create a positive lien or charge either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and against all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy." Mitchell v. Winslow, 2 Story, 630, 644, Fed. Cas. No. 9,673.

This doctrine has been applied in numberless cases in equity, but most frequently in cases of mortgages to secure bonds issued by railroad and canal companies and similar quasi public corporations, where the dismemberment of the enterprise by seizing and separating any part of the after-acquired property which has been added to the original equipment in order to make it more efficient would interfere with the performance of its quasi public functions. Such added chattels and augmentation of the plant might almost be presumed to be included in the words of a general grant. The present case is that of a private manufacturing corporation. The glassware manufactured by it must have been intended to have been sold. The object of the company and its plant, and the enterprise which the mortgagee assisted by his loan of money, was to produce glassware as a commercial article for immediate sale in the regular course of business. In considering the language of the clause of the mortgage now under consideration, so far as the after-acquired glassware is concerned, we start with the fact that the glassware was intended to be sold as produced, and was not intended to be added to the plant, either in augmentation of its efficiency, or in substitution of machinery or implements worn out and necessary to be kept up, or to in any way increase the permanent value of the plant. With this idea in mind as to the supposed subject-matter of this clause of the mortgage as indicating the intention of the parties, we are to consider whether the language used indicates an intention that the glassware was to be subject to the lien of the mortgage.

It is only because, as between the parties, their clear intention and express contract is permitted to govern, notwithstanding its invalidity at law, that in equity the lien on after-acquired property is upheld. It

is in the nature of compelling a specific performance of a contract, and, to be entitled to favorable consideration, its terms should be free from ambiguity.

The clause is:

"And also all the property, real, personal and mixed, of the said Maryland Glass Company, now owned by said company, or hereafter acquired by it, together with all improvements thereon, and all rights and appurtenances appertaining thereto."

It seems to me that the fair intention and meaning of that clause, under the circumstances of the case, may well be taken to mean the personal property in some way appurtenant to the fixed property of the company, and not the merchandise made for sale, and being sold day by day. In the previous clause, in speaking of the fixed structures, such as piers, wharves, tanks, pipes, boilers, etc., which would hardly need enumeration in order to pass by the grant of the land and plant, they are specified with abundant care; and it is not overstrained to say that any one reading the second clause would properly conclude that, if the goods produced by the factory were intended to be covered, they would be mentioned. Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637.

It does not seem to me to have been the clearly expressed intention that the goods manufactured for sale were to be subject to the mortgage. The words "together with all improvements thereon, and all rights and appurtenances appertaining thereto," do not suggest a grant of glassware, but tend to exclude that idea, in a document so carefully drawn as this mortgage. It is only equitable that if a mortgage which asserts a right expressly denied at law, and the effect of which, as to the goods produced for immediate sale, would be so contrary to the intended and actual dealings under it, and which is so markedly in derogation of the rights of creditors, who give credit to the factory on the expectation of its paying its current bills for supplies out of the unrestricted current sales of its product, is to be upheld in equity because of the intention of the parties to the mortgage, the language in which the mortgage lien on such goods is attempted to be given should be unmistakable.

The question is not without difficulty. It has been most ably presented by counsel for the mortgagee, and very carefully considered by the special master in his excellent report; but, upon the best consideration I can give it, I think the exception should be sustained, so far as the fund has resulted from the sale of merchandise intended for sale, and not from articles in some sense appurtenant to the plant.

COSTER et al. v. PARKERSBURG BRANCH R. CO. et al.

(Circuit Court, N. D. West Virginia. April 1, 1904.)

1. FEDERAL COURTS—RAILROADS—RECEIVERS—JURISDICTION—EMINENT DOMAIN —ACTIONS.

Where a federal court has appointed a receiver of a railroad company in proceedings to foreclose an underlying mortgage, a proceeding against such receiver by another railroad to condemn a grade crossing could only be permitted in the court where such receivership was pending, notwithstanding the act of Congress permitting such receivers to be sued without leave of court first obtained, since such act relates only to suits arising out of acts of the receiver in the discharge of his duties in transactions connected with the property in his hands.

In Equity.

Reese Blizzard and W. S. Meredith, for petitioner.
J. W. Davis and John Bassel, for receiver.

GOFF, Circuit Judge. The bill of Coster et al., trustees, was filed March 13, 1899, its purpose being the foreclosure of the underlying mortgage of the Parkersburg Branch Railroad Company, dated July 1, 1879. In accordance with the prayer of said bill John W. Davis was appointed receiver of all the property of said railroad company, and he duly qualified as such officer. Pending the proceedings in that case the Buckhannon & Northern Railroad Company, on the 27th day of October, 1903, filed its petition therein, asking permission to institute and prosecute in the circuit court of Taylor county, W. Va., certain condemnation proceedings against the said receiver, the object of which was to secure a crossing for the Buckhannon & Northern Railroad Company over the railroad and right of way of the Parkersburg Branch Railroad Company at a point within the corporate limits of the city of Grafton, in Taylor county, W. Va. It was set out in the petition that the Buckhannon & Northern Railroad Company is a corporation organized under the laws of the state of West Virginia for the purpose of constructing and operating a railroad for public use from the town of Buckhannon, in Upshur county, to Fairmont, in Marion county, W. Va., and thence on to the boundary line between the states of West Virginia and Pennsylvania; and that in constructing its railroad it is necessary for the petitioner to cross at grade the right of way and roadbed of the Parkersburg Branch Railroad at the point desired to be condemned for that purpose, and that such crossing was necessary in connection with the construction of petitioner's railroad; that said petitioner and the Parkersburg Branch Railroad Company could not agree upon the amount of compensation to be paid for such crossing, nor upon the point at which it was to be made, nor the manner of making the same. This court, on consideration of such application, granted permission to the Buckhannon & Northern Railroad Company to institute and maintain a suit against John W. Davis, receiver of the Parkersburg Branch Railroad Company, relative to such crossing; the

¶ 1. Suits by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.

order then entered containing these words: "The court at this time not passing upon the forum in which said suit or proceeding is to be instituted." On the 4th day of November, 1903, the receiver moved the court to strike from the record of this cause the order entered therein on the 27th day of October, 1903, giving such permission to institute proceedings to condemn, and the court, on considering such motion, set the hearing of the same for November 17, 1903. Notice of the fact that this court had so set the hearing of such motion was served on the Buckhannon & Northern Railroad Company on the 6th day of November, 1903. On November 9, 1903, the Buckhannon & Northern Railroad Company served notice on the receiver that it would, on November 19, 1903, make application by petition to the circuit court of Taylor county, W. Va., to appoint commissioners to ascertain a just compensation to the owners, and to secure such orders as might be necessary to condemn the right of way before mentioned. This notice was served without any application having been made to this court to dispose of the question of the forum, reserved when leave to sue was granted. The receiver, on November 17, 1903, filed a report of his proceedings as such officer, and, the cause coming on to be then further heard, it was ordered that the hearing on the motion to set aside the order giving permission to sue be had on December 2, 1903, and that in the meantime the Buckhannon & Northern Railroad Company be restrained from prosecuting its said action in the circuit court of Taylor county, W. Va., until the further order of this court. Counsel have been fully heard on the questions raised by said motion, and the court has carefully considered the briefs filed and the authorities cited.

This court, by its order appointing John W. Davis receiver, assumed the administration of the assets of the Parkersburg Branch Railroad Company; all of which the court took into its possession for the benefit of those it might thereafter find entitled to the same. It is the duty of this court to see that the receiver not only properly and faithfully performs his duties, but also that every reasonable facility is afforded him to do so, and that the property with which he is intrusted, and for which he is responsible, is duly protected by its orders and its officers. Would it be fair to the receiver and to those he represents for this court to transfer to another jurisdiction the control of any portion of the property for which such officer is responsible? If the court submitted to such other jurisdiction the questions relating to the condemnation of the property, would the receiver's liability therefor cease, and, if so, would he be accountable for the same? Would it be just to those entitled to the property, or to the funds arising from its sale—parties who, under the law, have the privilege of entering this jurisdiction, and who having entered it insist on their right to remain therein—for this court to require them to litigate in another tribunal matters which, as stated by the party presenting them, will necessarily have a direct and important bearing on the property and the funds involved in this suit? I am not favorably impressed with the contention of counsel for the petitioner that the Buckhannon & Northern Railroad Company could have maintained its suit against this receiver in the circuit court of Taylor county, W. Va., without first having obtained the permission of this court so to sue him. The act of Congress relating to such suits au-

thorizes them to be brought without leave of the court only where the suit so instituted is because of some act or transaction of the receiver in carrying on the business connected with the property in his possession. If a receiver appointed by this court has negligently discharged his duties, and thereby has caused an injury to another, he can be sued therefor in any court of competent jurisdiction; and if he has made a contract as such official, and thereafter refused or neglected to observe the terms of the same, he may be sued concerning it within another jurisdiction, without the permission of this court, for in such instances the suits would be in respect to his act in carrying on the business connected with the property in his custody. In this case the object of the bill is to foreclose the underlying mortgage of the Parkersburg Branch Railroad Company, dated July 1, 1879. If counsel are right in their contention that in all cases permission to sue the receiver is unnecessary, then the validity of that mortgage, or the claim that it has been satisfied, could be litigated in a suit filed in another court against said receiver, thereby at least greatly embarrassing the complainants in this suit, as also this, the court of original jurisdiction. That would be a most anomalous situation, one not calculated to promote the due and orderly administration of justice, and, in my judgment, one not contemplated by the Congress when it enacted the legislation referred to. When this court passed the order authorizing its receiver to be sued—the order it is now asked to set aside—it especially reserved all questions relating to the court in which the suit should be filed. It was asked to designate the circuit court of Taylor county, W. Va., and it did not do so, but held that matter open for further consideration. With the assistance of counsel, the court has given the matter the careful attention its importance demands, and has reached the conclusion that under the circumstances of this case it would not be proper to either authorize or permit its receiver to be sued in any other jurisdiction for the purpose set out in the petition of the Buckhannon & Northern Railroad Company, filed herein. The practice found by long experience to be productive of the best results to all concerned is to hear and determine all matters and claims relating to the property in the hands of a receiver by petitions filed in the cause in which he was appointed. This rule has been modified by statute, so far as the courts of the United States are concerned, by permitting a receiver appointed by those courts to be sued in another jurisdiction in cases where his act is drawn in question in transactions connected with the property in his hands, arising during the discharge of his duties as such official. In reaching the conclusion I do I have not overlooked the opinion of the Supreme Court of the United States in the case of Gableman v. Peoria, D. & Evansville Railroad Company, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220. The opinion and judgment in that case had reference to the special facts then presented to the court, from which it clearly appeared that the receiver had been sued in a court other than the one by which he was appointed for alleged negligence in the operation of a railway train, and for carelessness in the use of gates at a railway crossing. The Supreme Court held that under such circumstances the receiver could be sued in another jurisdiction without the leave of the court appointing him. I cannot reach the conclusion that the Supreme Court, by its

judgment in that case, intended to hold that a receiver appointed by a federal court could be sued in a state court without the permission of the court appointing him, the object of such suit being to condemn and remove from its jurisdiction a portion of the very property that the court appointing such officer had taken under its control.

I do not think it would be just to the interests involved in this suit for this court at this time, under the pleadings as they now exist, to pass upon the questions argued by counsel relating to the method of proceeding to condemn the crossing described in the petition of the Buckhannon & Northern Railroad Company, nor would it, in my judgment, be proper for the court to now construe the sections of the Code of West Virginia under which it is claimed that such proceedings may be prosecuted. The order heretofore entered, granting permission to sue, will be so enlarged as to permit the petitioner to institute in this court and in this cause such proceedings as it may deem proper, having for their object the securing of the crossing referred to in the petition mentioned. To such proceedings the receiver can set up by plea, answer, or demurrer such defense as he may conclude to be proper, and the matter can then come on for hearing and disposition in the regular manner.

The injunction heretofore granted, restraining the Buckhannon & Northern Railroad Company from prosecuting its proceedings for condemnation in the circuit court of Taylor county, will be continued in force.

CHEATHAM et al. v. EDGEFIELD MFG. CO.

(Circuit Court, D. South Carolina. July 14, 1904.)

1. PLEADING—IRRELEVANT MATTER—DEMURRER—MOTION TO STRIKE.
   Where, in ejectment, certain paragraphs of the answer objected to alleged facts constituting a legal defense as mere inducement to other facts pleaded as an equitable estoppel, the entire paragraph might be attacked by demurrer, instead of by motion to strike the facts pleaded as such estoppel.

2. FEDERAL COURTS—EJECTMENT—EQUITABLE DEFENSES—ESTOPPEL.
   Facts constituting an equitable estoppel may be pleaded as a defense to an action of ejectment in the federal courts.

J. P. K. Bryan, for plaintiffs.
H. A. M. Smith, for defendants.

BRAWLEY, District Judge. Motion is made to strike out certain portions of the answer as irrelevant to the issues in this action. The action is for ejectment and to recover possession of a certain tract of land in Edgefield county, which plaintiffs claim under the will of their father, Charles A. Cheatham. Numerous defenses are pleaded, which, under the practice, is permissible. Among others, the fifth defense alleges that the tract of land was sold under and by virtue of a judgment duly entered in certain proceedings, to which plaintiffs were parties, in the court of common pleas for Edgefield county, and conveyed to the grantor of the defendant company on January 25, 1876.

The sixth defense is a repetition of the fifth in part, and to it is added the following:

"That the said judicial proceedings in which said premises were sold as aforesaid were proceedings instituted in the court of common pleas for Edgefield county for the purpose of subjecting the estate of the late Charles A. Cheatham to the payment of his debts, and under the said proceedings a certain portion of the proceeds of sale of the real estate (including the land and premises mentioned and described in the said third article of the complaint herein) of the said Charles A. Cheatham was set aside and applied to the purchase of a homestead for the benefit of the widow and children (to wit, the two plaintiffs herein) of the said Charles A. Cheatham. That the said plaintiffs have enjoyed the benefit of the said homestead so purchased with the said proceeds of sale, and have lately sold the said homestead so purchased, or a portion thereof, and used and applied to their own benefit the proceeds of sale thereof, and have thereby, as this defendant alleges, ratified, approved, and confirmed in all respects the action of the court in making said sale, and the said sale made thereunder, to the grantor of this defendant, of the lands and premises described in the said third article of said complaint, and are now estopped to deny the title of this defendant thereto."

The seventh defense likewise alleges the judicial sale, and adds:

"And that the plaintiffs, and both of them, well knew that this defendant and their grantors claimed and were in possession of the said lands and premises under a sale made in an equity suit to which they, the said plaintiffs, were originally parties; that they have for years remained silent while the defendant has been in possession of the said premises, and while said defendant and its grantors have expended large sums in the improvement of said premises, during all of which period, and while this defendant and its grantors were in possession and expending large sums in the improving of said premises, plaintiffs, and each of them, have forborne to raise any question whatever as to the validity of the title of this defendant, and by their conduct, and the conduct of each of them, they have indicated their purpose not to make any issue in reference thereto, and upon the faith of which conduct on the part of the plaintiffs this defendant and their grantors have acted. Whereby said plaintiffs, and each of them, are now estopped to dispute or deny the title of this defendant to the said land and premises."

The eighth defense, after stating the judicial sale, says:

"And that the proceeds of said sale were applied to the payment of the debts and liabilities of Charles A. Cheatham, the father and devisor of the plaintiffs, and in especial to the payment of a mortgage for the purchase money made upon the said premises by the said Charles A. Cheatham in his lifetime; and that the benefits of such payments so made and inuring to the plaintiffs have been accepted and acquiesced in by the plaintiffs, who are thereby now estopped to deny the title of this defendant to such premises and tract of land."

Under the Code of South Carolina irrelevant or redundant matter in a pleading may be stricken out on motion, and an allegation is irrelevant when the issue formed by its denial can have no connection with or effect upon the cause of action. The first case relied upon by counsel for plaintiffs is Buist v. Salvo, 44 S. C. 143, 21 S. E. 615, which held that a demurrer cannot be sustained which is good only as to some of the paragraphs of the complaint; and as it is claimed that the first paragraph in each of these separate answers states a legal defense the motion is to strike out those paragraphs which are in the nature of equitable estcppels. The next case cited is Harman v. Harman, 54 S. C. 100, 31 S. E. 881, which does not seem to have any special bearing; and Lawson v. Gee, 57 S. C. 502, 35 S. E. 759, which indicates that, where parts of a defense are irrelevant, the proper practice is a motion

to strike out, a demurrer is not the proper practice when it is only as to certain paragraphs of the defense. Allan v. Cooley, 60 S. C. 370, 38 S. E. 622, and Ragsdale v. Southern Railway, 60 S. C. 381, 38 S. E. 609, and Marion v. City Council (S. C.) 47 S. E. 140, all go to sustain the contention that the proper practice in cases of this nature is that pursued by plaintiffs. This view is undoubtedly correct if the first paragraph in the sixth, seventh, and eighth defenses is to be taken as setting up a purely legal defense, for the allegations of equitable estoppel set up in the paragraphs sought to be stricken out are not necessary to support the legal defense, and should not be blended with it; but the reference to the legal proceedings as stated in each of these separate defenses is not to be so interpreted. That legal defense is stated separately in the fifth defense, and, of course, if sustained, will be a bar to this action. The reference to these proceedings in the sixth, seventh, and eighth defenses is by way of inducement merely. They refer to the legal proceedings with a view of bringing home to the defendant certain knowledge, and then allege certain facts which constitute an estoppel en pais, upon which the defendant would rely as a defense even if the judicial proceedings were a nullity. If this view of these separate defenses is correct, it would seem that a demurrer would lie to the whole, but it is of little consequence in this case whether the motion should be considered as one to strike out certain allegations or as a demurrer to the whole separate defense. In neither view can it be sustained. The motion rests upon the ground that in actions of ejectment in the courts of the United States the strict legal title must prevail, and that any equities should be considered only on the equity side of the court. Undoubtedly that is the general rule, and it is so held in Foster v. Mora, 98 U. S. 428, 25 L. Ed. 191, and in other cases relied upon by the learned counsel for plaintiffs; but to this rule there are well-defined exceptions, and the allegations of equitable estoppel sought to be stricken out fall within these exceptions. In Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618, where the purchaser of land in Michigan, which had descended to a sister living in that state and a brother who was resident of California, and who had bought from the sister and her husband with covenants of general warranty, after learning of the brother's interest, wrote to him concerning it. The brother wrote to the sister, saying:

"You can tell D. for me he need not fear anything from me; you can claim all there; this letter will be enough for him. I intend to give you and yours all my property there and more if you needed it."

Upon the contents of this letter becoming known to D., he conveyed the lands, for a valuable consideration, to others, who had occupied and improved them. The brother subsequently sued in ejectment, and the court held that the letter above referred to was an estoppel en pais, which precluded him from setting up a claim to the land, and was an available defense to the action. It says:

"The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

It discusses the question at some length, and directly decides that in a case like that the defense may be made at law. In Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79, where the plaintiff, having knowledge that defendant, who claimed under a judicial sale, was expending money and making improvements on the premises, and had asserted no title thereto while that was going on, was held to be estopped from maintaining his action; and this independently of the question whether a sale by the trustee and its confirmation by the court was itself a valid, binding transfer of the title to the purchasers; the court saying:

"He was silent when good faith required him to put the purchasers on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others acted."

These cases, decided since Foster v. Mora, are directly to the point that an equitable estoppel may be set up as a defense in cases of ejectment in courts of law of the United States, and are conclusive of the question. They have been repeatedly followed. Berry v. Seawall, 65 Fed. 753, 13 C. C. A. 101; City of Cleveland v. Cleveland; etc., Railway Company (C. C.) 93 Fed. 123; National Nickel Company v. Nevada Nickel Syndicate, 112 Fed. 46, 50 C. C. A. 113.

Motion to strike out is therefore denied, with costs.

In re SCHERBER.

(District Court, D. Massachusetts. July 22, 1904.)

No. 8,102.

1. BANKRUPTCY — REFERENCE — RECOVERY—SUMMARY PROCEEDINGS—JURISDICTION.

Where, in the petition of a trustee in bankruptcy to recover an alleged preference by summary proceedings, there was no allegation that respondent's claim was colorable only, and respondent promptly objected to the form of the proceeding, the court of bankruptcy had no jurisdiction to determine the matter except by plenary suit.

In Bankruptcy.

Arthur E. Burr, pro se.

Brandeis, Dunbar & Nutter, for creditor.

LOWELL, District Judge. On January 6, 1904, the trustee in bankruptcy filed with the referee the following petition:

"In the Matter of John F. Scherber, Bankrupt. In Bankruptcy. (No. 8,102.)

"Petition to Recover a Preference from Charles P. Holden, of Boston, in Said District of Massachusetts.

"Respectfully represents your petitioner, Arthur E. Burr, duly appointed trustee of the estate of the aforesaid bankrupt, that said Charles P. Holden is a creditor of the aforesaid bankrupt; that, within four months before the filing of the petition by the aforesaid bankrupt, said bankrupt made a transfer of certain of his property, to the amount of three hundred forty and $^{26}/_{100}$ (340.-26) dollars, to said Charles P. Holden; that the effect of the enforcement of said transfer will be to enable Charles P. Holden to obtain a greater percentage of his debt than any other creditor of the same class; that the said trans-

fer constituted a preference; that said Charles P. Holden had reasonable cause to believe that it was intended by said transfer and preference to give a preference. Wherefore your petitioner prays that he may recover said property, or its value, from said Charles P. Holden, and that this court may make suitable orders and decrees whereby your petitioner may be enabled to recover said property."

The referee thereupon issued the following order of notice:

"To Charles P. Holden, of Boston, in Said District of Massachusetts: You are hereby notified to appear before this court, at 704 Tremont building, in said Boston, on the 20th day of January, A. D. 1904, at 10 a. m., to show cause, if any you have, why you should not be ordered to pay over to Arthur E. Burr, trustee of the aforesaid estate in bankruptcy, the sum of three hundred forty and $^{26}/_{100}$ (340.26) dollars, according to the prayer of the petition of said trustee, filed in this court on the 6th day of January, 1904, in which petition it is alleged that you have received said amount as a preference from the aforesaid bankrupt. Emery B. Gibbs, Referee."

Service was accepted by Holden as follows:

"Due and sufficient service of the within order of notice is hereby accepted on behalf of Charles P. Holden, within named.

"Brandeis, Dunbar & Nutter."

Thereafter Holden appeared specially and filed the following motion:

"Motion of Charles P. Holden to Dismiss Trustee's Petition.

"Now comes Charles P. Holden, summoned as respondent in the above matter, appearing specially for this purpose only, and moves that the trustee's petition be dismissed upon the ground that it appears by the face of said petition that the trustee seeks therein to set aside an alleged preference to this respondent by summary proceeding before the referee in bankruptcy, and that by the bankrupt act the referee has no power or jurisdiction to entertain such petition.

"By his Attorneys, Brandeis, Dunbar & Nutter."

No evidence being presented, the referee overruled the motion. Holden thereupon filed the following petition:

"Petition for Review.

"Now comes Charles P. Holden, summoned as respondent in the matter of the petition by the trustee for the purpose of setting aside certain payments alleged to have been made by the bankrupt to said respondent as a preference, and says that, in the proceedings before the referee upon said petition, an error has happened, in that said referee has overruled the motion of said respondent that said trustee's petition be dismissed upon the ground that it appeared by the face of said petition that the trustee sought therein to set aside an alleged preference to this respondent by summary proceedings before the referee in bankruptcy, and that by the bankrupt act the referee had no power or jurisdiction to entertain such petition. Wherefore this respondent requests that the referee forthwith certify to the District Judge the question presented, a statement of the trustee's petition, and the motion of this respondent, and the findings and order of the referee thereon.

"By his Attorneys, Brandeis, Dunbar & Nutter."

The case presents two questions: (1) May the proceedings in a court of bankruptcy to recover a preference be by summary petition, notwithstanding the respondent's seasonable objection to this form of proceeding, or must they be by plenary suit? (2) Has a referee jurisdiction of proceedings to recover a preference, however framed, if the respondent objects to his exercise of jurisdiction? The case has been ably argued,

and the court has been helped by the acute discussion of counsel on both sides.

1. In re Steuer (D. C.) 104 Fed. 976, this court decided that, in proceedings to recover a preference, where the jurisdiction of the referee was not objected to, and where the summary petition contained all the substantial allegations of a bill in equity, the judge, on appeal from the referee, had jurisdiction to decree the return of the preference, whether the referee originally had jurisdiction of the proceedings or not. See Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, where it is implied, if not expressly decided, that consent will give jurisdiction to the referee over a summary petition against an adverse claimant, although, without consent, the court of bankruptcy would be altogether without jurisdiction. See, also, In re Thompson (C. C. A.) 128 Fed. 575. Later decisions binding upon this court contain nothing contrary to In re Steuer. But in the case at bar due objection to the jurisdiction was taken. Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. In White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, the Supreme Court held that property taken from the custody of a trustee in bankruptcy may be recovered by him summarily, and without a plenary suit. In re Redburn, Ex parte Rochford, 124 Fed. 182, 59 C. C. A. 388; In re Kellogg, 121 Fed. 333, 57 C. C. A. 547; In re Reynolds (D. C.) 127 Fed. 760. If there be anything to the contrary in In re Russell, 101 Fed. 248, 41 C. C. A. 323, it must be taken as overruled. The ultimate disposition of property which has thus come into the possession of the court of bankruptcy may, it seems, be determined by summary proceedings before the referee. See Ex parte Rochford, 124 Fed. 182, 59 C. C. A. 388; In re Kellogg, 121 Fed. 333, 57 C. C. A. 547; Hutchinson v. Le Roy, 113 Fed. 202, 51 C. C. A. 159. But in the case at bar the property was never in the possession of the trustee. In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, the Supreme Court decided that where the respondent's claim to hold property alleged to belong to the bankrupt estate was merely colorable, and not really adverse, the trustee might recover the property by summary proceedings instituted before the referee, without resorting to a plenary suit. Therefore Mueller v. Nugent decided that in summary proceedings the referee may inquire if the claim is really adverse; declining jurisdiction if this is made to appear, taking jurisdiction if the adverse claim is merely colorable. See In re Durham (D. C.) 114 Fed. 750; In re Tune (D. C.) 115 Fed. 906; In re Waukesha Water Co. (D. C.) 116 Fed. 1009; In re Davis (D. C.) 119 Fed. 950; In re Breslauer (D. C.) 121 Fed. 910; In re Knight (D. C.) 125 Fed. 35; In re Weinger (D. C.) 126 Fed. 875; In re Teschmacher (D. C.) 127 Fed. 728. These cases have not drawn definitely the line between claims only colorably adverse and those which are really so. See In re Krinsky (D. C.) 112 Fed. 972. But the respondent's claim in the case at bar is not alleged in the petition to be merely colorable, and must be taken to be really adverse. Where this is true, and where due objection to the form of proceeding is made, the decisions and language of the Supreme Court imply that a plenary suit must be resorted to. See Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

As the Supreme Court has said, this means "risk of the accompaniments of delay, complication, and expense." Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 275, 46 L. Ed. 405. But such is the law. The tendency to relax the requirement of a plenary suit, and to permit proceedings by way of summary petition containing the substantial allegations of a bill in equity, which tendency was manifested in Stickney v. Wilt, 23 Wall. 150, 23 L. Ed. 50, Milner v. Meek, 95 U. S. 252, 24 L. Ed. 444, and White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, has been corrected by the decisions in Bardes v. Hawarden Bank, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262, and Louisville Trust Co. v. Comingor. To permit summary proceedings in the case at bar would permit them in practically every case. It is true that, in cases where the nature of the proceedings was not particularly considered, the dicta and even the decisions are in some degree conflicting. In In re Whitener, 105 Fed. 180, 44 C. C. A. 434, it was held that the judgment of the District Court, rendered in a controversy between the trustee and a transferee of the bankrupt concerning property in the trustee's possession, was rendered in the exercise of the court's jurisdiction in bankruptcy, and not in the exercise of its general jurisdiction to determine controversies between adverse parties. The judgment was therefore held to be final and subject to no appeal. See Hutchinson v. Le Roy, 113 Fed. 202, 51 C. C. A. 159, to the opposite effect. In Hutchinson v. Otis, 123 Fed. 14, 59 C. C. A. 94, it is implied that "controversies," as distinguished from "proceedings in bankruptcy," may be determined upon summary petition as well as upon plenary suit. The nature of the controversy does not always determine the form of proceeding. See, further, Burleigh v. Foreman, 125 Fed. 217, 60 C. C. A. 109; In re Groetzinger (C. C. A.) 127 Fed. 124. The Ray bill, so called, has not affected the question here before the court. It has given jurisdiction to the District Court over this controversy, but has done nothing to provide that the jurisdiction shall be exercised by summary proceedings on a petition.

2. If the District Court is altogether without jurisdiction to proceed in this case except by plenary suit, it becomes unnecessary here to determine if the referee has original jurisdiction to hear and decide these issues if presented in a plenary suit.

Judgment of the referee reversed. Trustee's petition dismissed.

VAN TINE v. HILANDS.

(Circuit Court, S. D. New York. July 26, 1904.)

1. JOINT ADVENTURE—PARTNERSHIP—EVIDENCE.

In a suit for an accounting of the profits of a joint adventure, evidence reviewed, and *held* to justify a finding that the parties had agreed to prosecute the same in partnership, and share equally the profits and losses.

2. SAME—ACCOUNTING—DEFENSES—FRAUD.

Where plaintiff and defendant entered into a partnership to share the profits and losses in the purchase and sale of certain stock, it was no defense to defendant's liability to account for all of the profits received that

certain of them had been illegally received by accepting commissions from both the purchaser and the seller of the stock, in which improper conduct plaintiff did not participate.

In Equity for Partnership Accounting.

Abram I. Elkus, for complainant.
Gilbert E. Roe, for defendant.

COXE, Circuit Judge. This is an equity action for an accounting. The bill alleges that, in February, 1901, the parties entered into an agreement by which they were to procure options on large blocks of stock of the Carnegie Company, held by parties residing at Pittsburg, Pa., and sell the same, dividing the profits and losses equally between them. Pursuant to such agreement the complainant was to contribute his services in securing the stock and the defendant was to procure purchasers therefor. Between February 12 and March 1, 1901, the complainant procured 4,475 shares of said stock, which was sold by the defendant, who received for his services from the vendors and vendees the sum of $460,189 and other large sums to the complainant unknown. That the defendant has paid the complainant the sum of $2,600, but with this exception he retains the profits received by him and refuses to account for the same. The judgment demanded is that an accounting be had and the defendant decreed to pay over to the complainant his share of the partnership profits.

The answer is a denial of the principal allegations of the bill, the defendant alleging that there was never a partnership agreement between the parties as stated in the bill, and that the co-operation of the complainant in the sale of said stock was confined to one small transaction which was expressed in writing, pursuant to the terms of which the complainant was paid in full settlement of his claims the sum of $1,600.

The main issue between the parties is one of fact, namely, was there a partnership agreement between them to share the profits jointly on the sale of stock of the Carnegie Company? This question is pre-eminently one for a jury and at the argument it was suggested that issues be framed and sent to a jury for answer, but neither counsel was ready to assent to the proposition. There is, therefore, no alternative but to dispose of the controversy upon the present record. The court, however, feels constrained to say that the impropriety of requiring such a question, which depends so largely upon the appearance and conduct of the witnesses, to be determined without the advantage of seeing and hearing them must be apparent to all. There is an irreconcilable contradiction between the parties and yet the court is compelled to decide the controversy without the aid of many of the almost infallible guides which make it well-nigh impossible to obscure the pathway of truth.

It is wise to start the inquiry with a consideration of conceded facts and those regarding which there is no serious dispute. The circumstances out of which the controversy arose took place in the winter of 1901 when the United States Steel Corporation was being formed, when transactions of great magnitude were being negotiated and fortunes were made daily by those who possessed the ability or audacity to seize the opportunity of the hour. The defendant was in New York for the

purpose of purchasing Carnegie stock of parties residing at Pittsburg. By the aid of the complainant he succeeded in securing at least 1,543 shares of this stock, making a profit thereon of not less than $175,000. Both parties knew that it was a time of almost unprecedented speculative activity, when immense sums were being paid, out of all proportion, apparently, to the services rendered, and when millions were made by men who were not conspicuous for either industry or ability. It is not probable that at such a time any one with the slightest business sagacity was giving away opportunities of unquestioned value. The complainant controlled an opportunity which the defendant wanted. Both knew this. The delay of a week might be fatal to both. Some one else might get the Moreland stock or the demand for it might no longer be urgent. Whoever succeeded in disposing of this stock would probably secure other stock held in Pittsburg. That the complainant rendered valuable services is not denied; that the defendant felt himself under obligation to remunerate the complainant in some form is admitted. In such circumstances it seems probable that the parties would enter into an agreement of some kind and the most natural agreement to make would be to divide the profits. If the complainant were uncorroborated it would be an exceedingly difficult task to determine where the truth lies. Six witnesses have testified to the bad character of the complainant and two to the bad character of the defendant. True, sustaining witnesses have also been called, but the fact remains that, even when one citizen of good repute is compelled to say of his neighbor that his oath is valueless, it is safe to assume that there is something in the latter's career to justify the opinion. Men of high honor are never subjected to such attacks. Suffice it to say that the narrative of neither party, standing alone, commends itself to the court; the conviction is forced on the mind that both are disingenuous and are seeking to withhold important facts; neither is telling the exact truth.

But the complainant is corroborated first by the testimony of Moreland and Walker, witnesses whose word there is no just reason to doubt; second, by the documentary evidence; and, third, by the probabilities. Mr. Moreland testifies that both Hilands and Van Tine told him, when all three were together, that they were going into partnership to handle the Carnegie stock and that the profits were to be divided equally between them. This is precisely complainant's version of the transaction. Indeed, it is unnecessary to discuss this branch of the subject at length, for the reason that the defendant's brief admits, what is unquestionably the fact, that "the complainant is corroborated in his testimony by his witness, Andrew M. Moreland." Mr. Walker's testimony is to the same effect. The defendant's brief contains this statement:

"There is nowhere, in all Mr. Walker's testimony a suggestion that it was ever stated to him by either complainant or defendant that profits were to be divided equally between them."

It is thought that counsel has inadvertently overlooked that portion of Mr. Walker's testimony where he says (page 218):

"Mr. Hilands sent for pen, paper and ink and wrote out what I would call a provisional bill of sale of the stock. He stated * * * that he would sell it for the best he could get, but all that would be in it to him was the one

per cent. named in the bill of sale, and that I knew was to be divided between him and Mr. Van Tine, as they were working as partners in the transaction."

And, again (page 227):

"I knew that Mr. Van Tine had told me that he and Hilands were partners; and Mr. Hilands confirmed that in my room in the Manhattan Hotel, that they were partners working this thing together."

Pursuant to the agreement with the defendant the complainant went to Pittsburg to secure other stock and while there several telegrams and letters passed between them confirmatory of complainant's version of the transaction. The defendant's attempts to deny the responsibility for the letter sent by him and the telegrams and letter received from the complainant do credit neither to his intelligence nor his veracity. On February 25th, there having been dispute as to the expenses to be deducted prior to the division of profits, the complainant wrote out a paper which the defendant signed as follows:

"New York, Feb. 25, 1901.

"It is agreed that W. H. Van Tine is to share equally with me in commissions on the sale of Curry estate Carnegie stock (represented by Thomas D. Chantler).

"W. J. Hilands."

The defendant admits that this writing was made at his suggestion and that he signed it. He says, however, that the words in parenthesis were not there when he signed it. Whether they were there or not is immaterial, in either case the legal effect of the paper is the same. It is contended that it is quite improbable that a man of Hilands' experience in the sale of stocks and bonds would make the contract which is the basis of the action. But of what avail are such arguments in the face of the unquestioned fact that the defendant did make precisely that contract when about to negotiate for the sale of 3,000 shares of stock?

It is urged that this is not the contract sworn to by Moreland, for the reason that it uses the word "commissions" and not "profits." The point is not persuasive. In the business in which they were engaged the two words are substantially synonymous. When a broker buys or sells stock for a customer his commissions are profits and his profits are commissions. But even were this otherwise, the distinction is too attenuated to base thereon a theory that the man who signed the Curry agreement without demur would balk at the Moreland agreement.

Again, the agreement is criticised because there was no provision for the sharing of losses. The answer is that in such a contract the agreement would be implied if there were any losses; but it will be observed that the business was of such a character that loss could not occur. They neither purchased nor sold stock. They incurred no expense. They acted simply as brokers, finding vendor and purchaser and bringing the two together.

It is said, further, that the agreement is too indefinite, no time being mentioned for its continuance. This objection, also, is hypercritical. The contract was made between friends meeting casually in New York to dispose of certain designated stock, owned by a small number of shareholders, for a particular purpose and for a necessarily limited

period. It may be said, generally, of all this class of objections that, in such circumstances, it is hardly to be supposed that the parties would deem it necessary to have a formal contract drawn up by a lawyer. If their intention can be ascertained from the testimony it is the duty of a court of equity to vitalize such intention and enforce it.

Regarding the Moreland sale the point is made that the entire transaction was fraudulent because the parties were acting for both Moreland and Morgan & Co., taking compensation from both. The defendant testifies that he told Moreland that he was being taken care of by the purchaser and that there were no commissions for him (Moreland) to pay. The complainant did not know of the payment of the $88,400 by Morgan & Co., or the agreement by them to compensate Hilands until long afterwards. Assuming, however, the existence of the double agency the answer to the defendant's proposition is found in the language of the court in Pennington v. Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589, 24 Am. St. Rep. 419.

"When an innocent member of a firm, established for the conduct of a lawful and moral business, calls upon his partner for a share of profits made in partnership transactions, is the partner absolved from the duty of dividing, if he shows that he realized the profits by cheating the customers of the firm? * * * When the plaintiff is blameless, and the contract on which he stands is legal and moral, no court has ever permitted a defendant to escape responsibility because of his own misconduct."

Numerous criticisms are made of complainant's testimony and many mistakes of time and place are pointed out. For instance, the complainant testified that he met and talked with the defendant on the veranda of the Manhattan Hotel. The hotel has no veranda. Complainant testified that he first saw Hilands on Saturday morning, February 9th. It is now quite clearly established that the defendant did not reach the hotel, from Montreal, until Sunday morning, February 10th, and saw the defendant first on that day for a few moments. In view of the undisputed facts that the parties met at the hotel and negotiated there, the foregoing and all similar mistakes are deemed to be immaterial.

Without adverting further to the evidence the court cannot resist the conclusion that an agreement existed between the parties substantially as alleged in the complaint, that the complainant rendered valuable services in the common venture and is entitled to share in the profits.

The facts regarding the sale of the Curry stock are somewhat obscure. The actual transfer seems to have been negotiated through Col. McCook, but the inference is strong that $48,160 placed to the credit of the defendant was on account of services rendered by him and complainant in the Curry transaction. The exact nature of this transfer to Hilands can be shown on the accounting and if the said sum, or any part thereof, is shown to be in the nature of "commissions on the sale of Curry estate stock" the complainant is entitled to half thereof.

It follows that the complainant is entitled to the relief demanded in the bill. Unless the parties can agree upon the amount a reference will be ordered to take and state the account.

BETHEL v. MELLOR & RITTENHOUSE CO.

(District Court, E. D. Pennsylvania. May 27, 1904.)

No. 34.

1. SHIPPING—DAMAGE TO CARGO—LIABILITY FOR IMPROPER STOWAGE.
A provision of a charter party that the master shall employ the charterers' stevedores at ports of loading, and discharge and pay them stated compensation, "the stevedores to be wholly under the direction and control of the master," does not affect the liability of the ship or owners for improper stowage.

2. SHIPPING—LIMITATION BY BILL OF LADING—HARTER ACT.
A cargo of licorice root was damaged in shipment, because, in loading, the stevedores, who were under the direction and control of the master, broke open a large number of the bales and stored the root in unusual places, where it received injury. *Held*, that the ship was liable for the damage, and could not avoid such liability by a notation, placed on the bill of lading at the insistence of the master, stating that the ship was not responsible for broken or cut bales; such notation being void under section 1 of the Harter act (Act Feb. 13, 1893, 27 Stat. 445, c. 105 [U. S. Comp. St. 1901, p. 2946]), which makes it unlawful to insert in a bill of lading any clause relieving the ship from liability for damages "arising from negligence, fault, or failure in proper loading stowage," etc.

In Admiralty. Action to recover freight.

Convers & Kirlin and Charles R. Hickox, for libelant.
Horace L. Cheyney, for respondent.

HOLLAND, District Judge. This suit is for a balance of freight, amounting to $838.21, claimed by the libelant to be due on a cargo of licorice root, shipped from Alexandretta to Philadelphia on the ship Cilurnum, under a charter party. When the cargo arrived here on the 16th day of April, 1901, it was found that more than three times the usual number of bales had been broken, and the root stowed away in every available space in the ship, even between the battens. The respondent avers:

"That the said cutting and breaking was due to a want of proper care, or rough handling in stowage, and to the lack of proper care. That by reason of the cutting and breaking of said bales said cargo was damaged to the amount of five hundred and twenty-five and fifty-two hundredths dollars ($525.52), which the respondent now claims to recover by way of set-off against the freight due said steamship."

This averment is sustained by the evidence, except as to the amount of damage. The libelant seeks to avoid this liability because (1) the loading was under the direction of the shippers at Alexandretta; (2) the loading was done in accordance with the custom at that port; (3) the stevedores were appointed by the charterers; and (4) there was found on the bills of lading a written notation by the consignee that the libelant is "not responsible for broken or cut bales."

The testimony of the master as to who was in charge of the licorice root as it was brought alongside of his ship on lighters at the port of lading is entirely too vague to show whether or not there was a representative of the shippers or the charterers directing the loading. Some person was giving orders, but his identity is not disclosed, nor

is his name given, and the evidence of the method of loading, being in accordance with the custom at that port, is still more vague, and not sufficient to establish that fact. The charter party provides that:

"The master shall employ charterers' stevedores at loading ports, paying one franc per ton on the guarantied dead weight capacity, * * * and to employ charterers' stevedores at discharging ports, paying usual charge, not exceeding forty cents per ton discharged. The stevedores to be wholly under the direction and control of the master."

The master testified that he objected a number of times to the bales being broken, but that the stevedores followed his direction for a while, and then would continue in their own way to break bales and stow licorice root as found in the vessel when she arrived at Philadelphia. It was his duty to see that the cargo was loaded properly, and prevent the stevedores from breaking the bales and stowing it in unusual places in the ship, which resulted in this damage.

The provisions in a charter party that charterers' stevedores be employed by the master and paid by him does not affect the liability of the ship, or the owners, for improper stowage, since the stevedores in such case are held to be in the employ of the captain, and under his direction and control as the representative of the owners. Richardson v. Winsor, 3 Cliff. 405, Fed. Cas. No. 11,795; The T. A. Goddard (D. C.) 12 Fed. 184. The ship is liable for damage resulting from improper stowage and for the breaking of these bales and stowing the licorice root in unusual places in the ship, no matter by whom the stevedores are employed, or whosoever may have been liable personally, especially when he permitted this to be done by the stevedores wholly under his own direction and control. The Boskenna Bay (D. C.) 22 Fed. 662, The Keystone (D. C.) 31 Fed. 412, and Robinson v. Sugar Refining Company (D. C.) 70 Fed. 792.

The last matter set up by the libelant as a defense against this claim is the fact that, when these consignees obtained the bills of lading, they found upon them a notation that the ship was "not responsible for broken or cut bales." The captain testified that he insisted upon this qualification of the bills of lading before he would sign them at the port of lading. The bills of lading state, in the usual printed form, that the cargo was shipped in good order and condition. This notation upon the bills of lading cannot protect the ship from the responsibility for negligent loading and stowage. The first section of the act of February 13, 1893 (27 Stat. 445, c. 105), provides as follows:

"That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect." Section 4289, Rev. St.; U. S. Comp. St. 1901, p. 2946.

It wili be noted that the prohibition is aimed at an attempt of a master to relieve himself from liability "arising from negligence, fault or failure in proper loading, stowage, custody," etc. In the case at bar,

the captain, with the stevedores wholly under his control and management, noticed they were loading and stowing the root in an improper manner, they were breaking the bales against his protest, and he should have insisted upon their performing their duty in a proper and careful manner. Their actions in this particular were his, for which he is responsible in case damage resulted; and an attempt to escape this responsibility by a notation such as we find upon these bills of lading, in the judgment of the court, is an attempt to do what the provisions of this act aimed to prevent.

The evidence is not sufficiently clear as to the amount of damage sustained by the respondent for the court to pass upon that question at this time. It is therefore referred to a commissioner, who, with the assistance of the parties, may pass on the question and report.

YORK CITY SCHOOL DIST. v. ÆTNA INDEMNITY CO.

(Circuit Court, M. D. Pennsylvania. July 5, 1904.)

No. 11.

1. SURETYSHIP—CONTRACTS—OMITTED PROVISIONS—REFORMATION OF INSTRUMENT—FEDERAL COURTS—JURISDICTION.

Where, after a building contractor, who had agreed to erect a schoolhouse for plaintiff school district, had abandoned the contract, the school board and the contractor's surety entered into an agreement under which the board was entitled to finish the work at the expense of the surety, whatever its cost, the surety, in an action at law in the federal courts on such contract to recover the difference between the amount so expended and the contract price, was not entitled to have the contract reformed for the purpose of inserting an alleged omitted provision that, if the surety would waive a payment erroneously made by the school board to the contractor, and would agree to the payment of certain debts due to local materialmen and laborers, the district would finish the building within the contract price.

Rule for Judgment for Want of a Sufficient Affidavit of Defense.

N. Sargent Ross, for the rule.

Henry P. Brown and Thomas W. Barlow, opposed.

ARCHBALD, District Judge. In January, 1902, one Harry Knerr entered into a contract with the York City school district by which he undertook to construct a certain school building for the sum of $38,300, giving a bond, with the Ætna Indemnity Company as security, for the faithful performance of his undertaking. The building was to be completed by December 15th, and a penalty of $25 a day was to be paid for every day it was delayed beyond that. There was also a provision that, in case the contractor made default, the school district might go on and complete the work at his expense. He entered upon the construction of the building, but was not able to complete it, being compelled to make an assignment for the benefit of creditors in June following. The defendant company, as surety, was notified of the difficulty, and, the parties having got together, articles of agreement under seal were entered into between them by which it

was provided that—the time limit being dispensed with—the school board should go on and complete the building with all reasonable dispatch under the direction of their building committee and the supervision of the architect previously selected, assuming the contracts for materials which had been entered into by the contractor, and taking care of the labor which had been performed, but not paid for. At the conclusion of the work a detailed statement of all materials bought and labor performed upon the building, approved by the school board, and verified by affidavit of the superintendent or architect, was to be furnished to the indemnity company, and, unless found incorrect, was to be assumed and paid. In pursuance of this agreement, and in compliance with its terms, the school district went on and completed the building at an expense of $48,634.54, which was $10,334.50 above the original contract price; but upon rendering an account of it to the defendant company and demanding payment, the latter, without calling in question the correctness of the expenditures, refused to pay, and thereupon the school district brought suit.

The defendant company, to meet this prima facie showing, rely on the following facts, which are set up in the affidavit: By the terms of the original contract, which was made a part of the bond in which the company joined, the contractor was to be paid in installments—$5,000 when the first-floor joists were laid, $5,000 when the second-floor joists were laid, and so on; a final payment of $3,300 being withheld until 30 days after the completion of the building and the return of the plans. A strict compliance with this provision, and the protection which it secured, was relied on by the defendant, as is alleged; but in disregard of it, and to the prejudice of its rights, the contractor—before anything was done—was paid some $1,700, which he appropriated to his own use. In the negotiations leading up to the agreement in suit the defendant company, as it is said, was not willing to have this credited, and neither was it willing that materials and labor which had been furnished to the contractor by local dealers and workmen, and which the plaintiffs were anxious to have taken care of, should be paid, unless the amount in the hands of the plaintiffs was sufficient to do so, and still enable them to complete the building. In order to ascertain whether this was the case, the contracts for labor and material which had been made by the contractor were examined by a representative of the plaintiffs, who reported that provision had been made for all materials and labor necessary to finish the work, and that that which had been so far furnished, together with that which was still required, could all be met by the balance of the contract price in the hands of the school board, and leave a margin of $3,000. The defendant company, as surety, having the right, as it is asserted, to complete the building, and collect the full contract price without deduction or allowance for the $1,700 improperly paid to the contractor, and the plaintiffs being anxious to avoid this loss, and at the same time to have the local materialmen and workmen taken care of, it was proposed by the school board, as it is said, that they should be allowed to go on and finish the building, which they agreed to complete within the contract price, provided the defendant would waive any right with regard to the $1,700, and would allow the outstanding contracts for labor and ma-

terials to be paid. Upon this understanding, as it is alleged, the agreement in suit was executed, but through accident or mistake the provision with regard to the building being completed by the school board within the original price of $38,300 was omitted, as was also that with regard to the $1,700 payment. Assuming, however, that this was sufficiently indicated in the agreement, or implied from its terms, the defendant executed it; but, if it is not to be so interpreted, it is charged that it does not correctly represent the intention and understanding of the parties, and would not have been executed by the defendant without first having been so corrected. Whereupon the defendant claims that there is nothing due to the plaintiff, and that the rule for judgment should be discharged.

The immediate facts which are relied on to establish the alleged accident or mistake by which, as it is claimed, the writing does not express the real agreement, are not given. But, passing this by, the defense rests, as it will be noted, on something outside of the writing, which the defendant seeks to have incorporated into it and enforced. Unless this can be done, it has no defense, being plainly liable for the amount demanded as the agreement stands. The suggestion that the latter is capable of being interpreted to mean that the school board were to keep within the contract price has nothing whatever to sustain it. It may be that the defendant company could have availed itself of the $1,700 improperly advanced to the contractor as a departure from the contract, even to the extent of avoiding it (Shelton v. American Surety Co. [C. C.] 127 Fed. 736), and could also have repudiated the debts due to local materialmen for what they had furnished to the building, there being no right of lien on public property. But the time to use these as a leverage to secure advantage was when the agreement was being made. The school board were entitled, under the terms of the original contract, to go on and finish the work at the expense of the defendant, whatever it cost. If they succeeded in doing so within the original contract price, there would be no occasion for calling on the defendant; but if they did not the defendant was liable for the excess, this being one of the purposes for which the contractor gave bond. The idea that under the new agreement the contract price was not to be exceeded—which would practically mean that in no event was the defendant to be held liable—could hardly have been contemplated. But, if any such unlikely bargain was discussed, there is no trace of it to be found in the writing, and by that the defendant must abide. If anything was omitted which would make it speak otherwise, it cannot be corrected here. As was said in Pitcairn v. Hiss (C. C. A.) 125 Fed. 110: "Whatever be the case in other jurisdictions, in a federal court a written contract cannot be reformed in an action at law." Such a proceeding is essentially equitable in its nature, and must, therefore, be pursued by bill, the state practice to the contrary notwithstanding. It is not necessary to consider what would be the result if fraud in the procurement of the contract was relied upon, for there is nothing of that kind set up.

Finding no defense, therefore, to the action, the rule is made absolute, and judgment directed to be entered in favor of the plaintiff for the amount claimed in the statement.

JACKSON et ux. v. DELAWARE RIVER AMUSEMENT CO.

(Circuit Court, E. D. Pennsylvania. July 8, 1904.)

No. 20.

1. FEDERAL COURTS—CORPORATIONS—PROCESS—SERVICE—RETURN.
Where in an action in the federal courts against a corporation neither the statement, summons, præcipe, nor the return of the marshal recited that the corporation was transacting business in the state in which the court was sitting, and the process was served, a return of the marshal that he served the writ within his district on the corporation by giving a true and attested copy thereof to T., president of the corporation, and making known the contents of the same to him, was insufficient on its face.

2. SAME—VACATION OF SERVICE—RULE—PLEA IN ABATEMENT.
While a marshal's return of service on a corporation is conclusive on the parties, and cannot be contradicted, yet, where the return did not show that the corporation was doing business in the state in which the court was sitting, and in fact the corporation transacted no business in such state, service being made on its president while he was engaged in private business therein, an application to set aside such service might be made by a rule to show cause, instead of by plea in abatement.

Myles Higgins, for plaintiffs.
Mark W. Collet and Michael J. Ryan, for defendant.

HOLLAND, District Judge. This is a suit to recover for a personal injury to Clara Jackson against the defendant, a New Jersey corporation, which was instituted in this district, and service of the writ of summons was made upon Mr. Thompson, the president of the company, while engaged in business in Philadelphia not connected with the said corporation, and at an office of another and different corporation, totally distinct from the one named above. It nowhere appears that the defendant corporation was engaged in business in the state of Pennsylvania; in fact it is denied by the affidavit that it is so engaged. The return is as follows:

"At Philadelphia, in my district, served the within writ upon the Delaware River Amusement Company by giving a true and attested copy thereof to William J. Thompson, president of said company, and making known the contents of the same to him. So answers John B. Robinson, U. S. Marshal."

This return, in view of the record in this case, would be insufficient upon its face upon the authority of Earl v. Chesapeake Railroad Company (decided by Judge McPherson, in this court, Feb. 8, 1904) 127 Fed. 235, for the reason that neither the statement, summons, præcipe therefor, nor the return of the marshal recites that the said defendant corporation was transacting business in Pennsylvania; and, while this may not be necessary in the local courts, in the federal courts, which are courts of limited jurisdiction, it is necessary that every jurisdictional fact must appear upon the record. This view is supported by the case of St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. Other

¶ 1. Service of process on foreign corporations, see note to Eldred v. Palace Car Co., 45 C. C. A. 3.

cases in point decided in this district, are Scott v. Oil Company (C. C.) 120 Fed. 698, and Id., 122 Fed. 835.

A question of practice, however, is raised as to the proper method of bringing the matter before the court. A rule was granted upon the plaintiff to show cause why the summons should not be set aside upon affidavit made (not in the shape of a petition) by William J. Thompson, the president of the company, alleging that the defendant was engaged solely in business in New Jersey, and that it transacted no business in the state of Pennsylvania, and that service was made upon him, the deponent, while engaged in Philadelphia on private business not connected with that of the defendant corporation. It is contended by the plaintiff in this case that the marshal's return is conclusive of the facts therein stated, and that the question should have been raised by plea in abatement, instead of a rule to set aside the service. In answer to the first question, it is sufficient to say that it will be noted from the facts stated in the defendant's affidavit, which are not contradicted by the plaintiff, that there is no issue raised there with the statement of facts in the marshal's return. It is not denied by Mr. Thompson that he is president of the defendant corporation, or that notice was served upon him in Philadelphia. These facts are admitted; but it is asserted that the service is illegal for the reason that the defendant company carried on no business in this district, and that its president was not in this district in a representative capacity at the time of service. Even if we follow the practice in the local courts in considering the return conclusive, this case is controlled by the recent decision of Chief Justice Mitchell in Park Bros., etc., Co. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334, wherein it is stated that, while it is still the law that the sheriff's return is conclusive on the parties, and cannot be contradicted, yet modern practice is liberal in allowing inquiry into the actual facts, where the return itself is not full or explicit. A plea in abatement will not be required. It is the more ancient and formal way, but not necessarily exclusive now. It has been held that the enlarged operation of rules is a somewhat peculiar and admirable feature of Pennsylvania jurisprudence, growing largely out of the administration of equity through common-law forms, and that the practice of setting aside service on rules has the sanction of precedents sufficient to save it from being pronounced irregular in cases where it reaches the desired end without inconvenience or injustice to either party. Park Bros., etc., Co. v. Oil City Boiler Works, supra, and cases there cited. The same view has been taken in this court in the case of Scott v. Oil City, supra, where the question was directly raised. In fact, the practice of setting aside service on rule has been adopted in many of the districts, even where the local practice requires a plea in abatement, and there is no reason why the more inconvenient method should be employed in this district. Wall v. Chesapeake & Ohio Railroad Company, 95 Fed. 398, 37 C. C. A. 129.

Rule absolute.

THE WILLIAM POWER.

(District Court, E. D. New York. January 4, 1904.)

1. SHIPPING—DAMAGE TO CARGO—UNSEAWORTHINESS.

Damage to a cargo of hay from water *held*, under the evidence, to have been due to leakage, owing to the inability of the vessel to carry the cargo for which she was chartered without straining, which rendered her unseaworthy.

In Admiralty. Suit for damage to cargo.

William J. Cleary, for claimant.

Simpson, Thacher, Barnum & Bartlett (Dean Sage and Mark Hyman, of counsel), for libelant.

THOMAS, District Judge. This action is by a shipper against the canal boat William Power for such injury to 376 bales of hay in transit as to render it valueless. The hay was ruined at the time of its arrival by contact with water. One of the libelant's witnesses states that he saw—

"Long seams that were wet, and stains trickling down from them. I did not see the water trickling through, but the indications were there of there being leaks. Q. Was the inside of the boat—the side of the boat on the inside, around the seams you mentioned—damp? A. Wet just where the bales came from under the decks. * * * How many wet seams did you observe? A. Some of the seams were quite long. I should say I saw three or four probably 10 feet long. Q. On both sides of the boat, or on one? A. Mostly on the off side. Q. Do you know or did you observe any of the bales of hay which were afterwards rejected being removed from such a position on the side of the canal boat where it would be in contact with the damp seams that you have mentioned? A. It came from right along the side of the boat. They were taken right from those places."

The claimant states that before entering St. Johns on his outward journey, and before taking the hay, there was a shower, and his canal boat, which had open hatches, was damp therefrom, and that, against his advice or protest, the shippers scattered a quantity of fine chaff along the bottom, and that this absorbed the moisture and communicated it to the hay. The ruined hay was baled in such a way as to be best guarded against water. The tiers next to the bottom and the sides of the vessel in a particular section of the hold were in the condition stated by the witness. It is highly improbable that such condition of wetting and molding could have come from so slight a cause to such a quantity of hay so baled, from mere dampness arising through chaff, and also rising above the wooden dunnage over the chaff. The claimant is also understood to contend that the boat was overloaded, or the load improperly distributed, and hence sprung a leak. The charter party did not require the shipper to load or to distribute the cargo, although the expense of it was to be borne by him. The master contends that he objected to the manner of distributing the load, but it is doubtful if he carried his protest to the shipper. In any case, his remonstrance was feeble. However, it was his duty to attend to the distribution of the cargo. It seems to be further objected that the boat was overloaded. The shipper was entitled to the cargo spaces, and it was the duty of the carrier to furnish a vessel that was seaworthy for

a full load. If he thought that she was being overloaded, he should have stopped it. It is considered, however, that the leak was caused from her inability to carry, without straining, the load demanded by the charter.

The libelant should have a decree.

UNITED STATES v. GRUNBERG et al.

(Circuit Court, D. Massachusetts. May 16, 1904.)

No. 2,001.

1. INDICTMENT—MOTION TO QUASH.
   On a motion to quash an indictment, the court will consider only such propositions as raise clear points of law.
2. CONSPIRACY—INDICTMENT—ALLEGATION OF MEANS INTENDED TO BE USED.
   An indictment for conspiracy to defraud the United States of sums to become due to it as customs duties must allege, to some extent at least, the means intended to be used to defraud—as that it was by smuggling, or by forged or false invoices, or the like—although the details of the plan need not be set out, since they may not have been known to the grand jury or to the conspirators themselves.
3. SAME—SETTING OUT INSTRUMENT.
   In an indictment in a federal court, it is not necessary to allege the tenor of an instrument unless it touches the very pith of the crime itself, as in forgery, or counterfeiting. An indictment for conspiracy to defraud the United States by obtaining the entry of imported merchandise without payment of the legal duty thereon need not allege the tenor of an instrument by means of which, as charged, it was intended to accomplish the fraudulent entry.

On Motion to Quash Indictment.

The following is the motion to quash the indictment:

Now comes John W. Trafton, one of the defendants in the above-entitled case, and moves to quash the above indictment, and each and every count thereof:

First. Because the same nowhere charges him with any offense under the laws of the United States, set forth plainly, formally, and substantially, as required by the laws of criminal pleading.

Second. Because said indictment does not set forth plainly, formally, and substantially, and in such a manner as to reasonably inform the defendant, the nature, character, form, and contents of the alleged false and fraudulent papers to be used pursuant to and in promotion of said conspiracy, as alleged in said indictment.

Third. Because said indictment does not set forth plainly, formally, and substantially, and in such a manner as to reasonably inform the defendant, the nature and details of the alleged conspiracy—particularly as to what is intended to be charged by the allegation that, as a part of said conspiracy, one or more of the defendants should and would present and cause to be presented certain false and fraudulent entries.

Fourth. Because that in said indictment, and each and every count thereof, no overt act is alleged, the performance of which would have amounted to or resulted in a defrauding of the United States, so far as appears from the allegations in said indictment.

Fifth. Because in other respects the said indictment is insufficient and void.

¶ 2. See Conspiracy, vol. 10, Cent. Dig. §§ 85, 96.

Wherefore this defendant prays that the said indictment, and each and every count thereof, may be quashed, and that he may be hence discharged.

Burdett, Wardwell & Snow, for John W. Trafton.
Charles K. Cobb, for James A. Shedd.
C. P. Searle, Arthur P. Hardy, and Melvin O. Adams, for William Monroe.
H. N. Allen, for Grunberg, Baitler, and Burman.
Henry P. Moulton, U. S. Atty.

PUTNAM, Circuit Judge. On motions to quash, the court accepts only such propositions as raise clear points of law. Any involved question should be raised by demurrer or motion in arrest of judgment, where the court must meet the issues and dispose of them, holding them under consideration if necessary for that purpose; but a motion to quash, being addressed to the discretion of the court, and interposing avoidable delays, unless clearly justified, should be decided on the spot, and therefore our practice as to such motions is as stated.

Except on two propositions, we need only refer to Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, and Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. In view of the nature of the conspiracy alleged, those cases cover every other point now brought to the attention of the court. It is to be borne in mind, in considering and applying the suggestions of counsel, that the pith of the offense is contained in the first seven or eight lines of the indictment. Six persons, including all who are represented here by the motions to quash, are charged with "unlawfully, willfully, knowingly, and designedly conspiring, combining, confederating, and agreeing to defraud the United States of America of large sums of money, to become due and payable to the United States of America as customs duties accruing upon divers importations of merchandise to be thereafter imported and brought by said Grunberg, Baitler, and Burnham from a foreign country, to wit, from the republic of Switzerland, into the United States of America, to wit, into the port and collection district of Boston and Charlestown, in said district of Massachusetts." Every element is here which is necessary to make out to the common understanding an offense. But, according to the settled practice on indictments for conspiracy, whether the means to be employed are in themselves lawful or unlawful, it is not sufficient to merely allege in such general terms that the defendants have conspired to defraud. The indictment must allege, to some extent at least, the means intended to be used in defrauding.

What we have read from the indictment covers everything which the letter of the statute requires, except the overt act. All which follows is to be construed in reference to that fact.

Of course, there are various ways of defrauding the customs. Parties may conspire to defraud by smuggling in goods at night; they may conspire to defraud by bribing the customhouse officers; they may conspire to defraud by forging invoices; they may conspire to defraud by false invoices; and the pleader must ordinarily

show, in a general way, which of those methods the parties intended. The indictment must go at least so far as to point out something as to the way in which the parties intended to defraud, because there cannot be a conspiracy known to the grand jury, without some knowledge of the general line in which it was to march. Therefore the grand jury are supposed to know this, but they are not supposed to know all the details. The conspirators themselves may not have known them. They may agree on a general purpose to defraud by the use of false invoices, or by smuggling at night, and the rest they may leave for further consideration. They may even leave it for chance, to be determined according to the success or emergencies of the enterprise. Therefore it never has been necessary that, with reference to such details as have been called to our attention, the grand jury should be charged with knowledge.

A criticism has been made with reference to the word "entry." In one of the cases cited the court went so far as to hold that it might determine from the context whether the word "entry" was used in a technical sense or in a popular sense. In this case the meaning of the word is determined from the context. It is clearly a customhouse entry. It is also clear that it is not necessary to declare that the collector had power to liquidate. It is not necessary in an indictment to allege what the law itself determines, and the law determines that, on the certificates named in the indictment being received by the collector, he is authorized to liquidate the duties.

As to the setting out the tenor of any paper, in Pooler v. United States (C. C. A.) 127 Fed. 509, the court had occasion to go over this topic carefully. In the federal courts, at least, it is not necessary to allege the tenor of an instrument unless it touches the very pith of the crime itself, as forgery or counterfeiting. The tenor of an instrument is never alleged in conspiracy indictments of the class at bar, where, as we have said, the setting out of the means is only incidental to the description of what is the substance of the offense.

The suggestions made with reference to the effect of section 3169 of the Revised Statutes, as amended in 1875 (Act Feb. 8, 1875, c. 36, 18 Stat. 312 [U. S. Comp. St. 1901, p. 2060]), is very striking, but we can come to only one conclusion on these motions. We will not consider ourselves bound, so far as this point is concerned, by anything we now determine, if the point comes before us again, with full time for consideration, on a motion in arrest of judgment. We now think that the United States have an option, where customs officers and individuals have combined, to proceed against the customs officers under the new law or against all under the Revised Statutes. The new statute is so framed that it seems to permit a severance to such an extent that probably a single customhouse officer who has conspired with merchants may be indicted, whether the merchants are joined in the indictment or not; but take the case of one customhouse officer and one merchant. The merchant could not be indicted alone under any existing law, unless there is some statute of the United States which we do not know of, without joining the customhouse officer; and we cannot now accept the proposition that Congress intended to go so far as to enact that, because one is a custom-

house officer, the merchant who conspires with him, when there are only two conspiring, shall be free from punishment as a conspirator. Therefore, at least for these motions, we cannot give that proposition effect, and all the motions are overruled.

UNITED STATES v. SWAN.

(District Court, E. D. Missouri, E. D. June 15, 1904.)

1. FORGERY—PENSION AFFIDAVIT—STATUTES—CONSTRUCTION.

The forgery of an affidavit by a pensioner, to be used in contesting his deserted wife's claim for one-half of his pension, as authorized by Act March 3, 1899, c. 460, § 1, 30 Stat. 1379 [U. S. Comp. St. 1901, p. 3288], is not an offense within Rev. St. U. S. § 5421 [U. S. Comp. St. 1901, p. 3667], providing that any person who falsely forges any writing for the purpose of obtaining or receiving, or enabling any other person, directly or indirectly, to receive, from the United States, any sum of money, shall be imprisoned, etc.

Motion in Arrest of Judgment.

D. P. Dyer, U. S. Dist. Atty.

J. J. Howard, for defendant.

ADAMS, District Judge. The accused was indicted under the provisions of section 5421 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3667], which reads as follows:

"Every person who falsely makes, alters, forges, or counterfeits * * * any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money, * * * shall be imprisoned," etc.

He was tried, and found guilty as charged.

The particular charge laid in the indictment against the accused is that he forged an affidavit by signing the name of Alvin G. Burkey to it, and, after so doing, forwarded the same to the Commissioner of Pensions at Washington "for the purpose of obtaining from the United States a sum of money, to wit, the sum of $12 per month." From other averments of the indictment it appears that the accused, Swan, was a pensioner of the United States, receiving a fixed pension of $12 per month; that Martha J. Swan, his wife, pursuant to the provisions of the act of March 3, 1899, c. 460, § 1, 30 Stat. 1379 [U. S. Comp. St. 1901, p. 3288], presented her claim for one-half of her husband's pension on the alleged ground that she had been deserted by him, and was of good moral character, and in necessitous circumstances; and that, while her claim was so pending before the Commissioner of Pensions, Swan made and used the forged affidavit set out in the indictment by way of resisting or defending against the claim of his wife. The motion in arrest, now under consideration, raises the question whether the making and using of the forged affidavit for such a purpose is within the comprehension of section 5421, supra. The indictment discloses that Swan's imme-

diate purpose was to make use of the forged writing to prevent his wife's obtaining one-half of the pension, which had already been allowed to him. It is contended by the United States attorney that the effect of his act was to enable him to continue to draw the whole amount of his pension which had been theretofore granted to him. The argument is that, if he could defeat his wife's claim, he would thereafter collect it all as he had done theretofore, and, for this reason, that the use of the forged writing to defeat her claim was, in effect, the use of the writing to obtain the money himself. The offense denounced by section 5421 obviously is the making of the forged writing in aid of a claim against the United States, with the purpose and intent of thereby obtaining for the claimant, or some other person, a sum of money from the United States. The forged writing must have such direct relation to the object to be accomplished as to evince an intent or purpose on the part of the forger to thereby obtain money. The gist of the offense is as much the wrongful obtaining of the money as the forgery of the means to do so. Both of these elements must concur to constitute the offense. The forged writing must obviously be the means whereby the money was intended to be secured. In the light of these obvious reflections, what does the indictment disclose? Swan's real intent and purpose was to prevent the United States from paying money to his wife. She was making a claim for it, and he, instead of aiding her, was resisting the claim made by her. He was making no claim against the United States for himself. His right had already been established. At the worst, his remote intent and purpose was to defend and protect an existing right of his own, and not to extract any more money than was due him, but to prevent its division with his wife. This remote intent and purpose is not, in my opinion, the proximate actuating intent and purpose denounced by the statute in question. A penal statute should not be extended by implication. As said by a distinguished English jurist: "It would be exceedingly wrong that a man should, by a long train of conclusions, be reasoned into a penalty, when the express words of the act of Parliament do not authorize it." Rex v. Bond, 1 B. & Ald. 392. "Penal statutes are not enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because of their resemblance, or because they may be equally and in the same way demoralizing and injurious; * * * nor can a statute be extended beyond its grammatical sense or natural meaning by any plea of failure of justice." Sutherland on Statutory Construction, §§ 352, 355, and cases cited. The plain and natural meaning of the language employed in section 5421 is, in my opinion, to prevent the making or using of a forged writing in asserting a claim against the United States for the purpose of obtaining money on that claim, and it would, in my opinion, be a strained and unwarranted construction of this highly penal statute to hold that a forged writing made to resist a claim asserted against the United States would fall within its comprehension merely because the ulterior effect of the claim, if successful, would prevent the forger from collecting from the United States an amount of money otherwise conceded to be due him. To extend the statute to cover such

a state of facts would involve a train of reasoning resulting in new legislation, rather than in the construction of an existing statute. This kind of argument might prevail in a civil action, but it is too indirect and forced for a criminal case.

The motion in arrest must be sustained.

In re WILDE'S SONS.

(District Court, S. D. New York. June 9, 1904.)

1. BANKRUPTCY—REFEREES—JURISDICTION—ADMISSIBILITY OF EVIDENCE—RULINGS.

   Since a referee in bankruptcy is required not only to take evidence, but to determine issues of fact and law based thereon, he has power to exclude inadmissible evidence offered under objection.

2. SAME—HEARINGS—PRESENCE OF REFEREE.

   A referee in bankruptcy, having power to rule on the admissibility of testimony offered before him, is bound to personally hear the evidence, unless his presence is waived by the parties.

In Bankruptcy.

Morris J. Hirsch, for Bennett & Co., creditors.
Smith & Bowman, for trustee.

HOLT, District Judge. This motion involves the question whether a referee in bankruptcy has any power to exclude evidence. As I understand it, an officer appointed to simply take testimony for the use of the court—as, for instance, an examiner in an equity suit—has no jurisdiction to exclude or pass upon testimony. Unless the parties refer any question of the admission of testimony to the court, he is obliged to take all that is offered. But I think that whenever any officer is appointed whose duty it is to take evidence, and also to exercise any judicial duty in regard to it—as to decide issues or to state the facts or law in an opinion or report—it is his right and his duty to exclude inadmissible evidence upon objection. Why should he admit evidence which it would be his duty to disregard if admitted? Substantially all the cases in which evidence is taken by referees in bankruptcy, either in their character as referees or as special commissioners, are cases in which they either decide questions outright, or draw conclusions from the evidence in the shape either of a report or an opinion, and I think that in all such cases the referee has the right to exclude evidence which he deems inadmissible. If error is committed by such exclusion, any party interested can take up the matter immediately on a certificate, or can urge the alleged error on final hearing. I am aware that there are authorities to the contrary for which I feel sincere respect, but none of them is necessarily controlling upon me, and I am not able to concur with them. The delay and expense of a bankruptcy system under which a referee has no power to exclude testimony, however irrelevant, is so great that such a method of procedure should not be permitted unless the principles of law absolutely require it. In my opinion, they do not require it in proceedings before referees in bankruptcy.

The determination of the question whether a referee in bankruptcy has power to pass upon testimony substantially determines the question whether he should be personally present when it is taken. Formerly examiners in equity suits usually took down the testimony in longhand, but under the modern practice the actual taking down of the testimony is usually performed by a clerk or stenographer. Under these circumstances, as the examiner has no power to rule upon testimony, the only substantial necessity for his presence is to administer the oath to the witness, and in actual practice it frequently occurs in such cases that, after administering the oaths, he does not remain personally present. But a judicial officer, who is to decide upon the effect of testimony, in my opinion, is bound to personally hear the evidence, if required by any interested party. A referee in bankruptcy, therefore, in my opinion, is bound to be personally present when evidence is taken which he is to pass upon, unless, in the case of purely formal evidence, his presence is waived.

I decline to make any direction in reference to closing the reference in this case. That matter is left to the discretion of the referee.

JANNEY v. PAN-COAST VENTILATOR & MFG. CO.

(Circuit Court, E. D. Pennsylvania. June 16, 1904.)

No. 20.

1. INJUNCTION—VIOLATION—CONTEMPT PROCEEDINGS.
   The president of a defendant corporation *held* guilty of contempt of court for violation of an injunction restraining the use by the corporation of a trade-name.

In Equity. On motion to revoke appointment of master, and motion to attach Joseph C. Henvis for contempt for violation of injunction.

See 128 Fed. 121.

A. B. Weimer, for complainant.

A. T. Johnson and Charles F. Warwick, for Jos. C. Henvis.

J. B. McPHERSON, District Judge. Much as I should have preferred to profit by the report of a master on the motion to attach the respondent, Henvis, for contempt, I shall be obliged to forego that advantage. The complainant moves to revoke the order appointing the master on the ground that he has no further testimony to offer, and for that reason asks the court to dispose of the motion to attach upon the affidavits that have already been presented. Under these circumstances I think the motion to revoke should be granted, and, as this requires me to decide for myself whether a contempt has been committed, I have given the testimony careful consideration, making an especial effort to read it without bias or prejudice. I hope I may have succeeded, for my conclusion is adverse to the respondent. To my mind it is clear that he deliberately evaded and disobeyed the injunction order of February 26, 1904, by issuing the circular headed,

"We challenge the world," etc., if by no other act, and I am therefore obliged to adjudge him guilty of contempt.

It is accordingly ordered that the motion to revoke the appointment of the master be granted, and, after consideration of the affidavits heretofore submitted, the court does adjudge Joseph C. Henvis, the respondent, guilty of contempt in disobeying the injunction order of February 26, 1904, and as a penalty for this disobedience orders that he pay a fine of $100 and the costs of this attachment proceeding within five days from this date. In default of such payment the marshal is directed to take him into custody, and deliver him to the jail of Philadelphia county, there to suffer imprisonment for the period of 30 days.

THE CORA F. CRESSY.

(District Court, D. Massachusetts. June 20, 1904.)

No. 1,457.

1. SEAMEN—DISOBEDIENCE—PUNISHMENT—IMPRISONMENT.

That the master of a vessel failed to replace a second mate who had been paid off at an intermediate port, as required by Rev. St. § 4516 [U. S. Comp. St. 1901, p. 3071], was no excuse for the total refusal of members of the crew to work the vessel, and was therefore no defense to the master's right to punish them for their disobedience.

In Admiralty.

John J. O'Connor, for libelants.
Carver & Blodgett, for claimant.

LOWELL, District Judge. This was a libel to recover (1) damages for false imprisonment, and (2) wages.

1. The seamen libelants refused to work, and were put in irons until they were ready to obey orders. The imprisonment was justified, unless the refusal to work was justified. The libelants' counsel seeks to justify the seamen's disobedience by the master's alleged violation of Rev. St. § 4516, as amended by Act 1898, c. 28, § 1, 30 Stat. 755 [U. S. Comp. St. 1901, p. 3071], in that the vessel put to sea without replacing a second mate who had been paid off at Norfolk, an intermediate port. But, even if section 4516 applies to domestic vessels, and extends to the replacing of both officers and seamen, and though it be assumed that the master of the Cressy could reasonably have obtained a second mate at Norfolk (all disputable propositions), yet the master's violation of law does not excuse the crew's total refusal to work the vessel, either at Norfolk or after leaving that port. Hence the libelants have failed to prove any false imprisonment.

2. It follows that the master was justified in docking the crew's wages during their confinement, but, as he failed to comply with the provisions of Rev. St., § 4597 [U. S. Comp. St. 1901, p. 3115], I am disposed to mark my disapproval of this irregularity by disallowing the deduction.

Decree for balance of wages, without costs.

CLARKE v. EUREKA COUNTY BANK.

(Circuit Court, D. Nevada. July 18, 1904.)

No. 728.

1. APPEAL—FINAL JUDGMENT—MOTION FOR NEW TRIAL—PENDENCY.
The judgment of a federal court is not final, so that the jurisdiction of the appellate court may be invoked, while the judgment is still under the control of the trial court through the pendency of a motion for a new trial.

2. SAME—SUPERSEDEAS BONDS—SUFFICIENCY.
Where plaintiff was present when the amount of defendant's supersedeas bond for appeal was fixed by the trial court, and made no objection to the amount fixed, whereupon a writ of error was allowed, the bond accepted, and citation issued, the fact that the amount fixed, was, by inadvertence, some $30 less than the amount actually due on the judgment, including interest, etc., was immaterial.

3. MOTION TO INCREASE BOND—JURISDICTION.
Where a supersedeas bond has been accepted, writ of error allowed, and the citation issued, a motion to increase the bond is within the exclusive jurisdiction of the appellate court.

Motion for Issuance of an Execution.

Alfred Chartz and N. Soderberg, for plaintiff.
Cheney, Massey & Smith, for defendant.

HAWLEY, District Judge (orally). The record in this case shows that the judgment was rendered July 6, 1903, in favor of plaintiff, for the sum of $11,251.75; that thereafter stipulations were filed by the respective parties, and orders made by the court in pursuance thereof, extending the time for plaintiff to file and serve notice of motion for new trial and bill of exceptions, and for a stay of execution. The first of these stipulations was filed January 14, 1903, the second was filed July 31st, and the third August 31st, extending the time up to and including the 21st day of September, 1903. The notice of motion for new trial was filed August 31, 1903, and thereafter set for hearing on September 21, 1903, then overruled, and on the same day this court allowed the writ of error to the Circuit Court of Appeals upon the defendant giving a bond in the sum of $11,500 to operate as a supersedeas bond. It further appears that in due course of time the case was regularly placed upon the calendar of the Circuit Court of Appeals, and on May 2, 1904, the judgment of this court was affirmed. A petition for rehearing was filed, and on June 3, 1904, denied. Thereafter the plaintiff in error, defendant in the court below, moved the Circuit Court of Appeals for, and obtained, an order staying the mandate herein until the Supreme Court pass upon an application for a writ of certiorari to review the judgment herein rendered upon the filing of an additional bond in the sum of $1,000. On July 1, 1904, the plaintiff moved this court "to vacate and set aside the order herein made and entered in said cause on the 21st day of September, 1903, granting the supersedeas and stay of execution, and ordering that upon the giving

¶ 1. What decrees are final, see note to Brush Electric Co. v. Electric Imp. Co. of San Jose, 2 C. C. A. 379.

of a bond by defendant in the sum of $11,500 said bond should operate as a supersedeas bond, and that execution issue herein upon the judgment made and entered by said court on the 6th day of July, 1903, in favor of plaintiff and against said defendant."

1. It is claimed that the writ of error was not sued out within 60 days from the entry of judgment, in accordance with the provisions of section 1007, Rev. St. [U. S. Comp. St. 1901, p. 714], 60 days having elapsed since the judgment was originally entered. This contention is without merit. The decisions of the Supreme Court are to the effect that a judgment is not final, so that the jurisdiction of the appellate court may be invoked, while it is still under the control of the trial court through the pendency of a motion for new trial. Kingman Co. v. Western M. Co., 170 U. S. 675, 678, 18 Sup. Ct. 786, 42 L. Ed. 1192, and authorities there cited.

2. It is claimed that the bond given on the writ of error is insufficient in amount to operate as a supersedeas, in this: that it was allowed in a sum about $30 less than the amount then actually due upon the judgment, including interest, etc. This, if true, seems to have been an inadvertence. The plaintiff was present when the amount was fixed by the court, and no objection was made to the amount of the bond. The rule is universal that when a writ of error or an appeal is allowed, the original bond accepted and the citation signed, the jurisdiction of the suit is in the appellate court, and the jurisdiction of the lower court over the cause ceases, and a motion to increase the bond on the writ of error could have been addressed to the appellate court, if so desired. Morrin v. Lawler (C. C.) 91 Fed. 693, and authorities there cited; Keyser v. Farr, 105 U. S. 265, 26 L. Ed. 1025. As was said by the court in Draper v. Davis, 102 U. S. 370, 26 L. Ed. 121:

"The power of the justice over the appeal and the security, in the absence of fraud, was exhausted when he took the security and signed the citation. From that time the control of the supersedeas as well as the appeal was transferred to this court; and even here, as we held in Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515, in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted."

It necessarily follows that the supersedeas granted by this court by the order allowing the writ of error herein on September 21, 1903, is still in force, has never been, and cannot now be, vacated.

The motion is denied.

In re CARLETON.

(District Court, D. Massachusetts. June 21, 1904.)

No. 8,359.

1. BANKRUPTCY—DISCHARGE—EFFECT OF PRIOR DISCHARGE.

A discharge granted to a bankrupt, in partnership proceedings instituted by himself, is one granted in voluntary proceedings, and precludes him from obtaining a second discharge within six years, under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411].

2. SAME.

The provision of Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], which forbids a discharge if the bankrupt has in voluntary proceedings been granted a discharge within six years, is not retroactive as applied to cases where the first proceedings were had prior to its enactment, but merely adds a new condition of discharge in cases instituted after the amendment.

In Bankruptcy. On application for discharge.

William H. Preble, for bankrupt.
Charles H. McIntyre, for objecting creditor.

LOWELL, District Judge. Carleton was adjudged bankrupt upon a petition which he filed as member of a firm composed of himself and one Freeman. On October 28, 1902, he received his discharge. On December 10, 1903, he was again adjudged bankrupt upon his individual voluntary petition, and now seeks for a discharge thereunder. The only objection made thereto is that founded upon section 4 of the Ray bill (Act Feb. 5, 1903, c. 487, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 411]), which forbids discharge if the bankrupt has "(5) in voluntary proceedings been granted a discharge in bankruptcy within six years."

Counsel for the bankrupt has suggested that the first adjudication was not had in voluntary proceedings; but, so far as the present bankrupt is concerned, the partnership proceedings must be deemed voluntary. He contends chiefly that to deny the bankrupt a discharge in this case would be to give to the Ray bill a retroactive effect; but this is not true. The original bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), indeed, did not forbid successive petitions in bankruptcy and successive discharges thereunder, but it conferred upon a bankrupt no vested right to file successive petitions and to receive successive discharges which is impaired by the Ray bill. That statute is not retroactive. It creates no new offense and imposes no penalty, but only fixes new conditions of discharge in case of petitions filed after its passage. Its language is plain, and, in accordance therewith, the discharge is here refused.

LAKE DRUMMOND CANAL & WATER CO. v. WEST END TRUST & SAFE DEPOSIT CO.

(Circuit Court, E. D. Pennsylvania. June 27, 1904.)

No. 56.

1. CONTRACTS—PERFORMANCE—INDEMNITY—SURETIES—EVIDENCE—RECORDS.

Where a contractor for certain work covenanted to save plaintiff harmless from all claims advanced by any person by reason of the work done or omitted to be done under the contract, and at his own cost and expense to defend all suits which might be brought against plaintiff on such claims, the records of suits so brought in which recoveries were had against plaintiff, which plaintiff paid, were conclusive evidence as against the contractor's surety, provided they disclosed with sufficient certainty that the suits were founded on the negligence or other improper conduct of the contractor.

2. SAME.

Where a contractor agreed to indemnify plaintiff against claims of third persons arising out of the work, but the records in suits brought on such claims did not identify the contractor either by name or description as causing the injury, and it affirmatively appeared that a part of the injuries for which recoveries were had occurred after the contractor had left the work, such records, being offered as a whole in an action against the contractor's surety, were properly excluded.

Motion for New Trial.

A. T. Freedley, for plaintiff.

John Hampton Barnes, for defendant.

J. B. McPHERSON, District Judge. This controversy arises upon the following facts: In March, 1896, Patricius McManus entered into a contract with the plaintiff to dredge and widen a section of the Dismal Swamp Canal. He continued at work until the latter part of the year 1898, when, in consequence of disputes between him and the company, he gave up the contract. These disputes were settled by an agreement dated December 3, 1898, of which the following is the only passage that is now relevant:

"(3) The said McManus hereby further covenants and agrees to duly and promptly protect and save harmless the company [plaintiff] from all claims of any sort or description which may be advanced against the company by anyone on account of or by reason of work done or omitted to be done under the said contracts of March 23, 1896, and March 28, 1898, and at his own cost and expense to defend all suits which may be brought against the company on such claims."

The defendant became the surety of McManus upon this agreement, binding itself for "the prompt and faithful performance of all the covenants, warranties, and agreements of Patricius McManus as set forth in the foregoing contract." During the period between June 29, 1900, and May 25, 1901, eight suits were brought against the canal company in North Carolina by owners of land bordering upon the canal along the section where McManus had been at work. In these suits it was charged that the canal company, its agents, employés, and contractors, deposited large quantities of mud, sand, and water upon the lands of the plaintiffs, filled up the drainage ditches, and caused water to accumulate or pond upon the surface, thereby injuring the productive capacity of the soil, and doing much damage both to the annual crops and also to the freehold. Recovery was had in each case, the judgments were affirmed by the Supreme Court of North Carolina, and an aggregate sum of more than $10,000 was paid by the canal company in satisfaction of the claims. Both McManus and the defendant were notified of the suits as they were brought, and were asked to defend them, but these requests were either ignored or refused. The present suit is brought to recover from the surety the sums thus paid by the defendant, the averment being that all these suits were founded upon the negligent or other improper conduct of McManus, and that he had bound himself by the agreement of December 3, 1898, to save the canal company harmless from all litigation that might grow out of work done by him. At the trial the plaintiff offered in evidence certified copies

of the North Carolina records, but they were excluded by the court, and this exclusion is the principal subject of complaint under the present motion.

It is undoubtedly true that under the facts above stated the records would have been not only evidence, but conclusive evidence, against the surety (Washington Gas Co. v. District of Columbia, 161 U. S. 329, 16 Sup. Ct. 564, 40 L. Ed. 712), if they had disclosed with sufficient certainty that the suits were founded upon the negligent or other improper conduct of McManus. The difficulty, in my mind, during the trial, however, was that they did not show with the needful precision this important fact. McManus' name does not appear in them at all; neither is he so described as to be definitely pointed out. The acts complained of are described as the acts of the canal company, its agents, employés or contractors, and the only way in which McManus can be connected with the injuries is by other evidence in the case, coupled with the averment in five of the records that the harm was done when the canal was being widened in 1898. Even this help is not to be found in three of the records—the suits of Norris, Burnham, and Edney—for in each of these cases the injury is averred to have been done in part during the year 1899, after McManus had retired from the work, and the company alone was carrying it on. These records afforded no means of separating the damage done in the year 1899 from the damage done in 1898, the judgments being for lump sums; yet for the first item McManus could not be held liable. So, also, with regard to the items making up the sums recovered. In several of the cases it affirmatively appears that awards were made for damages to the crops of 1899, 1900, and 1901, for which the canal company would be liable, if the injury was done by its failure to open the drainage ditches that McManus may have left filled up; and this is specifically charged against the company as one of the grounds for recovery. Surely, if the canal company found that a nuisance had been left on its hands by McManus, it was bound to abate it, and if it failed to do so, and thereby became liable in damages, it cannot recover such damages from the person who may have been equally guilty of the wrong. Because of this lack of definiteness and precision in the records, they did not seem to me to be competent, and I am still of the same opinion.

I may add that the records were offered as a whole, and the ruling of the court was upon them as a whole, and not separately.

The motion for a new trial is refused.

In re O'DONNELL et al.

(District Court, D. Massachusetts. July 22, 1904.)

No. 8,573.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—TRANSFER WITH INTENT TO PREFER CREDITOR.

An assignment by an insolvent to a creditor of earnings to become due under a building contract, where recording was essential to the validity of such assignment under the laws of the state, and it was so recorded within four months prior to the filing of a petition in bankruptcy against the assignor, was a transfer with intent to prefer the creditor, which constituted an act of bankruptcy, and warrants an adjudication under Bankr. Act, July 1, 1898, c. 541, § 3b, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

2. SAME—CREDITOR—ACCOMMODATION INDORSER.

An accommodation indorser of notes, even before payment, is a creditor of the maker, and a transfer of property to him as security by such maker while insolvent constitutes an act of bankruptcy.

In Bankruptcy. Hearing on involuntary petition.

Berry & Upton, for petitioning creditors.
H. H. Folsom, for Reichenbacher.

LOWELL, District Judge. Involuntary petition filed February 6, 1904, against O'Donnell and Ferguson as partners. The acts of bankruptcy alleged were (1) a conveyance to hinder, delay, and defraud creditors, and (2) a conveyance with intent to prefer Reichenbacher. I find the facts as follows: The firm had a contract to build a house. On July 11, 1903, O'Donnell assigned the payments coming due thereunder to Reichenbacher. At that time Reichenbacher had indorsed for accommodation the firm notes for $1,265. On October 2d, O'Donnell disputed the validity of the assignment. Another was signed by both partners, expressly recognizing and confirming the first. At that time the firm was indebted to Reichenbacher by way of his indorsement of their paper and otherwise to the amount of $3,090. The assignments were recorded October 6th and 9th respectively. When the petition was filed the firm owed Reichenbacher about $3,763, and he held as security from $3,500 to $3,800 by virtue of the above-mentioned assignments of moneys coming due under the contract. At the time the assignments were made the respondents were insolvent. The writings and agreements of the respondents shown in evidence establish the existence of a partnership, and I find accordingly. The first act of bankruptcy alleged was not proved. The second assignment of earnings, made October 2, 1903, and recorded October 9th, can hardly be treated as a superfluous recognition of the validity of the first assignment. There was admitted doubt of its validity, and payment had been refused thereunder. Even if the later assignment be disregarded, however, the decision is not affected, for the earlier assignment was no less invalid as a preference. The assignments required record. Rev. Laws Mass. c. 189, § 34; Somers v. Keliher, 115 Mass. 165; Tracy v. Waters, 162 Mass. 562, 39 N. E. 190. In Chester v. McDonald (Mass.) 69 N. E. 1075, the Supreme Court of Massachusetts said, indeed, that the cases first cited cannot be sustained if they cover the price to be

paid for the construction of a building into which enters no service by way of manual labor or of personal supervision, direction, or control of the assignor. In the case at bar the contract calls for no supervision from the contractors, and O'Donnell was not fitted to give any, but Ferguson became a partner expressly to give this supervision, and so Chester v. McDonald must be deemed inapplicable. It follows that the giving of these conveyances was an act of bankruptcy if either gave a preference to the assignee. Bankr. Act July 1, 1898, c. 541, §§ 3b, 60a, 30 Stat. 546, 562 [U. S. Comp. St. 1901, pp. 3422, 3446] as amended by Ray Bill (Act Feb. 5, 1903, c. 487) § 13, 32 Stat. 799 [Supp. U. S. Comp. St. 1901, p. 416].

Was Reichenbacher a creditor preferred by the assignments? He was then an indorser of the respondents' paper. His liability was contingent. In Moch v. Market Bank, 107 Fed. 897, 47 C. C. A. 49, a noteholder was held to have a provable claim against a bankrupt indorser, and in Swarts v. Siegel, 117 Fed. 13, 54 C. C. A. 399, it was said that an accommodation indorser, even before payment, is a creditor of the bankrupt debtor whose paper he has indorsed. See pages 17, 18, 117 Fed., and pages 404, 405, 54 C. C. A. Reichenbacher was, therefore, the bankrupt's creditor at the time of both assignments. If the assignments stand, Reichenbacher will receive a greater percentage of his debt than other creditors. Whether he can hold the assignments by paying to the estate the amount he has been preferred, need not now be determined.

Adjudication to be made.

In re COLEMAN.

(District Court, S. D. New York. June 10, 1904.)

1. MANDAMUS—FEDERAL COURTS—JURISDICTION.
   Federal courts can only grant a writ of mandamus in aid of an existing jurisdiction.

2. SAME—BANKRUPTCY—EXECUTIVE OFFICERS—DISCRETION.
   Where a receiver in bankruptcy was authorized to carry on the business of publishing a newspaper with a view to preserving its good will as an asset of the bankrupt's estate, but pending such publication the postmaster, by direction of the Postmaster General, prohibited the circulation of the paper through the mails as unmailable matter, mandamus would not be granted to reverse such determination, though the question whether the publication was objectionable might be the subject of a difference of opinion.

Michel Kirtland, for petitioner.
Charles D. Baker, Asst. U. S. Atty., opposed.

HOLT, District Judge. It is well settled that the United States courts can only grant a mandamus in aid of an existing jurisdiction. It is usually granted to enforce the collection of a judgment. In this case this court, as a court of bankruptcy, has made an order authorizing

¶ 1. See Courts, vol. 13, Cent. Dig. § 803.

a receiver in bankruptcy to carry on for a short time the business of publishing a newspaper, with a view of preserving its good will as an asset of the bankrupt estate. Under these circumstances I should hesitate to hold without further consideration that this court would have no power in a proper case to issue a mandamus in furtherance of the order in bankruptcy to carry on the business. But I think in this case the general principle applies that a mandamus will not be issued to interfere with the legitimate discretion of an executive officer. The postmaster, by direction of the Postmaster General, under the statute, has prohibited the circulation through the mails of the paper in question as unmailable matter. The question whether the contents of the publication in question come within the prohibition of the statute is one upon which there might be a difference of opinion, but the articles and pictures in the paper which are objected to are of such a character that, in my opinion, it cannot be said that the postmaster, in deciding that it is unmailable, has abused his discretion.

I think, under these circumstances, that the motion must be denied.

STOCKWELL v. BOSTON & M. R. CO.

(Circuit Court, D. Vermont. June 30, 1904.)

1. DEATH—FEDERAL COURTS—JURISDICTION.
   The federal courts have jurisdiction of an action for death of a servant only where it is between citizens of different states or between citizens and aliens.

2. SAME—JURISDICTIONAL FACTS—AVERMENT.
   In an action in the federal courts for the wrongful killing of a servant, an averment that the defendant is a corporation organized under the laws of the commonwealth of Massachusetts, and that the plaintiff was "of Brattleboro, in the county of Windham and state of Vermont, executrix" of the will of the deceased, late of Brattleboro, was insufficient to show diversity of citizenship, since the allegation of plaintiff's residence did not negative the fact that she was only temporarily residing in the state of Vermont, and was not a citizen of the same state as the defendant.

At Law.

Clarke C. Fitts, for plaintiff.
Wm. B. C. Stickney, for defendant.

WHEELER, District Judge. This cause has been heard upon a demurrer to the plaintiff's declaration. A declaration that does not set forth a cause of action within the jurisdiction of the court is insufficient. This court has jurisdiction of suits of this nature only when they are between citizens of different states, or between citizens and aliens. The declaration should, therefore, show by direct allegation, without ambiguity, either in itself or in connection with the writ, the required diversity of

¶ 2. Averments of citizenship to show jurisdiction in federal courts, see note to Shipp v. Williams, 10 C. C. A. 261.

citizenship or alienage. There is no mention of either in this declaration or writ. The defendant is set up as a corporation organized under the laws of the commonwealth of Massachusetts, which may well enough show that it is a citizen of the state of Massachusetts; but the plaintiff is only set up as "of Brattleboro, in the county of Windham and state of Vermont, executrix" of the will of Walter D. Stockwell, late of Brattleboro. This may be true and she not be a citizen of Vermont, but only a temporary resident or inhabitant, and a citizen of the same state as the defendant. Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. This leaves the court now without jurisdiction of the question discussed by counsel as to maintaining a suit upon the New Hampshire statute.

Demurrer sustained.

STOCKWELL v. BOSTON & M. R. CO.

(Circuit Court, D. Vermont. July 11, 1904.)

1. FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—AMENDMENT OF RECORD.
Where a demurrer to a declaration in a federal court was sustained because of an insufficient averment of diversity of citizenship on which jurisdiction depended, plaintiff was entitled to amend the writ to show diversity of citizenship according to the fact.

2. WRONGFUL DEATH—TRANSITORY CAUSE OF ACTION—ACCRUAL—PLACE.
Where intestate was domiciled in Vermont at the time he was killed in New Hampshire, the cause of action for his alleged wrongful death accrued to him in Vermont, and not in New Hampshire.

3. SAME—SURVIVAL OF ACTION.
A cause of action for wrongful death would not survive, as authorized by Pub. St. N. H. 1901, c. 191, in any place where an administrator should be appointed merely for the purpose of recovering damages for such wrongful death as an asset of decedent's estate, but survived only in the state where deceased had his domicile at the time of his death, where the cause of action accrued.

At Law.

Clarke C. Fitts, for plaintiff.
Wm. B. C. Stickney, for defendant.

WHEELER, District Judge. As the writ has been amended according to the fact, which is allowable in such cases, the plaintiff now stands as a citizen of this state, and this court has now jurisdiction to consider the cause of action set up in the declaration as challenged by the demurrer.

The intestate was domiciled in Vermont, and, although he was killed in New Hampshire, here is the place where transitory causes of action would accrue to him and survive, if by law survivable. The action is for causing his death, and by the statute of New Hampshire is made to survive for the benefit of the widow and of the children, if any; but the statute does not provide to what personal representative the cause

¶ 1. Averments of citizenship to show jurisdiction in federal courts, see note to Shipp v. Williams, 10 C. C. A. 261.

of action shall survive. That is left to the operation of general law. Pub. St. N. H. 1901, c. 191. It would not survive in any place where an administrator should be appointed merely for recovering this liability as an asset. Lyon v. Boston & M. Railroad Co. (C. C.) 107 Fed. 386. As no cause of action would accrue to the deceased in such a jurisdiction, there would be none to survive; but wherever it should accrue to him, there it would be to survive. Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Stewart v. Baltimore & Ohio Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. The right of action seems by the statute to be intended to survive where it would accrue to the deceased, which would be at the place of his domicile and principal administration, which is here; and the plaintiff seems to be his personal representative here, to whom it would survive if it existed.

Demurrer overruled.

THE VEDAMORE.

(District Court, D. Maryland. June 28, 1904.)

1. COLLISION—FOG—NEGLIGENCE.

Defendant steamer, while seeking anchorage in Chesapeake Bay during fog, collided with libelants' schooner, laden with cord wood, with such force as to cut into the schooner's hull, though her deck was loaded 8 feet high, with wood which extended about 10 inches beyond her hull. At slow speed, with her engines full speed astern, the steamer could have stopped her headway in not more than twice her length, yet, when those on the steamer heard the schooner's fog horn, and the pilot gave orders to reverse, the vessels were so close that a collision could not be averted. The only lookout maintained on the steamer was in the crow's-nest on the foremast, 60 feet above deck, and over a flock of sheep laden on deck, the bleating of which tended to neutralize signals. There was evidence that the schooner was going at a speed not exceeding four miles an hour, and that she blew proper fog signals at very frequent intervals. *Held*, that the collision was caused either by the immoderate speed of the steamer, or by her failure to seasonably hear the schooner's foghorn, caused by failure to maintain a lookout in the bow, and that the steamer was therefore liable.

In Admiralty.

Robert H. Smith, for libelants.

Arthur George Brown, Charles W. Field, and R. E. Lee Marshall, for respondents.

MORRIS, District Judge. This was a collision in a fog off Smith's Point, in the Chesapeake Bay, between the steamer Vedamore and a small schooner-rigged sail vessel loaded with wood. The fog was of such density that vessels could not be seen more than 200 or 300 feet off, and the master of the steamship considered it was unsafe to navigate a vessel of the great size and momentum of the Vedamore in the Chesapeake Bay, and had urged the pilot to come to anchor. The pilot

¶ 1. Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.

sounded the depth, and, finding 17 fathoms, concluded that it would be better to take the steamer nearer to the westward shore, and more out of the track of vessels, before anchoring. He headed the steamship to the westward, going at a slow speed, and had stopped his engines preparatory to anchoring, when he heard the fog signals of another steamer approaching him in her course down the bay. He then, in order to avoid lying directly across the track of the approaching steamer, started his engines slowly ahead, directing his course to the southward until the approaching steamer had overtaken him and passed on his port side. Having again sounded the depth of the water while proceeding at a very slow speed, he was preparing to anchor, when the fog signal of the schooner was heard on the port bow. As soon as the signal was heard on the bridge, the pilot rang to stop and reverse the engines; but, before the steamship came to a standstill, it collided with the schooner, with the result that the schooner was so cut into that she filled with water, and would have overturned, but was held upright by the entanglement of her rigging with the bow of the steamer until the steamer, after the schooner's master and crew had been taken on board, backed out from her.

The proof in the case supports the contention that the schooner had a light wind, and was going at a moderate speed, not exceeding four miles an hour, and that she was blowing proper fog signals at very frequent intervals. The light wind was blowing from her directly towards the steamer, the water was smooth, and there was nothing in the weather or the water to prevent the schooner's horn from being heard on the steamer. As to the steamer's speed, the proof and all the surrounding circumstances support her contention that she was going at a moderate speed—probably not over four or five miles an hour, and perhaps less. The testimony of the master, the pilot, the second officer, and the wheelsman, all of whom were on the steamer's bridge, is that, as soon as the schooner's horn was heard on the bridge, the pilot signaled full speed astern to the engine room. And yet the vessels came together with sufficient force to cut into the schooner's hull, although her deck was loaded 8 feet high with cord wood, which extended out 10 inches beyond the sides of the schooner's hull. Going at slow speed, the steamer, with her engines full speed astern, could have stopped her headway in not more than twice her length; but it appears that when those on the steamer's bridge heard the schooner's fog horn, and the pilot gave the order, the vessels were so close together that the steamer did not stop her headway in time to avoid cutting down the schooner. I think the proof leaves only one probable explanation of this state of facts, and that is that the schooner's signals were not heard as soon as they should have been.

The steamer is of the largest class of ocean freight steamers. Her bridge is at least 150 feet from her bow. The only lookout was in the crow's-nest on the foremast, some 60 feet above the deck. The steamer was carrying on her deck a large number of sheep. The master, I think, said about 1,000 of them. When the schooner's fog signal was first heard on the bridge, the master said to the pilot, "I just heard either a fog horn or the bleating of a sheep;" and, the lookout just then

signaling by one stroke on his bell a vessel on the port bow, the pilot rang to the engine room, "Full speed astern," and the collision quickly followed. It seems not improbable that the attention of those on the bridge was directed to finding a suitable anchorage, and to getting ready to anchor, and to the danger from the other steamer which had been coming down behind them, and had only just then passed clear, and their hearing may have been distracted by the noises from the animals on deck. The lookout was up high on the foremast, about a hundred feet from the stem, and over the animals. This was not the best location for hearing the fog signals of the small sailing vessels, of which so many navigate the Chesapeake Bay. I should say that a man forward in the very bow would be in a better position. In so dense a fog, and in a water so frequented by vessels, every reasonable precaution should be observed; and it would seem that, under the surrounding circumstances, a lookout forward on the bow would have been a proper additional safeguard. It seems quite satisfactorily proved that the schooner gave fog signals which should have been seasonably heard. The mate of the schooner testified that on the schooner they heard at intervals three fog signals from the steamer, and that the schooner's signals were blown more frequently and at less intervals. If they had been seasonably heard, I cannot find that there was anything to prevent the steamer coming to a standstill in time to prevent damage to the schooner. The schooner having but little speed, the collision must have been caused either by the immoderate speed on the part of the steamer, or by her failure to seasonably hear the schooner's horn. In my judgment, the surrounding circumstances point to this latter cause as the fault to which the collision is attributable.

Decree in favor of the libelants.

PETERSON v. ROESSLER & HASSLACHER CHEMICAL CO.

(Circuit Court, D. New Jersey. July 22, 1904.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—MEASURE OF DAMAGES.
In an action against a master for injuries to a servant, in the absence of aggravating circumstances, the measure of damages is the pecuniary loss sustained by plaintiff, and compensation for suffering endured.

2. SAME—DAMAGES—PECUNIARY LOSS—HOW ESTIMATED ON COMPLETE DESTRUCTION OF EARNING POWERS.
Where there has been a complete destruction of the plaintiff's earning powers, the pecuniary loss is to be theoretically estimated by the capital which, at a fair rate of interest, will produce a yearly sum equal to the average wages likely to be earned during the plaintiff's expectancy of life, less such a sum as, at compound interest for the same period, will equal and offset such sum.

3. SAME—DAMAGES—EXCESSIVENESS.
Where plaintiff, a laborer 39 years of age, who had been in defendant's employ for 11 years, during which time the character of his work had not materially changed, was so injured by the explosion of certain lime that he lost his sight at a time when his earning capacity was $1.50 per day, a verdict awarding plaintiff $9,500 was excessive, and should be re-

duced to $8,000, of which $6,000 should be awarded for the pecuniary loss sustained, and $2,000 as compensation for suffering.

Rule to show cause why a new trial should not be granted on the ground that the verdict is excessive.

Willard P. Voorhees, for the rule.

Joseph E. Stricker, opposed.

ARCHBALD, District Judge.[1] The ground of the defendants' liability is a narrow one. The plaintiff, who was employed as a laborer at their works, was engaged in the somewhat ordinary task of making whitewash from unslacked lime. He was using a sheet-iron can or drum, about the size of a barrel, and, after the lime had slacked a little, incautiously pouring in a second supply of water and stirring it around with a stick as he stood over it, the lime exploded in his face and burned out his eyes. The jury have found that, on account of the danger involved in the process, particularly where such a vessel as this was used, the plaintiff, who was unacquainted with it, ought to have been properly warned and instructed, for failure of which they have given him a verdict for $9,500. It is claimed that this is excessive, in view of the fact that the plaintiff was an ordinary laborer, earning but $1.50 a day; and the court is moved to reduce the verdict to what would be reasonable, or to grant a new trial in case the plaintiff refuses to consent to it. It is a delicate matter to revise the action of a jury in such a case, the whole subject of the damages to be given being committed so completely to their judgment. There are a few general considerations, however, which afford some guide. Aside from the question of the suffering endured, and there being no circumstances of aggravation, the basis of the verdict is the pecuniary loss which has been sustained; and to that, so far as it can be determined, it is to be confined. The question in the present instance is whether that has been exceeded. The plaintiff, as already stated, was a day laborer, doing the most ordinary manual work, and earning $1.50 a day. He was 39 years old at the time of the accident, and had been in the defendants' employ for about 11 years, during which time the character of his work had not materially changed. By the loss of his eyes he is deprived of the means of making a living, such as he had been doing, and the question is, what is a fair compensation therefor?

The earning capacity of the plaintiff at the time of the accident was undoubtedly at its maximum. In all the years of his employment, he seems to have made no advance, and none could therefore be expected in the years to come. His physical powers were also at their best. With steady employment, uninterrupted by sickness, accident, or other cause, his wages would amount to about $450 a year. But with the uncertainties of life considered, of which his present condition affords an unfortunate example, he could hardly count on this for all time. Much less could he with advancing age, assuming that he lived out his expectation, according to the tables of mortality, of 25 or 30 years. What, then, can be said to represent the present cash value of the abil-

[1] Specially assigned.

ity to earn a living for himself and family of which he was possessed?

It is said by the plaintiff's counsel that it would cost $8,100, at the ruling rates of interest, to purchase an annuity of $468, which is taken as representing his yearly earnings, for a person of his age. But this is putting these earnings—all things considered—entirely too high. Neither is the problem to be solved on the basis of what would be required to buy an annuity. Year in and year out, from the age of 40 to 70, which comprised the probable span of life of this man at the time of the accident, $1.25 a day, or $375 a year, as it seems to me, was all, on an average, that he could expect to earn by the labor of his hands. This allows for contingencies which cannot be disregarded, as well as for decreasing ability with the advance in age. Now, $7,500 invested at 5 per cent., which it ought not to be difficult to obtain, would yield $375 a year throughout the plaintiff's life; affording him all that he could hope to earn, and leaving the principal intact at the end. Except for the latter circumstance, this might be regarded as fairly representing, in capitalized form, the earning power of the plaintiff, of which he has been deprived; but the fact that the capital remains unimpaired must be taken into consideration, and a material deduction made on account of it. Theoretically this should be such that, at compound interest for the period of expectancy, it would equal, and thus offset, the amount awarded, which it would thus practically wipe out. In the present instance, if I have figured it correctly, there should be a reduction of some $1,500 from the sum first named, leaving $6,000 to represent the actual pecuniary loss. To this must be added something, outside of the question of earnings, to compensate for the suffering which the plaintiff has endured, and for the fact, aside from any sentiment, that he must go blind all his days. Fixing this at $2,000, the total damages would be $8,000, to which amount, in my judgment, the verdict should be reduced.

It is therefore ordered that the plaintiff within 20 days agree to a reduction of the verdict to $8,000, remitting the excess, or otherwise that the defendants have a new trial.

DANA & CO. v. COSMOPOLITAN SHIPPING CO. et al.

(District Court, E. D. Pennsylvania. July 7, 1904.)

No. 51.

1. ADMIRALTY—FREIGHT—NONDELIVERY—INTERROGATORIES—EXCEPTIONS.

Where, on a libel in admiralty to recover for a shortage of 51 tons in a delivery of pig iron, it was alleged that respondent delivered to other consignees out of the same cargo 91 tons of pig iron more than had been shipped to them, respondent could not object to answering interrogatories calling for the names of the other consignees to whom delivery of pig iron was made out of the same cargo, the number of tons delivered to each, and the amount called for by their respective bills of lading, on the ground that it required respondent to disclose the business of other shippers engaged in the same trade as libelant.

In Admiralty. Dismissing exceptions to interrogatories.

Flanders & Pugh, for libelant.

Biddle & Ward, J. Rodman Paul, Howard H. Yocum, Convers & Kirlin, and John Munro Woolsey, for respondents.

HOLLAND, District Judge. The libelant alleges that the respondent company delivered to them, at Philadelphia, 51 tons of pig iron less than was placed on board its vessels at Rotterdam for them, and further alleges that at the same time the respondent delivered to other consignees, out of the same cargo, 91 tons of pig iron more than they had shipped to them. A recovery for the amount of shortage in pig iron is sought by the libelant, and interrogatories were filed requiring the respondent to answer on oath, giving the names of the other consignees to whom delivery of iron in Philadelphia was made out of the same cargo, the number of tons to each, and the amount in excess to such consignees called for by their respective bills of lading. Exceptions were filed to these interrogatories for the reason they are irrelevant and immaterial to the issue raised by the libel and answer, and objecting to a disclosure of the business of the respondent.

I cannot agree with the exceptants. The claim of libelant that there were delivered to them 51 tons of pig iron less than was placed on board for them is the fact sought to be established, and if they can show that other consignees, who shipped iron at the same time in the same vessels, received much more than they had purchased and for which their bills of lading called, it would be some evidence to show that the libelant's iron had been received on board and delivered to some one else by the respondent. The objection that it requires the respondent to disclose the business of their shippers engaged in the same trade as libelant cannot be considered if the libelant's claim is a valid one. They are entitled to the production of such facts as will prove their case, notwithstanding it may divulge the business of other shippers who are engaged in the same business. There is nothing in the law to exempt respondent from disclosing in its answer to interrogatories matters of this kind, otherwise relevant, so long as they are not matters which will expose him to any prosecution or punishment for crime or for any penalty or any forfeiture of his property for any penal offense. This is the only ground of objection that can be interposed to interrogatories eliciting facts which have a bearing upon the case.

The exceptions are dismissed, and the respondent directed to answer.

M. J. BREITENBACH CO. v. SPANGENBERG et al.

(Circuit Court, S. D. New York. June 15, 1904.)

1. TRADE-MARKS—DESCRIPTIVE OR ARBITRARY NAME.
The name "Pepto-Mangan," as applied to a medicinal preparation, is apparently arbitrary and fanciful, rather than merely descriptive, and, in the absence of evidence to the contrary, must be assumed to be one which may be lawfully appropriated as a trade-mark.

2. SAME—UNFAIR COMPETITION.
A bill alleging that defendants make a medicinal preparation similar to one sold by complainant, which they have given a similar name, and have supplied to customers asking for complainant's preparation, states a cause of action.

In Equity. Suit for infringement of trade-mark and for unfair competition. On demurrer to bill.

Philip Carpenter and Frank Parker Ufford, for complainant.
Frederick C. McLaughlin and Fred. L. Chappell, for defendants.

HOLT, District Judge. I do not think that the name "Pepto-Mangan" is simply descriptive, within the meaning of that term in the law of trade-marks. It seems, if analyzed by a person familiar with the Greek and German languages, somewhat descriptive, but I think it would seem to the general public to be an artificial and manufactured word. The complaint alleges that the inventor "adopted the arbitrary and fanciful words 'Pepto-Mangan' as the trade-mark and trade-name" by which to designate his preparation, and the demurrer formally admits this allegation. Evidence possibly might lead to a different conclusion, but on this demurrer I think it clear that the court cannot assume that the term "Pepto-Mangan" is purely descriptive, but must assume that it is an arbitrary and fanciful trade-mark. That being so, it is not at all clear, under the authorities, that the defendants did not infringe the rights of the complainant when they adopted as the name of their preparation "Pepto-Manganate of Iron and Cascara." Moreover, the complaint alleges that the defendants have substituted their tablets, and supplied them to customers who have asked at their store for the complainant's "Pepto-Mangan." This allegation is formally admitted by the demurrer, and constitutes a legal cause of action, which, if supported by evidence, would authorize a recovery. Undoubtedly some of the facts alleged in the complaint do not constitute any legal cause of complaint, but I think that it is impossible to hold, upon this demurrer, that no cause of action whatever is alleged.

Demurrer overruled, with leave to defendants to answer within 20 days on payment of costs.

¶ 1. Arbitrary, descriptive, or fictitious character of trade-marks or trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.

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

CLANCY v. BARKER et al.

(Circuit Court of Appeals, Eighth Circuit. May 28, 1904.)

No. 1,941.

1. INNKEEPERS—LIABILITY TO GUESTS.
   Innkeepers are not insurers of the safety of the persons of their guests. The limit of their liability is for the exercise of reasonable care for the safety, comfort, and entertainment of their visitors.
2. SAME—NOT LIABLE FOR ACTS OF SERVANTS BEYOND THE SCOPE OF THEIR EMPLOYMENT.
   Innkeepers do not contract to insure the safety of their guests against injuries which are inflicted upon them by the negligent or willful acts of their servants beyond the scope and course of their employment, and for such acts they are not liable in damages when they have exercised reasonable care to prevent them.
3. SAME—LIABILITY TO GUESTS—FACTS.
   A boy about six years of age, a guest of the defendants at their hotel, wandered out of the room assigned to him, and into a room in which a bell boy or porter of the defendants was engaged in playing a harmonica for his own amusement, and the latter accidentally or willfully shot the former with a pistol.
   Held, the bell boy was not acting within the course or within the apparent or actual scope of his employment at the time of the shooting, and the innkeepers were not liable for the injury he inflicted.
   Thayer, Circuit Judge, dissenting.

(Syllabus by the Court.)

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

John O. Yeiser, for plaintiff in error.
William A. Redick, for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This case was determined in the lower court on a demurrer to the evidence; the trial court holding, on the conclusion of the plaintiff's testimony, that there was no substantial evidence warranting a recovery. It accordingly directed a verdict in favor of the defendants. This action was taken on testimony which tended to establish, and did establish, the following facts:

Freeman Clancy, in whose behalf the action is brought, at the time of the accident hereafter described, was about six years old, and was stopping with his parents at the Barker Hotel, in the city of Omaha, Neb.; the father, mother, and son having been guests at the hotel for a few days prior to the accident. During the evening of January 15, 1902, about 8:30 p. m., he went down the elevator from one of the upper floors, where the room occupied by his parents was located, to the ground floor of the hotel for the purpose, as he says, of getting some ice water. Reaching the ground floor, he passed by a room where some one was playing a harmonica. The door being ajar, he entered this room, actuated, apparently, by no other motive than childish curiosity, and found a boy, who was employed about the hotel either as a bell boy or porter, engaged in playing the instrument. Another boy who ran the hotel elevator

was also in the room. Both of these employés of the hotel seem to have been off duty at the time, and engaged in amusing themselves in a room that was not occupied by guests. As the boy Clancy entered the room, the boy who was playing the harmonica said to him, evidently in jest, "See here, young fellow; if you touch anything, here is what you will get," at the same time pointing a pistol at him. The pistol was accidentally discharged, the ball striking the boy in the head, fracturing "the frontal ethnoid and sphenoid bones of the head," and destroying one of his eyes. The ball also passed through the boy's thumb, but the injury did not prove fatal.

One paragraph of the complaint, on which the case was tried, alleged:

"That on or about the 12th day of January, 1902, the said father and mother of the plaintiff entered the said hotel of defendant with their said infant child, the plaintiff, as guests of defendant, for a temporary rest in said city at said hotel, and were received by the said defendants as the guests of the said innkeepers or hotel keepers; the defendants thereby contracting with the said father for and on behalf of said plaintiff, and with the plaintiff by implication of law, for his personal safety, kind treatment, and for all of the usual hospitalities, covenants, and agreements, and obligations due from an innkeeper and hotelkeeper to his guests."

Another paragraph of the complaint alleged, in substance, that it was the duty of the bell boy or porter, through whose acts as aforesaid the injury was sustained—

"To direct the guests of said hotel about said hotel, and to wait on, watch over, and protect said guests and their property and the property of the said hotel, and such other duties as are usually required of porters by innkeepers or hotel keepers, and imposed by law."

Another paragraph of the complaint alleged that said bell boy or porter, being a servant of the defendants and of said hotel, in that capacity, by the acts heretofore described—

"Violated all obligations of hospitality and patience due from said defendants, through said servants, to said infant guest, and the defendants thereby violated their agreement, duty, and obligation of law with and to the plaintiff."

On this state of facts and pleading, counsel for the plaintiff in error asserts a right of recovery against the defendants on two grounds: First, he contends that by receiving the boy and his parents as guests at the hotel the proprietors of the hotel undertook, like a common carrier of passengers, to protect him against injuries occasioned by the negligence or willful misconduct of their employés in and about the hotel, and that this contractual obligation of the defendants was violated. In the second place, counsel contends that when Lacey, the porter, pointed the pistol at the boy, he was guilty of a wrongful and negligent act; that he was engaged at the time in the performance of one of his duties as servant; and that on this ground the defendants are liable. It is argued that it was a part of Lacey's duty as a servant, when the child entered the room where he was playing the harmonica, to see that he did not disturb or handle any articles in the room; that a jury might well infer that the act which occasioned the injury was done by Lacey in the performance of this duty; and that the ordinary rule, "Respondeat superior," applies to the case.

We entertain no doubt that the act in question was in fact wrong-

ful and negligent, but the difficulty which we encounter in upholding this latter theory is that the evidence fails to show that Lacey had been charged with the duty of guarding such articles as may have been in the room where the accident occurred, or that the room contained any articles which the child could have injured or carried away, or that he had made any movement in that direction. All this is mere surmise, which will not suffice to sustain a verdict. So far as the evidence warrants an inference, the inference is that Lacey was not engaged at the time in the discharge of any duty for and in behalf of the defendants; that he was temporarily, at least, off duty, engaged in amusing himself; and that he pointed the pistol at the child in sport, to see how he would act, rather than to prevent him from touching or intermeddling with anything in the room. The act in question seems to have been prompted by a momentary impulse, and to have been done by Lacey for his own amusement, and to have been in no wise connected with the discharge of any duty or with the performance of any task that had been devolved upon him by the defendants. Under these circumstances we are of opinion that the proprietors of the hotel cannot be held accountable for the act in question on the second ground above stated, since it is too well settled to require the citation of any authority that the master is not responsible ordinarily for the negligent acts of his servant, unless they are committed while the servant is rendering some service for and in behalf of the master.

But counsel for the plaintiff insists that, although the defendants were not negligent in the employment of their servant, the bell boy, and although he was not acting in the course or within the actual or apparent scope of his employment when he discharged the pistol, yet the defendants are liable for the injury he inflicted, because it is a part of the contract between an innkeeper and his guest that the former will insure the safety of the person of the latter against injury from every act or omission of his servants. The crucial question here, therefore, is whether or not an innkeeper is an insurer of the safety of the person of his guest while the latter remains in his hotel against the negligent and willful acts of his servants, when they are acting without the course and without the actual or apparent scope of their employment.

An affirmative answer to this question would be in conflict with the decisions of the courts rendered prior to the time when the contract herein was made, and to our understanding of the law upon this subject as it then existed. The general rule of law governing the liability of innkeepers when these defendants made their agreement with the plaintiff, the rule which had received the approval of every court which had ever decided the question, so far as we have been able to discover, was that an innkeeper was not an insurer of the safety of the person of his guest against injury, but that his obligation was limited to the exercise of reasonable care for the safety, comfort, and entertainment of his visitor. Calye's Case, 4 Coke, 202, 206; Sandys v. Florence, 47 L. J. C. P. L. 598; Weeks v. McNulty, 101 Tenn. 499, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693; Curtis v. Dinneen (Dak.) 30 N. W. 148, 153; Sheffer v.

Willoughby, 163 Ill. 518, 521, 522, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; Gilbert v. Hoffman, 66 Iowa, 206, 23 N. W. 632, 55 Am. Rep. 263; Overstreet v. Moser, 88 Mo. App. 72, 75; Stanley v. Bircher's Ex'r, 78 Mo. 245, 248; Stott v. Churchill (Com. Pl.) 36 N. Y. Supp. 476, 477; Sneed v. Morehead, 70 Miss. 690, 13 South. 235.

In another class of cases, those involving the liability of common carriers and of the operators of palace cars to their passengers, this measure of liability has in later years been extended to include responsibility for the willful and negligent acts of those to whom the carriers intrust the transportation of their passengers, such as brakemen, porters, and conductors, upon the ground that these servants, when upon the trains or steamboats, are engaged in the course or scope of their employment to conduct the safe transportation of the passengers, whatever they may be doing. The reasons for this extension of liability are well stated in Bass v. Chicago & Northwestern Ry. Co., 36 Wis. 450, at page 463, 17 Am. Rep. 495, and in Mallach v. Ridley (Sup.) 9 N. Y. Supp. 922, 2 Abb. N. C. 181.

In the former case the court said:

"These officers [the conductors and other servants in charge of the train] may be guilty of acts of arbitrary oppression, beyond endurance, towards passengers, which might warrant resistance. But we feel warranted by principle and authority to hold that, in the enforcement of order on the train, and in the execution of reasonable regulations for the safety and comfort of the passengers, and for the security of the train, the authority of these officers, exercised upon the responsibility of the corporations, must be obeyed by passengers, and that forcible resistance cannot be tolerated. They act on the peril of the corporation, and their own. Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort in transitu, under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, pro hac vice, is vested in these officers, and that, as to passengers on board, they are to be considered as the corporation itself, and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers; the corporation being responsible for the acts of the officers, in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety, and sanctioned by great weight of authority."

In the latter case the court declared:

"It was long held by the courts that a common carrier was not liable for a willful assault by one of its employés upon a passenger. This rule, however, has been abrogated upon the theory that the carrier invites the passenger to subject himself to the protection and care of the employé of the corporation, and under these circumstances the common carriers should be responsible for all the acts of the subordinates toward the passenger while under his custody and control."

Counsel for the plaintiff insists that the liability of the innkeepers should be extended in the case at bar even beyond that of common carriers, so that the defendants should be held liable for the injuries inflicted by the willful or careless act of their servant when he was not acting within the course or scope of his employment. The argu-

ment in support of this contention is that common carriers are liable for the negligent or willful acts of their servants to whom they intrust the care, custody, and control of the passengers they transport, and that the liability of innkeepers to their guests is similar to that of carriers to their passengers. There are many reasons, however, why this argument is not persuasive, and why it fails to demonstrate that an innkeeper insures the safety of the persons of his guests against injuries inflicted by his servants when they are not engaged in the discharge of their duties as employés.

While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar, and while that proposition may be conceded, it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation fraught with no extraordinary danger. Sandys v. Florence, 47 L. J. C. P. L. 598, 600. It no more follows, from the similarity of the liability of the carrier to that of the innkeeper, that the latter is liable for the willful or negligent acts of its servants beyond the scope of their employment, than it does that the latter is liable for a failure to exercise the highest possible care to make his hotel and its operation safe for its guests, because the carrier must exercise that degree of care in the management of its railroad, engines and trains.

Again, there is a marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment at an inn, and a wide difference in the relations of the parties to these contracts. In the former, the carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. For the time being all other occupations are subordinate to the transportation. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep, while the passenger submits to the rules, regulations, and directions of the carrier, and is transported in the manner the latter directs. The contract is that the passenger will surrender the direction and dominion of his person to the servants of the carrier, to be transported in the car, seat, or berth and in the manner in which they direct, and that the latter will take charge of and transport the person of the passenger safely. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who is employed to assist in the transportation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected

by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or willful act of such a servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest, and their relations to each other, are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he shall occupy it; but they leave him free to use or to fail to use it, and all the other means of entertainment proffered, when and as he chooses, and to retain the uncontrolled dominion of his person and of his movements. The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper, in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety. The servants of the innkeeper are not placed in charge of the person of the guest, to direct, guide, and control his location and action, nor are they employed to perform any contract to insure his safety; but they are engaged in the execution of the agreement of the master to exercise ordinary care for the comfort and safety of the visitor. The natural and logical result of this relation of the parties is that when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or willful acts.

Moreover, the authorities in the cases involving the liability of common carriers, of owners of palace cars, of steamboats, and of theaters, upon which counsel for the plaintiff seems to rely, when carefully examined, are found to be cases in which the servants were acting within the course or scope of their employment, and they do not rest upon the proposition that the defendants in those cases were liable for the willful or negligent acts of their employés beyond that scope.

In Dwinelle v. New York Central, etc., R. Co., 120 N. Y. 117, 126, 127, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, the porter of a sleeping car, who had taken up the ticket of a passenger, was held to be acting within the scope of his employment when he struck the passenger during an altercation between them relative to the return of the ticket.

In Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588, 591, 43 Am. Rep. 185, the court declared the limit of the company's liability to be "to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger," and held that a driver of a street car, who was also the conductor, and who beat a passenger

in the car, was within the scope of his employment to carry the passenger safely when he committed the assault.

In Goddard v. Grand Trunk Railway, 57 Me. 202, 203, 2 Am. Rep. 39, a brakeman, who had authority to collect tickets, and who, after collecting one from a passenger, demanded another of him, and grossly insulted him because he declined to pay for his passage again, was held to have been acting within the scope of his employment, and the company was charged with the damages he inflicted.

So in Craker v. Chicago & Northwestern Ry. Co., 36 Wis. 657, 673, 17 Am. Rep. 504, a conductor who kissed a passenger; in Pendleton v. Kinsley, 3 Cliff. 416, 427, 428, Fed. Cas. No. 10,922, the clerk of a steamer who assaulted a passenger while trying to collect his fare; in Chicago & Eastern R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33, a brakeman who struck a passenger because during a search for a lost watch he said he thought the brakeman had it; in Terre Haute & Indianapolis R. Co. v. Jackson, 81 Ind. 19, 22, a conductor or brakeman who drenched a passenger with water; in Campbell v. Palace Car Co. (C. C.) 42 Fed. 485, a porter of a sleeping car who made indecent proposals to a passenger; in Williams v. Palace Car Co., 40 La. Ann. 421, 4 South. 85, 8 Am. St. Rep. 538, a porter of a Pullman car who assaulted a passenger; and in Dickson v. Waldron (Ind. Sup.) 34 N. E. 506, 24 L. R. A. 483, 41 Am. St. Rep. 440, the ticket taker and special policeman of a theater, who, in endeavoring to sell the tickets to a customer, assaulted him—were all held to be, and undoubtedly were, acting within the scope of their various employments when they inflicted the injuries for which the defendants were made to pay.

When all these authorities, and others cited by counsel for the plaintiff, are carefully considered, it clearly appears that the controlling reasons why common carriers have been held liable for the willful or negligent acts of their servants in these cases are (1) that they owe to their passengers the highest degree of care, and (2) that during the transportation they intrust the entire care, custody, and control of their trains, steamboats, and passengers to these servants, and the passengers yield obedience and control of their movements to these servants, under conditions of peril and subordination in which the passengers are confined and helpless, and the servants in charge of the train are practically the vice principals of the defendants. Bass v. Chicago & Northwestern Ry. Co., 36 Wis. 450, 463, 17 Am. Rep. 495. There are no such reasons for the existence of the liability of innkeepers for the willful or negligent acts of their servants beyond the scope of their employment, and the argument of counsel in support of such an extension by analogy with the liability of common carriers fails (1) because innkeepers are not liable to their guests for extraordinary care, while carriers are liable to their passengers for the highest degree of care; (2) because innkeepers do not intrust to their servants the absolute control and dominion of their hotels and of the persons of their guests, nor do the latter surrender themselves to the dominion and direction of such servants; and (3) because the willful and negligent acts of their servants, for which carriers have been held liable, were committed in the discharge of the duties which

they were employed to perform, while those of the servants of innkeepers, now under consideration, were done outside the actual and the apparent scope of their employment.

In addition to the argument by analogy which we have been considering, our attention is called to the remarks of Chief Justice Shaw in Commonwealth v. Power, 7 Metc. 596, 601, 41 Am. Dec. 465, a case in which the question was whether a railroad company had the right to exclude a disorderly person from its railroad station, and Chief Justice Shaw, in discussing that question, said:

"An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

It is also called to the opinion of Judge Story, of the same tenor, in Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258, a case which involved a similar question, to wit, the right of the owner of a steamboat to exclude a disorderly person therefrom; to the decision of the Supreme Court in Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732, that an innkeeper who furnished liquor to make a man drunk, and then with gross carelessness permitted him to attach a paper to the back of one of his customers and to set it on fire in his plain sight, was liable for the injury; and to the opinions of various courts in cases in which the liability of innkeepers for the loss or destruction of the property of their guests was in question. These cases have been examined, but neither the decisions of the questions there presented, nor the opinions of the courts concerning them, are either decisive or persuasive in the consideration and determination of the question here under consideration, whether or not an innkeeper is an insurer of the safety of the person of his guest against the willful or negligent acts of his servants beyond the scope of their employment, because that question was not considered or determined, and clearly was not in the minds of the judges who rendered the decisions and opinions to which reference has been made. This is also true of all the cases, opinions, and expressions which have been cited by counsel for the plaintiff. To them all the declaration of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257, applies in all its force:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

Finally, counsel for plaintiff presents for our consideration the opinion of the Supreme Court of Nebraska, rendered since the case in hand was argued and submitted to this court, in an action brought by the father of the plaintiff in this action for the damages which he suffered from the very accident here involved, and in which that court has held that the innkeepers were liable for the act of the bell

boy which inflicted the injury, although he was then acting beyond the course and scope of his employment. Clancy v. Barker, 98 N. W. 440. This opinion is entitled to, and it has received, great respect and grave consideration. But, after all, the question here is, not what the Supreme Court of Nebraska has made the law and the contract of innkeepers since the parties to this action made their agreement, but what that law was and what the contract between these parties was when their minds met upon the terms of their agreement. At that time no court had ever held, so far as our research and the authorities cited by counsel have disclosed the decisions, that the contract of an innkeeper was to insure the safety of the person of his guest against the negligent or willful acts of his servants without the scope of their employment. The pregnant fact that no case can be found in the entire field of English and American jurisprudence in which an innkeeper was ever held to be an insurer of the safety of his guest, or to be liable for the willful or negligent acts of his servants beyond the scope of their employment, is the most complete demonstration that this was not the law. If it had been, judgments founded upon it would not have been lacking. Every court that had ever decided the question had declared that the liability of the innkeeper was limited to the exercise of reasonable care, that it did not extend to a guaranty of safety, and hence that it extended only to the acts of his servants within the scope of their employment. This was declared to be the general rule of law in the digests and in the textbooks. 16 Am. & Eng. Enc. of Law (2d Ed.) 546, 547, note 6.

In Calye's Case, 4 Coke, 202, 206, the court declared that:

"If the guest be beaten in the inn, the innkeeper shall not answer for it."

In Sandys v. Florence, 47 L. J. C. P. L. 598, 600, a case in which a ceiling fell upon a guest in a hotel, Mr. Justice Lindley said:

"I pass over the previous allegation that it was the defendant's duty 'to keep the said hotel in a secure and proper condition, so as to be safe for persons using the same as guests,' because I think that duty is too widely alleged, and that the defendant's duty is, not to insure his guests, but to see only that they do not suffer from want of reasonable and proper care on his part."

In Weeks v. McNulty, 101 Tenn. 496, 499, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693, an action for damages for the death of a guest in a hotel by fire, the court said:

"The general rule of law governing the liability of an innkeeper is that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through the innkeeper's negligence."

In Sheffer v. Willoughby, 163 Ill. 518, 521, 522, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483, a case in which an attempt was made to apply the rule of absolute liability for the loss of the property of a guest in support of a claim for damages caused by the administration of unwholesome food to his guest by the keeper of a restaurant, the court held that the limit of the latter's liability was for the failure to exercise reasonable care.

In Stanley v. Bircher's Ex'rs, 78 Mo. 245, 246, 248, an action was brought by the plaintiff, Stanley, against the executors of the estate of Bircher for injuries to her person resulting from her fall down an

elevator shaft of a hotel operated by Bircher. She alleged that she was a guest at this hotel, that it became his duty and that he agreed to furnish safe accommodations for the reasonable wants of the plaintiff and that he did not perform the duty or keep the agreement, in that the door to the elevator pit was dangerously constructed and negligently left open by Bircher and his servants, so that she walked into it and was injured. A demurrer was interposed to this complaint on the ground that the cause of action did not survive the death of Bircher. Mark that the complaint clearly alleged a breach of a contract to keep the guest safely, as well as a failure to discharge the duty to exercise ordinary care as in the case at bar, and that the question was whether or not the innkeeper's obligation included a contract of safekeeping. If it did, the cause of action survived, and the action could be maintained; otherwise, it could not be. The Supreme Court of Missouri held that the obligation of an innkeeper comprised no such contract, that the action could not be changed from an action on the case for a breach of the duty to exercise ordinary care to one for a breach of contract of safe-keeping by an averment or proof of such contract and breach, because no such contract arose out of the relation of innkeeper and guest. That court said:

"But it is claimed by counsel for plaintiff that the action is for the breach of a contract, and that it is not an action on the case for injuries to the person. The allusions in the petition to the formal contract between the plaintiff and the proprietor of the hotel, whereby the plaintiff became a guest in the hotel, cannot change the true character of the action. In setting forth an action of trespass on the case, the pleader often finds it proper, although not absolutely necessary, to mention matters of contract connected with the tort, by way of inducement and explanation. In this case the relation of host and guest, which originated in contract, explains how the defendant's testator came to owe the plaintiff a duty. That duty, however, the law imposes. It is a public duty, which is not defined by the contract. Neither can the proprietor relieve himself from that duty by contract. The action in truth is for a violation of the duty which the law imposes, independent of the contract. Neither the damages nor the scope of the action can be measured or limited by the contract."

And in Curtis v. Dinneen, 30 N. W. 148, 149, 152, the Supreme Court of Dakota Territory directly decided the very questions presented in this case in accordance with this general rule and in favor of the innkeeper. The complaint in that case alleged, among other things, that:

"The defendant undertook, for a compensation paid her by the plaintiff, to keep safely and from harm and in a proper manner this plaintiff while she should remain in the plaintiff's inn or hotel, and that while the plaintiff was stopping at the inn or hotel of the defendant this plaintiff was by the wrongful and spiteful act of the defendant's servants greatly injured."

The evidence tended to show that one of the defendant's servants assaulted and inflicted serious injury upon the plaintiff while she was in the hotel as a guest, but the court held that the guest could not recover, because the assault and battery, although committed by the defendant's servant in her hotel, was not inflicted while the servant was acting within the actual or apparent scope of his employment.

The result is that when the defendants made their contract to entertain the plaintiff at their hotel the law was, and in our opinion it

still is (Rahmel v. Lehndorff [Cal.] 76 Pac. 659), notwithstanding the late decision of the Supreme Court of Nebraska to the contrary, that their agreement was to exercise reasonable care for his safety, comfort, and entertainment, and that their agreement did not include an insurance of his person against the willful or negligent acts of their servants beyond the course of their employment. A change of this law and an extension of the liability of the innkeepers now, after the execution of the contract, so as to make the agreement include such an insurance, is to make a new agreement for the parties after the event, and to impose upon the defendants a liability which they could not foresee and to which they did not assent. A retroactive decision, which makes and applies a new rule of law, and attaches another and unforeseen liability to a contract after its execution, is as vicious as an ex post facto statute.

The judgment below enforced the contract which the parties made in strict accordance with the law which governed it, and it is affirmed.

THAYER, Circuit Judge (dissenting). The important question in this case is whether an innkeeper is exempt from liability to one of his guests who is injured within the hotel by an act of gross negligence on the part of a servant of the innkeeper, because the servant, at the time he committed the negligent act, was not engaged in rendering any service for his master, but was momentarily off duty and awaiting orders. The majority of the court decide that question in the affirmative, holding, as I understand, that, if the proprietor of a hotel exercises ordinary care in the selection of his servants, he is not responsible to his guests for any of their acts committed, even within the hotel, no matter how rash, negligent, or brutal they may be, nor how seriously a guest may be injured, provided the servant was not at the moment engaged in some work for and in behalf of the master. I am unable to assent to this doctrine.

The relation existing between a carrier and a passenger has on numerous occasions been likened to that existing between an innkeeper and his guest. Thus, in Commonwealth v. Power et al., 7 Metc. 596, 601, 41 Am. Dec. 465, Chief Justice Shaw said:

"An owner of a steamboat or railroad in this respect is in a condition somewhat similar to that of an innkeeper whose premises are open to all guests. Yet he is not only empowered, but he is bound, to so regulate his house, as well with regard to the peace and comfort of his guests who there seek repose as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right and is bound to exclude from his premises all disorderly persons and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

This remark was quoted with approval by Ryan, C. J., in Bass v. Chicago & Northwestern Ry. Co., 36 Wis. 450, 459, 17 Am. Rep. 495.

Also in Jencks v. Coleman, 2 Sumn. 221, 226, Fed. Cas. No. 7,258, Mr. Justice Story compared the rights and duties of a carrier with those of an innkeeper, upon the evident assumption that the relation of an innkeeper to his guest was practically like that of a carrier to a passenger.

In Norcross v. Norcross, 53 Me. 163, 169, the Supreme Court of

that state remarked, when considering an innkeeper's liability for the property of his guest, that:

"Innkeepers are under the same liability as common carriers."

And in the case of Dickson et al. v. Waldron, 34 N. E. 506, 510, 24 L. R. A. 483, 41 Am. St. Rep. 440, the Supreme Court of Indiana remarked:

"But common carriers, innkeepers, merchants, managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them."

Also, in the case of Pinkerton v. Woodward, 33 Cal. 557, 585, 91 Am. Dec. 657, it was held that the liability of innkeepers and of common carriers is founded upon the same considerations of public policy in the one case as in the other.

In the absence of express authority on this point, I should be of opinion that an innkeeper is under the same obligation to protect his guests against the wrongful and discourteous acts of his servants, committed within or upon his premises, as a carrier to protect its passengers against like acts of its employés. A guest comes to a hotel on the invitation of the proprietor, and for the latter's profit and advantage, and upon the implied understanding that while on the premises as a guest he shall receive courteous and considerate treatment from the proprietor and all persons who are his servants, or, at least, upon the implied understanding that while beneath his roof the life of the guest shall not be imperiled by the rash, inconsiderate, or wrongful acts of those who are his servants. The general law of hospitality would seem to impose such an obligation upon an innkeeper. He promises suitable entertainment to all his guests, as well as respectful, considerate, and proper treatment on the part of all of his servants. If a servant of a hotel, when off duty, should meet a guest outside of the hotel, and not on the premises, and there assault him, it is doubtless true—although the case at bar requires no decision on that point—that the innkeeper could not be charged with responsibility for the servant's conduct; and it is probably true that the innkeeper would not be responsible for an assault committed on one of his guests within the hotel by a stranger, provided he has taken all reasonable precautions to prevent such occurrences by excluding disorderly persons from his premises. But in my opinion the law casts on the innkeeper an obligation to see to it that his guest is not injured, while within the hotel, by the wrongful, inconsiderate, or negligent acts of those who are his servants.

It is said in the opinion of the majority that an innkeeper is not an insurer of the safety of the person of his guest while within the hotel. The same may be said of carriers. They do not insure the personal safety of passengers, but only to exercise a very high degree of care, or, as it is sometimes said, "the utmost care," for their protection. Yet it is now well settled that this duty is so comprehensive that it renders the carrier responsible for injuries inflicted on passengers so

long as the relation of carrier and passenger exists, not only by the negligent acts of its servants done while in the performance of some duty, but also by their willful and wrongful acts, such as assaults committed on passengers or indignities offered to them. The obligation also rests on the carrier to protect its passengers while in transit, not only against the willful and wrongful acts of its own servants, but so far as practicable from acts of violence committed by strangers and co-passengers. It makes no difference, as it seems, what motive may have actuated a servant of the carrier in committing the wrongful act complained of, or whether it was done in conformity with the carrier's orders, or in express violation thereof and on the sole responsibility of the servant; for, if it was done while the relation of carrier and passenger existed, the carrier is responsible, and it cannot defend on the ground that the act of its servant was done without its sanction and at a moment when he was not rendering any special service to the carrier. A different rule obtains, of course, as respects willful and wrongful acts done by employés to those to whom the carrier at the time owed no other or greater duty of protection than it owed to every other person in the community; but, when the peculiar relation of carrier and passenger exists, the modern rule appears to be that the carrier is under an obligation to see to it that a passenger suffers no harm on account of the wrongful and willful acts of its servants, and that every practicable precaution is taken to protect him against the wrongful acts of strangers and co-passengers. Stewart v. Brooklyn & Crosstown Railroad Co., 90 N. Y. 588, 43 Am. Rep. 185; Dwinelle v. New York Central & H. R. R. R. Co., 120 N. Y. 117, 125, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Goddard v. Grand Trunk Ry., 57 Me. 202, 213, 2 Am. Rep. 39, and cases there cited; Bryant v. Rich, 106 Mass. 188, 8 Am. Rep. 311; Spohn v. Missouri Pacific Ry. Co., 87 Mo. 74, 80; Craker v. Chicago & Northwestern Ry. Co., 36 Wis. 657, 17 Am. Rep. 504; Pendleton v. Kinsley, 3 Cliff. 416, 427, Fed. Cas. No. 10,922; Chicago & Eastern R. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Terre Haute & Indianapolis R. R. v. Jackson, 81 Ind. 19.

Now, it is true that a hotel is an immovable structure and does not run on wheels like a train of cars; but in all other respects the relation existing between an innkeeper and his guest is like that existing between a carrier and passenger, and this fact has always been recognized, as shown by the cases above cited. An innkeeper, like a carrier, is engaged in a quasi public service. When he embarks in the business of keeping a hotel, he is bound to provide entertainment for all travelers who seek a place of rest and refreshment, provided they come to him in a fit condition to be entertained as guests, and are able to pay the customary charges. Unless relieved of the obligation by an express statute, the innkeeper, like the carrier, is an insurer of his guests' baggage against loss occasioned otherwise than by an act of God or the public enemy. American & English Ency. of Law (2d Ed.) vol. 16, p. 528, and cases there cited. Besides, an innkeeper is vested with the same power of control over his premises which the carrier exercises over such means of public conveyance as he provides. An innkeeper has the right to exclude from his premises all

disorderly persons, and to suppress all disturbances therein that tend to disturb his guests or imperil their safety, and according to the decision of Chief Justice Shaw in the case above cited (7 Metc. 596, 601) it is his common-law duty to exercise this power. Aside from these considerations, the innkeeper, like the carrier, has the exclusive right to select all of the persons who are to aid him in the discharge of his quasi public functions. I have been unable, therefore, to discover any sufficient reason why he should not be held responsible to his guests for the consequences of any willful and wrongful acts of his servants, committed within the hotel, to the same extent that the carrier is responsible to his passengers for like wrongful acts of its servants; and within the authorities above cited a carrier would be clearly responsible to one of its passengers for an injury inflicted by one of its employés under such circumstances as those disclosed in the present case.

Relative to the authorities cited in the majority opinion and not already referred to, this may be said:

Calye's Case, 4 Coke's Rep. 63, 66, contains the single detached statement that, "if the guest be beaten in the inn, the innkeeper shall not answer for it." But it does not say by whom beaten, whether by a servant of the innkeeper or by a stranger. This, however, is a very old case, decided in 1584, and the statement quoted is purely dicta, since the case involved no question respecting the liability of an innkeeper for an assault committed upon a guest within the hotel. Moreover, as the learned editor of the American & English Ency. of Law remarks, in substance (vide vol. 16 [2d Ed.] p. 545), it may well be doubted whether the statement above quoted would be accepted at the present day as authority for the doctrine which it enunciates, since the modern authorities are opposed to the view that an innkeeper cannot be held responsible for an assault committed upon one of his guests within the hotel by a servant, or even by a stranger when the innkeeper has not taken proper care to exclude disorderly persons from his premises.

Curtis v. Dinneen (Dak.) 30 N. W. 148, was a case in which a guest of a hotel kept by a married woman sought to hold her responsible for an assault and battery committed by her husband without her consent or ratification. The husband was living with the wife in the hotel, as he had a right to do, and was assisting her to operate it, so that the case was embarrassed by the existence of the marital relation; the court holding that under the circumstances the wife could not be held responsible for the tort of the husband.

The other cases that are referred to are without exception cases where it was sought to hold the innkeeper responsible for some defect in the hotel premises, and in one of them (Sandys v. Florence, 47 L. J. 598, 600) it was remarked arguendo, in discussing a demurrer to the complaint, that an innkeeper's duty "is not to insure his guests, but to see only that they did not suffer from want of reasonable and proper care on his part." None of the cases, however, discuss the particular question which is presented in the case at bar, whether an innkeeper is liable to his guest for the reckless conduct of one of his servants committed upon the hotel premises, whereby the life of the

guest is jeopardized. In my judgment an innkeeper ought to be held liable for an act of that nature, and as respects that question I concur in the view which was expressed by the Supreme Court of Nebraska in Clancy v. Barker, 98 N. W. 440, that was decided upon the same state of facts which this record discloses.

I think the judgment below should be reversed, and a new trial ordered.

PHŒNIX BRIDGE CO. v. CASTLEBERRY.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1904.)

No. 499.

1. JUDGMENTS—COLLATERAL ATTACK—FEDERAL AND STATE COURTS.
   The jurisdiction of a court to render a judgment is always subject to collateral attack and inquiry in a court of another sovereignty in which such judgment is relied on, and in such respect federal and state courts are foreign to each other, although sitting within the same state.

2. SAME—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
   The right of collateral attack on a judgment is a matter of general law as to which the decisions of the courts of a state are not binding on a federal court.

3. ADMINISTRATION OF ESTATES—PRIORITY OF JURISDICTION—SOUTH CAROLINA STATUTE.
   Under 2 Code Civ. Proc. S. C. § 48, which provides that, "when any probate court shall have first taken cognizance of the settlement of the estate of a deceased person such court shall have jurisdiction of the disposition and settlement of all the personal estate of such deceased person to the exclusion of all other probate courts," that court first "takes cognizance of the settlement" of an estate which first grants letters thereon, which is the first judicial act in the proceeding, the petition being ex parte, and the issuance of citation thereon ministerial.

4. MASTER AND SERVANT—INJURY OF SERVANT—RULE GOVERNING MASTER'S DUTY.
   The rule as to the duty of a master in respect to providing a safe place to work is not applicable to a case where a servant is injured by reason of defects in or insufficiency of a temporary structure, such as a scaffolding or framework for supporting heavy materials, which are appliances or instrumentalities by means of which the work is to be done.

5. SAME—APPLIANCES OR TEMPORARY STRUCTURES.
   When, by the express or implied contract between the master and servant, the former undertakes to furnish the necessary tools or appliances, it is his duty to use ordinary care to see to it that such instrumentalities are safe and suitable; and as this duty, when it exists, is one of the absolute or personal duties, any servant to whom the master delegates it is pro hac vice a vice principal, for whose negligence the master is responsible. But where, by the express or implied contract, the master undertakes merely to furnish the materials needed for the construction of some appliance, which is to be constructed by the workmen themselves, as incident to the main work, the master's duty is performed if he furnishes suitable material and competent workmen, and the negligence of a foreman in charge of the construction by which a workman is injured is that of a fellow servant, for which the master is not liable.

¶ 2. State laws as rules of decision in federal courts, see note to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

6. SAME—RULE APPLIED—INSPECTION.

A bridge company sent a force of men under a foreman to make repairs on a railroad bridge, consisting in part of replacing certain old parts with heavy steel girders. In doing this, it was necessary to construct on the spot wooden frames or bents to support the weight of the girders while they were being put in place, and they were made by the workmen as an incident to the work. Owing to the defective construction or condition of one of such frames, which had been erected three days before, a girder fell, and killed one of the workmen. *Held* that, in the absence of evidence that the materials furnished by the company were not in all respects suitable and sufficient to make a safe structure, it was not liable for the negligence of the foreman either in the construction of the frame or in failing to inspect it on the day of the accident.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

J. S. Muller, for plaintiff in error.

Stanyarne Wilson and J. Q. Marshall, for defendant in error.

Before GOFF, Circuit Judge, and BRAWLEY and McDOWELL, District Judges.

McDOWELL, District Judge. S. J. Castleberry, an inhabitant of Spartanburg county, S. C., was, on August 26, 1901, killed while employed in repairing a bridge. His wife, Effie Castleberry, petitioned the probate court of Richland county (in which the decedent had no estate and of which he was not a resident) for letters of administration on August 29, 1901. Citation was issued by that court on the same day, and letters of administration were granted Effie Castleberry on September 19, 1901. On August 30, 1901, Jas. H. Castleberry, the father of the decedent, filed his petition for letters of administration in the probate court of Spartanburg county. Citation issued the same day, and letters of administration were granted on September 16, 1901. On September 17, 1901, Jas. H. Castleberry instituted the present action in a state court of South Carolina, which was removed to the federal court; and on September 21, 1901, Effie Castleberry, in the same state court, instituted her suit for the same cause of action against the plaintiff in error here. On December 4, 1902, Effie Castleberry applied for and obtained from the probate court of Richland county an order revoking the letters granted her by that court, in which order is a recital that the court had acted under a misapprehension, and had not had the right to issue letters of administration. And on December 9, 1902—the day the trial of the case at bar was commenced in the federal Circuit Court, and just before it was commenced—Effie Castleberry dismissed her action against the plaintiff in error here. The jury rendered a verdict for the plaintiff below and judgment was entered in accordance therewith.

It is contended for the plaintiff in error that the plaintiff below did not have title as administrator at the time of the institution of this action. The trial court decided this question against the plaintiff in error, and this is the first error assigned here. The statute law of South Carolina bearing on the question here presented is as follows (2 Code Civ. Proc.):

"Sec. 37. Every judge of probate in his county shall have jurisdiction in all matters, testamentary and of administration, in business appertaining to

minors and the allotment of dower, in cases of idiocy and lunacy, and of persons non compotes mentis."

"Sec. 39. The probate of the will and the granting of administration of the estate of any person deceased shall belong to the judge of probate for the county in which such person was last an inhabitant; but if such person was not an inhabitant of this state, the same shall belong to the judge of probate in any county in which the greater part of his or her estate may be.

"Sec. 40. All proceedings in relation to the settlement of the estate of any person deceased shall be had in the probate court of the county in which his will was proved, or administration of estate was granted."

"Sec. 48. When any probate court shall have first taken cognizance of the settlement of the estate of a deceased person, such court shall have jurisdiction of the deposition [disposition] and settlement of all the personal estate of such deceased person to the exclusion of all other probate courts."

"Sec. 49. The jurisdiction assumed by any probate court in any case, so far as it depends on the place of residence or the location of the estate, shall not be contested in any suit or proceeding whatever, except in an appeal from the probate court in the original case, or when the want of jurisdiction appears on the record."

Rev. St. § 2027 (1901):

"The judge of probate shall grant administration in the following manner: After requiring the person or persons applying therefor to file a petition in writing, he shall issue a citation to the kindred or creditors of the intestate or person deceased, to show cause, if any they have, why administration shall not be granted to the person or persons applying therefor," etc.

The alleged invalidity of the grant of letters of administration to the plaintiff below by the Spartanburg court is founded on section 48 of volume 2, Code Civ. Proc., supra.

It is a settled rule of law of the state courts of South Carolina that the first grant of letters of administration by a domestic probate court—even when made by a court not having jurisdiction of the particular estate in question—cannot be collaterally attacked. Petigru v. Ferguson, 6 Rich. Eq. 380. See, also, Turner v. Malone, 24 S. C. 398; Ex parte Crafts, 28 S. C. 281, 5 S. E. 718. And this rule was followed by at least two of the subordinate federal courts in respect to a judgment of a probate court of the state in which these federal courts were sitting. Holmes v. Oregon & C. R. Co. (D. C.) 5 Fed. 523; Id. (C. C.) 9 Fed. 229. But we regard these opinions as overruled by the Supreme Court in later cases cited herein below. However, the courts of the state in which a federal court sits are not domestic courts quoad the federal court. The two courts are created by and exist under different governments. Swift v. Meyers (C. C.) 37 Fed. 43; Hekking v. Pfaff, 91 Fed. 60, 33 C. C. A. 328, 43 L. R. A. 618; Pennoyer v. Neff, 95 U. S. 732, 24 L. Ed. 565. Hence the federal court sitting in South Carolina should, on collateral attack, examine the question of the jurisdiction of a South Carolina state court which rendered a judgment relied on in such federal court. That there is a right of collateral attack for want of jurisdiction on a judgment of a court of another sovereignty is the rule prevailing in the majority of the states, not excepting South Carolina. McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; 2 Black on Judgments (2d Ed.) § 897; 12 Am. & Eng. Ency. (1st Ed.) 148 et seq. And beyond question this is the rule laid down by the Supreme Court of the United States, which we are required to follow. Thompson v. Whitman, 18 Wall. 457, 21

L. Ed. 897; Simmons v. Saul, 138 U. S. 448, 11 Sup. Ct. 369, 34 L. Ed. 1054; Guaranty Co. v. Railroad Co., 139 U. S. 147, 11 Sup. Ct. 512, 35 L. Ed. 116, and cases therein cited.

If the above-mentioned decisions in Petigru v. Ferguson, Ex parte Crafts, etc., could be considered as decisions of a matter of local law, we should be bound to follow them. But the right of collateral attack on a judgment for want of jurisdiction is a question of general law. The plaintiff in error is relying on a common-law right. Galpin v. Page, 3 Sawy. 93, Fed. Cas. No. 5,206; Chicago v. Robbins, 2 Black, 419, 17 L. Ed. 298; Olcott v. Supervisors, 16 Wall. 689, 21 L. Ed. 382.

Again, if the South Carolina decisions above mentioned could be considered as construing the statute law of that state, we should be bound by them. But they were not so intended. They merely lay down the rule of common law prevailing in the South Carolina state courts, where it is proposed to collaterally attack in such courts a first grant of letters of administration made by a South Carolina probate court. So far as we are advised, the Supreme Court of South Carolina has never construed section 48 of the Code of Civil Procedure in respect to the question here made. It follows that we must now construe that statute.

In the opinion of the learned trial court it is said:

"In the case at bar the probate court of Spartanburg county was the first court which had taken cognizance of the settlement of the estate of Castleberry. It first issued the letters granting plaintiff title, and when the Richland court acted there was nothing to act on. The petitions were ex parte. They decided nothing. The effective action was the grant."

The language of section 48 is peculiar. If it had declared that the court in which the petition is first filed, or which first issued citation, should have exclusive jurisdiction, we should have a different question. But the language is "the court which first takes cognizance of the settlement of the estate." Section 40 of the Code of Civil Procedure reads:

"All proceedings in relation to the settlement of the estate of any person deceased shall be had in the probate court of the county in which his will was proved, or administration of estate was granted."

Apparently the theory of the Legislature was that the grant of letters is the first action of a court which may be considered as "taking cognizance of the settlement" of an estate. The filing of the petition is ex parte. The issue of citation is a ministerial act in essence, made obligatory by section 2027 of the Revised Statutes, and does not involve the exercise of discretion, or any strictly judicial action. The first judicial act of the probate court is the grant of letters of administration. Such action is beyond doubt taking cognizance of the settlement of the estate. And it is the first act that can be properly so considered. We are of opinion that the jurisdiction of the Spartanburg court was not defeated by the subsequent grant of letters by the Richland court. It follows that the grant by the Richland court was made without jurisdiction, and was void ab initio. The plaintiff below, therefore, had title as administrator at the institution of this action.

Finding no error so far in the rulings of the trial court, we must now

state the facts on which are based the remaining assignments of error. The Phœnix Bridge Company, a Pennsylvania corporation, had undertaken to make certain repairs of a railroad bridge over the Congaree river in South Carolina. The business of the company is divided into two departments, and this work belonged to the "erection department." Neither the superintendent nor the assistant superintendent of this department left the home office. The work in question was in immediate charge of one Simmons, who was the foreman. Castleberry was a workman employed by and under the direction of Simmons. The repairs to be made consisted in part in replacing certain old parts of the bridge with heavy steel girders. In order to do this, it was first necessary to erect certain wooden frames or bents to sustain the weight of the steel girders while being put in place. These wooden frames had been made on the spot by the bridge force under the direction of Simmons, and had been on the Friday preceding the accident, which occurred on Monday, August 26, 1901, put in place and held there by guy ropes. On the following day heavy rain prevented work. The next day (Sunday) was clear and warm. On Monday Simmons ordered Castleberry to take up the old track under the steel girders, which were suspended above him, and which were sustained by the wooden frames. While in this situation the frames gave way and toppled over, and the girders fell and killed Castleberry. There was evidence tending to show that under the girders was not a safe place to work, in the absence of cribs to support the girders and take the strain off the wooden frames, and that cribs were not on this occasion used. Also that the frames had not been constructed according to the plans furnished by the defendant company, and that they were unsafe. Also that the frames were not properly guyed. There was also evidence that the rain on the Saturday preceding the accident, which contracted the guy ropes, and the heat of the sun on Sunday, which loosened the ropes, had disturbed the placing of the frames, and that on Monday no inspection of the condition of the frames was made, the guy ropes were not tightened and the frames were not plumbed. There was evidence introduced by the defendant below tending to contradict the evidence of the plaintiff below. The remaining assignments of error are to certain parts of the charge given by the trial judge and to his refusal to give certain instructions requested by the defendant below. It is unnecessary to state in detail these assignments. The instructions given the jury were based on the theory that the defendant was liable for want of ordinary care in furnishing safe and proper instrumentalities for carrying on the work, or for want of ordinary care in inspecting the condition of such instrumentalities. Counsel for the defendant below excepted to the parts of the charge covering these points, and also to the refusal of the court to give certain instructions based on the theory that Simmons and Castleberry were fellow servants. It was evidently the plan of work that the new steel girders should be temporarily suspended, or otherwise supported, above their final resting place, and that thereafter the workmen must, going under the steel girders thus supported, remove some of the old parts of the bridge.

It is the established rule of the federal courts that a mere foreman—not the head of a separate department—is a fellow servant of the work-

men under him, or a vice principal, dependent on the nature of the duties such foreman is discharging at the time of the negligent act with which he is charged. If he is discharging one of the absolute or personal duties of the master, he is a vice principal, and his negligence is imputable to the master. Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; Central R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Martin v. Atchison R. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; 12 Am. & Eng. Ency. (2d Ed.) p. 933. The injury to Castleberry was caused either by the insufficiency of the supports for temporarily holding the steel girders, or because of a want of proper inspection of their condition. In cases such as we have here—where the injury results from the use of some device or appliance intended for temporary use—it is frequently difficult to determine whether the rights of the parties are to be determined by reference to the duty of the master in respect to providing a safe place in which to work or to the master's duties in respect to appliances and instrumentalities for carrying on the work. Under the circumstances of this case we think that the rule as to providing a safe place is inapplicable. In Thomas on Negligence, at page 790, it is said:

"A staging or scaffolding for workmen is not a place in which work is to be done, within the rule requiring the master to furnish his servants a suitable and safe place in which to work, but it is an appliance or instrumentality by the means of which the work is to be done."

See, also, 20 Am. & Eng. Ency. (2d Ed.) p. 81, note 7, where it is said, citing Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Whallon v. Sprague Co., 1 App. Div. 264, 37 N. Y. Supp. 174; Stewart v. Ferguson, 34 App. Div. 515, 54 N. Y. Supp. 615:

"Under these decisions, what is temporary must be considered as an 'appliance,' and only what is permanent as a 'place.'"

It has frequently been said that it is one of the absolute and personal duties of the master to furnish reasonably safe and suitable appliances. This statement cannot be considered as universally true. We think a better statement of the rule is as follows: When, by the express or implied contract between the master and his servant, the former undertakes to furnish the necessary tools or appliances, it is the master's duty to use ordinary care to see to it that such instrumentalities are safe and suitable. And as this duty, when it exists, is one of the absolute or personal duties, any servant to whom the master delegates it is pro hac vice a vice principal, for whose negligence the master is liable. It frequently happens that by the express or implied contract the master undertakes merely to furnish the materials needed for the construction of some appliance, and that the workmen themselves, as incident to the main work, construct the appliance. In many such cases it has been said that the master's duty is performed if he furnishes suitable material and competent workmen. In 20 Am. & Eng. Ency. (2d Ed.) at page 82, it is said:

"Where the servant, as a part of his work, is to construct a scaffold or other structure out of materials furnished by the employer, and the employer furnishes proper materials for that purpose, but the servant, by negligence either in putting the materials together or in selecting them, erects an unsafe appliance, which results in injury to another servant, no negligence can be imputed to the master, and he is not liable for the injury. In such cases the master's responsibility ends with the selection of suitable material and suitable men for the work."

Again, in 12 Am. & Eng. Ency. (2d Ed.) p. 956, it is said:

"But where the duty of erecting the necessary scaffold or staging is devolved upon workmen as a part of or as incident to the work which they are to perform, they are all fellow servants, and the master is not liable to one of them for the negligence of his fellow workman in the construction of the scaffold. * * *"

The numerous cases referred to in the Encyclopædia have been examined, and we find them to fully warrant and support the above-quoted statements. It is true that in the majority of the cases cited in support of this rule the defective structure was a simple scaffold or staging. But we are unable to find any line of demarcation between such cases and the case at bar. Here the frames for the support of the steel girders were constructed on the spot by the bridge force as a part of the work. The construction of these frames was merely a detail of the work. The duty performed by Simmons in directing the construction of the frames or bents did not differ from that performed by him in regard to the other details of the work. If these frames had been constructed elsewhere, and furnished as a completed instrumentality, a different rule would apply. As the employer here only undertook to furnish the materials and the plan, and as the bridge force was to construct the supports, we are constrained to hold that in such construction Simmons was not a vice principal. If his negligence in constructing insufficient supports caused the injury, it was the negligence of a fellow servant, for which the employer is not liable.

In the case at bar it is clear that the duty of furnishing proper materials for constructing the device needed to temporarily support the steel girders rested on the master. There was evidence in this case tending to show that the frames were not sufficient without cribs or blocks, and that cribs were not used. But there was no evidence that such cribs were not furnished. So far as the record shows, the necessary blocks may have been furnished, and the failure to use them may have been simply the result of negligence on the part of Simmons, the foreman. The burden of proving negligence rested on the plaintiff, and, in the absence of affirmative evidence that the defendant failed to furnish the blocks, there could not properly have been a verdict for the plaintiff on this ground.

There was evidence, also, tending to show that the injury may have been caused by want of proper inspection of the condition of the frames and guy ropes. If the duty of inspection in this respect rested on the master, Simmons, the foreman, was, as to such duty, a vice principal. But we fail to find a sufficient reason for holding that the master was here charged with the duty of inspection. Where the master furnishes an appliance, he is charged with the duty of inspecting its condition. But where, as here, the construction of the appliance devolved on the workmen, there was no more reason for requiring inspection of its

condition than of requiring inspection of any other part of the work. So far as we have found, whenever the authorities discuss the duty of the master in respect to inspection, it is in regard to the safety of the place of work or the condition of appliances and instrumentalities furnished by the master.

The charge given the jury was based on the theory that the defendant had undertaken to furnish the appliances needed for the temporary support of the girders, and that a want of ordinary care in constructing or inspecting such appliances made the defendant liable. From what we have said it follows that we are of opinion that the charge was erroneous. We must, therefore, reverse the judgment of the trial court and remand the cause for proceedings not inconsistent with this opinion.

Reversed.

ELLIS v. INMAN, POULSEN & CO. et al.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1904.)

No. 1,000.

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

In determining whether or not a combination is in violation of the federal anti-trust law, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. The true inquiry is whether it tends directly to appreciably restrain interstate trade, and, if it does, it is within the statute, although such effect may not be so considerable as its other effects.

2. SAME.

A complaint alleged that plaintiff was a builder doing business in Portland, Or.; that in such business he purchased large quantities of rough lumber from mills located at Vancouver, Wash., which was seven miles from Portland, but that such mills did not manufacture finished or kiln-dried lumber; that defendants, who comprised all the manufacturers and dealers in Portland, combined to fix exorbitant prices on all lumber sold by them, and to compel all consumers in Portland to pay such prices by refusing to sell any finished lumber at any price to such consumers as bought lumber of any kind from other dealers, except on condition that such consumer pays to defendants the difference between the price he paid for lumber so bought from others and the price charged therefor by defendants and promises to buy all his lumber thereafter from defendants; that the purpose and effect of such combination was to prevent plaintiff and other consumers from buying lumber at Washington mills, and to obtain a monopoly of the trade in Portland at unreasonable and exorbitant prices. *Held*, that the combination charged constituted a violation of the federal anti-trust act, its effect being to directly restrain interstate commerce, and that the complaint stated a cause of action thereunder for the recovery of damages alleged to have resulted to plaintiff.

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

For opinion below, see 124 Fed. 956.

The plaintiff in error brought an action against the defendants in error under the provisions of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to recover damages resulting from a combination of the defendants in error to prevent him from purchasing lumber in the city of Vancouver, Wash., to be used in the city of Portland, Or. The substantial averments of the complaint are as follows: That the plaintiff in error is engaged in the business of constructing houses and other buildings in the city of Portland and selling the same for profit, and in the business of constructing such buildings on contracts with his customers; that the defendants in error are engaged in the business of manufacturing and selling both rough lumber and seasoned or kiln-dried lumber at Portland, Or., and that they are the only manufacturers of such lumber in or adjacent to said city who sell lumber therein; that there are persons engaged in the business of manufacturing and selling rough lumber at the city of Vancouver and at other points in the state of Washington, and that, until interfered with by the acts and combination of the defendants in error, the plaintiff in error could and did purchase at and import from the city of Vancouver large quantities of lumber for use in his business at Portland; that, in order to carry on his said business, it is necessary for him to purchase and use large quantities both of rough lumber and of seasoned or kiln-dried lumber; that the mills at Vancouver produce only rough lumber, and that the seasoned or kiln-dried lumber required by the plaintiff in his business can only be procured from the defendants in error, and he is absolutely dependent upon them for his supply thereof; that on July 2, 1902, the other defendants in error organized the defendant City Retail Lumber Company, and for the purpose and with the intent of creating a monopoly of the manufacture and sale of lumber for local use in the markets of the city of Portland, and of controlling and restricting the output of lumber from defendants' said mills, and fixing and controlling the price of lumber in said Portland market, and arbitrarily advancing said price and demanding and receiving excessive and unreasonable prices for the lumber manufactured and sold by them, and preventing the shipment of lumber by the said manufacturers in the state of Washington from said state to the city of Portland, and preventing the sale in the city of Portland of lumber manufactured in the state of Washington, and preventing the plaintiff in error and all other contractors and builders in Portland from purchasing lumber from any dealers other than the defendants, and particularly from said manufacturers in the state of Washington, did conspire, confederate, and agree together that they would sell lumber in the Portland market only through said City Retail Lumber Company at prices to be fixed by it and to persons to be designated and approved by it; that thereafter the entire sales of lumber in the Portland market from all the defendants in error were placed in the control of said City Retail Lumber Company for the purpose and with the intent of preventing the plaintiff in error and other contractors and builders in Portland from purchasing lumber from said manufacturers in the state of Washington, and that the defendants in error further conspired and agreed to adopt such means and prescribe and enforce such burdens and penalties as might be necessary to carry out said purpose, and thereby enable them to fix a price on lumber in the city of Portland, and control the output and sales of lumber therein; that to carry out said purposes the defendants in error have employed agents to watch the construction of all buildings in the city of Portland, and ascertain the sources from which lumber used therein is procured, and to report to the City Retail Lumber Company all buildings for the construction of which any lumber was procured from said manufacturers in the state of Washington, and that upon such report the defendants in error would refuse to supply any lumber upon any terms to such contractor, builder, or other consumer who purchased any lumber for use in Portland from said manufacturers in the state of Washington, and have refused to sell any lumber to such contractor, builder, or other consumer, except upon the condition that he pay them, in addition to the price charged by them for lumber required from them, the difference between the price he paid for the lumber so purchased in the state of Washington and the price then charged by them

for the same quantity of similar lumber, and the further condition that he promise them to purchase no more lumber from said manufacturers in the state of Washington, and that in all cases where the contractor, builder, or other consumer had procured a sufficient supply of rough lumber from manufacturers other than the defendants in error, and bought from manufacturers in the state of Washington, the defendants in error have refused to sell any finished, seasoned, or kiln-dried lumber to such contractor, builder, or other consumer, except upon his making such payment and such promise; that by these means the defendants in error have compelled all contractors and builders in Portland to cease buying lumber from the mills in the state of Washington, and have been enabled to and do control the output of lumber sold in the market in Portland, and have fixed extortionate prices therefor; that in March, 1903, in the course of his business, the plaintiff in error purchased from a manufacturer in Vancouver, Wash., and had shipped to and delivered to him at Portland, a large quantity of rough lumber at a price of $250 less than was then charged by the defendants in error for the same quantity of like lumber in Portland, and the plaintiff used the same in the construction of buildings; that on March 20, 1903, he required for use in the construction of said buildings large quantities of finished and seasoned or kiln-dried lumber, and was and has been unable to procure the same from any manufacturer or dealer other than the defendants in error, and that on or about that date he applied to the defendants in error to purchase such lumber, to wit, about 7,000 feet of flooring, about 7,000 feet of ceiling, and about 9,000 feet of rustic, which lumber was so needed by him in his business, and offered to pay them therefor the regular price charged by them for the same, but that because of his purchase of lumber at Vancouver, Wash., the defendants in error refused to sell him said or any lumber upon any terms, and so refused for a period of two months, and still refuse, unless the plaintiff in error pay them, in addition to the prices charged by them for the lumber which he wished to purchase from them, the sum of $250, the difference between the price he paid for lumber in Vancouver and the price they charged for the same quantity and quality at Portland, and unless, in addition thereto, he promise them in the future to purchase no lumber from any manufacturer or dealer in the state of Washington; that the plaintiff in error refused to comply with said conditions, and was unable to procure any lumber from the defendants in error; that at all the times mentioned in the complaint the defendants in error have had on hand and for sale in the city of Portland ample supplies of lumber of the quantity and kinds that the plaintiff in error required, and during all said time the plaintiff in error has been ready and able and has offered to pay therefor the regular prices charged by the defendants in error, but they have so refused to sell the same in pursuance and furtherance of their conspiracy, and for the purposes and with the intent above stated, and for the reason that the plaintiff in error had purchased lumber from said manufacturers in the city of Vancouver, and for the purpose and with the intent of preventing him from purchasing lumber from said manufacturers in the city of Vancouver and forcing him to purchase the same from the defendants in error, and for the purpose of punishing and injuring him for having made such purchase in Vancouver, and not for any other reasons. The plaintiff in error alleged that he was damaged in the sum of $7,000 through his inability to continue his business and through loss of profit on his business during the building season of 1903, and the loss of custom and good will of his said business; in the sum of $500 through the delay caused in the construction of two certain buildings and from being compelled to use unseasoned and inferior lumber in their construction; in the sum of $1,000, caused by delay in the construction of a certain building which he had contracted to build for the price of $4,000, and by the exposure of said building to the rains, and by being required to use unseasoned and inferior lumber in finishing the same, and by being unable to secure payment on his contract on that account; in the sum of $25 through being compelled by reason of said combination to purchase in the month of April, 1903, rough lumber from them at their own price, which was $25 in excess of the cost of the same lumber if purchased in Vancouver and shipped therefrom to Portland. The defendants in error filed demurrers to the complaint on the ground

that it did not state facts sufficient to constitute a cause of action. The demurrers were sustained, and the complaint was dismissed, with costs to the defendants in error. To review that judgment the plaintiff in error has sued out this writ of error.

Veazie & Freeman, for plaintiff in error.

Cake & Cake, for defendants in error Inman, Poulsen & Co.

Wm. D. Fenton, for remaining defendants in error.

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

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

The question presented is whether the complaint states a cause of action. It alleges that an interstate trade in lumber had existed between purchasers in the city of Portland, in the state of Oregon, and manufacturers at Vancouver, in the state of Washington, about seven miles distant from Portland, and that the defendants in error, who constitute all the manufacturers of lumber in the city of Portland, formed a combination for the purpose of preventing the importation of lumber from the state of Washington for use in Portland, and that they adopted means such as to accomplish their purpose. It is contended by the defendants in error: First. That the combination does not operate directly upon the manufacture, sale, or transportation of an article of interstate commerce; that it only incidentally and collaterally relates to or affects the sale and transportation of lumber from another state, and that it is therefore not within the prohibition of the act. Second. That the injury complained of by the plaintiff in error was not the direct or unavoidable result of an illegal combination, but that such injury, if any, resulted from the refusal of the defendants in error to deal with the plaintiff in error except upon terms acceptable to them. The interpretation of the statute applicable to the case is found in Anderson v. United States, 171 U. S. 615, 19 Sup. Ct. 54, 43 L. Ed. 300, in which it was said:

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. * * * If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good; otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to in some obscure way affect that commerce, and to be therefore void."

Also, in United States v. Joint Traffic Association, 171 U. S. 568, 19 Sup. Ct. 31, 43 L. Ed. 259, where it was said:

"The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate

business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

Does the combination which is set forth in the complaint in the present case tend directly to restrain interstate commerce? The complaint alleges that such was its purpose, and that such is its effect. Notwithstanding these allegations, however, it is clear that, if it can be seen from the facts set forth that the restraint is only indirect and incidental, no cause of action is stated within the intendment of the act. But it is equally clear that the distinct allegation of the purpose of such a combination may be taken into consideration in connection with the facts alleged. If it be true that the purpose of the defendants in error was as alleged, how can it be said of any means which they adopt to effectuate the purpose that they accomplish it only indirectly and incidentally? It is true that the complaint alleges the existence of another purpose—the purpose to obtain excessive and unreasonable prices for lumber; but one of the purposes alleged in attaining that end is the purpose of shutting off the Portland trade in Washington lumber. In determining whether or not the restraint of trade is the direct and necessary result of the combination, no assistance is to be found by pursuing the inquiry further and ascertaining whether its main purpose and chief effect are to foster the trade and increase the business of those engaged in it. It may be conceded that the main purpose of all such combinations is to foster the trade and increase the profits of those who are engaged in them, that the restraint of interstate trade as such is not their ultimate object, and that the effect of the combination on interstate trade is to the members of the combination an immaterial matter. Nor is it material, we think, to inquire what is the chief effect of the combination? The true inquiry is, does it tend directly to appreciably restrain interstate commerce? It is not material to ascertain just what proportion the resulting restraint of interstate commerce bears to other effects or results of the combination. Nor is the court called upon to weigh the effects, or to determine that, if the effect in restraining interstate trade is not so considerable as other effects, the combination is not forbidden. In the case of W. W. Montague & Co. v. Lowry et al., 24 Sup. Ct. 307, 48 L. Ed. 608, in which the Supreme Court very recently affirmed the judgment of this court, a combination was made between certain dealers of tiles, mantels, and grates in the cities of San Francisco, Sacramento, and San José, who were members of an association formed for the purposes of the combination, and all of the manufacturers of such articles in the other states of the Union. By the terms of the agreement the manufacturers bound themselves not to sell goods in San Francisco, or within a radius of 200 miles therefrom, to any one who was not a member of the association. There was no manufacturer of such goods in California. The plaintiffs who brought the action were dealers in tiles, but not members of the association. They were unable to purchase goods of the manufacturers. The only restraint on trade was that which resulted from the inability of the plaintiffs to buy goods on equal terms with members of the association for use at their place of business in San Francisco. It could not be

demonstrated in that case that by reason of the agreement the total amount of interstate trade would be at all diminished. But the Supreme Court held that it was sufficient if it could be seen that the tendency of the combination was such as to diminish such interstate trade. Said the court, "The amount of trade in the commodity is not very material."

The defendants in error admit that the business of importing lumber from the state of Washington into the city of Portland may be affected by the combination; but they say that the result is due, not to their combination to refuse to sell to purchasers in the city of Portland who make such importations, but to the inability of the Washington mills to supply the Portland market with kiln-dried or finishing lumber; and that the combination is not the direct and proximate cause of the inability of the Washington mills to sell lumber in the city of Portland. But that very inability is one of the essential facts which aid to create the situation which is complained of. It is a fact conceded to exist, and it is taken advantage of by the defendants in error. But for the existence of that fact, it is safe to assert that the combination would not have been formed. The facts must be reckoned with as they are found. Can it be said that the absence of factories and plants outside of the combination capable of producing finishing lumber so as to compete with the defendants in error shall relieve them from responsibility for their acts? Does the fact that the whole combination and its success are made possible by the adventitious circumstance that no one has yet seen fit to invest the capital necessary to establish a competing plant at Vancouver render the restraint of interstate commerce effected by the combination any the less direct and necessary? If such is the law, it follows that, to secure immunity for every such combination, it is necessary only to bring into it all manufacturers of its line of goods, and to intrench it behind the proposition that the resulting restraint of trade comes, not from the combination, but from the inability of others to supply the market. The mere statement of the proposition is its refutation. With equal reason it might have been urged in the Montague Case that the restraint of interstate trade was owing, not to the combination, but to the fact that there was no independent manufacturer of tiles from whom the plaintiffs in that case could purchase.

The opinion of the trial court in sustaining the demurrers seems to have been largely influenced by the argument that if the defendants in error, instead of combining to advance prices and to refuse to sell to certain purchasers, had combined to reduce the prices of all kinds of lumber to all purchasers, it would have had an equal tendency to destroy the trade in lumber between Vancouver and Portland, and yet in so doing the defendants in error could not have been accused of acting unlawfully in restraint of that trade. But is this argument sound, and does it lead to the conclusion which was reached by the court? We submit that a combination which is made for the specific purpose of restraining interstate trade and which accomplishes that purpose, restrains it directly, and that, if such be its intention and its direct tendency, it is under the ban of the act, whether it include an agreement to raise prices or an agreement to lower them. The mere agreement to raise or lower prices, as was said by the court in the E. C. Knight Case, 156 U. S. 16,

15 Sup. Ct. 255, 39 L. Ed. 325, might tend to restrain external trade, "but the restraint would be an indirect result, however inevitable and whatever its extent; and such result would not necessarily determine the object of the contract, combination, or conspiracy." But this is far from saying that a combination to raise or lower prices aimed directly at the destruction of a particular branch of interstate trade would accomplish that result indirectly, and therefore lawfully. In United States v. Freight Association, 166 U. S. 328, 17 Sup. Ct. 554, 41 L. Ed. 1007, the court, referring to the terms of the act, said:

"The plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

The same view was reaffirmed in United States v. Joint Traffic Association, 171 U. S. 558, 19 Sup. Ct. 25, 43 L. Ed. 259. In United States v. Swift & Co. (C. C.) 122 Fed. 534, Judge Grosscup, referring to the doctrine of the two cases just cited, well said:

"It is clear from them that restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred; nor is it to be tested by the prices that result from the combination. Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices may, as against the producer, be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition."

From the recent case of Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, it would appear that when the questions involved in the opinions of the Supreme Court in the two cases last above quoted shall again come before that court for consideration the majority of the members of the court may hold that the rulings in those cases should have gone no further than to decide that the contracts there presented were unreasonable restraint of interstate trade, and were, as such, within the scope of the act. But if we adopt that view of the law, and assume that the purpose of the act was to place a statutory prohibition only on those combinations which are unreasonable and against public policy, as well as in direct restraint of interstate trade, the present combination, as it is set forth in the complaint, clearly comes within the prohibition. The complaint alleges that the prices placed upon all lumber by the defendants in error are excessive and unreasonable, and that for unfinished lumber their price is double the price of Vancouver lumber of the same kind. The combination, as it is stated in the complaint, is more than a mere agreement to raise prices. It includes also an agreement to coerce purchasers of lumber by other means, and to compel them to desist from the interstate trade. Taking together all the allegations of the complaint, it appears that an active trade in lumber between the Vancouver mills and the Portland consumers of lumber has been restrained by the acts of the defendants in error. By combining as they did they wielded a power that no individual action could possess. They possessed the power to

ruin the business of any Portland contractor who imported lumber from the adjoining state, and they exercised that power. Restraint of the trade resulted therefrom, and the restraint was the direct and necessary result of a combination made to carry out that specific purpose. If the allegations of the complaint be true, the defendants in error have violated the prohibition of the act, and are answerable to the plaintiff in error in damages.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with these views.

THE KING GRUFFYDD.

(Circuit Court of Appeals, Second Circuit. April 6, 1904.)

No. 160.

1. SHIPPING — INJURIES TO STEVEDORE — APPLIANCES — SELECTION — FELLOW SERVANTS.

   Where a stevedore was injured during the raising of a skid weighing something more than a ton from a lighter, by the breaking of a wire cable known as a "topping lift," and it appeared that such lifts, when in apparent good condition, as was the one in question when selected, were capable of lifting 20 tons, the servant who selected such lift was not guilty of negligence in selecting it, instead of selecting a chain span, which was used for heavier loads.

2. SAME—APPLIANCES—INSPECTION.

   A stevedore was injured by the breaking of a topping lift furnished by the vessel for use in raising a skid from a lighter. Such appliance consisted of a wire cable bent round a concave ring and spliced; the splicing being served with spun yarn, wrapped with bagging and saturated with oil. The appliance in question, instead of being carefully stowed between voyages, had been permitted to remain on deck, exposed to the weather, during several voyages to West India ports, which tended greatly to shorten the period within which it could be safely used. *Held*, that the master of the ship was guilty of negligence in permitting such lift to be used after a mere external inspection, without a periodic examination of the splice, and a renewal of the oiled service intended to protect it.

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

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, in favor of libelant, for personal injuries sustained by him in an accident on the steamship King Gruffydd, on which he was working as a stevedore.

J. Parker Kirlin, for appellant.

Alfred C. Cowan, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. At the time of the accident the port boom at No. 1 hatch had been rigged, and the stevedore's men were about to raise a heavy skid from a lighter, so as to bring one end of it to the rail of the ship, to facilitate discharge of cargo into the lighter. The boom was held up by a wire cable known as a "topping lift," which extended from the end of the boom to a block on the mast, and thence to

the deck. The fall from the end of the boom was hooked into the skid, and while it was being hoisted by the winch the topping lift broke close to the eye, which was fastened to the boom, and the latter fell upon the plaintiff. There is much dispute in the evidence as to how far up the skid had been lifted, and whether it had been kept free of the vessel; but the District Judge, who heard and saw all the libelant's witnesses, and all but two of the claimant's, finds it was raised till it caught on the side of the vessel, and we see no reason to dissent therefrom. There is no other finding of fact in the opinion, which is only five lines in length, and does not indicate the theory upon which defendant was held liable. We have reached a like result upon independent conclusions as to the truth of the testimony, which is very conflicting. We are satisfied that the boom was rigged up for service by the stevedores, not by the ship; that an ample supply of gear and tackle for such rigging was furnished by the ship, but that its officers did not indicate which should be used, the selection being left to the stevedore's men. We are not satisfied that the libelant at any time before the accident called the attention of the mate or boatswain to the topping lift, saying "it was rusty and didn't look very strong." The libelant testified on direct, cross, and redirect without any suggestion of his having made any such complaint. Subsequently one of his fellow workmen testified that he heard him say so; volunteering the statement, which was not responsive to any question. Thereupon the libelant was recalled, and told the same story. The importance of such evidence must have been so obvious, even to an ignorant man, that it is difficult to understand how the case could have been prepared for trial without any suggestion of it being made to libelant's counsel. Apparently none such was made, since he made no effort to elicit it from the plaintiff. Moreover, the libelant and his witness both testify that the statement to the mate or boatswain was made before anything had been done by them in the way of rigging, and while the end of the boom was hoisted up—it came to within 10 or 15 feet of the mast—and that they were looking up at it. It must have been considerably more than 15 feet above their heads, and, since the wire cable was only about 1 inch in diameter, the statement that plaintiff at that time noticed rust spots on it, and signs of weakness in it, is so extremely improbable, that, in view of the positive denials by both mate and boatswain, we must discredit it.

The claimant contends that the negligence which caused the accident was that of libelant's fellow servant, to wit, the particular stevedore who made selection of a wire-cable topping lift to support the boom, instead of a chain (technically called a "chain span"), which was available, and equally at his service, and would undoubtedly have withstood all strains. Much evidence has been introduced showing that when the ship's crew were working the derricks, in foreign ports, they used wire topping lifts only for light loads, not over a ton in weight, and the chain spans for heavier ones. But the question is not what the ship's crew did, but what a reasonably prudent man would have done when making the selection. The stevedores were about to discharge pig lead, 100 pounds to the pig; 15 to 20 pigs to a sling or single load. The skid weighed somewhat more than a ton—possibly a ton and a half. It might be anticipated that the skid would catch on some projection.

Indeed, such a contingency was taken into consideration, for the stevedores had men hauling on the skid to prevent it from contacting with the ship's side. In the event of its catching on some projection, the load would be increased, possibly up to the limit of the lifting capacity of the winch. The captain testified that such capacity was 3 tons. We are satisfied that, except in the place where it broke, which had been "served," as will be hereafter explained, and was therefore covered from view, there was nothing about the topping lift to indicate that its tensile strength was not normal. The selection made by the stevedores, therefore, was between a chain and a wire rope, both apparently in good order; and the only question is, would a reasonably prudent man have rejected the wire when about to rig the boom for regular sling loads of 1 ton, with the possibility of exposure to strains up to 3 tons? The testimony introduced by libelant is to the effect that a normal wire cable of that size would have held more strain than the engine could have pulled on it, while a witness called by claimant testified that a cable of that size in good condition will lift easily 20 tons. In view of this evidence, it cannot be held that there was any negligence in the selection of the topping lift instead of the chain.

The claimant contends that the defect was latent, and that there was no negligence in examination, nor in failure to anticipate and provide for such defect. The topping lift is a section of wire cable, at each extremity of which an eye has been inserted by bending the cable around a metal ring concave on its outer periphery, and splicing the end into the cable just above the ring. This splice necessarily breaks up the structure of the cable, and leaves a place more exposed than the rest of it is to the entrance and retention of water, and to the corrosive action of rust. In order to guard against this, the splice is "served"; that is, bagging saturated with oil is wrapped around the splice, and then spun yard is put over that—"served" over with a mallet. The service covered the place where the break in this wire rope occurred, and the defect which caused the break apparently could not have been discovered without removing the service. The captain testified that gear of this kind ought to be examined every time they are taken down and put up, but, under the authorities there was no obligation to take the structure apart on each of these examinations. The Olympia, 61 Fed. 120, 9 C. C. A. 393; Killman v. Robert Palmer & Son Shipbuilding & Marine Ry. Co., 102 Fed. 224, 42 C. C. A. 281. In the absence of anything which challenged attention, and under normal conditions of use, the claimant was entitled to rely upon a certain period of life in the structures it used. The captain testified that the life of a wire topping lift "depends on the use it is put to—sometimes it will last 3 and 4 and 5 years"—and that this particular one had been in use not more than 18 months. If it had been used in the ordinary way, there would be much force in the contention that the testimony failed to show any negligence on the part of the ship or those in charge of her. Such topping lifts are commonly and ordinarily used when in port for loading and discharging cargo—not always in every port, because sometimes when heavier loads are being moved the chain spans are used. While they are thus in use in port they are exposed to the weather, but that time occupies a comparatively small part of the ship's period of activity.

When cargo handling is completed and a voyage begins, the topping lifts are taken down and stowed either in the forepeak or in the alleyway under cover in a place that is warm and dry, owing to its proximity to the boilers; and, of the "three years' life" of such a cable, by far the greater part is thus passed in a place where the effects of moisture are dissipated, or at least greatly retarded. But this particular topping lift had had a very different experience. The ship had made 14 round voyages under her last charter between New York, Philadelphia, Baltimore, and Norfolk and some 16 West India ports; the delivery and discharge of cargo being unusually frequent. The boatswain testified that on the last voyage up from Tampico the topping lift, instead of being stowed away, was hung in the rigging up against the mast; one end being shackled to the sheer pole in the rigging, and the other being shackled to the deck. This was done, as he said, in order that it might be available to lift out any cattle that might die on the voyage. The captain, moreover, testified that, during the short trips between the different West Indian ports, it was left thus on the mast—apparently to avoid the necessity of constantly putting it up and stowing it away—and that during such times it would get all the dampness that there was in the salt air and in any rain or storm that happened to be going on at the time. It is also apparent that hung in this way, with one end fast to the sheer pole far up the mast, and the other end shackled to the deck, the rain and moisture which might be deposited on its whole length would naturally trickle down, so that the lower end would be exposed to a more continued wetting than other parts of the cable. And the water thus coming from above would have a tendency to make its way under the service to the point of weakness where the splice had disintegrated the structure of the cable. The captain further admitted that this topping lift was thus left on the mast "perhaps 100 days in the year." This is a use very different from the ordinary, and those in charge of the ship were bound to know that they were exposing the topping lift to conditions which would in all probability greatly shorten its life. Reasonable prudence, under these circumstances, would seem to require, in addition to the external inspection whenever it was put up or taken down, some periodic examination of the splice, and renewal of the oiled service which was intended to protect it. In the absence of proof of any such examination, we concur in the conclusion of the District Judge that there was negligence on the part of the ship.

The decree is affirmed, with interest and costs.

BUCKINGHAM et al. v. FIRST NAT. BANK OF CHICAGO et al.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1904.)

No. 1,288.

1. BANKRUPTCY—PARTNERSHIP—EVIDENCE TO ESTABLISH.

Two men for a number of years conducted a business under a partnership agreement by which each agreed to bring into the business as rapidly as practicable all money he should be able to control, and not to withdraw, without the consent of the other, more than necessary to support

his family. It was also provided that each was to have a certain interest in the business, and, to equalize the capital, interest should be allowed annually. All the capital was contributed by one, and, the business having been conducted during the later years at a loss, the other, by agreement, drew out a fixed sum per month for living expenses. *Held*, that such arrangement constituted a partnership, and that, on the bankruptcy of the concern, the capital employed in the business and the debts incurred therein were firm property and debts, and not those of the partner who furnished the capital.

2. SAME—INDIVIDUAL DEBTS—FIRM AND INDIVIDUAL ESTATES.
Holders of notes of a bankrupt partnership, also indorsed by the individual partners, may, at their election, prove the same as individual debts of one of the partners, and, under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], are entitled to payment in full from his estate before any part of the same is applied on firm debts, at least where there are substantial firm assets; and it is immaterial that all the capital of the partnership was also contributed by such partner.

3. SAME—INDEBTEDNESS OF PARTNER TO FIRM.
A finding by a referee, affirmed by the District Court, that a partner in a bankrupt firm was not indebted to the partnership on account of money drawn out, which was less than he was entitled to draw under the partnership agreement, *held* sustained by the evidence.

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

In Bankruptcy.

Carroll, McKellar, Bullington & Biggs, for appellants.

Turley & Turley, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On October 16, 1901, Z. N. Estes and S. S. Spicer, alleging they were doing business under the firm name of Z. N. Estes & Co., filed their petition in bankruptcy, upon which an adjudication has been had. The firm had been engaged in the grocery, cotton, and commission business. In the schedules annexed to the petition were contained statements of the firm property and of the individual property of Estes, Spicer having no property. The firm assets consisted of tangible personal property (stock in trade, etc.) estimated at $17,700, and accounts receivable aggregating a very large amount. The individual property of Estes was placed at over $100,000; the largest items being his residence in Memphis, valued at $25,000, and a plantation in Tunica county, Miss., known as the "Indian Creek Farm," valued at $65,000. Among the creditors of the firm were certain banking associations, the appellees, who had bought and held $35,000 of the firm notes. These notes were drawn by Z. N. Estes & Co., payable to their order at the First National Bank of Chicago, and indorsed by them in blank. They also bore the individual indorsements of Z. N. Estes and S. S. Spicer. These notes were presented as claims against the individual property of Estes. Their allowance was resisted by the appellants (creditors of the firm only) on the ground there was no real partnership; that Spicer was only an ostensible partner, having no property or real interest in the firm; that Estes owned all the firm property, and

was in fact the firm, doing business individually under the firm name; and that therefore the firm creditors ought to share equally with the individual creditors in the individual property. The referee sustained this contention, holding that the assets of every description were the individual property of Estes, in which all creditors—firm and individual—must share pari passu. The action being certified up, the court below reversed the referee; holding that the "above-named banks, who, it appears by said certificates, are the individual creditors of said Z. N. Estes, as well as joint creditors of the firm of Z. N. Estes & Co., * * * are entitled to be paid out of the individual property * * * before any of the firm creditors can participate therein."

It is urged the court erred (1) in holding there was a partnership estate, as distinguished from an individual estate; and (2) in sustaining the claims of the appellees against the individual estate in preference to those of the so-called creditors.

1. Z. N. Estes was in business in Memphis for more than 35 years. He had many partners, but there was no break in the business. As one partner retired, another took his place. The last articles of partnership were entered into April 26, 1886, between Z. N. Estes, S. S. Spicer, and W. B. Doan. They stated at the outset:

"The said parties hereby agree to form and do form a partnership for the purpose of carrying on a wholesale grocery, cotton and commission business on the following terms."

The style of the partnership was to be Z. N. Estes & Co. The business was to begin June 1, 1886, "and continue as long as is agreeable to all parties, unless dissolved by death or mutual agreement of all parties." The parties agreed—

"To bring into the business as rapidly as practicable all moneys they may be able to control from former business connections, and to withdraw nothing from the business except such amounts as may be necessary for the support of their families unless by mutual agreement.

"To equalize the amount of all parties, interest shall be charged and allowed at the end of each business year at the rate of 8 per cent. per annum. * * * The profits and losses of the said partnership are to be divided as follows, to wit: Z. N. Estes' interest to be four-sixths, W. B. Doan, one-sixth and S. S. Spicer, one-sixth."

Doan remained in the firm four years, and withdrew by mutual agreement. Estes and Spicer continued to do business under the articles until the application in bankruptcy. The firm was held out as a partnership composed of Estes and Spicer, the stationery used in the business so representing it. Firm books were kept, containing a statement of the property owned and a record of the business done by the firm. Estes furnished the entire capital, amounting to about $165,000. Spicer never contributed any. After a few years the firm ceased to make any profits, and thereafter Spicer, by agreement with Estes, was allowed to withdraw $125 per month for the support of his family.

We are satisfied from these and other facts shown in the record that there was a partnership existing between Estes and Spicer. To constitute a partnership, it was not necessary that Spicer should contribute to the capital employed. Joint capital is not necessary. One

partner may furnish capital, and another experience in the business, and they may agree to share the profits and losses in a certain proportion. Such was this case. But there was also, in addition, an agreement by all the partners to contribute to the capital of the firm in a certain contingency. Each agreed to bring into the business as rapidly as practicable all money he might be able to control, and withdraw nothing except an amount necessary for the support of his family. To equalize the amounts thus contributed, interest was to be charged and allowed at the end of each business year at the rate of 8 per cent. per annum. If the business had proved profitable, Spicer would have had an interest in the capital as well as the profits of the firm. Although it did not prove profitable for some years before the bankruptcy proceedings were begun, there was always the chance of a turn in the tide, and therefore Spicer had an interest in the capital contributed by Estes, which could not be withdrawn without Spicer's consent. We are satisfied that the relations created by the articles of partnership were never terminated by mutual agreement between Estes and Spicer. After the business ceased to be profitable, Spicer was allowed to draw $125 monthly, but this did not operate to end the partnership and place Spicer on a salary. The allowance was to cover his expenses. It was a temporary expedient. As a salary, it would have been singularly small. One of the employés was getting $200 a month.

2. The next question is whether the claims of the appellees as individual creditors of Estes should be paid out of his individual estate in preference to the claims of the firm creditors. Doubtless the notes executed by the firm and indorsed by Estes were firm debts, as well as individual debts of Estes. But the holders had a right, if they preferred, to present them as claims against Estes individually. And they did so. The notes were originally purchased by the firm of Gartenlaub & Co., of Chicago, which sold them to the banks. Gartenlaub, who acted for the firm, was advised of the fact that Estes individually owned a large amount of real estate, and for that reason required his individual indorsement.

The present bankruptcy act provides:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts." Section 5f, Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424].

This is a statutory statement of a general rule early adopted in England (Ex parte Crowder, 2 Vernon, 706), upon which subsequently an exception was ingrafted to the effect that firm creditors may share in the individual assets in competition with individual creditors, if there be no firm assets and no solvent partner. Lowell on Bank. § 125. Loveland, Bank. (2d Ed.) § 99. Recently, in Conrader v. Cohen, Trustee, 9 Am. Bankr. Rep. 619, 121 Fed. 801, 58 C. C. A. 249, the Circuit Court of Appeals of the Third Circuit sustained Judge Buffington (In re Conrader, 9 Am. Bankr. Rep. 85, 118 Fed. 676) in

applying this exception under the present bankruptcy act; but in the case of In re Wilcox (D. C.) 94 Fed. 84, Judge Lowell, in an opinion showing unusual research and learning, declined, under the present bankruptcy law, to recognize or apply the exception; holding that firm creditors are not entitled to receive dividends out of a partner's separate estate until his individual creditors have been paid in full, and this notwithstanding there are no partnership assets.

But we are not obliged to choose between these two views. In the present case there are partnership assets of a substantial character. Already a dividend of 15 per cent. has been paid out of them to the firm creditors. The case, therefore, is not one involving questions of law, so much as questions of fact, namely: Was there a partnership? Are there partnership assets? Is there an individual estate? And are the notes of the appellees claims against the individual estate? All these questions, as we read the record, are answered in the affirmative. The two largest pieces of property held by Estes separately were his residence and what is known as the "Indian Creek Farm." The proof is clear that he purchased each of these himself, with his own money, and for himself. They stood in his name, and were always regarded as his individual property. It is true that, in the statement he made out for Gartenlaub, he placed them among the assets of the firm as real estate. But he did so, as he explained, because he was the only solvent member of the firm, and he knew they were liable for the firm debts. In this sense only were they firm assets. Gartenlaub understood this, was advised of the fact that they were owned by Estes individually, and accordingly required his individual indorsement on the notes.

Apparently, reduced to a simple form, the contention of the appellants is that, because all the capital of the firm belonged to Estes, therefore all the capital of Estes belonged to the firm. This is a strange contention. A man may put all the capital a firm has into it, but it does not follow that he puts all the capital he has into it. Estes had other ventures than this mercantile business. He put into it what he saw fit, and, with the consent of his partners, he drew out considerable amounts. The record shows clearly what he put in, what he kept out, and what he drew out. His residence and the Indian Creek farm were never put in. They and all his individual estate should be applied first to the payment of his individual debts, as the court below held.

3. The final claim is made that Estes was indebted to the firm in a very large amount for money drawn out, and the court was asked to compel the collection of this from his individual estate for distribution among the firm creditors. In this way it was sought to convert the separate estate into firm assets, and distribute them pro rata among all the firm creditors, including the appellees. This claim was disposed of by the finding of the referee that it does not appear from the record that Estes "ever was or is indebted to the firm in any amount." In this connection the referee said:

"I find from the evidence before me that Z. N. Estes at the end of the first year of the partnership had put into the firm $128,821.30, and that from this period the amount to his credit varied, running up to $166,770.76 for a short

time in 1891, and then declining to $101,188.27 in 1898, and then gradually increasing until he had to his credit as capital in the firm on the date of the bankruptcy thereof, after charging him with all amounts of every kind withdrawn therefrom, the sum of $106,424.13; that the capital originally contributed by him was reduced only $22,397.17, and that the amounts necessary for the support of his family, which, as shown, he was entitled to withdraw from the firm, far exceeded this amount; that up to and including the year 1891 the firm was prosperous, and a large amount of profits was annually credited up to each one of the partners; that there was also interest, under the terms of the partnership articles, credited up to Z. N. Estes up to and including the year 1895, and that the amount of interest and profits thus credited up to him, and which he had a perfect right to withdraw from the firm, amounted up to September 30, 1895, the sum of $146,344.29; that from September 30, 1895, to September 30, 1901, being the period embracing the last six years of the business prior to the bankruptcy of said firm, no interest had been credited to Z. N. Estes; that during all this period he had more than $100,000 of capital in the firm, on which he was entitled to 8 per cent. interest under the partnership articles; that it thus appears he is entitled to a credit on this account. It will be seen that this capital has not been in any respect diminished. In other words, if this credit is placed to his account, the result will show him entitled to about $160,000 at the time of the bankruptcy of the firm. It appears affirmatively from the testimony that all sums drawn by each of the partners were drawn out by mutual consent; that each partner knew what the other partner was drawing out, and for the purpose for which it was being drawn; and that there never was any intention or expectation of calling for the return of any of these sums to the firm. It is clearly established by the proof that every dollar drawn out by Z. N. Estes was drawn out in good faith, for honest purposes, and with the full acquiescence and understanding of Mr. Spicer, and that not a dollar was ever drawn out for the purpose of injuring or defeating any partnership creditor. And it further appears affirmatively by the proof that from 1898 up to the bankruptcy of the firm, in October, 1901, Z. N. Estes, instead of reducing his capital, was gradually increasing the same, and this objection should be sustained. This claim is therefore disallowed."

This finding, affirmed by the court below, has our approval. The judgment of the lower court is affirmed.

RICHMOND LOCOMOTIVE WORKS v. RAMSEY.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1904.)

No. 508.

1. NEGLIGENCE—CONTRACTOR'S SERVANT—INJURIES—QUESTION FOR JURY.

Plaintiff, a negro laborer, was employed by an independent contractor to tear down a wall in defendant's locomotive works during the making of the alterations therein, for which purpose plaintiff climbed on the third round of a ladder, with the width of the wall of the erecting shop of the defendant's works between him and the rail on which a movable crane was operated. Plaintiff reached across the wall and took hold of the rail, and in this position began throwing bricks from the wall, and while so engaged the crane was moved along the rail, crushing plaintiff's hand. At the time defendant's crane operator started the same, when it was about 50 feet distant from the plaintiff's hand, he looked along the track, and saw nothing to cause him to suspect danger to plaintiff, and there was nothing in plaintiff's position to cause the operator to believe that plaintiff's hand, which was dark, was on the rail. *Held*, that such facts did not justify the submission of the case to the jury on the theory that defendant, after plaintiff had put himself in a position of danger, could, by exercise of reasonable care, have discovered the danger, and avoided the injury.

On Writ of Error to the Circuit Court of the United States for the Eastern District of Virginia.

C. V. Meredith and M. M. McGuire, for plaintiff in error.

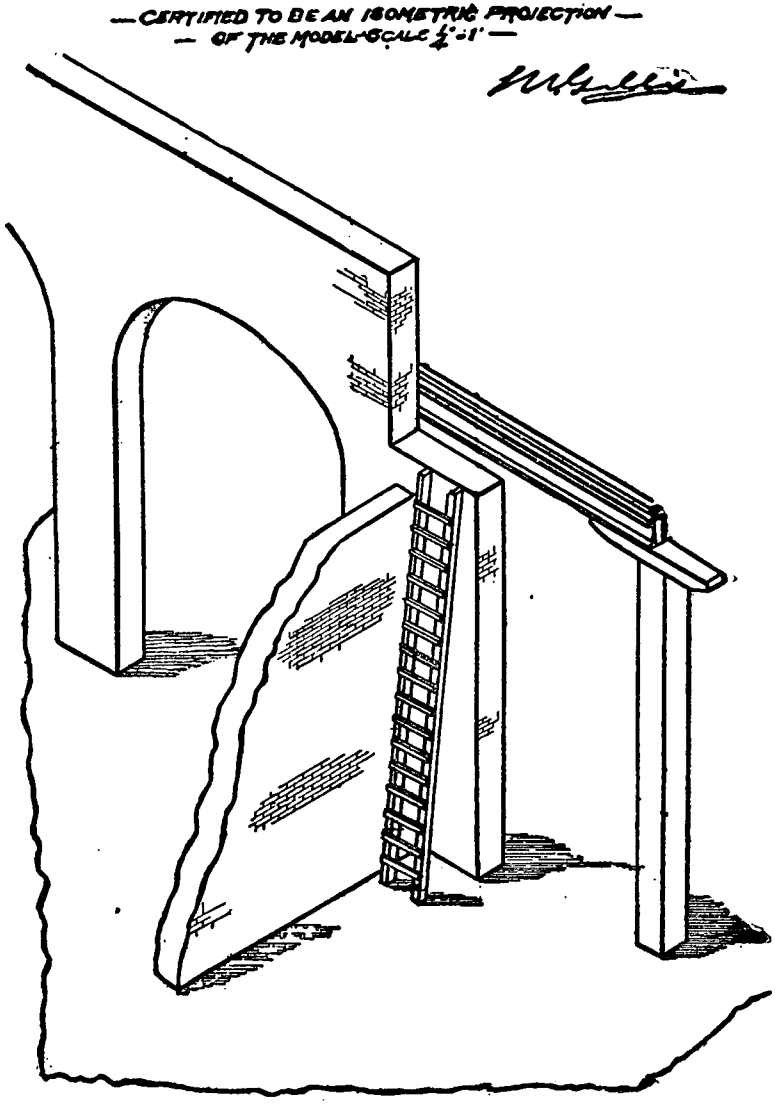
John A. Lamb (H. A. Atkinson and R. T. Lacy, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and BRAWLEY and McDOWELL, District Judges.

McDOWELL, District Judge. This was an action at law, brought by the defendant in error, who will be hereafter designated as the "plaintiff," for damages for personal injury, which resulted in a verdict and judgment in behalf of the plaintiff for $2,917.50. The Richmond Locomotive Works, to be hereafter designated as the "defendant," had some months previous to the accident to the plaintiff let to contract the work of tearing down certain parts of its building and erecting others in lieu thereof. The contractor sublet a part of the work to one Wilson, by whom the plaintiff was employed at the time of the accident. Wilson's men had been at work for some weeks, and the plaintiff, who had also been on the work previously, had been engaged for about a week prior to the accident. The work at which the plaintiff was engaged was in tearing down a brick wall of the old boiler house, which ran at right angles to the erecting shop. The drawing opposite shows the partially demolished brick wall which the plaintiff was tearing down, the ladder on which he was standing at the time, which is leaning against the western wall of the erecting shop, and one of the rails on which ran a crane, which was constantly used in the erecting shop. The crane tracks were about 600 feet in length, and some 39 feet apart. The man who operated the crane was in a cage suspended under the bridge or axle of the crane, on the far side of the erecting shop, and nearly under the more distant rail, with his head about 18 inches beneath the level of the rails. The crane was used for hoisting and carrying heavy machinery and materials from place to place in the erecting room.

On the morning of the accident, Cole, foreman of Wilson, the subcontractor, directed the plaintiff, a negro laborer 23 years old, to go up on the ladder and throw off the bricks composing the boiler house wall to be removed. The plaintiff ascended the ladder until he stood on the third round from the top. He then turned so that his face was towards his work, put his left hand over the crane rail, and, stooping forward and towards his right, commenced to pull out and throw down the bricks with his right hand. While he was in this position, the crane, which was moved slowly from the south (right side of drawing), ran over the plaintiff's hand, and injured it and his forearm to such an extent that the arm had to be amputated. The crane operator did not know of the plaintiff's position until after the injury. The plaintiff knew that the crane was frequently and almost constantly moved up and down the erecting room.

There is a conflict of testimony as to whether the ladder was put in the position shown in the drawing by the plaintiff under Cole's direction, or whether it had for some days been standing as shown. There



was some testimony for the plaintiff to the effect that Cole, when directing the plaintiff to tear down the wall, told him that the crane would not be operated. This is denied by Cole. There is no evidence that Cole, if he made this statement, had been authorized to make it by any person representing the defendant, or that this statement, if made, was heard by any one representing the defendant. The contract made by the defendant with the contractor provided that the contractor's work should be so carried on as not to interrupt the work of the defendant. And the defendant's work in the erecting shop was being carried on at

the time of the injury. So far as appears, no employé of the defendant knew of the plaintiff's position of danger. The crane operator had been engaged by the defendant for about ten years, and for three years prior to the accident he had been operating the crane. It was affirmatively shown that he was competent and careful, and that, if there was any cause of complaint against him, it was that he was wont to move the crane too slowly because of his unusual caution. His testimony, which is wholly uncontradicted, is that he looked down the tracks before starting the crane—which had been for some moments standing some 30 feet south of the place of the accident—and saw nothing to indicate that any one was in danger.

Had the learned trial court taken the view of this case that we feel constrained to take, the jury would have been directed to find for the defendant, and we think the court erred in not giving such instruction. In other respects we find the charge given the jury erroneous, in that it was based on the theory that the defendant, after the plaintiff had put himself in a position of danger, could, by the exercise of reasonable care, have discovered his danger and avoided the injury. But to us, even without considering the fact that the plaintiff's negligence continued until the moment of the injury (Gilbert v. Erie R. Co., 97 Fed. 747, 38 C. C. A. 408; Kirtley v. Chicago R. Co. [C. C.] 65 Fed. 386; St. Louis R. Co. v. Shumacher, 152 U. S. 77, 81, 14 Sup. Ct. 479, 38 L. Ed. 361; Rider v. Syracuse R. Co. [N. Y.] 63 N. E. 836, 58 L. R. A. 125; Fonda v. St. Paul R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341; Montgomery v. Lansing R. Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287), it seems that there was no evidence making this rule applicable. The plaintiff had unnecessarily taken an unusual and extraordinary position. He was standing on the third round of the ladder, with the width of the wall of the erecting shop between him and the rail, leaning towards the partially demolished wall of the boiler house. There was nothing in his position, as viewed from the situation of the crane operator, which would have suggested to the latter that the plaintiff had his hand on the rail. The erecting shop was under roof, and it appears that it was rather dark. The plaintiff is a negro, and his hand therefore would not have attracted the attention of the crane operator. According to his uncontradicted testimony, the crane operator looked along the tracks before starting the crane, and saw nothing to cause him to suspect the danger of the plaintiff. The crane operator was, when he started the crane, about 50 feet distant from the plaintiff's hand. At the very moment of the accident he was nearly 40 feet distant, with his head some 18 inches below the level of the rail. In looking down the tracks to see if the way was clear, if he had seen the plaintiff's head, or his head and shoulders, he would not have been led to suspect that the plaintiff had his hand in the extraordinary position in which he did have it. The back of the plaintiff's head was toward the crane operator. Under these circumstances negligence could not be imputed to the defendant. There was, therefore, no room for the application of the rule of law on which was based the charge to the jury. It follows that it is unnecessary to consider the other assignments of error.

We are of opinion to reverse the judgment below, and remand this cause for proceedings consistent with this opinion. Reversed.

MOULTON v. COBURN et al.

In re GEORGE M. COBURN & CO.

(Circuit Court of Appeals, First Circuit. July 6, 1904.)

No. 521.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—WITHDRAWAL OF PETITION FOR LEAVE TO JOIN AS PETITIONER.
   A court of bankruptcy is authorized, in its discretion, to permit the withdrawal of a petition filed by a creditor asking leave to join in a petition in bankruptcy which had been filed against the debtor, when no action had been taken thereon, and the right of such creditor to become a petitioner was not free from doubt.
2. SAME—WHO MAY BECOME PETITIONERS—CREDITORS ASSENTING TO ASSIGNMENT.
   A creditor who has assented in writing to the terms of a common-law assignment for the benefit of creditors, unless under special circumstances, is not entitled to join in an involuntary petition alleging as the sole act of bankruptcy the making of such assignment; being estopped by his election between his rights under the assignment and those under the bankruptcy law.
3. SAME—NUMBER OF CREDITORS.
   To entitle less than three creditors to maintain a petition in involuntary bankruptcy, it must appear that there were less than twelve creditors at the date of the filing of the petition.

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

For opinion below, see 126 Fed. 218.

Lee M. Friedman (Godfrey Morse, on the brief), for appellant.

Charles K. Cobb (William D. Whitmore, Jr., on the brief), for appellees.

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

BROWN, District Judge. The original petition in involuntary bankruptcy was filed by a single creditor. It alleged as the sole act of bankruptcy an assignment for the benefit of creditors, and that there were less than twelve creditors. In fact, there were at the date of filing the petition about thirty creditors. An attempt was made to increase the number of petitioners in accordance with section 59d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]). The District Court held that there were but two proper petitioners, and more than twelve creditors, and dismissed the petition. The petitioner, Moulton, now appellant, contends that the dismissal of the petition was erroneous; claiming, first, that there were three or more proper petitioners; second, that at the date of hearing there were less than twelve creditors who could be counted, and therefore that a single petitioner was sufficient. We find no error in the ruling of the District Court that there but two proper petitioners.

After answer setting up the existence of some thirty creditors, the Tripp Giant Leveler Company, a corporation, on September 2, 1903, filed

an intervening petition praying "that it may be allowed to adopt the allegations set forth in the petition in the above-entitled case, and join in said proceedings, and become a petitioning creditor therein." Subsequently, on September 28, 1903, it filed a second petition, asking "that it may be allowed to withdraw its petition to join in the petition against the above-named bankrupts, and become one of the petitioning creditors." This petition was, by order of court, referred to a referee to ascertain facts and report thereon, under rule twelve of general orders in bankruptcy (89 Fed. vii, 32 C. C. A. xvi). On November 13, 1903, the referee reported certain facts, with his conclusion that the first petition of the Tripp Giant Leveler Company was filed "under mistake and misapprehension, as the company had already assented to the assignment in the manner above stated." The District Judge, upon consideration of the facts, held that the joinder in the petition was under a misunderstanding or mistake of fact; that the withdrawal was not necessarily governed by In re Cronin (D. C.) 98 Fed. 584; and, as an exercise of discretion, granted the petition to withdraw.

The appellant contends that the withdrawal of a petitioner should in no way invalidate the bankruptcy proceedings to which he has become a party, and cites In re Bedingfield (D. C.) 96 Fed. 190; In re Cronin (D. C.) 98 Fed. 584.

The present case, however, differs essentially from a case in which one of three original petitioners in involuntary bankruptcy seeks to withdraw, and thereby to impair the rights of his co-petitioners. There had been no express joinder in the original petition, but merely a petition that the Tripp Company be allowed to join, and a withdrawal of this petition before any final action of the court, making it a party to the original petition.

The right of the Tripp Company to become a petitioning creditor was not free from doubt, and was at least a contestable right. Before the filing of its intervening petition, the treasurer of the corporation had authorized Adams to assent to the assignment upon a condition which was complied with, and Adams on August 14, 1903, had signed a document on behalf of the corporation expressing its assent to the assignment. Forgetting or without bearing in mind his previous authorization of Adams, the treasurer authorized the filing of the intervening petition for leave to join in the original petition. Subsequently the corporation decided to adhere to the first action of its treasurer.

The appellant questions the legality and sufficiency of the authorization of Adams, and of the execution of the document expressing the assent of the corporation to the assignment. We do not consider it necessary to consider these questions, for, even were there a defect in the execution of the document, the circumstances were clearly of such a character as to justify the corporation in adhering to and ratifying the action of Adams, and to give the District Court discretion to permit the withdrawal of such an intervening petition as was filed by the corporation.

Fogg, assignee of the Manufacturers Die Company, was clearly not a qualified petitioner, since his assignor was not the real creditor. The Graton & Knight Manufacturing Company, assignor to Atherton, before the bankruptcy proceedings, had assented to the assignment.

Atherton therefore acquired only the rights of a creditor who had already assented to an assignment.

A creditor who has assented in writing to the terms of a common-law assignment for the benefit of creditors is not entitled ordinarily to join in an involuntary petition alleging, as the sole act of bankruptcy, the making of the general assignment to which he has expressly assented. This is not because he has ceased to be a creditor, but because, having voluntarily elected that the bankrupt's estate shall be administered under the assignment, and having accepted the provisions of the deed of trust, he is thereby estopped from action inconsistent with the agreement. Lowell on Bankruptcy, § 51. While special circumstances might entitle a creditor to repudiate his agreement, or relieve him from the consequences of an election, no such circumstances are presented in this case. The decision of the Circuit Court of Appeals for the Seventh Circuit in Re Curtis, 94 Fed. 630, 36 C. C. A. 430, was upon a petition setting up facts so different from those before us that the case is not in point.

The acceptance of the terms of the assignment was not an unlawful agreement, but an assent to an arrangement which, though voidable by an adjudication in bankruptcy, until such time was valid. In re Chase, 124 Fed. 753, 59 C. C. A. 629. The creditor's assent to the assignment therefore could not be repudiated as an unlawful agreement.

It must be assumed that the assenting creditor had knowledge of his rights under the bankruptcy act, and voluntarily chose to assent to the terms of the assignment in preference to exercising his rights under the act. Here was a complete election between rights under the assignment and rights under the bankruptcy act. That one small creditor alone cannot file a petition in bankruptcy, that he may have doubts of his ability to induce other creditors to join him, and that his remedy by a petition in bankruptcy is dependent upon the co-operation of other creditors, does not justify him in assenting to an assignment, and afterwards repudiating it if he can find a sufficient number of creditors to join him in a petition. The election results from his choice of rights which are inconsistent with the enforcement of rights under the bankruptcy act. That he may not have an individual right to prefer a petition in bankruptcy does not render impossible an election between such rights as the act confers and rights under an assignment. He has chosen between two rights, one of which is derived from an instrument in which a clear intention appears that he should not enjoy both. Simonson v. Sinheimer, 95 Fed. 948, 37 C. C. A. 337; Brandenburg on Bankruptcy (3d Ed.) § 923.

It followed that there were but two proper petitioners, and that it was incumbent upon them to prove that the number of creditors was less than twelve.

At the date of filing the petition, there were about thirty creditors. Afterwards thirteen assented to the assignment. The appellant claims also that thirteen other creditors, after filing the petition and before answer, had sold and assigned their claims in such manner that they were controlled by the assignee or the respondents.

The appellant contends that the count of all creditors to determine

the sufficiency of the number of petitioners is to be made at the date of hearing, and that at this date the number of creditors had been reduced to less than twelve who could be counted, and argues that section 59d of the bankruptcy act expressly fixes a time other than the filing of the petition for the fixing of the status of the bankruptcy proceedings.

It is true that, according to express provisions of the statute, the sufficiency of the number of petitioning creditors is to be determined as of the date of hearing, and not as of the date of filing the original petition. Upon the joinder of three or more creditors, the allegation of the original petition that the creditors are less than twelve in number becomes immaterial, since the statute prescribes a special procedure for securing the number of creditors required by the first clause of section 59b. It is also probably true that the adjudication in such a case will relate to the date of the original petition, and that the continuity of the proceeding will be regarded as unbroken, although at the date of filing a sufficient number of creditors had not asserted their rights to an adjudication. Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866.

But while we find in the statute an express privilege to creditors to join in a petition, we find nothing to contravene the ordinary rule of law that the allegations of a declaration, bill, or petition are to be disposed of as of the time of filing or of beginning the suit. Thus we find in the statute nothing to indicate that creditors whose debts are created after the filing of a petition are entitled to join, or that a bankrupt may defeat a petition by increasing the number of his creditors between the filing of the petition and the time of answer. That the statute permits a creditor to become a party to a proceeding already begun affords no indication that the substantial rights of the parties are to be determined as of any other date than that fixed by the filing of the original petition. An answer which asserts that the number of creditors is twelve or more is not a denial of the act of bankruptcy, but only of the sole petitioner's right to proceed. The statute provides a special method of obviating this objection, and, as we have said, makes this allegation of the number of creditors immaterial; but otherwise the case stands as before, and the rights must be determined according to the allegations of the petition.

The statutory right of a single creditor to have his debtor adjudged a bankrupt exists only under special circumstances, namely, that his claim shall be sufficient in amount, and that all of the creditors shall be less than twelve. Assuming that since the filing of the petition the number of creditors is reduced to twelve, it is nevertheless true that at the date of filing the petition there existed no right under the statute, and that the right came into existence at a later date. Evidence that a creditor subsequently to the filing of the petition came within the provisions of the statute does not prove that at the time of filing of his petition he had any rights under the statute.

We are of the opinion that the District Court was right in holding that, upon a petition by less than three creditors, it must appear that there were less than twelve creditors at the date of filing the petition, and therefore that the subsequent acts of the creditors and of the volun-

tary assignee need not be considered. To take any other date for the count would result in uncertainty and confusion. The date at which a creditor's rights accrue under the bankruptcy act is a matter of material consequence. While the statute gives to creditors who intervene in a sole petition the right to proceed as parties to that petition, we find in the statute no evidence of an intention that rights not existing at the date of the petition can be made effective thereunder, or that a sole petition alleging what is not true—that there are but twelve creditors—can be validated at some indefinite subsequent time by a reduction of the number of creditors.

The decision of the District Court is affirmed, and the appellees recover their costs of appeal.

ZEIGLER v. HALLAHAN.

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 25.

1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ALTERATION OF CONTRACT.
Where defendant became surety for the performance by a tenant of the covenants of a lease for 10 years, which bound the tenant to keep and pay rent for the premises, and, at the expiration of the term, deliver them in good condition, a modification of the contract before the tenant took possession, without the knowledge or consent of defendant, by the insertion of a provision that, in the event of the total or partial destruction of the premises by fire or other casualty, rendering the same untenantable, the lease from such time should become void and should be surrendered to the lessor, constituted a material alteration, which operated to discharge defendant from liability.

2. SAME—EFFECT OF ALTERATION.
In determining whether a surety is discharged by an alteration of the principal contract without his consent, the question is not whether the change was or could be prejudicial to him, but whether it effected a material alteration of the agreement to which his undertaking of suretyship related; and, if it did, he is discharged, even though the change may have been beneficial to him.

3. SAME—CONTRACT OF SURETYSHIP—RECITAL OF CONSIDERATION.
The rule as to the discharge of a surety by an alteration of the principal contract without his consent is not affected by the fact that his undertaking recites that it was made by him for a valuable consideration.

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

For opinion below, see 126 Fed. 788.

Wm. Jay Turner and Samuel Dickson, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The decision of the court below was based upon a case stated as follows:

"The plaintiff, Mary Helen Zeigler, on April 2, 1901, made, executed, and delivered to one Moses H. Lichten an indenture of lease for the premises

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¶ 2. See Principal and Surety, vol. 40, Cent. Dig. § 178.

known and numbered as No. 50 North Eighth street, in the city of Philadelphia, of which indenture a copy is hereto attached, marked 'Exhibit A,' and made a part hereof, and the defendant, Peter T. Hallahan, by writing, became surety for the fulfillment of all the obligations of said Moses H. Lichten under and by virtue of said indenture of lease; said contract of suretyship being endorsed on Exhibit A. On or about April 29, 1901, an agreement supplemental to said indenture of lease, without consultation with or approval of the defendant, was executed by and between the plaintiff and the said Moses H. Lichten, as follows:

"'It is hereby mutually agreed between M. Helen Zeigler and Moses H. Lichten, the parties to the foregoing indenture of lease, that the following shall become part and parcel thereof with like effect, as if the same were embodied in the foregoing agreement.

"'It is hereby further covenanted and agreed in the event of the total or partial destruction of the within demised premises, rendering the same untenantable by reason of fire or other casualty, this lease shall from such time become absolutely null and void and the within lease shall be surrendered by the lessee to the lessor.

"'In witness whereof the parties hereunto set their hands and seals this 29th day of April, A. D. 1901.

"'Mary Helen Zeigler. [Seal.]
"'Moses H. Lichten. [Seal.]'

"Said Moses H. Lichten violated the covenants and conditions of said lease, by subletting the premises thereby let and demised, and by assigning said lease without the consent of the plaintiff, and by cutting a passageway through the south party wall of said premises into the adjoining premises, in consequence whereof, on January 4, 1902, the plaintiff, by virtue of the warrant of attorney to confess judgment in ejectment contained in said lease, entered a judgment in ejectment against said Moses H. Lichten in the court of common pleas, No. 3, for the county of Philadelphia, of December term, 1901, No. 2,180, and issued a writ of habere facias possessionem against Moses H. Lichten for the recovery of possession of said premises. Said Moses H. Lichten thereupon filed his affidavit, of which a copy is hereto attached, and obtained a rule in said court of common pleas to show cause why such judgment in ejectment should not be opened, and said Moses H. Lichten let into a defense, all proceedings to stay. To said affidavit of Moses H. Lichten the plaintiff filed her answer as required by the rules of said court of common pleas, and thereafter depositions were taken by the said Moses H. Lichten and the plaintiff. On March 31, 1902, said court of common pleas discharged said rule. On April 19, 1902, the said Moses H. Lichten caused to be issued a certiorari from the Supreme Court of Pennsylvania to said court of common pleas, but did not file any bond as required by the laws of the commonwealth of Pennsylvania for the purpose of making said certiorari act as a supersedeas. On April 30, 1902, the plaintiff issued an alias writ of habere facias possessionem under the aforesaid judgment in ejectment, and, by virtue of said writ, recovered possession of said premises, which until said date remained in the possession of said Lichten. On May 8, 1902, the record in said action of ejectment was duly certified to the Supreme Court of Pennsylvania, and on February 10, 1903, the said record was returned to said court of common pleas, with a remittitur certifying that the judgment of said court of common pleas was affirmed. The rent for said premises reserved in said indenture of lease was paid by said Moses H. Lichten up to January 1, 1902, On January 6, 1902, the agents of said Moses H. Lichten mailed to the plaintiff's attorney a check for the month's rent, in advance, of said premises, due January 1, 1902; but said check was returned to said agents of Lichten on January 9, 1902, accompanied by the following letter:

"'Philadelphia, Jan. 9th, 1902.

"'Dear Sirs: I beg to return herewith check to the order of Mary Helen Zeigler for $500, sent her on January 6th, in settlement of one month rent for premises No. 50 North Eighth street, due in advance January first.

"'I have advised Miss Zeigler not to accept this check in view of the fact that she has cancelled the lease with Mr. Lichten and has begun an action in

ejectment for the purpose of obtaining possession of the premises. You are fully advised regarding the reasons for this course of procedure. Will you be good enough to acknowledge receipt of check enclosed, and oblige,

" 'Yours very truly, Wm. Jay Turner.

" 'To Mess. A. J. & L. J. Bamberger.'

"Between January 1, 1902, and April 30, 1902, the plaintiff received no compensation for the use of said premises. The yearly rental value of said premises is agreed to be $6,185.

"Should the court be of opinion that the defendant, Peter T. Hallahan, is indebted to the plaintiff, M. Helen Zeigler, by virtue of the contract of suretyship above set forth, under the foregoing facts, then judgment shall be entered for said plaintiff in the sum of $2,047.51, with interest thereon from April 30, 1902, or for so much less than that amount as the court shall determine shall be entered, if it shall be of opinion that any allowance shall be made by reason of the tender of $500 set forth in the statement of facts. Should the court be of opinion that the defendant, Peter T. Hallahan, is not indebted to the plaintiff, M. Helen Zeigler, by virtue of the contract of suretyship above set forth, under the foregoing facts, then judgment shall be entered for the defendant. The right to sue forth a writ of error to the United States Circuit Court of Appeals for the Third Circuit for the purpose of having a review of the judgment entered in accordance with the opinion of the court is hereby expressly reserved unto both parties in this proceeding."

The lease need not be set out in full. We may accept the statement made in the brief of the plaintiff in error that:

"The conditions of this lease that are of importance in the present case are that Lichten should keep the premises, and, at the expiration of his term, deliver them up in good order; that he should not assign his lease, nor underlet the premises, without the written consent of the plaintiff in error; and that, if he did assign his lease or underlet the premises without such consent, or fail to keep the other conditions of the lease, the plaintiff in error might terminate the lease and recover possession of the premises."

The contract of suretyship was as follows:

"For the valuable consideration heretofore received, I, Peter T. Hallahan, of the City of Philadelphia, for myself, my heirs, executors and administrators do hereby covenant and agree to and with the above named lessor, her heirs and assigns, that if the foregoing agreement entered into by and between the lessor and the lessee therein named, shall not be well and faithfully performed on the part of the lessee for and during the term of three years, eight months and fifteen days from the first day of May, A. D. 1901, that then the said agreement shall be promptly performed by me and that I will pay all damages arising of any breach of said agreement. And, further, that if the said lessee, his heirs, executors or administrators or any of them, shall fail to pay the rent reserved in the aforesaid agreement punctually, at the days and times the same shall fall due, that then immediate recourse may be had and made to me by demand, suit or otherwise.

"And I do further agree that all the remedies, actions and right to any judgment or judgments by said lease, yielded and reserved to the lessor therein named, and all conditions and covenants in the said lease relative thereto, and the waiver of all rights by the said lessee, including the waiver of the benefit of the law exempting property from levy and sale under execution, shall be deemed and held applicable to and enforceable against me with the same effect as if here fully inserted and mentioned.

"And also I do further agree that my liability under the aforesaid agreement of Lease between the lessor and the lessee shall continue according to the terms thereof so long as the liability of the said lessee shall continue for and during the term above mentioned.

"Witness my hand and seal the Second day of April, A. D. 1901.

"H. F. Turner. P. T. Hallahan. [L. S.]"

The Circuit Court entered judgment for the defendant, and, to maintain the averment that the judgment should have been for the plain-

tiff, two propositions have been submitted to this court, which will be separately considered:

1. It is said that "the defendant in error was not only not prejudiced or damaged, but could not possibly have been prejudiced or damaged, by the execution or operation of the supplemental agreement." This assertion is not unquestionable, but it need not be questioned, for, in our opinion, the true subject of inquiry in such a case as this is not as to whether the change made in the principal contract without the surety's assent was or could be prejudicial to him, but is as to whether it effected a material alteration of the agreement to which his undertaking of suretyship related. If it did, as in this case is indubitable, he was relieved from liability, and for the obvious reason that the identical contract to which alone his obligation attached had ceased to exist. In Bonar v. McDonald, 3 H. L. Cas. 226–238, the rule was stated to be "that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety." In Reese v. U. S., 9 Wall. 14, 19 L. Ed. 541, Reese was surety in a recognizance conditioned that one Limantour "should personally appear at the next regular term of the circuit court to be held in the city of San Francisco, and at any subsequent term to be thereafter held in that city." At the next subsequent term of that court the district attorney moved for and obtained a postponement of Limantour's trial, to which postponement he assented. The court below held that in this there was no ground for exemption of the bail from liability on the recognizance; but the Supreme Court, in an opinion delivered by Mr. Justice Field, reversing the judgment, said:

"The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. * * * The stipulation to postpone * * * was inconsistent with the condition of the recognizance. * * * The stipulation, in other words, superseded the condition of the recognizance. * * * The stipulation, made without their consent or knowledge, between the principal and the government, has changed the character of the obligation. It has released him from the obligation with which they covenanted he should comply, and substituted another in its place. * * * And the law upon these matters is perfectly well settled. Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In Cross v. Allen, 141 U. S. 537, 12 Sup. Ct. 67, 35 L. Ed. 843, the court stated the rule, of which it was "not unmindful," to be "that any material change in the contract on which he is a surety, made by the principal parties to it, without his assent, discharges the surety, even though he may be benefited by such change; the reason being that he has not assented to the contract in its altered form, and has a right to stand upon the very terms of his undertaking." There is nothing in the opinion of the Supreme Court in Roach v. Summers, 20 Wall.

169, 22 L. Ed. 252, which, when read with its context, does not appear to be in harmony with the other deliverances of that court. It was there said, it is true, that a certain arrangement "could not work a discharge of the sureties, unless it placed them in a different position from that which they occupied before it was made"; but that, in saying this, it was understood that the arrangement referred to would have placed them in a different position if it had changed the principal contract, is plainly shown by the observation which almost immediately follows, that "it [the arrangement] was no alteration of the original contract, and had no effect upon it." The decisions of the Pennsylvania courts are in accord with those of the Supreme Court of the United States. The rule in that state was declared, in Nesbitt v. Turner, 155 Pa. 431, 26 Atl. 750, to be:

"When the principal party modifies his contract, it is fatal to its validity, as against the surety, whose assent has not been obtained, even if it be for his benefit, or if it do him no harm."

And in Bensinger v. Wren, 100 Pa. 505, it was said that:

"Any alteration of a contract by the principal parties, without the assent of the surety, is fatal to its validity, as against the surety. Even if he sustains no injury by the change, or if it be for his benefit, he has a right to stand upon the very terms of his obligation, and is bound no further. Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him. Miller v. Stewart, 9 Wheat. 680 [6 L. Ed. 189]; Smith v. United States, 2 Wall. 219 [17 L. Ed. 788]."

2. It has been, however, further contended that "the contract of suretyship shows on its face that the general law, by which such contracts are to be construed strictly in favor of the surety, has no application to this case"; and Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242, has been cited in support of this contention. But it does not sustain it. The court there said that it had been—

"Argued with much persuasiveness that this rule of strictissimi juris, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary considerations, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation, and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract."

But the court declined to express an opinion upon this subject, and remarked that:

"It is at least open to doubt, however, whether any relaxation of the rule should be permitted, as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of strictissimi juris, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment."

Hence it is evident that it was not really decided that the rule in question should be relaxed, even as against a company which, as matter of business and for compensation, assumes obligations like that upon which this action was founded; and we are not prepared to say that such companies are any less entitled to rely upon the protection which that rule affords than is the "ordinary guarantor," who lends his signa-

ture without pecuniary consideration. But even if guaranty companies were excluded from that protection, it would not follow that it should be denied to the surety in this case. He certainly is not a guaranty company, nor does it appear that he undertakes as a matter of business to become surety; and there is nothing to indicate that in this particular instance he received any compensation for doing so, unless it be the formal mention of "valuable consideration" in the instrument itself, and this, in our opinion, should not, for the present purpose, be regarded as proof that he was in fact compensated. Clearly, as it seems to us, the question discussed, but not decided, in Guaranty Co. v. Brick Co., has no application to such a state of facts as is disclosed by the record before us.

The judgment of the Circuit Court is affirmed.

SHELTON v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court of Appeals, Third Circuit. June 13, 1904.)

No. 32.

1. BUILDING CONTRACT—SURETIES—DEPARTURE—DISCHARGE.

Where a building contract provides that no payments shall become due until in each case the contractors shall have delivered to the owner a satisfactory release of liens against the premises, and the owner makes payments without requiring vouchers or releases, such payments constitute a substantial departure from the contract, to the prejudice of the contractor's surety, and discharge it from liability for a loss resulting therefrom.

Acheson, Circuit Judge, dissenting, in view of the special conditions of the surety bond and the facts.

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

For opinion below, see 127 Fed. 736.

C. Berkeley Taylor, for plaintiff in error.

H. Gordon McCouch, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. But little, if anything, need be added to the opinion of the court below. 127 Fed. 736. It sufficiently states the material facts and correctly applies the law.

This court has this day decided, in the case of Zeigler v. Hallahan, 131 Fed. 205, that any material alteration of the principal contract, to which an undertaking of suretyship is attached, discharges the surety; and the question which this case presents is whether the same consequence results where the contract, though not avowedly altered, is materially departed from, by the principal parties to it, without the surety's knowledge, and to his prejudice. We think it does. He is entitled to rely upon its provisions as definitive of the extent of his responsibility, and the law which protects him against any express agreement to materially change them would be of dubious efficacy if the principal parties

¶ 1. See Principal and Surety, vol. 40, Cent. Dig. § 284.

were permitted to enhance his liability by simply disregarding them. Therefore "any dealings with the principal by the creditor which amount to a departure from the contract by which the surety is bound, and which by possibility might materially vary or enlarge the latter's liabilities without his consent, generally operate to discharge the surety. * * * There must be an assent of the surety to the creditor's dealing with the principal debtor otherwise than in the manner pointed out by the contract." Brandt on Suretyship & Guaranty (2d Ed.) § 397, and cases there cited. "In such cases he contracts in reliance upon the exact terms of his principal's undertaking, and has a right to suppose that no change will be made without his consent; and the courts have gone so far as to hold that any change will exonerate him, though it really rebound to his benefit." Guaranty Co. v. Pressed Brick Co., 191 U. S. 416–425, 24 Sup. Ct. 142, 48 L. Ed. 242. We need not pursue the argument. To do so would be but to repeat what already has been well said by the learned judge of the circuit court; and, in our opinion, this case is one which especially called for enforcement of the rule he applied to it. The contract by which the defendant in error was bound provided "that no payments shall become due until in each case the contractors * * * shall have delivered to the owner a satisfactory release of liens against the premises," and yet it is for a loss which resulted from the owner making payments without requiring the production of a release of liens that the plaintiff below sought to hold the contractors' surety liable.

The judgment is affirmed.

ACHESON, Circuit Judge (dissenting). I dissent from this judgment. The opinion of the court, which embodies the view of the majority, rests upon the assumption that the contract of suretyship was "materially departed from by the principal parties to it." Yet the opinion does not set forth the provisions of the surety bond, nor state the facts of the case. It refers to the opinion of the court below as stating the facts. But when we turn to that opinion, we discover that it is silent as to the terms of the bond, although that instrument—prepared by the surety company itself, and issued for pecuniary compensation paid to it—expresses the special conditions upon which the surety company took the risk of suretyship.

This action was brought by Frederick H. Shelton against the American Surety Company of New York upon the latter's bond, of which the following is a copy:

"Know all men by these presents, that we, Sherman Orem, trading as Sherman Orem & Company, of the City of Philadelphia, Pa. (hereinafter called the Principal), as the Principal, and the American Surety Company of New York (hereinafter called the Surety), as Surety, are held and firmly bound unto Frederick H. Shelton, of the City of Philadelphia, Pa. (hereinafter called the Obligee), in the sum of twenty-five hundred dollars ($2,500^{00}/_{100}$) for the payment whereof said Principal binds himself, his heirs, executors, administrators, and assigns, and said Surety binds itself and its successors, firmly by these presents.

"Whereas, said Principal has entered into a written contract, dated July 3, 1902, with said Obligee, for the erection, construction, and completion of alterations and additions to the residence No. 228 S. 21st street, in the City of Philadelphia, a copy of which contract is hereto annexed:

"Now therefore, the condition of this obligation is such, that if the said

Principal shall faithfully perform said contract on his part, according to the terms, covenants and conditions thereof (except as hereinafter provided), then this obligation shall be void; otherwise to remain in full force and effect.

"Provided, however, and upon the following further express conditions:

"First—That in the event of any default on the part of the Principal, in the performance of any of the terms, covenants and conditions of said contract, written notice thereof, with a verified statement of the particular facts showing such default, and the date thereof, shall, within twenty days after the discovery of such default, be delivered to the Surety at its office in the City of Philadelphia.

"Second—That no suit, action or proceeding shall be brought or instituted against the Principal or Surety upon or by reason of any such default, after the first day of June, 1903.

"Third—That the Principal shall not, nor shall the Surety be liable for any damage resulting from an act of God; or from a mob, riot, civil commotion, or a public enemy; or from employees leaving the work being done in the performance of said contract, or so-called 'strikes' or labor difficulties, or from fire, lightning, tornado, or cyclone; or from injury to person or property resulting from accident or negligence of the performance of such contract; and that the Principal shall not, nor shall the Surety, be liable for the reconstruction or repair of any work or materials damaged or destroyed by said causes, or any of them.

"Fourth—That Obligee shall retain not less than fifteen per centum (15%) of the value of all work performed and materials furnished in the performance of such contract, until thirty days after the work herein contracted for shall have been fully completed to the Architect's satisfaction.

"Signed and sealed this 22nd day of July, 1902.

"[Seal.] Sherman Orem,
"Trading as Sherman Orem & Co.
"American Surety Company of New York.
"[Seal.] Stephen W. White,
"Attest: Resident Vice-President.
"Edward P. Bailey,
"Resident Assistant-Secretary."

By the building contract between Sherman Orem & Co., the contractors, and Shelton, the owner, to whom the bond refers, Shelton covenanted and agreed to pay to the contractors, upon certificates of payment obtained from the architect, on the 6th day of each month, the sum of 80 per centum of the value of the labor and material on the ground, and work done—the valuation thereof to be made by the architect—and the final sum 30 days after the full completion of the work contracted for. The building contract also contains the following clauses:

"B. That no payments shall become due until in each case the contractors shall have delivered to the architect copies of all bills and vouchers for work done and materials furnished upon which payment is claimed to be due, or until they have given the architect a true and accurate account of the exact standing of all accounts to date, on their books, for the work herein contracted for and shall have delivered to the owner a satisfactory release of all liens against the premises on the part of all persons who have delivered materials for use in or performed work on said premises together with a true and accurate showing of the state of such persons accounts then due, or thereafter to become due, for materials to be furnished or work to be done under this agreement.

"And it is further agreed: That before the final payment shall become due, a full and complete release of liens, including the liens of the parties of the first part, shall have been delivered to the party of the second part, and accepted by him as satisfactory.

"C. That no liens, attachment or other incumbrance under any law of this State, or otherwise by any person or persons, whosoever, shall at any time be

put or remain upon the building or premises, unto or upon which any work is done or may be done, or materials are furnished or may be furnished under this contract for such work or material, or by reason of any claim or demand against the contractors in respect thereof.

"And it is further agreed: That if at any time there shall be any lien or claim which if established, the owner of the said premises might be made liable and which would be chargeable to the said contractors, the owner shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify him against such lien or claim, until the same may be effectually satisfied, discharged, or cancelled, and should there prove to be any such claim after all payments are made, the contractors do hereby covenant that they will refund to the owner all moneys that the latter may be compelled to pay discharging any lien on said premises, and obligatory in consequence of the former's default.

"And it is further agreed that they, the contractors, shall give a Trust Co.'s or Surety Co.'s bond of twenty-five hundred dollars ($2,500.00) for the faithful performance of the contract and against loss to the owner by reason of any kind of liens; said bond to be acceptable to the owner."

The contractors proceeded with the work, and on certain dates in the months of August, September, and October, 1902, the architect, pursuant to the terms of the building contract, certified that there were due to the contractors specified sums—the same being 80 per centum of the value of the labor and material on the ground and work done, and amounting in all to $5,736.43—which certified sums the owner paid to the contractors. Afterwards the contractors became insolvent and went into bankruptcy, and the owner, agreeably to the provision of the building contract, proceeded with the work and completed the same. Subsequently liens amounting in all to the sum of $4,434.13 were filed against the building for labor done and materials furnished to the same under contracts entered into by the contractors. These liens the owner was compelled to pay. The result was that, by reason of the money he was obliged to pay to complete the work and to discharge the above-mentioned liens, the owner sustained a loss of $2,901.05 by the failure of the contractors to perform the building contract. Thereupon he brought this suit against the surety company upon its bond.

It is not pretended that the plaintiff violated any of the conditions expressed in the surety bond. The defense rests exclusively upon his nonenforcement of the provision in clause B of the building contract, respecting the delivery by the contractors of releases of liens for materials furnished and work done. The contractors did not deliver such releases to the plaintiff when he made to them, as hereinbefore mentioned, the stipulated monthly payments of 80 per centum certified by the architect. Did the plaintiff's omission to exact such releases from the contractors, when he paid to them these certified sums, discharge the surety company from liability for the plaintiff's loss occasioned by the contractors' ultimate default? The answer to this question depends upon the construction of the contract of suretyship. Now, the surety company's bond carefully expresses the limitations which the company put upon its liability. The fourth condition is particularly noteworthy, for its specifies that the obligee shall retain not less than 15 per centum of the value of all work performed and materials furnished until 30 days after the work contracted for shall be fully completed to the architect's satisfaction. In view of this express provision, is there to be imported into the bond the further condition that the obligee shall make no payment

to the contractors on account of the value of work and material without releases of liens? No such obligation is imposed upon the owner by the building contract in express terms. The supposed duty to the surety company to exact such a release upon every payment is inferred from the provisions of clause B which declares that no payment shall "become due" until in each case the contractors shall have delivered to the architect copies of all bills and vouchers, etc., "and shall have delivered to the owner a satisfactory release of all liens against the premises on the part of all persons who have delivered materials for use in or performed work on said premises, together with a true and accurate showing of the state of such persons accounts then due or thereafter to become due for materials to be furnished or work to be done under this agreement." But in my judgment, this clause was intended altogether for the protection of the owner. This is its fair meaning when read in connection with the other provisions of the building contract. The owner's covenant to pay the monthly installments was conditioned only upon the architect's valuation and certificate. Nothing whatever is there said about releases. Therefore, when the plaintiff made his payments, he complied with the express agreement, namely, that the architect should value the work done and materials furnished each month, and that 80 per centum of his valuation should be paid to the contractors. Then, again, clause C of the building contract provides that "no liens * * * shall at any time be put or remain upon the building or premises unto or upon which any work is done or may be done or materials are furnished or may be furnished under this contract for such work or material, or by reason of any claim or demand against the contractors in respect thereof." This is sweeping language. It bars all liens for work done or materials furnished, and for the fulfillment of this prohibition the surety company was bound. The owner was at liberty to rely upon the stipulation against liens. He was not obliged to assume that this provision had been or would be disregarded. It seems to me to be a perversion of clause B to hold that it required the plaintiff to exact releases in the interest of the surety company. The true intention of the clause, I think, was that the owner, at his own pleasure, might further protect himself by releases if he saw any reason for so doing.

In Guaranty Company v. Pressed Brick Company, 191 U. S. 416, 426, 24 Sup. Ct. 142, 48 L. Ed. ——, the court, in rejecting a construction of a bond insisted upon by the surety company, said, "The narrow construction claimed would destroy the principal value of the security." This observation is most apposite here. Indeed, if this obligee was bound to exact a release of liens upon every payment he made to the contractors, the surety bond issued to him was absolutely useless, so far as liens were concerned. Yet if any one thing in this case is clear, it is that this surety company issued its bond as indemnity "against loss to the owner by reason of any kind of liens," as expressed in the building contract, and was pecuniarily compensated for taking that risk. I am not willing to accept a construction of the contract of suretyship which affords this surety company a loophole of escape from its just liability.

I would reverse the judgment of the court below, and order judgment against the defendant.

BEAN-CHAMBERLAIN MFG. CO. v. STANDARD SPOKE & NIPPLE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 16, 1904.)

No. 1,302.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—INTENT IN MAKING TRANSFER OF PROPERTY.

In determining the question whether a transfer by an insolvent manufacturing corporation of the greater part of its business and property to another corporation, organized largely by the same persons, in exchange for the stock and bonds of the latter, was made in good faith, or with intent to hinder, delay, or defraud its creditors, so as to constitute an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3, cl. "a," subd. 1, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], the jury may properly take into consideration the natural and necessary result of the transfer, and may infer the intent therefrom.

2. APPEAL—REVIEW—EXCEPTIONS TO CHARGE.

A general exception to the refusal of a number of requests to charge is not well taken if any of such requests were properly refused.

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

In Bankruptcy.

Fellows & Chandler, for appellant.

Bowen, Douglas, Whiting & Murfin, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from a decree of the lower court, based upon the verdict of a jury, adjudging the appellant, the Bean-Chamberlain Manufacturing Company, a bankrupt.

The principal act of bankruptcy relied on by the petitioning creditors (appellees) was that the appellant, in violation of subdivision 1 of section 3, cl. "a," of the bankruptcy act, had "conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any [some] part of his property with intent to hinder, delay or defraud his creditors, or any [some] of them." Act July 1, 1898, c. 541, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422].

There was testimony tending to establish the following facts: In the year 1901 the appellant, a Michigan corporation, was engaged in the manufacture of pumps, farm implements, and bicycles at Hudson, Mich. It had been so engaged for some years. The bulk of its property was employed in the pump business. Roscoe Bean was its president; Henry G. Chamberlain, its secretary; and O. R. Pierce, a director, and the indorser on more than half its paper. In the latter part of this year an inventory showed its assets amounted to $72,135.83, while its bills payable aggregated $75,440.42. Some of its bills were overdue. Neither the profits nor the prospects of the company were encouraging. In the year 1902 a company was organized at Toledo, Ohio, called the United States Pump & Supply Company. The leading object of this company was to take over and conduct the property and business of the appellant. Bean and Chamberlain, the president and secretary of the appellant, were made its president and secretary,

and Pierce, the leading director and backer of the appellant, one of its directors. The authorized capital stock of the Toledo company was $400,000, half common and half preferred. But $105,000 of the preferred stock and half that much of the common was issued, and of all this but $25,000 was sold on the market. Aside from the appellant, the original arrangement contemplated the taking over of the Standard Manufacturing Company of Toledo at a valuation of $15,000. Later the Lucas Pump Company, of Toledo, was absorbed at a valuation of $8,000. The original arrangement provided for the purchase of the entire plant and business of the appellant. For this, $75,000 in stock was to be given, and cash for the stock on hand to be appraised. This was subsequently modified, and in July, 1903, only the pump plant and business of the appellant were sold on the following terms: $54,000 of the par value of the preferred stock of the United States Pump & Supply Company; $27,000 of the common stock of the same company; $30,000 of the par value in two-year bonds of the same company. All of this being turned over to Mr. Fellows, the attorney of the appellant, as trustee for it. This stock was received by Mr. Fellows upon the condition that it should not be put upon the market for a period of one year. The bonds were secured by a deed of trust on but a part of the Toledo company's property; the deed containing a condition that no bondholder should have the right to institute any action foreclosing the mortgage, except in case of refusal on the part of the trustee to perform some duty imposed upon him. The Toledo company was unable to meet its maturing obligations, owing to a want of ready money, and it never paid any dividends upon its preferred stock. No public record was made of the sale by the appellant to the Toledo company. The sale to the Toledo company was made in July. In September an option was given to the Chamberlain-Rider Company for $9,000 on the implement business, and to the Hudson Manufacturing Company for what proved to be $1,800 on the bicycle business of the appellant. Both these companies were organized or to be organized by former stockholders or employés of the appellant for the purpose of taking over what was left of its business. Following these deals, the books of the appellant company were placed in the hands of Pierce for the purpose of collecting its assets and winding up its business. The appellant had ceased to be a going concern. One of the witnesses testified that Mr. Chamberlain told him that for the past two years they had been losing money on account of the bicycle business, and that they had put the matter in Mr. Pierce's hands to close up. As to the business of the Bean-Chamberlain Manufacturing Company, it had ceased doing business, and, as soon as Mr. Pierce could get things wound up, the company would go out of existence. Mr. Bean was a witness, and testified that they were closing up the business of the Bean-Chamberlain Company as rapidly as they could, and that would have been the ultimate end. That was what they were striving for. Including the real estate, farm implements, and bicycle business, optioned, but not sold, the assets of the appellant at the time of the filing of the petition in bankruptcy, aside from the stock and bonds received from the Toledo company, did not exceed in value $25,000. The liabilities amounted to over $75,000.

There being testimony tending to show the above facts, the court left it to the jury to say whether the sale to the Toledo company was made with intent to hinder, delay, or defraud the creditors of the appellant; advising the jury that, in determining the question of intent, they should consider the necessary result of the acts done by the appellant, for every one is presumed to contemplate the necessary consequences of his conduct. It is now contended that the instruction of the court below upon this point was inconsistent with the construction placed by this court upon subdivision 1 of section 3, cl. "a," of the bankruptcy act, in Lansing Boiler & Engine Works v. Ryerson & Son (C. C. A.) 128 Fed. 701. The appellant complains because the court did not instruct the jury that the whole question for them was one of actual intent, and that if they should find that the appellant made the transfers in good faith, without an actual intent to hinder, delay, or defraud its creditors, it could not be adjudged a bankrupt, whatever the result of the transfers may have been. We fail to see wherein the position of the court was inconsistent with our holding in the Lansing Boiler Case. In that case the court below took the view that the giving of a mortgage by a manufacturing company on all its property to secure a part of its indebtedness was an act of bankruptcy, although the property mortgaged was worth enough at a fair valuation not only to liquidate the mortgage, but to pay all the remaining debts of the company twice over. We held that the court erred in assuming that, because the mortgage covered the whole property of the debtor, it necessarily followed that a case was made out under subdivision 1, and that no proof of good faith could prevail against that assumption, saying:

"Upon the vital question of the bona fides of the mortgage, it was of importance to consider, among other things, what was the value of the property mortgaged, when compared with the indebtedness of the company. Moreover, the testimony of those conducting the transaction was admissible to prove its actual good faith. In the end, when all the available light had been shed upon it, the court would be in a situation to judge whether the transaction was prompted by a fraudulent motive or a legitimate one."

The fault we found with the court in that case was that it refused to consider the question whether the mortgagor acted in good faith in giving the mortgage. Our holding was that if the mortgage was given in good faith, and without intent to hinder, delay, or defraud creditors there was no act of bankruptcy. There was testimony tending to show that the property mortgaged was worth $70,000, the mortgage was for $27,000, and the remaining creditor's claims amounted to $8,000. If this was credible, there was left property worth $43,000 to pay claims aggregating $8,000, and the court should have considered these facts both in determining whether the company was insolvent when it gave the mortgage, and whether the mortgage was given in good faith. In the present case the court submitted to the jury the question whether the transfers complained of were made in good faith, or with intent to hinder, delay, and defraud, saying:

"The intent with which an act was done is very difficult to prove. Of course, the mind cannot be probed to ascertain just what that intent was. It must be inferred, and usually is inferred, from the circumstances, from the act itself, and from its necessary effect. If this operation necessarily was to

produce the consequences of the act prohibited by the statute, you may infer the intent to defraud—the intent to hinder, delay, or defraud."

After commenting upon the facts, the court left them to the consideration of the jury, advising them that they were the judges of the facts. In determining the question of the solvency of the company, the court excluded from consideration the stock and bonds received from the Toledo company and deposited in the hands of Fellows, as trustee, because they were under restrictions which rendered them unavailable to meet the claims of creditors. The charge, as a whole, fairly left the determination of the question of good faith to the jury. While the court commented upon the facts, and indicated a view unfavorable to the appellant, at the same time it advised the jurors that they were the final judges of the facts, and that whatever views it might indicate with respect to the facts were in no sense binding upon them. We have no criticism to make because of these comments, since we heartily concur in the views expressed. In our opinion, the proof was of such a nature that no injustice was done to the appellant by the action of the court. For the court to have complied with the request of the appellant, and instructed the jury that, ignoring the natural and necessary result of the transfers made, they should direct their attention solely to the good faith of the transaction, and, whatever the result of its conduct, acquit the appellant, if they found it had acted in good faith, would have been misleading. It was the right of the jury to determine the intent, but in doing so it was the duty of the jury to consider the testimony and the natural presumptions which flow from acts done by design. If a company in failing circumstances willfully places all its property beyond the reach of its creditors, that circumstance is a fact to be considered in determining whether it did so in good faith, without any intent to hinder, delay, or defraud its creditors.

There was no specific exception taken to any particular portion of the charge of the court as given. Ten requests to charge were presented by the respondent below and refused. The exception to this refusal was so worded that we are disposed to regard it rather as a general exception to the refusal to charge all the requests in a lump, than a specific exception to the refusal to charge each separate request (Bogk v. Gassert, 149 U. S. 17, 26, 13 Sup. Ct. 738, 37 L. Ed. 631; Holloway v. Dunham, 170 U. S. 615, 619, 18 Sup. Ct. 784, 42 L. Ed. 1165), so that, some of the requests (notably the eighth and ninth) being clearly unsound, under the rule all are disposed of. We resolve the doubt as to the exception in favor of its being a general one, not only because the proof so abundantly sustains the verdict, but, if the exception be taken as a specific one, we are satisfied that the requests which were proper were sufficiently covered by the charge as given, and that no prejudice resulted to the appellant from the refusal to charge.

The judgment of the court below is affirmed.

SACKETT v. McCAFFREY et al.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1904.)

No. 957.

1. INTERNAL REVENUE—STAMP TAX—HOMESTEAD DECLARATION—ACKNOWLEDGMENT.

A notary's certificate of acknowledgment attached to a declaration of homestead was subject to a stamp tax under War Revenue Act June 13, 1898, c. 448, § 13, 30 Stat. 454 [U. S. Comp. St. 1901, p. 2294], requiring documents mentioned in the schedule, and certificates of any description required by law not otherwise specified, to be stamped.

2. APPEAL—RECORD—ORIGINAL DOCUMENTS—CERTIFICATION.

Where the Circuit Court, as authorized by Court Rule 14, subd. 4 (91 Fed. vii, 32 C. C. A. lxxxix), transmitted to the Circuit Court of Appeals an original document admitted in evidence over objection that it was not stamped, it was immaterial that the copy of the document contained in the record did not show either that the document or the certificate of acknowledgment indorsed thereon by a notary public was not stamped.

3. SAME—JUDICIAL ACTS.

Under Civ. Code Mont. §§ 1606, 1609, 1611, providing that acknowledgments by married women to instruments purporting to be executed by them must be taken in the same manner as that of any other person, and shall be that she "executed the same," a notary, in taking a married woman's acknowledgment to a declaration of homestead, required by section 1700, does not act as a judicial officer.

4. SAME—STATE FUNCTIONS.

Since stamps required to be affixed to a notary's certificate of acknowledgment to a declaration of homestead, under War Revenue Act June 13, 1898, c. 448, § 14, 30 Stat. 455 [U. S. Comp. St. 1901, p. 2296], are required to be furnished by the person for whose benefit the instrument is furnished such tax is not objectionable on the ground that the notary, in taking the acknowledgment and indorsing his certificate, was exercising a function of the state government not subject to federal taxation.

5. SAME—UNSTAMPED INSTRUMENTS—EVIDENCE—STATE DECISIONS.

Decisions of state courts that instruments, though unstamped, as required by War Revenue Act June 13, 1898, c. 448, § 14, 30 Stat. 455 [U. S. Comp. St. 1901, p. 2296], were admissible in evidence, have no application to federal courts.

6. SAME—STATUTES—REPEAL.

War Revenue Act, June 13, 1898, c. 448, § 13, 30 Stat. 454 [U. S. Comp. St. 1901, p. 2295], providing for a stamp tax on certificates attached to legal instruments, was amended by Act March 2, 1901, c. 806, § 7, 31 Stat. 941 [U. S. Comp. St. 1901, p. 2294], which, however, specifically provided for the continuing of the law with regard to the stamping of unstamped instruments subject to a stamp tax at the time they were issued; and section 14 of the original act (30 Stat. 455 [U. S. Comp. St. 1901, p. 2296]), providing that unstamped instruments should not be recorded or received in evidence, was not repealed either by Act March 2, 1901, or by Act April 12, 1902, c. 500, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 276], which repealed the whole of Schedule A of the original act; and Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], declares that the repeal of a statute shall not release or extinguish any penalty, forfeiture, or liability incurred thereunder, unless the repealing act so expressly provides, etc. *Held*, that the repeal of the act requiring certificates to be stamped did not authorize the subsequent admission in evidence of an instrument containing an unstamped certificate of acknowledgment subject to the tax.

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

The plaintiff in error, a citizen of New York, brought this action in ejectment against the defendants, citizens of Montana, to recover possession of lot 11 in block 89 in the city of Anaconda, Mont., alleged to be of the value of $2,500 and more. The plaintiff in error bases her claim of title to the premises in controversy upon a sheriff's deed dated May 19, 1902, issued pursuant to an execution sale upon a deficiency judgment against the defendants in error. The defendants in error deny the right of the plaintiff in error to the premises, and claim title to the property under a declaration of homestead dated November 24, 1900, and made by Mary McCaffrey; her husband, Joseph McCaffrey, not having made such selection. The plaintiff in error, in reply to this defense, alleges that the declaration of homestead filed by Mary McCaffrey was wholly void and of no effect by reason of the omission to state an estimate of the actual cash value of the premises therein described, and denies that the premises in question could have been a homestead, because the defendants in error at the time of filing the pretended declaration of homestead, and long prior thereto, did not reside on the entire premises described, a portion of the lot in question being occupied by and rented to tenants of the defendants in error, and entirely distinct from the premises used by defendants in error as a home. Upon the trial, for the purpose of showing that the premises in controversy were at the date of their sale under execution exempt from execution, the defendants in error offered in evidence the homestead declaration of Mary McCaffrey, dated November 24, 1900, covering the entire premises in controversy to which plaintiff in error objected on the grounds (1) that the instrument was not stamped as required by the laws of the United States in force at the date of its execution; (2) that the notarial certificate of acknowledgment to said instrument was not stamped as required by the laws of the United States at the date of its execution; and (3) that the filing of record of the same in its unstamped condition was in violation of said laws, and the record thereof was void and of no effect as against the rights of the plaintiff in error. The objection was overruled, and the declaration of homestead admitted in evidence. The jury returned a verdict in favor of the defendants in error, and a judgment was entered thereon. Upon this judgment a writ of error was obtained by the plaintiff in error.

E. B. Howell and Charles E. Sackett, for plaintiff in error.

William B. Rodgers, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The specification of error mainly relied upon is the admission in evidence of the homestead declaration of Mary McCaffrey over the objection of the plaintiff in error that it was an instrument required by law to be stamped, under the provisions of the act of June 13, 1898, and, being in an unstamped condition, was not entitled to be recorded or admitted in evidence. The act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes" (30 Stat. 448, 458, c. 448 [U. S. Comp. St. 1901, pp. 2284, 2300]), provides in Schedule A for the prepayment of an internal revenue tax by means of stamps, denoting the tax on certain documents to which the stamps are to be affixed. Among other documents mentioned in this schedule as subject to a stamp tax is that of a "certificate of any description required by law, not otherwise specified in this act, ten cents." Within this very broad language the plaintiff in error claims that the homestead declaration is itself a certificate subject to the stamp tax; but as this claim is not seriously urged it need not be considered, except in connection with the notarial certificate of acknowledgment, which the law of Montana requires to be indorsed upon or attached to the instrument before it

can be recorded. The declaration of a homestead covering the property in controversy was executed by Mary McCaffrey November 24, 1900, and on the same day its execution was acknowledged by her before a notary public, and his certificate to that effect was indorsed upon the instrument, but no internal revenue stamp was affixed to the declaration of homestead or the accompanying notarial certificate of acknowledgment, and because of the absence of the stamp it is urged by the plaintiff in error that the court erred in admitting the document in evidence.

Section 14 of the act of June 13, 1898 (30 Stat. 455 [U. S. Comp. St. 1901, p. 2296]), provides:

"That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped or with a deficient stamp, nor any copy thereof, shall be recorded or admitted or used as evidence in any court until a legal stamp or stamps denoting the amount of tax shall have been affixed thereto as prescribed by law."

In our opinion, the certificate of acknowledgment was subject to the stamp tax under this statute, and should have been stamped before being admitted in evidence.

It is objected that the copy of the declaration of homestead, as printed in the record, does not show that either that instrument or the certificate of acknowledgment indorsed thereon by the notary public was not stamped as required by the laws of the United States. Under rule 14, subd. 4, of the rules of this court (91 Fed. vii, 32 C. C. A. lxxxix), the judge of the Circuit Court has transmitted to this court the original homestead declaration, from which it appears that neither the homestead declaration nor the certificate of acknowledgment has been stamped.

It is next objected that a notary public acts judicially in taking and certifying an acknowledgment to a deed or other instrument affecting real estate, and that Congress has no power to impose a tax upon the judicial acts of a state officer. In some states it has been held that the taking of an acknowledgment of a married woman joining with her husband in granting an estate in real property is a judicial act when, under the law, the officer is required to acquaint the wife with the contents of the instrument separate and apart from her husband, and ascertain whether the execution of the instrument is her free and voluntary act. In such case the officer necessarily acts judicially, because he is obliged to draw his own conclusions from an examination conducted by himself as to the voluntary or involuntary character of the act of the wife, and to base his official conduct upon the conclusions so drawn. People v. Bartels, 138 Ill. 322, 332, 27 N. E. 1091. In the present case there is no such requirement for a married woman making a declaration of homestead. The statute of Montana provides that, "in order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." Civ. Code Mont. § 1700. The acknowledgment of a married woman to an instrument purporting to be executed by her must be taken the same as that of any

other person (section 1606), and the acknowledgment is that she "executed the same" (section 1609, 1611). Clearly, the notary performed no judicial function, either in taking such an acknowledgment or in indorsing his certificate upon the declaration that she had appeared before him, that she was personally known to him to be the person whose name was subscribed to the instrument, and acknowledged that she executed the same.

It is contended, further, that the notary, in taking the acknowledgment to the declaration of homestead and indorsing his certificate thereon, was exercising a function of the state government, and that the certificate was therefore exempt from a stamp tax, under the decision of the Supreme Court in Buffington v. Day, 11 Wall. 113, 20 L. Ed. 122. The law involved in that case was the act of Congress imposing a tax upon the gains, profits, and income of every person residing in the United States. The Supreme Court held that the right of the state to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, were not proper subjects of the taxing power of Congress, and that the salary of a judicial officer of the state was therefore exempt. This well-known principle of self-preservation accorded to the government of the several states has no application to the present case. The notary is not taxed as an officer of the state or at all. The individual for whose use and benefit the certificate is made pays the notary's fees and the tax upon the certificate. The commissioner of internal revenue, having in charge the administration of the internal revenue laws of the United States, has decided that the stamps required upon certificates by the provisions of the act under consideration should be furnished by the person applying for the instrument, and for whose use and benefit the same is issued. Circular No. 503, dated August 16, 1898.

The defendants in error refer to a number of cases wherein certain state courts have held that Congress has no power to prescribe rules of evidence for state courts, and that the provisions of the stamp act in this respect are not intended to govern such tribunals. Without discussing the correctness of these decisions, it is sufficient to say that they have no application to federal courts, where the laws of Congress prescribing rules of evidence must be observed, unless open to some constitutional objection, which has not been suggested with respect to this statute.

By the act of March 2, 1901 (31 Stat. 938, c. 806 [U. S. Comp. St. 1901, p. 2286]), the act of June 13, 1898, was amended, and the provision under consideration relating to stamp taxes on certificates was repealed. Section 7 of the amendatory act (31 Stat. 941 [U. S. Comp. St. 1901, p. 2294]) provides specifically for a continuing law for the stamping of unstamped instruments subject to a stamp tax at the time they were issued, and section 14 of the original act (30 Stat. 455 [U. S. Comp. St. 1901, p. 2296]), providing that unstamped instruments should not be recorded or received in evidence, was not repealed, nor was it repealed by the act of April 12, 1902 (32 Stat. 96, c. 500 [U. S. Comp. St. Supp. 1903, p. 276]), which repealed the whole of Schedule A. But defendants in error contend that when the law requiring

certificates of acknowledgments to be stamped was repealed the penalty for a failure to stamp such certificates could not be enforced. This is not the law, as appears from the provisions of the repealing acts. But, further than this, section 13 of the Revised Statutes [U. S. Comp. St. 1901, p. 6] provides as follows:

"The repeal of a 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."

There can be no question but that the court below was in error in admitting the declaration of homestead in evidence, but we do not wish to be understood as holding that, if the certificate of acknowledgment were now stamped, as provided in section 13 of the act of June 13, 1898, as amended by Act March 2, 1901, c. 806, 31 Stat. 941 [U. S. Comp. St. 1901, p. 2295], it would not be admissible in evidence on a new trial.

The judgment is reversed, with directions to grant a new trial.

BOYD et al. v. SCHNEIDER et al.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,034.

1. NATIONAL BANKS—NEGLIGENCE OF DIRECTORS—STOCKHOLDERS—RIGHT TO SUE.

The national bank act, providing for the administration of the affairs of an insolvent national bank by a receiver appointed by the Comptroller of the Currency, does not prevent depositors of an insolvent bank from maintaining a suit against its directors for negligently permitting its officers to loan the bank's assets in violation of such act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit, that the bank would use such deposits and its other assets in conformity with the safeguards provided by law.

2. SAME—EQUITABLE JURISDICTION.

Where several depositors of a national bank had claims against a number of the bank's directors, arising out of their failure to take steps to prevent the bank's assets being improperly loaned, and none of such depositors could, by separate suits at law, recover that to which he was entitled, such depositors were entitled to maintain a single suit against such directors in equity.

3. SAME—MULTIFARIOUSNESS.

Where the right of each of several depositors of an insolvent national bank to recover against several of the bank's directors, made parties to the bill, was based on the same theory, the bill was not multifarious.

4. SAME—SURVIVAL OF ACTION.

An action by depositors against directors of an insolvent national bank to recover damages for breach of the directors' implied contract to see that the bank's assets were used in the manner prescribed by the national bank act is an action on contract, and survives against representatives of deceased directors.

5. SAME—AMENDMENT OF BILL.

Where several depositors of an insolvent national bank filed a bill against its directors for a breach of their implied contract to see that

the bank's assets were used according to law, but the bill failed to allege the time when complainants' deposits were made, complainants were entitled to leave to amend in that respect.

6. SAME—PARTIES.

That certain of the defendants sued were not directors of an insolvent bank at the time acts of mismanagement complained of occurred, did not exempt them from liability to depositors, where it appeared that during their term of office dividends were paid from the capital, which was also alleged as a ground of action.

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

See 124 Fed. 239.

The bill was by appellant, a depositor of the National Bank of Illinois, on behalf of himself and all others who might join him, against appellees, directors of the bank, to recover losses to the assets of the bank, otherwise distributable to the depositors and creditors, alleged to have been brought about by the negligence and misconduct of such directors.

The bill shows that the National Bank of Illinois, organized in 1871, and granted an extension of corporate existence in 1891, was, until closed by the comptroller of the currency, December 19th, 1896, engaged in a general banking business in Chicago, its capital stock after 1891 being one million dollars; that on the failure of the bank, it had more than eleven million dollars on deposit from more than four thousand depositors; that the deposits of the appellants, twenty-six in all, amounted to more than four hundred and forty-seven thousand dollars; that the depositors have received from the receiver but seventy per cent. of their deposits; that the remaining assets do not exceed in value two millions of dollars, leaving a deficit of over a million and a half dollars; and that the insolvency of the bank began about 1893, its assets steadily decreasing from that time until it was closed in 1896.

The bill sets out with particularity various acts of alleged neglect of duty, and misconduct, among which may be stated as the most important the following: (1) That Hammond, vice-president, and Moll, cashier, owners of interests in the Calumet Electric Railway Company, and left by the directors to their own discretion, began in 1891 to loan to such company, both in its own name and the names of its officers, employees and agents, sums that amounted at the time of the failure to three million five hundred thousand dollars, upon the collateral solely of the assets of said company; that to evade the provisions of the national banking act respecting the amounts loanable to any one person, five hundred thousand dollars of the amount thus loaned was carried on the books of the bank in an account known as "foreign exchange"; that the loans were made ostensibly to employees of the company, some of whom lived on small salaries, had no financial standing, and except one or two of the officers, had no interest in the property; that all the loans, together with the real purpose for which, and the real borrowers to whom, the loans were made, were discernible on the books of the bank; and that the present value of the assets of the Calumet Company are not to exceed two millions of dollars;

(2) That Schneider, the president of the bank, left to his own discretion by the directors, loaned, without security, to a soninlaw, and to two corporations of which such soninlaw was president, sums exceeding half a million of dollars, all of which was lost; also, without security, to the firm of E. S. Dryer & Company, one member of which was another soninlaw, sums exceeding a half million of dollars, all of which was lost;

(3) That during all this time, and up to the failure, the bank continued to pay dividends to its stockholders out of its capital stock.

The bill shows that the bank kept a discount ledger on which were entered all the loans from day to day, showing the names of the borrowers, and the security, if any, including the loans above set forth, which discount ledger was always open to the inspection of the directors; that the bank also kept an offering book, but such book contained, not the loans asked for, but the loans made from day to day, which book was on various days, submitted to such

directors as called at the bank, and the loans entered in most cases, marked as approved by certain of the directors.

The bill shows that in December, 1895, the comptroller of the currency wrote each one of the directors, calling attention to the fact that the loans to the Calumet Company amounted at that time to one million one hundred and seventy thousand dollars, and notifying them that such loans were in violation of law and good banking; that such letters were received by each of the directors, and their receipt acknowledged; that in June, 1896, another warning of like character from the comptroller of the currency was sent to the directors; but, notwithstanding these notices, the Calumet Company, in the way already pointed out, was allowed to increase its then existing loans by a million of dollars, and dividends continued to be paid.

The bill further avers that the directors, knowingly and wilfully, permitted the officers of the bank to violate the provisions of law relative to the bank; that none of them made diligent or reasonable effort to see to it that the total liabilities to the bank of any one person, did not exceed the amount designated by law, but that they knowingly and negligently sanctioned the practices by which such provisions of law were evaded; that they knowingly and negligently sanctioned or permitted, in the form of dividends, the withdrawal of portions of the capital stock; that they failed to see that correct books of account were kept, or proper business methods followed in regard to such books; negligently suffering the accounts to be falsified; that they did not exercise due care in the selection and retention of the officers of the bank, permitting Hammond, vice-president, and Moll, cashier, interested as stockholders in the Calumet Company, to largely control the affairs of the bank, and use and lend its money and assets as they saw fit; that no finance or auditing company was given supervision over the making of loans; and that through this and other means, the losses suffered by the bank are directly traceable to the negligence of the directors.

The bill shows that the receiver of the bank has been asked to bring suit against the directors, to recover the amounts thus lost; that to the comptroller of the currency the same request has been made; but that the request has by both of them been denied. The bill prays that an account may be taken of the assets of the bank lost through the negligence, carelessness and misconduct of the directors, and each of them, that the amount each of the directors should be held responsible for may be ascertained, and each decreed to pay the amount so found due from him, to the receiver of the bank, to be by such receiver distributed in accordance with law.

The bill was demurred to, first for multifariousness; second for want of particularity; third that there was no proper allegation of interest of the complainants therein prior to the date on which the bank failed; fourth, that the remedy is at law; and fifth, that certain paragraphs therein state an action of deceit. The demurrer having been sustained, complainants asked leave to amend to show that they had been depositors continuously for more than five years prior to the failure of the bank; but such amendment was denied.

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

William Burry and F. B. Johnstone, for appellants.

John J. Herrick, Joseph B. Leake, Jesse A. Baldwin, John P. Wilson, and E. Allen Frost, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

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

We do not deem it necessary to pass on the question whether, between directors of a national bank and its depositors, there subsists such a trust relation as would bring this case, as one arising out of a trust, under equitable cognizance; nor need we pass upon appellants' contention that the receiver of a national bank, being a trustee for the depositors, who has refused to bring action, courts of equity on that ac-

count are clothed with jurisdiction to proceed against the directors at the suit of the depositors. In our judgment the case stated in the bill is one of equitable cognizance, but on considerations entirely distinct from the propositions just stated. To this we will recur after dealing with some of the affirmative propositions of the appellees.

The chief insistence of the appellees is, that the right of action stated in the bill, if anything at all, is an asset of the bank vested by law in the receiver on his appointment, and therefore not one on which simple contract creditors are entitled to bring suit. If there be no privity of contract, or obligation of duty, between the directors and the depositors, this contention may be sound; but if the nature of the contract of deposit is such that the duty of the directors in the premises runs directly to the depositors, there can be no doubt that the depositors can, in their own right, bring such action as may be essential to the fulfillment of their rights. This leads to an examination of the nature of the relation that subsists between the directors of the bank and its depositors.

The relation of depositors to the bank, and so far as directors stand liable for the doings of the bank, the relation of the depositors to the directors, while that of debtor and creditor, is something more than the mere relation of debtor and creditor. The contract of deposit is a loan; but not a loan pure and simple. On the acceptance of the deposit, a promise is raised that the bank will repay it on demand, or at the time stipulated; and to that extent the transaction is a loan. But when this much is said, the whole contract is not stated. The parties deal with each other on a basis, not merely that of borrower and lender, but on the basis, that the party receiving the money is a bank, organized under the laws of the United States, and subject to the provisions of law, present and future, relating to the custody and disposition of the money deposited; and that the party loaning the money is a depositor, leaving his money with the bank on the faith that such provisions respecting the custody and disposition of the deposit, will be observed. In legal effect, the depositor says, Here is my money; in consideration of its reception, and such interest as you pay, you can have its use; but only on this condition, that the use conform to the safeguards provided by the law. The acceptance of money thus tendered, implies that the bank and its directors, so far as they are responsible for the doings of the bank, agree to conform to the conditions named. The law governing the custody and disposition of deposits thus enters into and forms a part of, the relation created between the parties (Walker v. Whitehead, 16 Wall. 314, 21 L. Ed. 357); thereby creating direct privity of relation between the directors and the depositors.

The bill clearly shows that the deposits in the custody of the National Bank of Illinois, as an entirety, were used and disposed of contrary to the provisions of law relating to custody and disposition. The deposits were disposed of in sums, and to persons forbidden by law; and were used to pay dividends when no dividends had been earned. The bill shows also, that the directors had knowledge of some of these violations of law, such as the payment of dividends out of the capital stock, and the increase of loans in large amounts to the Calumet Company, after notice from the comptroller that such loans were contrary to law; and also, that of other violations of law they would have been advised,

had reasonable diligence on their part been exercised. It seems clear to us that on such a state of facts, the directors are answerable in some kind of action, directly to the persons to whom their duty ran; and that, to the extent that the depositors suffered losses therefrom, the right of action, whatever it may be, runs directly to the depositors as a class. The question is not determined by whether the amount thus recovered might not become an asset of the bank; but whether, aside from that, the depositors may not enforce the liability as a right special to them—a right growing out of the contract of deposit, and not common therefore, to stockholders and other creditors not depositors. Unless the national banking act cuts deep enough to cut out these individual rights of action, the depositors have, in some form, a right to bring action on the claims set forth.

The national banking act provides a system for the collection of the assets of an insolvent bank, and their distribution among creditors. The legal machinery for this is a receiver appointed by the comptroller of the currency, and removable by him, in whom is vested all rights of receivership, to the exclusion of all other receivers or assignees; assessments leviable by the comptroller against the stockholders; and procedure for the allowance of claims, the payment of dividends, and the distribution of money thus collected. All this, however, is in the nature of administration. Barring the matter of assessment, it puts into the hands of receiver and comptroller only such powers as the bank itself had before becoming insolvent. It substitutes for the bank solvent, the machinery provided for the bank insolvent. Now the bank solvent, may sue and be sued, complain or defend in any court of law or equity, as fully as natural persons. We see in the act no reason to say that the bank insolvent, does not possess the same status; only it is exercisable through the receivership provided by law. There is no provision that exempts the insolvent bank or its directors, from suit (Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476); no provision that evinces an intention on the part of congress that persons having direct legal relations with insolvent banks, or their directors, may not have such relations interpreted and enforced through the judicial department of the government.

The cases called to our attention by the appellees do not bear upon this point.* These cases hold that national banks cannot, at the suit of creditors, be thrown into bankruptcy, or their affairs wound up in accordance with the statutes of states providing for the winding up of corporations. But proceedings to wind up, and bankruptcy proceedings, are essentially administrative. No one doubts the power of congress to provide the machinery for such administration, and no one doubts the intention of congress, in the enactment of the national banking act, that to the extent national banks were concerned, such machinery should be embodied in the powers conferred upon the comptroller. But it is one thing to make provision for the administration of the affairs of an insolvent or dead bank—provision that will exclude

*In re Manufacturers' National Bank, 5 Biss. 499, Fed. Cas. No. 9,051; Washington National Bank v. Eckels (C. C.) 57 Fed. 870; Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476; Pahquioque Bank v. Bethel Bank, 36 Conn. 325, 4 Am. Rep. 80.

all other forms of administration; and quite another thing to deny to parties their constitutional right to appeal to the courts for the enforcement of contract or other legal obligations. So distinct are these matters in their legal nature, that we cannot conclude from the presence, in a statute like the national banking statute, of the one, an intention to include also the other. On the whole matter our conclusion is, that considering arguendo that the receiver might have brought the action stated in the bill, his right to bring such action is not exclusive; and that, to the extent the directors are responsible specially to the depositors, the depositors have a right of action—an action, adequate to the fulfillment of the obligation due the depositors by the directors.

The remaining question is, whether the remedy should have been in the form of actions at law, or a suit in equity such as this.

The case, as already stated, appears to us to be one clearly of equitable cognizance. The rule relating to equitable jurisdiction applicable to this case is laid down by Pomeroy as follows: Where a number of persons have separate or individual claims and rights of action against the same party, all arising from some common cause, governed by the same rule, and involving similar facts, so that the whole matter might be settled in a single suit brought by all the persons uniting as co-plaintiffs, or one of the persons suing on behalf of himself and others; or, where one party has a common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, instead whereof he might procure the whole to be determined in one suit, a bill in equity will lie on the ground that it prevents a multiplicity of suits. Pomeroy, Equity Juris. (2d Ed.) vol. 1, § 245.

The case stated in the bill goes—in the matter of equitable cognizance—even beyond the rules thus laid down. It is a case not alone of a number of persons having separate and individual claims against one party, arising from a common cause; or one person having rights against a number of persons, arising from a common cause; but the case of a number of persons having each a right against a number of persons, all arising from a common cause. To this, too, must be added the further consideration, that neither of the depositors could, by separate suits at law, recover that to which he is entitled; for the defendants to such suits, being directors who served varying terms, and subject, therefore, to varying obligations, could not be called to complete accounting and apportionment in a suit at law. Our conclusion is that the bill filed is the proper way to obtain an enforcement of whatever rights the depositors individually, or as a class, may have against the directors individually, and as a class. Indeed, both our conclusion on this point of jurisdiction, and on the right of depositors to bring the action directly, without the intervention of the receiver, seems to be sustained, indirectly at least, in Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. There the suit was in equity by a depositor—the First National Bank of Buffalo through its receiver—against the directors, and no question seems to have been made that the suit in that form would not lie. While but four of the Justices were for sustaining the depositor's claim, the other five denied it, not on the

ground that the suit would not lie, but that the claim was not made out by the proofs.

In view of what has already been said, the other points made in support of the decree below lose their point. The bill is not multifarious, because it does not proceed on distinct theories of recovery. The bill may have some surplusage, but it sets forth the obligations of the directors and their breach, with sufficient certainty. And the suit survives against the representatives of deceased directors, because it is a suit on contract, and not in tort. We think, too, under all the circumstances, that appellants ought to have leave to amend with respect to the time when their deposits were made.

The special demurrers taken on the part of certain defendants, that they were not shown to have been directors at the time certain acts complained of were done, cannot be sustained. The bill shows, that during the whole period covered by the complaint, dividends were being paid out of capital stock; and to that extent, at least, all of the defendants named, are answerable to the depositors.

The decree of the Circuit Court will be reversed, and the case remanded with instructions to give appellees leave to file the amendment proposed, and thereupon to overrule the demurrers to the bill.

THE TITANIA.

(Circuit Court of Appeals, Second Circuit. June 23, 1904.)

No. 196.

1. SHIPPING—BILL OF LADING AS EVIDENCE OF RECEIPT.
   A bill of lading issued by the master of a ship is prima facie evidence of, and, in the absence of proof to the contrary, establishes, the receipt on board of the goods therein described.

2. SAME—CONSTRUCTIVE DELIVERY.
   To establish a constructive delivery by a ship of goods deposited on the wharf, it is necessary for the carrier to show that he separated the goods from the general bulk of the cargo, designated them, and gave due notice to the consignees of the time and place of their deposit, and a reasonable time for their removal.

3. SAME—CONTRACT.
   The question of the duty of the carrier to deliver goods carried is to be determined by the bill of lading, without regard to the charter party, of which the shipper had no notice till after the terms of his contract with the ship had been unalterably fixed.

4. SAME—WAIVER.
   Any right of the carrier under the contract to compel consignees to take goods shipped "from alongside" is waived by the carrier unloading the goods onto the dock.

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

For opinion below, see 124 Fed. 975.

Appeal by claimant from a decree of the District Court for the Southern District of New York in favor of the libelants for $1,412.93

¶ 2. See Shipping, vol. 44, Cent. Dig. § 426.

damages for failure to deliver 56 bales of hemp. The opinion of the District Court is reported in 124 Fed. 975.

J. Parker Kirlin and Charles R. Hickox, for appellant.
Theodore M. Taft, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We agree with the District Judge in holding that, in the absence of any proof to the contrary, the bills of lading sufficiently establish the receipt of the bales in controversy on board the ship at Manila. These bills duly acknowledged the receipt in good order of 1,500 bales of hemp as numbered and marked on the margins "to be delivered in the like good order and condition at the aforesaid port of New York." The libelants have never received the 56 bales which are in dispute in this action. The law applicable to such a situation is clearly stated by the Supreme Court in The Eddy, 5 Wall. 481, 495, 18 L. Ed. 486, as follows:

"Delivery on the wharf in the case of goods transported by ships is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. Where the contract is to carry by water from port to port an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment."

In order to make a valid delivery, which relieves the carrier from liability, it is necessary to show that the goods in question were landed on the wharf, segregated from the general cargo so as to be conveniently accessible to the consignee, that notice was given of their arrival and location and a reasonable time allowed for their removal. Manifestly it is not a good delivery to deposit the entire cargo of the ship on the wharf and inform inquiring owners that if their goods arrived they will be found somewhere in the general mass of merchandise.

There was no actual delivery; this proposition must be conceded. To establish a constructive delivery it was necessary for claimant to show, first, that he separated the libelants' goods from the general bulk of the cargo; second, that he properly designated the goods; third, that he gave due notice to the libelants of the time and place of the delivery. The Ben Adams, 2 Ben. 445, 449, Fed. Cas. No. 1,289. There is no proof sufficient to establish any of these essential conditions to relief from liability. The claimant reaches the conclusion that a proper delivery was made by a process of syllogistic reasoning, which may not unfairly be epitomized as follows: If the missing bales were put on board at Manila they were carried safely to

New York. All of the bales which reached New York were landed on the Staten Island pier and consignees notified. Ergo the missing bales were constructively delivered to libelants. It is this presumption which the claimant seeks to substitute for proof of delivery, actual or constructive, which he is bound to furnish.

The District Judge sums up the situation as follows:

"The only evidence in the case is that contained in the receipt in the bills of lading; and that binds the ship until it shows by equally cogent proof either that the bills of lading were false, or that it has delivered the goods."

The claimant is in the unfortunate predicament of being called upon for proof and offering conjecture in lieu thereof. The claimant's brief concedes that "the disappearance of the bales in suit, if they were ever on the wharf, cannot be absolutely accounted for in any satisfactory manner," and yet upon him the law imposed the duty of accounting for them.

As before stated the bills of lading were prima facie evidence of the receipt of the hemp. We have, however, examined the testimony upon this question sufficiently to conclude that the weight of evidence, irrespective of the bills of lading, tends to show that the goods were actually on board at Manila. So far as the bales in suit are concerned they may have been lost soon after they were placed on the wharf, or they may have been carried away by other cargo owners by mistake. If the record contains any proof that these bales were separated from the rest, libelants notified and an opportunity given them to carry their property away, we have failed to discover it.

The Titania was chartered by her owner to Warner, Barnes & Co., of Manila, November 12, 1902. The charter party was introduced in evidence by the libelants. The twelfth clause is as follows: "The cargo to be brought alongside and taken from alongside at merchant's risk and expense; and to be carefully stowed on board at steamer's expense." The District Judge ruled that the charter party had no bearing on the controversy and that the libelants were not bound by its terms, their contract being shown by the bills of lading. We incline to the opinion that this ruling is correct, the preponderance of evidence being that the libelants had no notice or knowledge of the charter party until after the terms of their contract with the ship had been unalterably fixed. The Pietro G. (D. C.) 39 Fed. 366.

Moreover, assuming notice by libelants of the clause quoted and that it is capable of the interpretation advanced by claimant, it is manifest that no one connected with the discharging of the ship ever asserted such a construction. If the master had the right to compel the libelants to receive the hemp at the end of the ship's tackles he should have so informed them and proposed such a delivery. Instead of doing so he proceeded to unload in a manner which made it impossible for the libelants to comply with the provision of the charter party in question even if they had known of it. The master testifies:

"The arrangement made between the ship and the dock with reference to the unloading of the cargo and the use of the dock for that purpose was that the cargo was to be discharged according to the custom of the port. The custom of the port, as I understand it, is to land the cargo on the wharf and deliver it from there. The ship paid for the use of the wharf for that purpose."

If, then, the claimant acquired any right to compel the libelants to take the hemp "from alongside," he waived the right by delivering from the dock in accordance with the provisions of the bills of lading and the custom of the port.

Although concurring in the foregoing the majority of the court are of the opinion, in which, however, the writer does not concur, that the evidence establishes the following propositions: First, that the 56 bales in controversy were actually placed on the dock and weighed by libelants' agents; and, second, that the ship undertook to deliver into lighters. Concededly these bales were not put into lighters sent to the wharf by the libelants and as the claimant has failed to show a delivery, pursuant to the agreement as aforesaid, the liability of the ship is established.

The decree of the District Court is affirmed with interest and costs.

In re HAAS CO.

TAYLOR v. ZIEGENHAGEN.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 1,042.

1. CORPORATIONS—VALIDITY OF MORTGAGE—SECURING DEBTS OF STOCKHOLDERS.

A corporation has no power to execute its notes, secured by a mortgage of its property, for individual debts of its stockholders incurred in the purchase of their stock, to the exclusion of creditors of the corporation, although their claims arose after the mortgage was executed and recorded.

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

The Haas Company, a corporation organized under the laws of Illinois, October 24th, 1892, with an authorized capital stock of eighteen thousand dollars, and engaged in a soda water manufacturing business, was, on or about the 22nd day of December, 1902, adjudicated a bankrupt, and its property put into the hands of a receiver pending the appointment of a trustee. Thereupon appellee, mortgagee under a chattel mortgage, filed his petition, praying that the receiver be directed to turn over to him all the personal property described in the mortgage which was made to secure notes aggregating the sum of two thousand dollars. The property covered constituted the entire assets of the company. The trustee answered, challenging the validity of the mortgage, and on hearing before the referee, an order was recommended denying the petition; but on exceptions in the District Court, this recommendation was overruled, and the trustee directed to pay to the petitioner the proceeds of the sale, a sale having already taken place. From this order the appeal is prosecuted.

The finding of facts by the referee, about which there is no dispute, is as follows:

Prior to and on March 5th, 1902, the Haas Company was a corporation having a capital stock $18,000.00 divided into 180 shares of $100.00 each, of which Mr. Charles Ziegenhagen was the owner of 119 shares, Mrs. Lena Haas was the owner of 60 shares and Rosina Ziegenhagen was the owner of 1 share, the last named persons being the owners of all the shares of stock and the directors and officers of the corporation. At a meeting of the said directors, on the 5th day of March, 1902, at which all the directors, stockholders and officers were present, the President Charles Ziegenhagen, stated that

he had received an offer of $3500.00, for all the capital stock of the Company, payable as follows: $1500.00 cash, balance in 1, 2, 3 and 4 years. After discussing the matter, the other stockholders agreed to assign their stock in blank, and deliver the same to Mr. Ziegenhagen in order that he might make the sale, and it was decided and agreed that Charles Ziegenhagen be authorized to make the sale upon the terms above stated.

The foregoing facts appear from the record of the minutes of the corporation for March 5th, 1902. It also appears from the testimony of the petitioner, Charles Ziegenhagen, and the testimony of Frederick H. Teeple, that the negotiations for the sale of this stock had been going on for some time prior to March 5th, 1902, between Charles Ziegenhagen and Frederick H. Teeple, the latter being the proposed purchaser and that an oral agreement was made prior to the meeting of March 5th, 1902, between Ziegenhagen and Teeple, which provided that Teeple was to purchase the stock and to pay $1500.00 cash and to give notes for the balance.

At the Directors' meeting above referred to, held on March 5th, 1902, Charles Ziegenhagen, Lena Haas and Rosina Ziegenhagen resigned as directors and officers of the corporation, the resignations to take effect March 6th, 1902, at 12:00 o'clock noon. The records of the corporation show what purports to be the minutes of the meeting of the stockholders of the Haas Company, held "pursuant to notice." It is stated that there were present at said meeting, the following named stockholders:

Frederick H. Teeple	178 shares
Frank W. Teeple	1 share
Frederick Matz	1 share.

The record is silent as to the date or day on which said meeting was held. The minutes of this meeting show that the parties named as stockholders, elected themselves as directors of the corporation for the period of one year. The evidence shows that none of the stock was turned over by Ziegenhagen until the 7th day of March, 1902, but the minutes of the corporation show that on the 6th day of March, 1902, a meeting of the new directors last named, was held pursuant to notice. At that meeting, the directors were elected officers of the corporation: Frederick H. Teeple, President and Treasurer, Frederick Matz, Secretary, and a resolution was passed as follows: "That the officers of this Company be and they are hereby authorized to execute a chattel mortgage for and in the name of the Company in favor of Charles Ziegenhagen upon the property of the Company to secure its five notes dated the 7th day of March, A. D. 1902 one—for $250, due in six months after date one for $250, due twelve months after date—one for $250, due eighteen months after date—one for $250, due twenty-three months after date—one for one thousand dollars due two years after date all of said notes to bear interest at the rate of 5% per annum and 7% per annum after maturity." On the 7th of March Ziegenhagen delivered the 180 shares of stock of the corporation to Teeple and the others purporting to be stockholders of the Company and received from Teeple, $1500.00 in cash, and notes and mortgage of the Haas Company for the balance, and a chattel mortgage as set forth in said petition.

On March 7th, when the original stock was turned over by Ziegenhagen, there was no indebtedness against the Haas Company.

I find that, at the time the meeting of March 6th, 1902, was held, Frederick H. Teeple and the others who purported to act as stockholders and directors were not the stockholders of the corporation and did not become stockholders or directors by right until the 7th day of March, 1902.

I further find that the indebtedness to Ziegenhagen was the indebtedness originally of Frederick H. Teeple and that no consideration whatever passed from Ziegenhagen to the Haas Company, a corporation, and that the notes and mortgage in controversy, were wholly without consideration, passing to the Haas Company and that the Haas Company, even through its authorized directors or managers, had no authority or power to make such notes and mortgage and that the petitioner, Ziegenhagen, had knowledge of all these facts when he turned over his stock and took the chattel mortgage and notes.

My conclusion is that the action of the directors and officers in giving the mortgage, was wholly unauthorized and ultra vires and if not absolutely void

as to the corporation, the said notes and mortgage should be held as void against the rights of even subsequent creditors.

The only further fact of consequence is that at the time of the giving of the chattel mortgage, the company was free from debt; the creditors represented by the trustee here having become such since the mortgage was put on record.

William E. Oneill, for appellant.

J. G. Grossberg, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court:

The sole question raised by this record is this: Is it within the lawful power of shareholders of a corporation, to the exclusion of creditors of the corporation, subsequent in point of time to the transaction, to use the notes, and pledge the assets of the corporation, toward paying the shareholders' individual debts contracted in the purchase from others of such shares?

We think not. The corporation, as a statutory person, with power to transact business, invite credit, incur obligations, and to discharge them, is an entity entirely distinct from its individual shareholders, and from their power to transact business, invite credit, incur obligations, and to discharge the same. The shareholders may, it is true, out of the assets of the corporation, declare and pay dividends; or, the affairs of the corporation being wound up, divide among themselves its capital and assets; but dividends mean the division not of capital and assets as such, but of earnings; and a final division of capital and assets means that the corporation will invite no further credit. Under the name of dividends there can be no lawful division of assets and capital that would impair the rights of creditors; and so long as the corporation is a going concern, there can be no lawful division of capital and assets that would diminish the security upon which continuing or future credit will be presumably based.

The notes and mortgage under consideration here are in no sense a dividend; they do not pretend to be a division of earnings. Nor are they a final distribution of capital and assets; the corporation remained a going concern, and invited the subsequent credit which the trustee now represents. Unless shareholders may invade, at will, the capital and assets of the corporation, appropriating them with impunity to the payment of their individual debts, the transaction complained of by the trustee cannot be sustained.

But it is said that the creditors represented by the trustee in this case had knowledge of the existence of the mortgage, and must therefore have extended their credit with notice of the facts. The contention clearly embodies a non sequitur. Knowledge of the presence on the records of the mortgage does not imply notice that out of the capital or assets of the corporation the shareholders were paying their individual debts. The mortgage on file, so far as the creditors knew, may have been executed for corporate purposes, its avails remaining somewhere among the corporate assets.

The order of the District Court is reversed, and the case remand-

ed with instructions to enter an order denying the petition of appellee, and to subject the proceeds of the sale, first to the payment of the corporation's just debts.

THE JOHN I. BRADY and THE WILDCROFT (two cases).

(Circuit Court of Appeals, Third Circuit. July 19, 1904.)

Nos. 36, 37.

1. COLLISION—STEAMSHIP AND TUG WITH TOW MEETING—APPROACHING TOO NEAR BEFORE CHANGING COURSE.

A steamship and a tug both *held* in fault for a collision between the ship and barges in tow of the tug, which occurred on the Delaware river in the night, on the ground that, although the two vessels saw each other when a mile apart, each held its course and approached head on until they were so close together that the danger of collision between them was imminent, and a confusion of signals resulted, which brought about the collision; the steamship also for failure to maintain an efficient lookout; and the tug for being on the left-hand side of the channel, and signaling her intention to pass on the starboard of the steamship, in violation of the rules; the evidence being insufficient to establish a custom which justified her in keeping that side of the channel in passing up the river.

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

For opinion below, see 115 Fed. 204.

J. Parker Kirlin and Henry R. Edmunds, for appellants.

Curtis Tilton, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. These appeals were heard together, inasmuch as the cases below depended upon the same facts and were heard upon the same depositions.

The libels were filed severally by James W. Levins, master of the schooner barge "Bertie and Maud," and by the P. Dougherty Company, owner of the barge "Calvert," against the steamship "Wildcroft" and the steam tug "John I. Brady," to recover damages growing out of the collision between the "Wildcroft" and the appellees' barges, while in tow of the "John I. Brady." The court below found the steamship and tug in fault, dividing the damages between them, and entered decrees accordingly. From these decrees, the appellants have taken these appeals.

The leading facts of the case, as disclosed by the record, are these:

The tug "John I. Brady," with a tow of four heavily laden barges, was proceeding up the Delaware river, between 8 and 9 o'clock p. m. of March 19, 1901. The tow was made up at Delaware City. There were four barges in two tiers, "two in each tier, close up," the distance between the two tiers being 10 feet or so, just enough to clear the rudders of the front tier. The schooner barge "Bertie and Maud" was on the port side, and the barge "Calvert" on the starboard side of the first tier, the barges "Provost" and "Experiment" being in the second tier. The hawser from the tug to the first tier of boats was about 125

feet in length, and the length of the tug 72 feet, the whole tow being about 600 feet in length. The regulation lights of the tug and tow were properly set and burning, there being a red light on the port side of the "Bertie and Maud" and a green light on the starboard side of the "Calvert," the starboard and the port sides of the two barges respectively being without lights. While the tow so made up was proceeding up the river, above Edgemoor, upon the western side of the channel, with lookouts properly stationed, the steamer "Wildcroft" was observed coming down the river, more than a mile off, some of the witnesses on the tug saying that she bore somewhat on the starboard bow. The wind was blowing from the eastward, and strong. Those on the tug testified that it was usual for tows like the one in question to keep on the western side of the channel. The testimony of those on the tug is, that about half a mile distant, two whistles were blown by the tug, to indicate that she was going to the westward, and intended to pass the steamer on her starboard side. The pilot on the steamer says that he first observed the tug and tow a little on his port bow; that he gave them one whistle, to indicate that he would pass to the port side of the tow. He says, also, that the "Brady" at that time was showing a red light, which would indicate that she had not yet put her helm to starboard, to pass to the westward of the steamer. The witnesses on the "Wildcroft" state that they only heard the blast of one whistle from the tug, and the testimony on the part of the tug is, that after hearing the one whistle from the steamship, they repeated the blast of two whistles from the tug, indicating that she persisted in her intention to pass to the westward.

We may here quote from the findings of fact, and opinion of the learned judge of the court below:

"The steamship and tug approached each other nearly head on, both being westward of the channel course. Each vessel had a proper lookout and each saw the other more than a mile away. If the proper maneuvers had been executed, I have no doubt that a collision would have been avoided, for there was abundant room and depth of water in the channel for both vessels, and if they had taken due precautions the accident would not have happened. A strong wind was blowing from the northeast, and it may be that this may have had some part in preventing the steamship from hearing the tug's signals. As usual, it is impossible to reconcile the contradictory accounts of the witnesses that were called by the respective vessels, and I shall not attempt to discuss the two theories in detail. I do not accept either of them as a whole, for it seems clear to me that the collision can be explained much more simply and more probably than by following either as if it were completely true. The tug and her tow were certainly upon what would ordinarily be the wrong side of the channel, and although there seems to be a more or less prevailing custom for tugs with their tows to take the western side of the river at this point, I do not think the custom is sufficiently established to furnish an adequate excuse. Unquestionably, if the tug upon this occasion had been upon the right hand side of the channel, there would have been no collision, and upon that side, I think, she should have been. It was a fault in the tug to have been in the wrong place; but aside from this, I think it was plain that each vessel was to blame for holding a nearly head on course too long. The evidence satisfies me that each held this course until they came so near each other that unless signals were precisely and promptly made and obeyed, there was great danger of collision. This, as it seems to me, is the true explanation of what happened. In the darkness of the night they came closer to each other than either vessel supposed the distance to be; and when the true situation was recognized and each realized the unexpected peril, a not unnatural confusion

of signals occurred, neither vessel being quite certain what was best to be done or what the real intention of the other might be. There is the usual conflict of testimony concerning the color of the lights that could be seen from the respective vessels, and I have little doubt that toward the last, when it was impossible to avoid the collision, the conflict may perhaps be explained by the fact that each vessel changed its course in the hope of escaping the impending disaster. At this stage of the affair it would be useless to apportion the blame, if accurate apportionment be possible. The initial fault, as it seems to me, a fault for which both vessels are equally liable, was in approaching each other head on too close for safety. Apparently, each vessel either expected the other to give way, or was confident that the passing could be safely accomplished on the course that each was holding—the result being that when the final effort to pass was made, there were mistakes on both sides, in consequence of which the two barges were injured. Immediately before the collision took place, the tug, by a desperate sheer to starboard, barely escaped the steamship, which broke the hawser leading from the tug to the 'Bertie and Maud,' and struck its starboard bow against the port side of the barge's stem, forced its way between the two barges, breaking several of the breast lines by which they were attached to each other, and struck the port bow of the 'Calvert,' doing injury to that boat also. Some of the witnesses for the steamship testified that her way had been stopped before the collision took place, and that she was actually going astern; but considering the extent of the injury that she inflicted, this testimony seems to me to be unreliable. For the reasons given, I am of opinion that both the tug and the steamship were at fault, and that each of the barges is entitled to recover from both. As I understand, it is not seriously contended that the barges were guilty of negligence; but if such a position is really taken, I have no difficulty in finding that they were free from blame."

We agree with the learned judge of the court below, that the testimony shows that the steamship and the tow were approaching each other head on, or nearly so, and that it was the duty of the tug to have observed the directions of article 18, rule 1, of the rules of the supervising inspectors (Act June 7, 1897, c. 4, § 1, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2881]), requiring steam vessels so approaching to pass each other port to port, and that the contention on behalf of the tug, that a custom existed, that tows of that kind should keep on the westward side of the channel under such circumstances, was not sufficiently sustained by the testimony to justify the tug in disregarding the directions of article 18, above referred to. We think, also, that the evidence shows that the steamer held on her head to head course too long before indicating, by proper signals, her intention as to passing, and persisted unreasonably in her intention to pass to the westward, after being made aware of the tug's intention of doing the same.

We think, also, the evidence shows that no sufficient lookout, as required by the inspectors' rules, was maintained on the bow of the steamship. The carpenter, who testifies that he was on the bow of the "Wildcroft" at and before the time of the collision, does not state that he was stationed as a lookout, but was doing work that necessarily distracted his attention.

On the whole, we think the case has been properly disposed of by the court below, whose decree is accordingly affirmed.

BURNS v. BURNS.

(Circuit Court of Appeals, Second Circuit. May 26, 1904.)

No. 211.

1. FEDERAL COURTS—APPEAL—OPINION OF TRIAL JUDGE—PRESUMPTIONS.
The opinion of a trial judge on conflicting evidence will be presumed correct on appeal.

2. CARRIERS—CONTRACT OF SHIPMENT—DEMURRAGE—BILL OF LADING.
Where libelant contracted to transport coal for respondent consignee, who was the owner, under a verbal agreement as to the terms of freight, and that the demurrage rate should be $6 per day, and libelant did not call respondent's attention to the fact that the shipper had inserted in the bill of lading a provision for demurrage at the rate of 6 cents a ton of cargo for each day's detention, until after the coal had been delivered, and respondent did not discover such change until delivery had been completed, the shipper having no authority to make a new contract for respondent, the latter was liable for the demurrage only at the rate specified in the original contract.

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

For opinion below, see 125 Fed. 432.

Martin A. Ryan, for appellant.

F. W. Park, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. It is not disputed that the libelant was entitled to recover demurrage for 20 days for the detention of his canal boat by the respondent, and the only question is whether he was entitled to recover at the rate of 6 cents per ton per day (which would be $18.42 per day), as claimed by him, or at the rate of $6 per day, as claimed by the respondent.

The respondent engaged the libelant's canal boat to go to St. George, Staten Island, and take on a cargo of coal from Hamilton & Co., for transportation and delivery to the respondent at New York City. Hamilton & Co. gave a delivery order for the cargo upon the Niver Coal Company, at St. George; the master of the canal boat delivered his order to the Niver Coal Company, and the cargo was put on board; and thereafter the master signed bills of lading in triplicate, presented to him by the Niver Coal Company, leaving two with them, and retaining one himself. In this instrument the Niver Coal Company was named as the shipper of the cargo, the respondent was named as the consignee, the quantity of coal was stated, the freight was stated as "agreed upon," and the rate of demurrage was fixed at six cents per ton of cargo for each day's detention. Upon giving notice of his boat's arrival at New York to the respondent, the master delivered his bill of lading to the respondent, and the respondent retained it without examination and without objection. After the cargo had been discharged the libelant claimed demurrage at the rate stated in the bill of lading. The respondent claims that upon engaging the canal boat

¶ 2. Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

he made a verbal agreement with the libelant not only as to the terms of the freight, but also as to the demurrage, and that the demurrage rate was to be $6 for each day's detention. The court below, upon conflicting testimony, found this contention in favor of the respondent. His opinion is presumably correct, and, upon reading the proofs, we are fully satisfied with his finding.

It is urged for the appellant that by receiving the bill of lading after accepting the cargo the respondent assented to the terms of the bill of lading, including the demurrage rate. Ordinarily, when goods are delivered to a carrier for transportation, and a bill of lading is delivered to the shipper, the latter is bound to examine it and ascertain its contents, and, if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior parol negotiations to vary it, nor can he set up ignorance of its contents. On the other hand, if the goods are accepted for transportation by the carrier without any receipt or bill of lading being issued, the subsequent delivery to and acceptance by the shipper or his agent of such an instrument will not constitute a binding contract, for in such cases there is no consideration for the subsequent agreement. Perry v. Thompson, 98 Mass. 249; Bostwick v. Balt., etc., R. R. Co., 45 N. Y. 712. Whether the fact that the bill of lading in the present case was prepared by the Niver Coal Company is of any consequence, in view of its not having been delivered until the cargo had been accepted by the carrier, further than as evidencing the assent of that company to the terms of demurrage, need not be considered. That company had no authority to make a new contract for the respondent, and the real question is whether what subsequently took place between the master and the respondent conclusively established a new contract between the libelant, whose agent the master was, and the respondent. Doubtless the consignee who receives the goods under a bill of lading is ordinarily liable to pay the freight or demurrage stipulated for in the instrument, although payment may not have been exacted before the delivery of the goods. But we think this rule does not apply where he is the owner of the goods, and they have been transported under a different contract with him by the carrier, and the goods are delivered without any new understanding between him and the carrier. The case of Old Colony R. R. v. Wilder, 137 Mass. 536, is in point. In that case the question was whether the consignee, who had bought goods upon which the consignor was to pay the freight, accepted the goods marked so as to make the freight payable on delivery; and it was held that, as there was no evidence of a demand of the freight by the carrier before delivery, the acceptance was merely evidence, but not conclusive evidence, of a promise by the consignee to pay the freight. The court treated the case as though the goods had been accepted under a bill of lading by the terms of which the freight was payable by the consignee, and said that if the defendant accepted the goods, knowing the carrier looked to him for the freight, the law would imply a promise to pay it, but, if he had not such knowledge, no promise would be implied. In the present case the master knew, or was bound to know, that the Niver Coal Company had inserted in the bill of lading terms with respect to the demurrage which the respondent had not authorized; but he did not

call respondent's attention to the change until after he had delivered the coal, and the respondent did not discover the change until the delivery had been completed. There was marked carelessness upon the part of some employé of the respondent, as well as of some employé of the Niver Coal Company, and we are unable to doubt that the libelant availed himself of the circumstance to put forward a claim which he knew was without merit.

The decree is affirmed, with costs.

ENTERPRISE MFG. CO. v. LANDERS, FRARY & CLARK.

(Circuit Court of Appeals, Second Circuit. June 2, 1904.)

No. 168.

1. UNLAWFUL COMPETITION—INJUNCTION.

Where defendants admitted that they were manufacturing and selling mills in competition with complainant's mills, and had used parts of complainant's mills as patterns wherever it was convenient or profitable to do so, and that they were now making and selling mills which in effectiveness and attractiveness were the same goods as those sold by complainant, such competition was unlawful, entitling complainant to an injunction.

2. SAME—DECREE.

Where in a suit to restrain defendants from selling certain grinding mills, on the ground of unlawful competition, the answer averred that, in addition to the manufacture and sale of similar mills by defendants, defendants also intended to make other mills which will be substantially the same goods as other classes of mills made and sold by complainant, a decree enjoining defendants from selling "any grinding mills having the characteristic shape, design, color, and ornamentation of the grinding mills sold by complainant, and referred to by the numbers 0, 1, 2," etc. (giving 15 numbers), was justified, though there was no proof of any sale of mills corresponding in size to such numbers.

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

For opinion below, see 124 Fed. 923.

This cause comes here upon appeal from a decree of the Circuit Court, District of Connecticut, restraining defendants from unfair competition in trade, and for an accounting. Complainant and its predecessors have for 30 years been engaged in the manufacture and sale of a line of mills for grinding coffee, drugs, etc., of varying sizes; adopting therefor a certain characteristic shape, design, color, and ornamentation, which have become well known to purchasers, and associated in their minds with the goods of complainant. In 1898, or thereabouts, the defendants began to make and offer for sale similar mills, and, upon discovery thereof, this suit was brought.

E. D. Robbins, for appellants.

Charles Howson, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

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

See Trade-Marks and Trade-Names, vol. 46, Cent. Dig. § 79.

LACOMBE, Circuit Judge. This is a most aggravated case of unfair trading. Usually in these cases the defendants so dress their goods as to present a number of points of difference, on which they rely when charged with intent to deceive; insisting that, although there may be resemblances, the differences are so great as to preclude any idea that they had sought to produce confusion. Here, on the contrary, they have not only conformed their goods to complainant's in size and general shape, which was to be expected, but also in all minor details of structure—every line and curve being reproduced, and superfluous metal put into the driving wheels to produce a strikingly characteristic effect—while the goods are so dressed with combinations of color, with decorations reproduced or closely simulated, with style of lettering and details of ornamentation, that, except for the fact that on the one mill is found the complainant's name, and on the other the defendants', it would be very difficult to tell them apart. It is elementary law that, when the simulation of well-known and distinctive features is so close, the court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, even though in their instructions to their own selling agents they may caution against oral misrepresentations as to the manufacture of the goods. There is evidence to show that purchasers have been deceived as to the identity of these mills, but, in the case of a Chinese copy, such as defendants offer to the public, such proof is hardly needed.

It is to defendants' credit that, when confronted with the charge of copying, they have not denied it, nor asserted that they were trying to differentiate their own products. On the contrary, they admit that they "concluded they could profitably manufacture this same line of hardware and sell it in competition with the Enterprise Company," and accordingly commenced the manufacture thereof, "using parts of mills sold by the Enterprise Company as patterns wherever it was convenient or profitable to do so," with the result that they are "now making and selling coffee mills which in all substantial respects, and especially in their effectiveness in use and attractiveness, are the same goods as those made and sold by the Enterprise Company."

No doubt, with such identity in attractiveness, competition with complainant's mills would be much more effective; but defendants overlooked the fact that a court of equity will not allow a man to palm off his goods as those of another, whether his misrepresentations are made by word of mouth, or, more subtly, by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor.

The decree enjoined the sale of mills of seven sizes which had been already offered for sale, and further enjoined the sale of "any grinding mills having the characteristic shape, design, color, and ornamentation of the grinding mills sold by complainant, and referred to by the numbers 0, 1, 2," etc. (giving 15 numbers). Although there was no proof of any sale of mills corresponding in size to these numbers, the decree as to them was warranted by the answer, which avers that "defendant also intends to make other mills which will be sub-

stantially the same goods as other classes of mills made and sold by the Enterprise Company."

The decree of the Circuit Court is affirmed, with costs.

BAILEY v. WILLEFORD.

(Circuit Court of Appeals, Fourth Circuit. February 10, 1904.)

No. 534.

1. INJUNCTION—PRELIMINARY RESTRAINING ORDER—DISSOLUTION—APPEAL.

Act Cong. June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551], amending Court of Appeals Act, § 7, and providing that an appeal will not lie from an order dissolving a preliminary restraining order, did not deprive the Court of Appeals of jurisdiction to entertain an appeal from such an order where it was in fact a final order granted on a decision that plaintiff was not entitled to any relief under the prayer of his bill, though the order did not in terms dismiss the bill.

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

On Motion of Appellee to Dismiss.

Cothran, Dean & Cothran and Adams, Jerome & Armfield, for appellant.

R. B. Redwine and A. M. Stack, for appellee.

Before WADDILL, BOYD, and KELLER, District Judges.

PER CURIAM. This motion is based upon the idea that the decree appealed from in this case is merely an interlocutory decree dissolving the preliminary restraining order awarded by the Circuit Judge in the first instance, and that since the passage of the act of June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551], amending section 7 of the act establishing Circuit Courts of Appeals, no appeal lies from such an order or decree. It is conceded that, if this were an interlocutory order, the appeal would not lie to this court; but it appearing in this case from an inspection of the bill, the order appealed from, and the opinion of the court as contained in the record, that the court finally decided that it could grant the appellant no relief under the prayer of his bill, and that the order made was in fact a final order, this court has jurisdiction to entertain the appeal, regardless of the fact that the order does not in terms dismiss the bill.

The motion to dismiss is accordingly refused.

GALOW v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

No. 979.

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

Where a partition made of planks nailed to piles under a railroad trestle was temporarily erected to separate piles of broken stone and sand dumped under the trestle, to be used in making certain concrete foundations, and such partition was put up, taken down, and transferred as the

work progressed by the workmen themselves, the master was not liable for injuries to a servant caused by his being struck by three of the planks which fell from the top of the partition by reason of their being insufficiently secured.

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

The action in the Circuit Court was to recover for personal injuries sustained by plaintiff in error, while at work on the railway tracks of the defendant in error, near Janesville, Wisconsin. The substantial facts brought to the attention of the court and jury were without dispute.

The tracks of the defendant in error entering Janesville, Wisconsin, pass over a high trestle on wooden piles. At the time of the injury complained of, the defendant in error was engaged in constructing concrete piers to support the tracks at their under crossings, in which work a large force of men was employed. To carry on this work, crushed stone and sand was, from time to time, unloaded from cars on the trestle to the ground below; and to separate the stone from the sand, a temporary wooden partition about sixteen feet high had been put up. The partition consisted of planks laid on edge crosswise of the trestle, and nailed to the upright piles. The partition was put up by the men themselves. At times the stone heap lying on one side of the partition would rise in the middle to a height of twenty feet; the sand heap on the other side being somewhat lower; but both the stone heap and the sand heap were in constant change, as stone and sand was being carried off by the workmen, in the progress of the work.

Plaintiff in error was, at the time of the injuries, engaged with others in wheeling stone from the pile to a mixer near by. Nearly all the stone had been removed, but the partition still remained. In this state of things, while engaged in loading a wheelbarrow, three of the top planks fell from the partition upon the back of the plaintiff in error, inflicting the injuries for which the action was brought.

The further facts are stated in the opinion of the court. At the close of all the evidence, the court, on motion, directed a verdict for the defendant, and from the judgment entered on such verdict, the writ of error is prosecuted.

Richard Fischer, for plaintiff in error.

Charles B. Keeler, 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.

It is clear that the partition fence was of the simplest kind of construction, requiring no skill—a mere temporary appliance to the work being done. It was put up, taken down, and transferred, as the work progressed, and the piles of sand on one side, and of stone on the other, rose or fell away from day to day.

It is equally clear that the erection, maintenance, and removal of the fence, was one of the details of the work necessarily entrusted to the workmen themselves. To the mere adjustment of such appliances, and their maintenance in a safe condition, the responsibility of the master to give a safe place in which to work, does not extend. Armour v. Hahn, 111 U. S. 318, 4 Sup. Ct. 433, 28 L. Ed. 440; Butler v. Townsend, 126 N. Y. 112, 26 N. E. 1017. This, indeed, is not a case where the master failed to give the servant a safe place in which to work. It is a case, rather, in which a servant in the performance of his work, was overtaken by an accident, due to the giving away of an appliance for the strength and safety of which he, along with the other workmen, was responsible.

The judgment will be affirmed.

IDEAL STOPPER CO. et al. v. CROWN CORK & SEAL CO.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1904.)

No. 517.

1. PATENTS—ANTICIPATION BY PAPER PATENT—IDENTITY OF IDEAS.
In determining the question of identity of the inventive idea involved in two patents, it is not a sufficient answer to say of an alleged anticipation that it was a mere paper patent, and that the device had never been operative or commercially successful, because prior existing conditions may not have stimulated full development.

2. SAME.
A patentee cannot be denied invention because of a prior patent for a device which never came into use, unless the idea upon which his patent is predicated is so clearly set forth or suggested in the alleged anticipating patent that a mechanic with such patent before him could by the exercise of mere mechanical skill so modify proportions or change the mode of operation as to overcome the difficulties which excluded the prior device from commercial utility.

3. SAME—BOTTLE STOPPERS.
The Painter reissue patent, No. 11,685 (original No. 540,072), for a bottle stopper, which consists of a cup-shaped disk of material having a permanent flexion, which is inserted in the neck of the bottle and there expanded into a groove having a shoulder below, and in which a gasket has been placed, thus making a tight stopper, was not anticipated by the British patent to Young, No. 12,247 of 1848, which does not cover a stopper, but merely a disk designed to be expanded on the top of a cork or other stopper, to hold the same in place, performing the function of the wiring otherwise used for that purpose.

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

For opinion below, see 123 Fed. 666.

Philip Mauro (Reeve Lewis and Joseph C. France, on the brief), for appellants.

John C. Rose and Robert H. Parkinson, for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

BRAWLEY, District Judge. The patent in controversy is that which was considered by this court in Crown Cork & Seal Company v. Aluminum Stopper Company, 108 Fed. 847, 48 C. C. A. 72. Of that decision the learned counsel for appellants say:

"We assent absolutely to every legal doctrine stated and applied in that decision, and find in it the full sanction and authority for every proposition upon which we rely. The sound principles and logical reasoning of that decision, applied to the state of facts as they are presented, led necessarily to the upholding of the patent. Applied to the actual state of facts, embracing the Young patent as part of the prior art, they lead of necessity to the opposite conclusion."

It thus appears that the single question presented by this appeal is whether the Young British patent discloses and anticipates the alleged invention of the Painter patent. It was decided adversely to the de-

¶ 1. See Patents, vol. 38, Cent. Dig. § 73.

fendants in the court below. We held in the former case that Painter's patent was—

"A distinctly original conception, so essentially unlike anything in the prior art that nothing earlier has been presented to us out of which the defendants could read the invention of the patent or either claim of it. There was no known device which could be converted into the Painter invention by any improvement short of rejection of the entire plan. The answer of defendants, it is true, stated that this patent was void for want of novelty, and referred to the prior invention of Young in Great Britain in 1848. This was urged by Hall's attorneys upon the attention of the officials of the Patent Office in opposition to the granting of the reissue, and was held by the board of examiners in chief not to exhibit the Painter invention; and the defendants' own expert, Lorenz, testified that the Young patent was not a practical or operative device, and seems so far to have satisfied the learned counsel for defendants on that point that Young's patent was not introduced in evidence."

Young's patent is now before us, and the appellants' case rests upon the proposition that there is "substantial identity of the inventive idea of the Young patent with that of the Painter patent," and the argument of the appellant is that every element or feature of the Painter device is found in the Young patent. If that is true, Painter is not entitled to be considered as a pioneer, as having disclosed a primary invention, and the decision of the court below should be reversed; for the evidence shows that the appellee company, the assignee of Painter, has a practical monopoly of certain bottle-stopping devices, and it would be unjust in principle and highly injurious in its consequences to the public to sustain its exclusive privilege, unless it is clearly established that Painter was the pioneer in this art, for this would tend rather to obstruct than to stimulate invention, which is the great object of the patent laws. If the original conception of that method of stopping bottles, for which his patents were granted, was not his; if the principle of the alleged invention, with all its undeveloped possibilities, is found in previous patents or rested in public knowledge, and he has done no more than extend the original thought by a change only in form, proportion, and degree; if he has carried forward another's conception by a new and more extended application of it; and if the essence of his patents is in doing substantially the same thing in substantially the same way, only providing such improvements or modifications as a mechanic conversant with the art could effect by skill or ingenuity—it would follow that he would be entitled only to patents upon his improvements, and would not be entitled to shut out others from the enjoyment of those improvements which the same or greater skill may have achieved. In other words, if the inventive idea was Young's, and not Painter's, and Painter had simply improved upon Young's conception, and if any skilled mechanic could take Young's patent and by a combination of the same elements, differing merely in degree or in detail, or in the substitution of equivalents, could produce a bottle stopper substantially the same as Painter's, merely varying the form of mechanism, but without involving any of Painter's ideas, then it would follow that Young was the pioneer in this art, and not Painter. But if the entire scheme of Painter is radically different from that of Young, and if, in construction, operation, purpose, and result, the invention set forth in Painter's patent is not responsive in terms or substance to the Young construction, and the same or nonequivalent elements are not used in substan-

tially the same way to produce the same result, and no mechanical skill working upon Young's plan could ever produce the same result that Painter accomplished, then it would follow that the inventive idea was different, and any modification or improvements worked out upon Painter's idea must be tributary to it. The question to be decided is mainly one of fact, and, whatever doubt there may be as to the correctness of our conclusion, there is no doubt as to the legal principle which should govern it.

Robinson, in his work on Patents (sections 272, 892, 893, 894, and cases cited), states the principle:

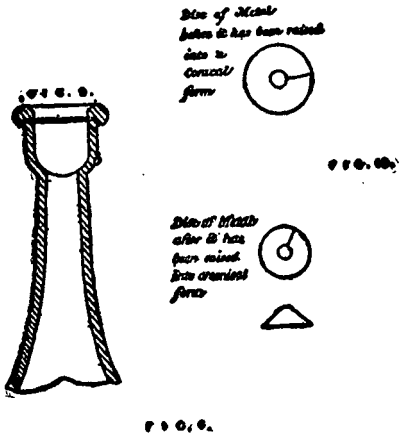
> The test of the question of identity in the inventive idea is whether "the compared inventions perform the same functions by the same modes of operation. If the effects produced are substantially different, there is no identity. If the effects are the same, and the functions are essentially distinct, there is no identity. If the functions are the same, and the modes of operation by which they are performed are radically unlike, there is no identity. Contrariwise, where the effects are identical, the functions identical, and the modes of operation identical, the ideas embodied in the two inventions must also be identical."

In determining the question of identity of the inventive idea, it is not a sufficient answer to say of any alleged anticipation that it was a mere paper patent, and that the same had not been operative or commercially successful; for prior existing conditions might not have stimulated full development. To discover the inventive idea that was in Young's mind, we naturally look to his statement of invention and to the drawings intended to illustrate it, for that is supposed to embody his ideas. We do not mean that Young's invention is necessarily limited to his own conception of its possibilities. Columbus would not be the less entitled to be considered to have discovered America because, when he set out on his voyage his object was, not to discover a new continent, but a new route to an old one; and if Young gave to the world an invention which was intended for one purpose only, yet which so clearly suggested the thought which afterwards bore fruitage in Painter's invention and which required only a more deft mechanic to develop it, then Young might justly be considered the pioneer in the art of inventing bottle stoppers, and Painter would be entitled only to such improvements as his mechanical skill wrought upon Young's invention. The line which separates invention from mechanical skill is at best a narrow one, and the difficulty of demarkation in this case is enhanced by the fact that of necessity we look upon Young's invention with eyes instructed by Painter's and other subsequent patents, and must take care that we do not in such light so reconstruct Young's patent as to see in it those possibilities which may seem very obvious now, but which may not have been disclosed by the patent itself; for, vague and uncertain as may be the line of demarkation between mechanical skill and invention, we could not deny Painter the right of invention, unless the idea upon which his patent is predicated is so clearly set forth or suggested in Young that a mechanic, with Young's patent before him, could by mere mechanical skill so modify proportions or change the mode of operation as to overcome the difficulties which excluded the prior device from commercial utility, and thus make fruitful the inventive idea which before was futile, merely through lack of the mechanical skill needed for its development.

Young's British patent, No. 12,247, August 21, 1848, contains the following statement of invention:

It "consists of employing discs of sheet metal raised into a conical form, so as to reduce the diameter in order to their entering the mouth or neck of such vessels, and then by causing them to be pressed so as to assume a flat form, they will retain the cork or other elastic stopper securely in the necks or mouths of such vessels. Figure 7 shows part of a section of a spirit can; figure 8, the plan thereof; figure 9 shows the section of a bottle or such like vessel; and figure 10 shows a disc of metal before and after it has been raised into a conical form. In these arrangements the cork or other elastic stopper enters the neck or mouth of the vessel, and rests on the shoulder, b, b, and is retained and pressed securely by means of the disc, which is introduced in the conical form, that then is to be caused to spread out and become flat by pressure, so that the edges will enter the groove around the neck or mouth, as shown by the drawing. By this arrangement the cork or stopper cannot be drawn out without the power equal to that required for bending the disc of metal."

Figure 9, showing the bottle neck, and figure 10, showing the metal discs, will be copied here from page 653.



A plain man, uninstructed by the learning of experts, reading the terms of the specifications and the drawing corresponding to those terms, would see in them a disc of sheet metal intended to hold the cork in its place as a substitute for the wire caging theretofore used for that purpose. There is no suggestion for providing any substitute for the ordinary cork stopper, nothing to indicate that the cork or stopper was to act in any manner different from the ordinary way, or that the disc of sheet metal was designed for any other purpose than to retain the cork in its place. No new method of stoppering bottles was claimed or suggested. The bottle was to be stopped by a cork or other elastic stopper, entering its neck in the old way and operating in the old way; the only thing that is new being the disc of metal that is to hold it in its place. It proceeds upon the theory that a cork or other elastic stopper is necessary, and provides only against its expulsion by a device in substitution for the old cork retainer of wire or other method applied on the outside of the bottle neck. In short, his invention consists, not of a new stopper, but of a new method of retaining the old stopper in its

place. That this disc, so operating, is all that there is in Young's patent, all that is claimed, and all that an inspection of the drawing shows it to be, is confirmed by its history. It has been before the world for more than half a century, and obviously the world did not want it; for it has not used it, although it has been free to do so for many years.

We have stated what we think would be the conclusions of the ordinary intelligence as to Young's inventive idea, drawn from the reading of the specifications and from the inspection of the drawing; but there are certain mysteries in the patent law that the ordinary mind cannot penetrate, and we must seek illumination from the experts. Unhappily we cannot accept without reservation the opinions of the experts who have been examined as witnesses, for they are necessarily partisans of the side calling them, and essentially advocates, and their opinions are contradictory, and tend to perplex, instead of elucidating, although they appear to be gentlemen of great ability and deserved eminence. But we have in the record before us the opinion of some experts whose testimony cannot be impeached because of interest. We refer to the trained officials of the Patent Office, who had the same question before them, and substantially the same arguments, when Hall filed his petition of interference on Painter's application for reissue, on the ground that Painter had been anticipated by Young. One of the primary examiners, Mr. Witherspoon, who has been examined as an expert by the defendants in this case, sustained this contention; but he was overruled by the unanimous judgment of the Board of Appeals. The case was exhaustively presented and carefully considered. We referred to these proceedings in our former opinion, and it is not necessary to repeat what was then said. The final decision of the board of examiners was that the "British patent cited has not this type of stopper, and does not include its elements operating in the same way to produce the same result."

In the former case one of the defenses set up in the answer was that Painter's patents "are void for want of novelty, because the contrivance described and shown therein was, prior to William Painter's alleged invention thereof, patented to Mr. Young in the United Kingdom of Great Britain and Ireland, August 21, 1848, in letters patent No. 12,247." When that case came on to be heard this prior patent was not introduced in evidence; but it was before the court as part of the proceedings of the Patent Office, growing out of Hall's interference, and did not escape our attention. There is an implication, rather than a suggestion, that there was something suspicious, if not sinister, in the failure of the defendants in that case to introduce this patent in evidence. It would surely have been as good a defense there as it is claimed to be here, and the omission to present it naturally calls for explanation. That it was due to lack of acumen and zeal on the part of defendants' counsel can hardly be successfully claimed. This court bears willing witness to the ability and earnestness with which the defense in that case was conducted. Mr. Walker, the leading counsel for the defendants, and the author of the well-known text-book on Patent Law, seemed to us to have explored the whole domain of the patent law to find weapons of assault upon the Painter patent, and all the learning on that subject was exhausted. That Painter's claim with-

stood these assaults seemed to us to be due to the fact that it stood upon an impregnable foundation. Inasmuch as certain testimony was offered by the defendants in this case in explanation of the reasons for the abandonment of this defense, Mr. Walker was called by the complainants as a witness in rebuttal, and testified as follows:

"No ulterior reason, or any reason aside from my judgment of want of merit in the Young defense, had any influence in causing that defense to be omitted from the evidence in the Aluminum Case."

Copies of his correspondence while engaged in preparing for the defense, giving in detail the reasons for this conclusion, are in the record, from which it appears that after repeated experiments by the expert, Mr. Lorenz, and after thorough analysis by Mr. Walker himself of the mechanical points which he found to be involved in the question, and a thorough study of the Young patent, he reached the conclusion that Young's combination was practically useless because it did "not provide any way to guide its conical disc into its groove fully and firmly enough to enable it to exert any material resistance to any tendency that the cork may have to be forced out of the bottle by pressure within the bottle." In his letter of February 2, 1899, he says:

"We find, on experiment, Young's cork will not expand his disc into its groove when it is cut on a line with the diameter of that groove, because, being yielding, the cork will suffer itself to be indented by the edge of the disc rather than force that disc outward into its groove. It is apparent to me that Young never made a stopper on that plan, or he would have discovered that it was necessary to not only give the shoulder under the cork a diameter smaller than that of the unexpanded disc, but also to give the shoulder immediately under the disc groove a diameter less than the unexpanded disc."

And, after giving further details, he adds:

"For these reasons I am convinced that we must give up all hope of making a successful defense on Young, and it is never wise to make any invalid defense in a patent case, because such a defense reflects injuriously upon whatever valid defenses may be introduced in the same case."

The conclusions reached, with manifest reluctance, after careful experiments and thorough analysis by experienced counsel, vitally interested and evidently anxious to discover in Young's patent an anticipation of the Painter patent, and which, if found, would have been a successful defense against it, and the conviction that there was no merit in such defense, and the entire abandonment of the same after it had been set up in the answer, seems to us to be entitled to great weight as the opinions of experts against their interest. Opinions of experts generally, though given under oath, are but arguments in behalf of the side calling them. They are paid for generally as counsel is paid. These considerations cannot affect the weight of the opinions of Mr. Lorenz and Mr. Walker, given in circumstances which furnished every possible motive for reaching conclusions the converse of those actually reached, and their weight depends solely upon our estimate of their ability and skill. In somewhat of the same atmosphere must be weighed the opinion of the learned and conscientious judge below. His judgment in the former case had been adverse to the complainants, not, it is true, upon the precise point now at issue, but his opinion evidently was that the Painter patent was not entitled to the broad construction claimed for it. So when this case came before him, in so far as bias may be predicated

of a mind so singularly open and just, it might be thought that his inclination would be rather to limit than to expand the claims of Painter's patent, and his conclusion that Young's patent is not an anticipation of the invention of the patent in suit states tersely the point and essence of this controversy:

"But Young's is, after all, a different kind of stopper. His is a cork or plug, which is the stopper, and which is kept from coming out by a metal disc or cup. The complainants' is a metal disc, which is the stopper, made tight by its contact with the bottle by an elastic packing of cork or other material."

On the side of the complainants, then, we have Young's statement of invention and the drawing illustrating it, which is fundamentally different from Painter's, in that it is a cork retainer, and not a new device for stoppering bottles, as Painter's is. We have the proceedings of the Patent Office, with its repeated adjudications, after discussion and consideration of substantially the same argument as now presented, adverse to the contentions now urged, and where the claims of the Painter patent were framed and approved as adequately expressing the distinction between Painter's invention and Young's and all prior inventions. We have the opinion and judgment of an uncommonly able and experienced lawyer, founded upon experiments of his expert and his own analysis, in circumstances tending to give it the highest value, that there was no merit in Young's patent as a defense against Painter. We have the judgment of the court below to the same effect, and we have the undisputed fact that, although Young's patent was before the world for half a century, it had no effect upon the bottle-stopping industry. There is no evidence that it was ever used for any practical purpose, or that any inventor or manufacturer ever found in it suggestion of or inspiration for any new form of bottle stoppers; and we have the judgment of this court, the correctness of which is not questioned or impeached, that:

"Prior to the inventions hereinafter to be described, which are the subject-matter of this controversy, the common method of stopping bottles was with cork, wood, rubber, or some other resilient material, inserted longitudinally into the neck of the bottle, and held there by its elastic, lateral pressure in frictional contact with the circumference, supplemented, in cases where gaseous liquids cause internal pressure, by wire or twine on the outside of the bottle head." 108 Fed. 847, 48 C. C. A. 72.

Such was our judgment as to the state of the art prior to Painter's invention, the testimony showing abundantly and conclusively that there was no practical method of sealing bottles which dispensed with the costly and inconvenient plug or cork; and there is nothing in the testimony in this case, or in the argument, which attempts to modify the correctness of that conclusion. There have been great improvements in the art since Painter first received his patent, such as Hall's, who was a sort of pupil of Painter, and whose patent was held to be infringement, and the patents now in controversy, admitted to be infringements, if Painter's patent is construed as we have heretofore construed it. The fact that from the time of Young, in 1848, up to the time of Painter, there were no improvements in the art, and that since Painter's invention there have been many improvements, creates a strong presumption that Young's inventive idea was a barren one, and that

Painter's inventive idea was a different and a fruitful one, and the converse of a suggestion of identity of ideas, upon which the defense rests.

Before considering further this defense it is well to state precisely what Painter's invention was. The pertinent claims are as follows:

"(1) The combination of a receptacle having a groove in the side of its mouth and a shoulder projecting inward beyond the wall of the mouth above the groove, and a cup-shaped disc or plate of material having permanent flexion, all operating as set forth."

"(4) The combination of a receptacle having a groove in the inside of its mouth and a shoulder projecting inward beyond the wall of the mouth of the groove, a cup-shaped disc or plate of material having permanent flexion, and a packing or stopper beneath and retained by the disc or plate, all operating as set forth.

"(5) A combination, substantially as hereinbefore described, of a bottle having an interior groove in its mouth, a packing or gasket in said groove, and a disc or plate of material having permanent flexion, which confines the packing in said groove, and maintains it in tight contact with the adjacent surface of the groove."

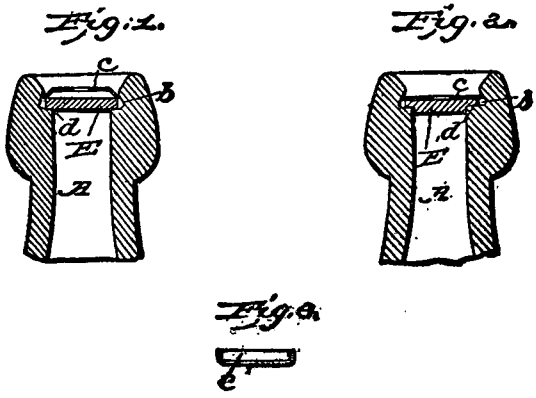


Figure 1 is a central section of the bottle neck, having a groove and a packing in such groove, and showing stopper in position to be expanded. Figure 2 is a similar section, showing the same expanded, and with the packing in the groove compressed and clamped against the adjacent surface of the groove. Figure 6 shows a cup-shaped disc. Reading his statement of invention and the figures illustrating it, what would the ordinary mind conceive to be the inventive idea of Painter? Clearly, his idea is to dispense with the old-fashioned method of stopping bottles with cork, and to produce by machinery a substitute for it. It is not intended to be an improvement on the old system, but a radical departure from it. Starting out with the knowledge that cork, being a natural product, was liable to great departures from uniformity in size and quality, relatively expensive in first cost, and requiring treatment to bring it to a satisfactory degree of elasticity, with certain disadvantages of a hygienic nature, by reason of its porous quality, which causes it to absorb deleterious substances, which might be injurious to the contents of the bottle, and which would also be injuriously affected by defective corks, requiring labor to put them in and additional labor to pull them out, he conceived a broadly novel system for stopper-

ing bottles, by dispensing with cork or reducing its use to a minimum, which would be free from the erratic effects of the natural material, inexpensive to produce, facile to operate, and efficient in results. Young's whole conception being that a cork is necessary, there is no suggestion of a substitute for it. The inventive idea involved in his disc of metal is to provide a substitute for the wire caging to hold the cork in its place. It proceeds upon the theory that a cork is necessary, and therein lies the fundamental difference in the underlying principle between Young and Painter. The elements employed, in their relation to each other, in their methods of operating, and in results obtained, are essentially dissimilar; the difference being a difference in the plan, not merely a difference of proportion and degree in carrying out the same plan. Painter's plan involves an interior annular groove in the bottle neck, which forms the chamber for the stopper, with the shoulder which forms the floor, another shoulder which forms the roof, and a peripheral wall. The stopper is a cup-shaped disc, formed of material having permanent flexion, small enough to enter the mouth of the bottle into the zone of the groove. When it so enters, being composed of material which retains its form when flattened, it is expanded by molecular deformation of the cup, whose periphery is pressed into hard and tight contact with the peripheral wall of the groove. If this wall was absolutely accurate in form, nothing more would be needed; but, as such refined nicety is expensive and difficult of attainment in ordinary bottles, Painter's scheme provides for supplementing the deflected cup with a packing of rubber, cork, or other suitable material, in the form of a gasket around the edges, and by the radial compression of this packing between the periphery of the cup and the peripheral wall of the groove; the disc serving not only its own office as a stopper, but also maintaining the packing in the groove in close contact with the adjacent surface of the bottle neck, thus making a stopper sufficiently tight to retain gaseous liquids. There is an inwardly projecting annular shoulder in the bottle neck, which prevents the cup slipping down too low in the neck of the bottle. A like shoulder above prevents it being pressed upwards by the expansion of the gaseous elements, and the cup thus easily positioned in the zone of the groove, when the deflecting agent is brought to bear on it, its periphery is expanded exactly where it is wanted. In such position it would be difficult to get it wrong. The packing required to make a tight joint need be very thin. If of cork, its bulk is trifling as compared with the amount of cork needed for an ordinary stopper; thus conserving economy and avoiding the other objections which experience has pointed out in the use of cork for stoppers.

Claim 1 of Painter's patent does not refer to packing. Claim 4 recites the packing, and claim 5 recites a bottle having an interior groove in its mouth, with a packing or gasket and a disc or plate having permanent flexion. The battle raged for years in the Patent Office over these claims, and after thorough examination of all prior patents, including Young's, and exhaustive consideration of the whole subject, as shown by the record—some of Painter's claims being disallowed—the claims of the patent were framed and allowed by the board of appeals as adequately expressing such distinctions as that board finally determined would be effective for the purpose of securing the invention

which the patent was intended to protect. If that board believed, as is claimed by appellants, that there is "substantial identity of the idea of the Young patent with that of the Painter patent," how is it possible that, after an exhaustive examination and review of the Young and other alleged anticipations, it could find, as it did find, that "there is novelty, and clear patentable novelty, in the combination which includes the vessel with its groove and shoulder and the raised expansible disc or plate?"

Having thus considered what we think are the essential features of Painter's patent, we will now, at the risk of some repetition, consider the essential features of Young's patent. Primarily, it suggests no substitute for the ordinary cork stopper. It proceeds on the theory that such a stopper is necessary, and provides nothing to take its place. There is no flanged or cup-shaped disc, or anything working on that principle as a substitute for the cork. All that it claims is "a disc of sheet metal raised into a conical form," which by pressure assumes a flat form, which "will retain the cork or other elastic stoppers securely in the necks or mouths of such vessel." The figures illustrating his conception show a round flat piece of metal, with a hole in the center and a line cut through to the circumference, which permits it to be coiled like a ribbon in the shape of a cornucopia. There is no inward projecting shoulder to the groove to arrest the coil of metal in the plane of the groove, for it is intended to rest on the cork. The law of its structure requires a pressure against the small end of the coil, which will cause it to unwind and thus slide flatwise into the groove. The principle on which it operates involves a radial division from center to circumference. It does not form and cannot form a continuous peripheral engagement with the wall of the groove as, either by itself or supplemented by a peripheral packing or gasket, will constitute a stopper, for it is not intended for any such purpose; its only purpose being to bar the escape of the stopper.

There is a great deal of testimony tending to show that it is not effective for that purpose; that, if operated under commercial conditions, it is not available for any practical purpose; and the record shows that experiments conducted in the former case for the purpose of preparing a defense satisfied the parties interested that it was inoperative and worthless. The experts, on the one hand, have pointed out the difficulties which in their opinion constitute a fatal disability inherent in the plan. On the other hand, experts have testified to their successful experiments. No bottlers engaged in the business and having practical experience in the art have shown that bottles can be stopped by this method with that uniformity, facility, and economy which gives it superiority over the old method of retaining corks by wire. All that these experiments prove is that by careful manipulation the disc can be inserted. There is no testimony whatever that the device has gone into practical use, and, as everybody has been free to use it for many years, this fact creates the strongest presumption of its inutility. Commercial success is not an infallible standard by which to test the merit of an invention. Such success is often due to mere business ability in manufacturing, exploiting, and advertising; but, given a large demand for a particular thing, a market already created, and an invention which it is free to use, the fact that it is not used strongly demonstrates

its inadequacy. The public, crying for bread, is not satisfied with a stone. It needed a new stopper, cheap in production, facile in operation, efficient in results. Young gave it only its old stopper with a new device for holding it in place, so difficult in operation as not to exclude the older method, which accomplished a like purpose, and the result was that nobody wanted it; and, so far as the testimony shows, nobody has ever used it, except the experts employed and paid to do so. From the time of Noah all mankind, including Young, stopped his bottles with cork or some other resilient material, until Painter's patents taught him something better and cheaper, so much better and so much cheaper that 60,000,000 of his stoppers were taken last year; and yet the learned counsel for the appellants, admitting in the court below, and not denying here, that he is operating under patents that are infringements, if Painter's is valid, asks with apparent earnestness, and with iteration, wherein consists Painter's inventive idea? If the records of the Patent Office, wherein it is set forth in detail, and where, after sharp contests and exhaustive examination, the claims were allowed and framed; if the instant public recognition in the large demand for the article produced—is not proof that he has invented something new and useful, it would be difficult, perhaps, to give an answer that would satisfy.

This is not one of those great inventions that awaken admiration for the genius of the inventor and stir the heart like a trumpet. It is nothing but a bit of metal and a bit of cork, so co-operating that the result is something very simple, very cheap, very efficient, and so very much needed that the wonder is that nobody did it before, but nobody did. It is not surprising that Young did not, for he was not working towards this result. He only sought to devise a new method of holding down the stopper, not to produce a new stopper. He had a different conception, worked on a different plan, and produced a different effect. He, too, it is true, used a bit of metal so coiled as to enter the mouth of the bottle, which in its devolution might be flattened out. There is no shoulder under the disc groove, with diameter less than the unexpanded disc, which would prevent its slipping into the bottle; for this shoulder, according to Young's conception, was not necessary, as the disc was not designed to enter until the cork was in, and was to rest on that. His coil might, by unwinding, serve the purpose of holding the cork in its place; but it could not possibly, by the very law of its construction, maintain that close circumferential contact with the wall of the bottle neck essential to make an effective stopper, either with or without the packing or gasket. It has not and cannot have the permanent flexion which Painter's disc has. It is a cone of thin metal, something like a metal ribbon, which is designed to perform its function by unwinding, liable to overlap, and entirely incapable of forcible expansion against the wall of the bottle like a continuous flange. The primary idea that an efficient seal could be effected by it alone, or by the lateral pressure of its edges against a packing of elastic material, which would thus insure the filling of any irregularities between the metal and the adjacent wall, is entirely lacking in Young's invention. Nobody has suggested, and nobody would pretend, that Young's disc alone could be used for sealing a bottle, while Painter's alone would seal the bottle, provided the bottle neck was perfectly round and regular; the gasket or packing being made necessary only by reason of the ir-

regularities and imperfections incident to cheap bottles. It does not follow that the inventive idea is the same because each employed a metallic element and an elastic element to accomplish the same purpose; for, if terms are employed which avoid defining the distinctive character of the device or imperfectly describe it, few patents would escape anticipation, for nearly all employ the same elements. The imagination may find in Young's "disc of sheet metal" the cup-shaped disc of Painter; for men are prone to see what they want to see. Polonius saw in the cloud first a camel, then a weasel, and then something "very like a whale," as Hamlet bade him. Taught by Painter, we can see that a "disc of sheet metal" may be converted to a purpose altogether different to that which Young conceived, not by a mere mechanical change, but by a functional change, due to a conception of a different plan. Young, it is true, does not in his statement of invention require that his disc of sheet metal should be slit; but his drawing shows it, and it cannot operate on his plan unless it is slit radially to form the coil or cone to enter the bottle neck, so as to unfold. So, with the cork. It is not a mere matter of dimensions, for that is simply a question of proportion, merely one of mechanical judgment; but the difference between the cork as used by Young and the thin layer or packing used by Painter is a difference of function. With Young the cork is the stopper; with Painter the packing is merely ancillary to the stopper. The difference in the interior groove and shoulders in the bottle neck is also one of function. This has already been pointed out, but a mere inspection of the drawings shows it more plainly than any words of description.

That there is a superficial resemblance between the two patents must be conceded, in that both use a combination of metal and elastic material; but it does not follow that there is an identity in the inventive idea, for, as we have endeavored to point out, each was guided and informed by a different purpose. The elements are combined upon a fundamentally different plan, and one cannot be merged into the other by mere changes in proportion or degree or by the substitution of equivalents. The mechanical skill which may be invoked to exclude the idea of invention must be mechanical skill applied in accordance with the direction of the alleged anticipating patent; not the skill which, taught by the invention in suit, seeks to reform and reorganize the former patent, so disguising it under a cloud of subtlety of argument and suggestion as to transform it.

The judgment of the court below is affirmed.

BRUNSWICK-BALKE-COLLENDER CO. v. KLUMPP et al.

(Circuit Court of Appeals, Second Circuit. May 17, 1904.)

No. 184.

1. PATENTS—INVENTION—BOWLING APPARATUS.

The Reisky patent, No. 599,447, claim 1, for an improvement in bowling apparatus, which consists of a specially constructed runway for the return of the balls, since the filing of a disclaimer of the feature of using a double incline, is void on its face, for lack of patentable invention.

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

For opinion below, see 126 Fed. 765.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, sustaining a demurrer to the complainant's amended bill, and dismissing the same. The decision below is reported in 126 Fed. 765.

J. C. Clayton, for appellants.

Harold Binney and S. L. Moody, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The suit was brought upon letters patent No. 599,447, granted February 22, 1898, to complainant, as assignee of Emil Reisky, for "improvement in bowling apparatus." It was heard upon pleadings and proofs, and the bill dismissed for lack of patentable invention. Appeal was taken to this court, and decree was reversed. Our opinion is reported in 111 Fed. 904, 50 C. C. A. 61. It sufficiently sets forth the specifications and the claim in controversy. We concurred with the judge who heard the cause in the conclusion that the "improvement" was one which should have been obvious to an ordinary skilled mechanic, but were constrained by the testimony to hold that there was patentable invention. That testimony is set forth in the opinion. It showed that the desirability of retarding the ball as it neared the home terminal of the returnway had been appreciated for many years; that many different devices to secure that result had been suggested, but that apparently no one of those who sought to secure the result had adopted the seemingly obvious one of making the ball reach the home terminal on an up grade. Had any such method been disclosed in the earlier art, the original decision would have been affirmed. It now appears that, apprehending proof of such a structure antedating the patent, the patentee has filed a disclaimer which recites that in the prior art there were ball returnways with "an upgrade near the player's end, merging into the terminal," and disclaims such part of the claim "as would include a returnway by which the homing of the ball was not accelerated." The bill presents the disclaimer as well as the patent, and, with the concession that in the prior art the returning ball had been retarded by an up grade, the case may properly be disposed of on demurrer; and, for the reasons set forth in our former opinion, we have reached the conclusion that the patent discloses no patentable invention, except possibly as to minor details of construction, which are subject of other claims, not here in controversy.

The decree is affirmed, with costs.

TIMOLAT et al. v. PHILADELPHIA PNEUMATIC TOOL CO.

(Circuit Court, S. D. New York. April 30, 1904.)

1. PATENTS—ANTICIPATION—UNSUCCESSFUL DEVICES.
A patent for an improvement or manufacture which does not accomplish the objects and purpose of its conception and is impracticable does not anticipate a later patent upon a similar device capable of successful operation, unless the objections to the device of the prior patent relate merely to details of construction, or where it can be converted into a successful device by a mechanic of ordinary skill.

2. SAME—PRIOR USE—BURDEN OF PROOF.
A defendant has the burden to establish an alleged prior use to defeat a patent by proofs clear, satisfactory, and beyond reasonable doubt.

3. SAME—INFRINGEMENT—PORTABLE DRILLING MACHINE.
The Moffet patent, No. 369,120, for a portable drilling machine having a rotary engine operated by steam or compressed air, was not anticipated, and is entitled to a liberal construction; the machine described being the first successful portable power drill for heavy metal boring. Claims 1 and 2 also *held* infringed.

In Equity. Suit for infringement of letters patent No. 369,120, for a portable drilling machine, granted to John Moffet August 30, 1887. On final hearing.

Hillary C. Messimer (John R. Bennett, of counsel), for complainants.

D. Frank Lloyd (E. Hayward Fairbanks and Hector T. Fenton, of counsel), for defendant.

HAZEL, District Judge. This is a bill in equity to recover damages for infringement of United States letters patent issued to John Moffet, No. 369,120, granted August 30, 1887, and to restrain infringement of claims 1 and 2 of said patent, of which complainant Timolat is the assignee, and the complainant corporation sole licensee. The patent is for a portable drilling machine. Its motive power is a rotary engine operated by steam or compressed air, compactly united and inclosed in a light cylindrical case, adapted to be used by the hand of the operator. The specification calling attention to the manner in which holes were formerly bored in metal parts connected and placed in position says:

"This has commonly been accomplished by the use of a suitable clamping device applied to the parts in which the hole was to be bored, and boring the same by the means of the ordinary ratchet-drill manipulated by the hand of the artisan, which is a very slow and fatiguing process."

The object of the invention is to supply the workman with a portable drill, with motive power, having a boring device suitably adapted for being changed from place to place as the operator desires. The engine is attached to the frame which carries the boring spindle and other parts connected with the boring device. Claims 1 and 2 only are involved. They read as follows:

"(1) In a portable boring machine, the combination of the boring spindle with a rotary engine, upon the cylinder of which is formed the journal bearing for the boring spindle, as set forth.

"(2) In a portable boring machine, the combination of the boring spindle,

¶ 1. See Patents, vol. 38, Cent. Dig. § 73.

the rotary engine, with its cylinder, upon which is formed the journal bearing for the boring spindle, the gear connecting the boring spindle and engine shaft, and the feed screw and sleeve nut adapted to turn and force forward the boring tool, as set forth."

Claim 1 is for a combination of elements, namely, a rotary engine and boring spindle, and the journal bearing formed upon the cylinder of the engine. Claim 2 has all the elements of claim 1, and, in addition thereto, includes gearing between the engine shaft and the shank of the boring spindle and a force screw and sleeve nut. The answer denies the novelty and utility of the Moffet patent; avers prior knowledge and use by others, anticipation by earlier patents and prior publications, and noninfringement. The Moffet patent is apparently well known to the Circuit Courts and Circuit Court of Appeals in this circuit, for it has been considered in one aspect or another at least five times at final hearing and on motions for injunctions pendente lite. A summary of the litigation in which this patent has been involved follows: At final hearing, Timolat v. Manning (C. C.) 110 Fed. 206. On motion for temporary injunction, Timolat v. Fairbanks; no opinion written. On motion for temporary injunction, Timolat et al. v. Franklin Boiler Works Co.; no opinion reported. On appeal from order granting temporary injunction, Timolat v. Franklin Co., 58 C. C. A. 405, 122 Fed. 69. Motion for preliminary injunction in the case at bar, 118 Fed. 852. Motion to dissolve injunction, Id., 123 Fed. 899. In the Manning Case, Judge Coxe, in his comprehensive opinion, after considering the Allen, No. 306,375, dated October 14, 1884, Fullman, No. 67,284, dated July 30, 1867, Noteman, No. 273,136, dated February 27, 1883, Whitcomb, No. 249,130, dated November 1, 1881, and Jones & Wild, dated December 22, 1881, patents, which were claimed by the defendant to anticipate the patent in suit, accorded to the inventor great credit for having been the first to conceive a highly meritorious and successful portable power drill for heavy boring. He also concluded from the evidence in that case that the patentee reduced the drilling device to practice several years prior to the date of the application, which was filed December 24, 1886, and accordingly decided that the date of the invention was before September 27, 1883. In the Franklin Boiler Works Co. Case, the Circuit Court of Appeals, after considering the patents before Judge Coxe, the Higginson and Mead English patents, and the Sharpneck and Leach (first) American patents, modified the injunction pendente lite granted by Judge Coxe as to claims 1, 3, and 4 of the patent, and continued the injunction as to claim 2. The reason for the modification, as announced by the court, was owing to proof of certain devices not before the Circuit Court in the Manning Case. The Court of Appeals gave no intimation as to the force and effect of such new evidence upon the validity or construction of said claim, "otherwise than to raise doubts which should preclude a decision upon affidavits alone." Such, then, was the practical status of the patent in suit, as declared at final hearing by the Circuit Court, and substantially as qualified on appeal in the Franklin Boiler Case, at the time this suit was instituted. In explanation of a vigorous defense in the case at bar and a voluminous record, it is contended that new evidence is disclosed, strongly supported by prior patents, showing indisputably that

the Moffet drill, the successful practicability of which is controverted, in all its essential elements is anticipated, and that, in connection with the file wrapper now before the court, it is proven that the patent was irregularly and illegally granted. It is asserted that the trained experts of the Patent Office were remiss in their duties when the application was filed, in that they failed to unearth or bring out of concealment the patents of Allen, Leach (first and second), and of Sharpneck. This additional evidence, it is claimed, would, beyond doubt, at least have resulted in limiting, if not anticipating, the scope of the Moffet patent at the initial hearing. It is further stated in argument that the Circuit Court was not correctly advised by the slender record of 56 pages in the Manning Case as to the state of the art, and hence a broader construction was vouchsafed the patent than it was entitled to receive. It is further insisted that the defense in that case was asserted with insufficient vigor and assiduity, and therefore it is thought such defense was farcical and not asserted in good faith. Attention is called to the evidence in the Manning Case upon which the Moffet invention was antedated. Upon that point it is now claimed that the proofs clearly establish that Moffet's first rotary engine patent, granted in 1883, was incapable of practical operation, and no successful rotary drill was perfected until a short time prior to December 4, 1886, the date of the patent in suit. The defense relies upon the alleged conflicting statements found in the cross-examination of complainant's witness Moffet to show that the earlier date of the invention of the Moffet patent was a mistake of fact, and that the first satisfactory rotary drilling machine was not completed until shortly before the date of filing the application in suit. On his direct examination the witness testifies that he completed the drill in the latter part of 1883. He was unable to state the exact date, but, producing a letter dated April 25, 1883, relating to a rotary engine for which he desired to secure a patent, testified that he was positive that he completed a drill prior to the receipt of the letter. Other correspondence in evidence, dated February 9 and February 16, 1885, relating to the purchase for Moffet of portable rotary drills suitable for boring one-inch holes, would seem to strongly support the earlier date of invention. Moreover, the witness Bollstetter is positive that perfected portable rotary drills invented by Moffet were used in the factory where Moffet and himself were employed in July, 1883. The evidence of Bollstetter, then a youth 14 years of age, is positive, direct, and unequivocal, and, as to the period of time when he first saw a perfected Moffet drill, is satisfactorily corroborated. It may well be that the first machine of this character which he had seen made a lasting impression upon his memory. As such evidence is uncontroverted, I am unable to see any reason why it should be disregarded, and I therefore concur in the conclusion heretofore reached in the Manning Case, that the invention was completed some time prior to September 27, 1883. Stress is placed upon the Moffet file wrapper to show that claim 2 was limited in the Patent Office when the application was under consideration. The requirements of the Patent Office that claim 2, as originally filed, be amended by the patentee to include the element "the rotary engine, with its cylinder, upon which is formed the journal bearing for the boring spindle," cannot be construed as a limitation

thereof. The object of the amendment obviously was to emphasize the self-evident fact "that the entire cylinder does not itself form the spindle bearing." The specification and drawings remove any suggestion of ambiguity by declaring that the engine and boring spindle shall be supported by a frame, which signifies nothing less than a cylinder frame, within which the small parts of the engine and the boring spindle are so connected as to transmit power to the boring shaft. The proofs are convincing that the above elements in combination embody the gist of the invention, without which the device would be incapable of successful operation. The intermediate actuating gearing arrangement between the boring spindle and the rotary engine enables the engine shaft to revolve more rapidly than the boring spindle, and accordingly an essentially slower velocity is imparted to the drill. This secures practical and successful boring in heavy metal work. Giving consideration, therefore, to the manifest intent of the Commissioner of Patents and of the inventor, which may be fairly presumed from the context of the specification and correspondence, it is not shown that a narrower claim was substituted. Nor are the claims of the patent limited to the details of construction. Hence the means adopted for journaling the boring spindle on a projection at the side of the cylinder, and integral therewith, are thought to be unimportant.

A description of the constructions, as found in the specification, follows:

"C is the engine cylinder. * * * This cylinder, C, is provided at diametrically opposite points with the tubular connections, a. * * * Upon the underside of the cylinder, C, is a projection, E, preferably integral therewith. This projection forms a sleeve or long journal bearing, in which the boring spindle, F, is carried. This spindle is provided at one end with a suitable socket to receive a drill or other boring tool, d, and has firmly secured to its opposite ends the gear wheel, c, which engages with the pinions, c, keyed upon the projecting end of the engine shaft, e. As the wheel, c, is much larger than the pinion upon the engine shaft, it follows that the revolutions of the latter will be greatly in excess of those of the boring spindle, and that there will be a consequent increase of power in the latter, with a corresponding decrease of speed, thus enabling a very small swiftly running engine to furnish all the power needed for operating the drill, without increasing the weight of the machine to such an extent as to render it unwieldy.

"Firmly secured to one end of the cylinder, C, is a frame, G, having an opening which receives the gear wheel, c, and an additional opening, in which the collar, h, upon the inner end of the feed screw, s, is placed. This feed screw is thus attached and extends outwardly from the frame, G, and is received into the sleeve nut, n, which is provided at its outer extremity with a pivoted joint, n, upon which it turns when revolved by the handles, o, or other suitable means. The point, n, has a bearing in the upright of the clamping frame, B, and forms the point of resistance for the drill in its forward motion."

It is perfectly true that nearly all the elements of the combination, taken separately, are old. The art of drilling metal was familiar when the patent was conceived. There were different ways and means in which such holes in metals were bored; the dimensions of the metal, and size of the holes desired, controlling the means employed. A breast drill was ordinarily used, and a jackscrew or brace as a force feed was very common. These earlier devices, imperfect in view of later improvements, could not accomplish the objects and purposes of the invention in suit. According to the defendant, the combination of ele-

ments is not new, by which a metal power drill or spindle is arranged in a rigid parallel alignment with the engine shaft, and supplied with means to produce a close union by the journaling of the boring spindle upon the engine cylinder. The proofs, however, do not sustain the antiquity of such a combination in a drilling device. The principle of decrease of speed resulting from the employment of larger gearing wheels is not new, but its application to a drill of this description accomplished a new result, and is therefore patentable. To assume lack of novelty in the Moffet patent, or to limit its claims, requires a conclusion by this court that the power drilling tools described in the patents of Allen, Fullam, Noteman, Whitcomb, Jones & Wild, Leach (first and second), Sharpneck, and Higginson were capable of successfully carrying out the objects and purposes of the Moffet patent. The evidence does not warrant such a conclusion. It is well established that a patent for an improvement or manufacture which does not accomplish the objects and purpose of its conception, and is impracticable, does not anticipate a later patent upon a similar device, capable of successful operation, unless the objections to the prior patent relate merely to details of construction, or where an ordinarily skilled mechanic may convert an impractical or unsuccessful device into a practical success. Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 469, 19 C. C. A. 534; E. M. Miller Co. v. Meriden Bronze Co. (C. C.) 80 Fed. 523. It may be that the patents cited in anticipation were not unpractical in the sense that they were paper patents, or entirely lacked utility and operativeness. Some of them doubtless were capable of successfully working in a circumscribed field, and if any of them disclosed a drill of the Moffet invention, such disclosure would unquestionably anticipate the patent in suit. The record, however, shows Moffet to have been the first person who described or made known to the world a portable power drill for heavy boring, namely, boring two-inch holes in iron. For work of this character hand ratchet drills were used, which were slow, costly, and inefficient. In the patents now for the first time urged in anticipation, it is stated in the specification that the drill is useful both for boring wood or metal. An important distinction is thought to exist between drills of this character. Moffet's object, as has been stated, was to adapt a power drill to bore holes in metal parts used in the erection of iron buildings, vessels, and bridges, which was movable without inconvenience from one position to another. To successfully carry out this object, it was necessary to arrange the engine gearing, boring spindle, and force feed in such a way as to secure a direct thrust directly in line with the drill, and at a certain rate of speed. The desired velocity of the boring spindle could be obtained only by adapting a journal bearing for the spindle connected in alignment with the engine shaft regulated by the rotating gearing. This is the essence of the invention, and, beyond doubt, entitles the complainant to a differentiation from the prior art. As to the references previously before the Circuit Court and Circuit Court of Appeals in the cases mentioned, no convincing new evidence being presented by the record, the construction adopted and differentiations could well be followed. Neither the Allen, Leach (first and second), Higginson (English), nor Sharpneck

patents embody the combination of the patent in suit. They are each functionally unlike the Moffet invention. The Sharpneck patent is for a rock drill, and, though removable from one position to another by the operator, has no journal or boring spindle. The drill is inserted in the socket of the engine shaft, and rotates with the shaft at the same velocity as the engine. Clearly it lacks the elements of claims 1 and 2. The Higginson patent has no actuating gearing arrangement between boring spindle and rotary engine, and accordingly, in my judgment, is unable to achieve the results attained by the complainants' drill. The reference to Leach was thought by Judge Coxe, in the Franklin Boiler Works Co. Case, to approach more nearly the Moffet device than the others, except the patent of Noteman. The court remarked that the alleged patent presented nothing new. The Circuit Court of Appeals, in speaking of the earlier Leach patent, said that the rotating spindle was merely an extension of the wheel, and revolved at the same rate of speed. In the opinion of Judge Lacombe, who granted the temporary injunction in the present case, it is stated that the Leach patent (second), considered by itself, does not indicate that the earlier decisions would have been different, had it appeared in the records. The Leach patent (second) describes a portable steam auger. It has two shafts; one, a, extending longitudinally through the engine cylinder at the lower end; and the other, e, which has a socket to the shaft on the auger or drill. Both shafts are provided with adjustable gears. The specification states substantially that by this arrangement, and by changing the pinions or gears upon the shaft or countershaft, the operator is enabled to increase or diminish the rotating speed of his auger shaft without altering the speed of the engine. Defendant's testimony tends to show that this construction, if it be construed in accordance with complainants' combination, is similar in appearance to that of Moffet, and has the precise elements of claim 1. The Noteman construction is practically similar to the Leach (second), and yet, after a careful examination of that patent, the Circuit Court reached the conclusion in the Manning Case that it was impractical for heavy metal boring. Again, it must be admitted that the drawings of Leach do not disclose the feature upon which complainants' expert witness Waterman lays great stress, namely, the line of thrust in actual alignment with the drill tool. I am not satisfied by the evidence of the practical operativeness of the alleged construction. It is incapable of boring large holes in heavy metals. Apparently the object of the invention was to construct a boring device for both wood and metal. I have not overlooked the testimony of defendant's witness Keller, to the effect that he had constructed a drill in accordance with the drawing of the Leach patent, and that it is capable of successful operation for metal boring and reaming. The model exhibit, modified in an important particular, is produced, showing a feed screw located in alignment with the drill. The Leach (second) patent undoubtedly closely approaches the Moffet structure. I am not satisfied, however, by the proofs, that it is so near as to anticipate it. The Allen patent has a boring spindle connected with the rotary engine cylinder in such a way as to form a bearing for the spindle and gearing, which, in operation, tends to increase the revolutions of the engine, and to decrease the speed of

the spindle. In the Manning Case, the court, speaking of this patent, said:

"The best reference offered by the defendants is unquestionably the patent granted to John F. Allen, October 14, 1884, for a portable drilling machine. The application was filed December 3, 1883, and there is no satisfactory testimony establishing the date of the construction of the Allen machine prior to the date of the application."

This brings me to a consideration of the defendant's asserted new evidence to establish the prior use of the Allen device. It is attempted to be shown that in the autumn of 1882 and in the spring of 1883, prior to the date to which the patent in suit was antedated, Allen built and successfully operated a portable drill embodying the combination of claims 1 and 2. An identical construction is not produced. A model made according to the Allen patent by Mr. Keller, patentee of the infringing drill, as an exhibit, is in evidence. The invention of Allen does not appear to have gone into general use. I have carefully read the testimony upon which it is claimed that the date of the Allen construction is prior to the date of the application. I am not favorably impressed by the testimony of Allen upon this point. Considered in connection with his former testimony and the testimony of his father in the Manning Case, it has not the weight claimed for it. A witness who has had ample opportunity to narrate his connection with a transaction, and apparently fully relates the same, and thereafter, in another litigation, gives a different narrative in relation thereto, or one from which an entirely different inference may be drawn, is not usually to be depended upon for accuracy of statement. The testimony of such a witness should be carefully scrutinized before it is accepted as true. Even where it is uncontradicted, it should not be accepted if there are reasonable grounds for believing that it is unreliable or mistaken. It may be that the testimony of Allen does not come within the range of testimony which is thus characterized and described by the courts. Certainly the testimony of one who concededly withheld material and important testimony upon a former trial ought to be convincingly supported by other satisfactory evidence before such testimony first offered at a later trial involving the same issue is accepted. The rule in such case imposes upon the defendant the burden of proving the earlier device, and also to establish prior use and invention by proofs clear, satisfactory, and beyond a reasonable doubt. Barbed Wire Patent, 143 U. S. 284, 12 Sup. Ct. 443, 36 L. Ed. 154. In the Manning Case, defendant's exhibit No. 7 was called to the attention of the witness Allen, and, in reply to questions put to him, he said that the drill was made in his father's shop, but he could not tell positively when it was made. Upon this subject the following is a portion of his examination:

"Q. I call your attention to defendants' Exhibit No. 7, Allen rotary drill. Do you recognize this exhibit? A. I do. * * * Q. State, if you know, when drills of the same type were made? A. I know positively that drills of that type were made in the latter part of December, 1885. Q. How do you fix this date? A. I fix the date by the timebook. Q. Please examine said timebook, and read the entries referring to this or similar drills? A. 'Monday, 28th, three rotary drills; Tuesday, 29th, ten rotary drills; Wednesday, 30th, five rotary; Thursday, 31st, two and one-half rotary.' That ended that book. I have not got any of the books which followed that. Q. How do you fix the

year in which these entries were made? A. By the date in front of the timebook, '1885.' "

The witness gave other testimony giving reasons for knowing the month and the year in which the entries were made in the timebook. In respect to this subject he further testified on cross-examination as follows:

"Q. You are not able to say just when the rest of the work on that drill was done? A. Some of it was done in January, 1886. Q. But just when the last work was done on that drill you are unable to say, are you? A. I am not able to say just when. Q. What has become of the timebook which would show that? A. I don't know what has become of it. I have tried to find it, but can't. It is lost, as far as I know. Q. Has this timebook been in your possession from the date of the entries to the present time? A. Yes; at the works."

John F. Allen, the inventor of the Allen drill, and father of the preceding witness, was also called as a witness in the Manning Case, and these questions were put to him.

"Q. State whether or not you ever made a drill constructed in accordance with said patent? A. Yes. Q. When? A. I made at least two in 1883."

He was asked to give a brief general history of what he did in the manufacture of drilling machines up to 1888. Nowhere in his testimony is found an intimation that the drill described in the patent was completed prior to the date of application, or that it was in prior public use. It further appears in this case from the testimony of Mr. Allen, son of the patentee, that rotary drills were made in 1882 and 1883 in his father's factory, and the dates thereof, as heretofore stated, are again fixed by timebooks which were then used. Though by such timebooks it appears that work on rotary engines for drills was done during the period stated, it nevertheless is not entirely clear that such labor was performed upon a portable drilling machine. The record in the Manning Case and the interrogatories and replies above mentioned show that both the witness and the patentee had in that case full and free opportunity to state the facts with reference to an earlier period of invention than that stated in the patent. No claim was then made by any one that a perfected portable drilling machine was completed in the year 1882, early in 1883, or prior thereto. It is true that other evidence is found in the record tending to corroborate the earlier conception of the Allen invention and its practical usefulness. Such evidence, however, is based wholly upon the unaided recollections of the witnesses. It does not conform to the strict rule that evidence to carry back the date of the invention shall be clear, satisfactory, and beyond a reasonable doubt. My conclusion is that the involved claims are entitled to the breadth of scope and construction heretofore given them in the Manning Case, and substantially concurred in by the Circuit Court of Appeals in the Franklin Boiler Works Co. Case. Claims 1 and 2 are not limited to the specific structure shown in the patent. The journal bearing in the defendant's drill extends beneath the engine cylinder; being attached to the cylinder, and operated identically with the Moffet journal bearing, which, as has been stated, projects from the side of the cylinder, and is integral therewith. In both devices under consideration, the boring spindle is united with the engine shaft by gearing, practically the same. The defendant also uses a feed screw

and sleeve nut, which appears as a force feed for the drill in infringement of claim 2. The latter element, as has been said, is old and familiarly known, yet when it is used in combination with other elements in complainant's device, which are new and perform a new function, then such combination of elements is entitled to the protection of the patent laws.

Let a decree be drawn in the usual form, sustaining the claims of the patent and directing an accounting.

NEW JERSEY WIRE CLOTH CO. v. BUFFALO EXPANDED METAL CO. et al.

(Circuit Court, W. D. New York. June 28, 1904.)

No. 16.

1. PATENT—INFRINGEMENT—FIREPROOF FLOOR CONSTRUCTION.
   The Orr patent, No. 471,772, for a fireproof floor and ceiling construction, is entitled to a narrow construction, only, in view of the prior art, limiting it to the precise structure shown. As so construed, it is not infringed by the construction shown in the Golding patent, No. 529,724.
2. SAME—EVIDENCE TO NEGATIVE INFRINGEMENT—PROCEEDINGS IN PATENT OFFICE.
   The fact that an application for a patent was considered in the Patent Office in connection with a prior patent, and several claims rejected thereon, creates an unusually strong presumption that the structure of the patent as granted is substantially different from the earlier patent.

In Equity. Suit for infringement of letters patent No. 471,772, for a fireproof construction, granted to William Orr March 29, 1892. On final hearing.

Phillip, Sawyer, Rice & Kennedy and Tracy C. Becker, for complainant.

John E. Brandegee, Geo. Quintard Horwitz, and Ernest Howard Hunter, for defendants.

HAZEL, District Judge. This is a bill in equity to restrain infringement of United States letters patent No. 471,772, granted to William Orr March 29, 1892, and assigned to complainant, for improvement in fireproof construction. The application was filed April 13, 1891. Its object is "to provide an improved floor and ceiling construction which shall avoid the use of these brick arches and similar constructions, thus reducing the weight of the structure, while at the same time all the fireproof qualities of the brick and tile construction are retained." The specification describes a fireproof floor and ceiling construction consisting of a number of light metal bars or suspenders, placed in series between the floor beams, and transversely thereto. The iron bars are styled "suspenders" in the patent, and they will be so styled in this opinion. The suspenders vary in width according to the strength of the floor desired. They are supported at the ends by the floor beams, but do not perform any like functions. When the suspenders are firmly attached in series to the top of the beams, a suitable portion of concrete of unequal depth is placed upon them. Concrete ribs are formed in

series which create and inclose air spaces extending from beam to beam. The concrete web also extends from beam to beam, and is integral therewith. The union of the floor beams and the suspenders with a portion of concrete or plastic material forming a web, and a series of horizontal ribs or arches between the beams, supported by the suspenders, produces a light, though strong and compact, fireproof floor construction. To emphasize the importance of the functions of the suspenders, the following is quoted from the specification:

"The suspenders may be very light, but they must be of sufficient width to give the cement rib resting thereon sufficient area, so that the crushing strength of the cement will about equal the tensile strength of the bar, and both the bar and cement rib must have sufficient strength to support with a sufficient factor of safety the load required."

Different forms of suspenders, dependent upon the character of building and weight of floor desired, may be used. For example, in residences where light floors are practicable, the concrete web is thinner, and the suspender comparatively lighter, than in buildings where the floors are designed to support great weights. In the latter case the cement web is thicker or more substantial, the ribs closer, and the suspender heavier and stronger. To provide suitable floors for different constructions, as already indicated, modified forms are clearly pointed out in the patent and accompanying drawings. The preferred form of structure shows the suspenders firmly hooked over the top flanges of the floor beams, extending downward very close to the side of the beams, and then horizontally across from beam to beam on a level with their lower side. Other constructions referred to in the specification show a horizontal suspender bent at its ends to rest flatly upon the lower flanges of the beams, and in another form (Fig. 10) an arch-shaped suspender is employed. The ends of the arched suspender do not rest on the flanges of the beams, but are connected with a horizontal part, B, of the suspender, in such a way as to prevent straining. Five claims, viz., the first, third, fifth, sixth, and ninth, are alleged to be infringed by the defendant. The first claim broadly covers the combination in these words:

"(1) The combination with floor beams, or a series of suspenders supported by said beams, and extending from beam to beam, and a body of cement or other plastic material forming a web and a series of ribs extending from beam to beam, said web lying above said suspenders, and the ribs extending downward from said web, and being supported by the suspenders, substantially as described."

The others differ from the first only in the following particulars: Claim 3 embraces a "woven wire or perforated sheet metal extending from beam to beam, and forming a bond" with the concrete. Claim 5 has the additional feature of "a ceiling of metallic lathing," which is supported by the beams. Claim 6 includes the words "arched suspenders." Claim 9 is fairly representative of the first. It describes a fireproof floor construction supported by the suspenders, having air spaces extending from beam to beam between adjacent suspenders. It is contended by the complainant that the claims are not specifically limited, and hence they should be given a liberal construction, in accordance with the reasonable import of the patent. Stress is placed upon the slender concrete surface of the structure, in connection with its great

strength, which, according to the complainant's proof, is owing to the fact that the suspenders afford support to the floor and ribs, and therefore have a tendency to resist the downward thrust of the weight above. Accordingly a strong floor is provided, the supporting structure itself being light. The complainant further contends that a fireproof floor such as described in the patent may be more quickly constructed, and at less expense, than the tile floors mentioned in the specification. The proofs of the defendant go to the validity of the patent in view of the prior art. Infringement is denied. An examination of the record shows that the patent must be restricted to the precise structure shown. The defendant's structure appears to be functionally different, in that the thrust from weight upon the floor is not downward, and rather tends to a lateral strain upon the lower flanges of the beams. The specification of the patent in suit, after in detail describing the structure, says:

"The floor load is lessened to one-half that of brick-arch floors, and the side thrust against the beams in the ordinary brick or tile arch construction is converted into very nearly a dead weight upon the beams."

It evidently was the intention of the patentee to construct suspenders which would support the entire load without straining the beams or exerting great pressure upon them. The conformation of the suspenders employed in the different forms of construction described in the specification negatives any other intention. Figure 9 of the drawings does not change this view, for the reason that the structures shown in Figures 10 to 13 of the patent would seem to emphasize the point that the weight is supported by the suspender, and that, when an arched suspender is employed, the structures shown by Figures 10 to 13 are preferred, to secure the desired result. The arched suspenders described in the specification are certainly so constructed that the load upon them, as already suggested, is in a very large measure borne by the suspenders, and not by the beams. The expert witnesses do not agree as to the asserted disclosures of the prior art, nor as to the scope of the patent in suit.

Inasmuch as the court is of the opinion that the scope of the patent is narrow and circumscribed, it is thought unnecessary that the validity of the patent be passed upon. The state of the art shows that it was not new to make fireproof floors, with arches of metal resting upon the flanges of iron beams. Such arches are found in the patents of Gilbert, No. 64,659, dated May 14, 1876; Snead, No. 91,375, dated June 15, 1869; Cheney, No. 137,345, dated April 1, 1873; Hoyt, No. 162,822, dated May 4, 1875; Hoyt, No. 172,470, dated February 15, 1876. The object of the invention of some of the patents cited to anticipate complainant's patent was to construct a light and strong, as well as economical, fireproof floor. It appears further that to use a sheet of woven wire or perforated metal in the manner set out in claim 3 of the patent in suit was also known to the art. On this point reference is made to the Hayes British patent of 1889. There "a sheet-metal lathing, formed with upturned flanges * * * curving over the flanges of the beam," is a marked feature of the invention. Moreover, the feature, as shown, was already patented by the same patentee. In his patent in 1890 a metallic lathing is shown, extending from beam to beam, se-

cured at the ends to the metal of the flanges. Reference is also made to the patents of Cheney, Jackson (1876), of Hoyt, and of Hayes, as showing a metallic lathing, and the cement supported by the suspenders on metal frames. In the Cheney patent, to which reference has been made, a metallic lathing is fastened to the suspender in substantially the same way as in the patent in suit. Defendant's best reference would seem to be the patents of Jameton, No. 361,361, April 19, 1887; Bruner, No. 356,704, January 25, 1887; and Hayes, 1889, British patent. The Jameton patent shows a series of suspenders, called "hooks" in the specification, which, in appearance, conform quite closely to the suspenders of complainant's structure. There the concrete is supported by the hooks and by longitudinal bars. The bars which are not essential to the support of the concrete rest on suspenders extending to the top of the flanges of the beams where they are fastened. The specification in the Jameton patent states that the bars are preferably used to better hold the material in position. To lighten the floor, the fireproof material does not extend to the level of the top of the beams, as in complainant's structure. The principal feature of difference between the Jameton patent and the patent in suit is that in the latter the upper surface of the concrete extends to the level of the beams, and dead-air spaces adjacent to the beams are provided. The Bruner patent describes a fireproof floor without metal suspenders. It shows a concrete web and series of concrete arches extending across from beam to beam. Though the above citations do not disclose the precise combination of the complainant, yet it is thought that enough similarity appears to deprive the patent in suit of liberal construction. Nothing is shown entitling the improvement to be classified as an invention of such merit as led from failure to success. Neither can it be correctly contended that the novelty of the patent is demonstrated by its general usefulness to the public, or that it was accepted by the skilled artisan as an invention which advanced the state of the art. The rule invoked by the complainant is to the effect that, even though the invention is not entitled to a broad construction, the patent nevertheless must be construed with such liberality as will preserve to the inventor what he has actually accomplished. Notwithstanding this rule, I am of opinion that whatever novelty is in the Orr patent is limited by the prior art. It is sufficiently shown that the principal elements upon which patentability depends were familiar to those practicing the art.

Is the defendant an infringer of the involved claims? The Golding patent, No. 529,724, dated November 27, 1894, under which the defendant's structure is made, understandingly describes the method of constructing fireproof floors and ceilings. It cannot be successfully disputed that prima facie the grant of the Golding patent negatives infringement. Putnam et al. v. Keystone Bottle Stopper Co. (C. C.) 38 Fed. 235; Boyden Power Brake Co. v. Westinghouse Air Brake Co., 70 Fed. 816, 17 C. C. A. 430. An unusually strong presumption that there is substantial difference between the patent in suit and the Golding patent arises from the fact that the file wrapper of the latter shows that the application, when filed, was considered in connection with the patent in suit. Several claims were rejected on Orr. The patent was finally granted upon a palpably narrow claim "for a curved channel

iron resting at its ends upon the flanges of the beams." Apparently, then, the allowance of the claim by the Patent Office was owing to the recognized distinction between the suspender of the defendant's patent and the channel bars of Golding. This conclusion of the Patent Office is entitled to weight, and has not been overcome by complainant's showing. The method of construction adopted by Golding is correctly stated in defendant's brief as follows:

"Arched channel irons are placed at intervals apart transversely between the I beams, with their ends resting on the inner lower flanges. On each side of these channel irons is placed an upright molding board. These boards are marked 'C' in Figs. 3 and 4 of the Golding patent. Between their upper edges is placed a temporary horizontal flooring or centering, over which is laid a sheet of expanded metal, which is a well-known form of metallic lathing. Concrete is then laid on the horizontal boards, or centering over the expanded metal, and is forced into the spaces between the vertical boards and above the channel irons. After the concrete has hardened or become set, the flooring and molding boards are removed, leaving an upper layer or web of concrete, with a sheet of expanded metal embedded in it, and a series of arched portions of concrete carried by the arched channel irons."

The defendant's device tends to establish that none of the disputed claims are infringed. The Golding patent, according to defendant's expert witness Hunter, has no ribs extending from beam to beam, nor suspenders, nor dead-air spaces. Regarding the use of channel irons, Mr. Hunter testifies as follows:

"The channel irons act as struts abutted against the lower portion of the floor beams, and produce an outward thrust, whereas the suspenders do not produce an outward thrust, but, instead, create a dead downward load upon the floor beams."

This view would seem to be corroborative of the object of complainant's patent. The function of the channel irons employed by the defendant is thought to be substantially different from complainant's suspenders. The combination of the Orr patent, No. 471,772, or its equivalent, is not found in the defendant's structure, and therefore the defendant's structure does not infringe it.

The bill is dismissed, with costs.

FRANK et al. v. BERNARD.

(Circuit Court, S. D. New York. July 12, 1904.)

1. PATENTS—INFRINGEMENT BY ASSIGNOR—ESTOPPEL TO DENY VALIDITY.
The assignor of a patent is estopped to set up its invalidity as a defense to a suit for infringement brought against him by the assignee, or to introduce evidence tending to disprove the novelty or utility of the patented device, where he uses the identical structure described, so that no question of construction of the patent is involved.

In Equity. Suit for infringement of patent. On final hearing.

Andrew Foulds, Jr., for complainant.
Charles S. Champion, for defendant.

¶ 1. See Patents, vol. 38, Cent. Dig. § 183.

HAZEL, District Judge. This suit is brought to restrain infringement of United States letters patent No. 571,121, issued November 10, 1896, to the defendant and Leo Frank, one of the complainants, as assignees of Hubel and Manger, the inventors. The patent is for improvements in match safes. The defendant and complainants were partners in business, trading under the name of Bernard, Frank & Co. Differences arising, the partnership was dissolved on January 12, 1898, by mutual consent; the defendant withdrawing from the firm, and the complainants continuing the business. At the time of the dissolution the defendant, in writing, assigned to complainants, inter alia, the patent in suit. The withdrawing partner was paid $6,000 in cash and $250 in merchandise, in consideration of the transfer to the remaining partners of all his right, title, and interest in and to the assets of the firm, including the good will of the business. At the same time defendant executed and delivered to the complainants another document, namely, an assignment of various letters patent, of which the partnership was owner, including, in express language, the invention in suit, and any improvement made thereunder by the defendant. The answer denies infringement, and alleges anticipation of claim 2 of the patent, prior knowledge, and public use. The record contains much evidence on the part of the defendant which, in view of the issues presented, is thought irrelevant and incompetent. The issue, under the pleadings and evidence, must be restricted to the questions of infringement, and the validity of the consideration upon which the transfer of the patent is based. The general principle is well established that defenses interposed by the assignor of a patent in a suit instituted by the assignee for infringement of such patent are restricted to rather narrow bounds. The assignor is estopped, as against the transferee, to challenge the validity of the patent for want of novelty and patentability. The defense of invalidity, while open to others, is closed to him. Alvin Mfg. Co. v. Scharling (C. C.) 100 Fed. 87. There are cases holding that, though invalidity of the patent is conceded in view of the state of the prior art, the assignor, on principle, is concluded from interposing the defense of invalidity of the patent, and denying his own title to the interest assigned. Woodward v. Boston Lasting Mach. Co., 60 Fed. 283, 8 C. C. A. 622; Walker on Patents, § 469; Chambers v. Chrichley, 33 Beav. 374; Parker, Trustee, v. McKee (C. C.) 24 Fed. 808; Griffith v. Shaw (C. C.) 89 Fed. 313; Marvel Co. v. Pearl (C. C.) 114 Fed. 946. The rule was stated by Judge Lacombe in Adee et al. v. Thomas (C. C.) 41 Fed. 345, as follows:

"It is well-settled law that a patentee cannot be heard to deny the validity of his own patent against the assignee to whom he has sold and transferred it. As to the rest of the world, the patent may be void, but the assignor is estopped from urging that defense against his assignee."

In Babcock v. Clarkson, 63 Fed. 607, 11 C. C. A. 351, it was held that an assignor of a patent for a valuable consideration is estopped from asserting anticipation by prior publications, or avoiding the patent for want of novelty and utility. True, that case is authority for the proposition that the state of the art, and anticipatory matter as a part thereof, may have a bearing on the construction of the patent; but in a case like the present, where the assignor employs the identical construc-

tion described in the patent transferred, and where the rights of the assignee are clearly based upon the purchase, and do not rest solely upon the estoppel, the principle quoted is not pertinent. Faulks v. Kamp (C. C.) 3 Fed. 898. The manifest object of producing evidence to show that Walton's device for rings set in grooves in the base of spittoons, as in the match safe described in the patent in suit, was to disprove the novelty of complainants' structure. The evidence does not show that a construction of the involved claim by comparison with the prior art is sought in good faith for the purpose of establishing a differentiation between the structure of the patent transferred and that actually used by the defendant. The controversy simply affects the transferror and transferee of the patent. Their rights alone are involved, and not the rights of the public. Assuming the invalidity of the patent in suit, it nevertheless was lawful for the parties to enter into an agreement by which the interest of the defendant therein was conveyed. The law does not expressly prohibit the transfer of invalid patents. The complainants have accepted the conveyance, have availed themselves of the benefits of the invention, and undoubtedly are prevented from denying the validity of the patent. On the other hand, assuming a valid consideration to have been paid, the assignor has not offered to restore the same, and hence, by parity of reasoning, is precluded from asserting the invalidity of the patent on the ground of want of novelty or practical utility in the invention. The case of Babcock v. Clarkson, supra, upon which the defendant lays stress, does not conflict with these views. The head note in Alvin Mfg. Co. v. Scharling, supra, states:

"An inventor who has assigned the patent for his invention cannot be permitted, in a suit against him for its infringement, to introduce evidence for the ostensible purpose of so narrowing the scope of the patent as to avoid infringement, but which in fact tends to show that it is invalid for want of novelty."

The language used would seem to apply to this case.

It is objected by the defendant that the complainants prior to the assignment were aware of the invalidity of claim 2 of the patent, and therefore they are concluded from denying the asserted failure of consideration of the assignment in question. The evidence is not convincing that the invalidity of the Huber and Manger patent was known to complainants. There is evidence tending to show that the complainant Frank knew that a similar groove in the base of a different structure was in prior public use, and on sale by one Walton. Such use, however, of nonscratching material in a groove formed in the base of a spittoon prior to such application in a match safe, standing alone, is not persuasive of the existence of such knowledge on complainants' part as debars them from maintaining this action against the defendant. The patent has never been adjudicated invalid, nor an infringement of any other structure. The grant of the patent carries with it a presumption of validity. Prima facie, therefore, the patent in suit was both novel and useful, irrespective of the prior issuance to another of a patent which apparently accomplished the same result. True, the state of the art is ordinarily presumed to be known to the patentee, yet the question of whether he was the first and original discoverer can be determined only on comparison of the invention with the prior art. Saunders v. Allen, 60 Fed. 610, 9 C. C. A. 157, 20 U. S. App. 446. Evidence

is presented from which it may be fairly inferred that, according to the terms of the assignment, the defendant intended to convey not only his title in the patent, but also his interest in a valid patent. Moreover, assuming the correctness of defendant's testimony that during the partnership he frequently remarked in the hearing of Frank that the match safe in suit was worthless and anticipated, in view of the state of the art, it does not now lie with him, the infringer and assignor, to proclaim its invalidity, so that he may reap further pecuniary benefit. Declarations of noninvention are not available to him in order that he may escape the liability for his infringement. The rights of the complainants are not based upon the estoppel, merely, but, as stated by Judge Wheeler, in the Faulks Case, "they rest upon the purchase, which must operate so that the orators may have what they bought, and so that the defendants shall not both sell and keep the same thing."

The defendant is confessedly an infringer of the patent of which he formerly was part owner. He contends that no valuable consideration passed for making the conveyance, and therefore that he is relieved from the operation of the rule of estoppel. The basis of such claim is not clear. Defendant's interest in the business when the partners dissolved their relations, according to the inventory, was $5,452.94. He was paid $6,250. A fair assumption is that the difference in the amount of these figures represented the consideration for the transfer to complainants of his interest in the patent. The evidence does not justify the conclusion that there was a counter estoppel in pais against the complainants because of their conduct towards the defendant. The record contains much evidence concerning the internal partnership dissensions which led to the dissolution of the firm. As already stated, it is immaterial and irrelevant, and therefore has not been considered. The pertinent evidence found in the record establishes that the defendant manufactures and sells the precise construction described in claim 2 of the patent. Such claim reads as follows:

"(2) As a new article of manufacture, a match safe, or similar article, having a groove formed in its base, in which is inserted nonscratching material, with its lower edge projecting below the lower surface of the base, said material being secured in place by forcing one side of the groove toward the opposite side to pinch the material, substantially as specified."

The court is of opinion that, under the circumstances presented, the written assignment of the patent in question must determine the legal relations of the parties. No substantial cause appears for allowing the defendant to contest the validity of the patent for want of novelty and utility.

The complainants are entitled to a judgment, with costs, decreeing the issuance of an injunction and an accounting. So ordered.

BROWN v. HUNTINGTON PIANO CO.

(Circuit Court, D. Connecticut. July 6, 1904.)

No. 1,114.

1. PATENTS—INVENTION—MUSIC DESKS FOR PIANOS.

The Brown patent, No. 468,077, for improvements in music desks for pianos, consisting of a device by which the opening and closing of the fall-board automatically opens and closes the music desk, and, when open, locks it in position for use, by means much better, because simpler, than those previously used for the purpose, discloses patentable invention; the simplification of such means having been an object sought for years by other inventors. Claims 1 and 2 also *held* infringed.

In Equity. Suit for infringement of letters patent No. 468,077, for improvement in music desks for pianos, granted to Theodore P. Brown February 2, 1892. On final hearing.

Southgate & Southgate, for complainant.
Roberts & Mitchell, for defendant.

PLATT, District Judge. This suit is based on letters patent to complainant, granted February 2, 1892, for "improvements in music desks for pianos," charging infringement and asking the usual relief. It is too plain for denial that the defendant infringes, if the patent is valid. The only defense is lack of invention. Claims 1 and 2 are in suit:

"(1) In a piano, the combination, with the case provided with a ledge, of a substantially L-shaped fall-board pivotally secured near its base within the case substantially below the front edge of the ledge, each arm or portion of the board being adapted to pass under the ledge, and thereby close the space between the ledge and the keys when it is closed or open, a lever pivotally secured at the rear of the fall-board, with its lower end entirely disconnected from, but in the path of and adapted to be engaged by the upper portion of the fall-board when the fall-board is opened, and a music desk in the front of the case, adapted to be operated by the lever, substantially as set forth.

"(2) In a piano, the combination, with the case, of a substantially L-shaped fall-board pivotally secured therein near its base, the front portion of the board being hinged and adapted to be folded so as to pass under the ledge of the case and close the space between the ledge and the keys, whether the fall-board be open or closed, a lever pivotally secured at the rear of the board, the lower end of which is inclined and projects towards the board, and is adapted to be engaged by and forced back by the upper portion of the fall-board, said upper portion of the board being in a straight line between the end of the lever and the hinge of the board, whereby the lever is locked in its rear position, and a music desk in the front of the case, adapted to be operated by the lever, substantially as set forth."

Looking at the prior art, we find that the L-shaped fall-board was old, and is substantially shown in patent to Neill, No. 183,773, dated October 31, 1876. A music desk, hinged at the top, which could be inclined outward and firmly held in position, so that music could be rested upon it, was old, as shown in patent to McCammon, No. 219,821, dated September 23, 1879. It was obvious that, when the fall-board was closed upon the keys, there was no advantage in having the music desk remain in position for use, and so the problem was to furnish simple automatic action by which the opening of the fall-board should open the music desk, and retain it securely in position for use, and by which the closing of the fall-board would permit the music desk to close. There were

many ways of making fall-boards, and this fact may have added to the confusion which followed; but it at last became settled that fall-boards practically of the Neill type were the best, and they are now in general use, and are called in trade the "Boston Fall-Board." The simple connection now in suit, between fall-board and music rack, is known to the trade as the "Kicker." The first person to attack the problem was Charles E. Bourne, of Boston, in patent 247,473, September 27, 1881; but he concocted a peculiar type of fall-board, which was a necessity in his combination, and the result was a very complicated affair, objectionable for many reasons. Before that patent issued, however, an attempt at improvement was jointly essayed by Mr. Bourne and a namesake, William, and patent No. 247,474 was also granted to them on the same date; but the improvement would seem to have intensified, rather than simplified, the complication. The objections to the Bourne structures may be thus stated: In effecting automaticity it was necessary (1) to discard the L-shaped fall-board; (2) to provide the floating inner part of the fall-board with a guiding mechanism, consisting of links and hinges, so that it might follow and lock the lever; (3) in the attempt at simplification, the rear end of the fall-board must be positively connected and hinged to obtain the coveted result. After the Bournes came Felldin, No. 307,933, November 11, 1884. He had a compound fall-board, of which the inner part slid downward and forward in grooves, while it oscillated on pivots which acted upon a lever with which before moving it was in contact; the upper part being a bent rod or coarse wire. When all was done, the locking does not appear to have been provided for. Ivers, 371,069, October 4, 1887, had a sliding fall-board, which was locked in place by a catch after acting upon the lever. There are also two organ constructions shown by drawings. In these seven devices the simple, pivoted, L-shaped fall-board is either lacking, or much modified to obtain what was wanted; and, if any of them locked, it was brought about by a floating rear portion provided with guiding mechanism connections and hinges, unnecessarily complicated, to follow the movement of the lever. In this situation, we come to Harper and Hoover, 372,616, November 1, 1887. Here the L-shaped, pivoted fall-board was used as the first element of the combination. The complicated mechanism employed in connecting it with the music desk can only be appreciated by reading the specifications of that patent. It probably serves to lock the desk when the fall-board is open, and to take up lost motion, thus avoiding jar or rattle, and, by the help of springs, will return the music desk to its normal position when the fall-board is closed, but it is painful to see the conglomerated series of devices by which the result is reached.

Such was the art prior to Brown. He took the old fall-board, the old music rack, and the old lever, and so arranged them that they entered into new co-operative relations, and produced an old result in a better, because simpler, way. The gist of his invention will be found by an examination of his specifications. I quote only a little part of them:

"The lower end of the lever is entirely disconnected from the fall-board, and has its front portion inclined toward the board, so that, when it is forced back by the upper portion of the board, it swings downward until it is substantially on a horizontal line with the hinge of the fall-board. This permits of the upper portion of the fall-board assuming a substantially horizontal posi-

tion between the hinge and the lower end of the lever, which locks the lever in its rear position, and also prevents the pressure of a heavy book upon the rack from moving the lever and closing the fall-board over the keys."

And so the simple connection becomes a disconnected, pivotally secured lever at the rear of the fall-board, in the path of and adapted to be engaged by the upper portion of the fall-board when it is open. The movement of the part of the fall-board which engages the lever is about a remote center from the pivot of the lever, and its path is of the opposite curvature to the path of the lever with which it engages. A wiping action therefore occurs, which ends in positive engagement of fall-board and lever at or near a dead center; resulting in locking, absorption of lost motion, and consequently freedom from jar or rattle. The piano can be taken apart and put together easily, connecting devices are unnecessary, and springs are eliminated. By this simple method the problem was solved, with a perfection which is ideal. It may excite surprise that Harper and Hoover, after recognizing the best style of fall-board, did not find the answer; but he who is surprised must remember the morass in which the inventors were floundering. Simple as the solution appears now, we must try to square our minds with those who struggled then. The court would be loath to charge the skilled mechanics of all the large piano manufacturing concerns of the country for about 15 years with imbecility, and yet that conclusion is inevitable if it is assumed that mechanical skill is the limit of the Brown structure. This is not an epoch-making invention. Its domain is limited. Its presence may furnish the feather's weight which, tossed into the scale, might direct the purchaser's choice; but, under the rules laid down in the mass of decided cases, I am compelled to find that inventive thought existed.

Every presumption is against the defense. The patent itself, after the careful scrutiny which it received in the office; its acknowledged merit, evidenced by its acceptance in the trade; the futile struggle of inventive minds for so many years—all argue against it. The climax is reached when the piano trade, recognizing the value of the invention, combines to defeat the contract which the government has entered into with one of its citizens. That trade plainly considers the "kicker" a thing which no well-ordered piano may omit, and prefers to pay tribute to counsel, rather than to the lawful owner. This court refuses to become privy to an act which seems to be nothing less than an attempt at unrighteous appropriation. The contract was made with wide-open eyes, and ought to be enforced.

Let the usual order be entered for an injunction and accounting.

BECHTOLD v. NOWACKE et al.

(Circuit Court, S. D. New York. July 8, 1904.)

1. PATENTS—INVENTION—HAIR RETAINERS.

The Bechtold patent, No. 682,448, for a comb for retaining the hair, consisting of a back with a comb attached, and extending contiguous thereto, having the prongs curved toward the back intermediate their length, for the purpose of locking the retainer to the hair, is an improve-

ment in efficiency over prior devices, and discloses invention. Also *held* infringed.

In Equity. Suit for infringement of letters patent No. 682,448, for a hair retainer, granted to William S. Bechtold September 10, 1901. On final hearing.

Walter W. Menzel (M. W. Divine, of counsel), for complainant.
Goepel & Niles (Joseph H. Niles, of counsel), for defendants.

HAZEL, District Judge. This is a suit to recover damages for infringement of United States letters patent No. 682,448, granted to complainant on September 10, 1901, on an application filed July 3, 1901. The invention relates to improvements in combs or so-styled hair retainers. The patent has two claims. The first reads as follows:

"(1) A hair retainer comprising a back and a comb attached to said back at one end thereof, and extending contiguous with said back, and the prongs of said comb having, intermediate of their lengths, portions curved toward the back for the purpose of locking the retainer to the hair, substantially as described."

The second claim is like the first, but has the additional feature of the prongs having their points diverging from the back. The essential elements of the combination comprise (a) a back or frame; (b) a comb attached at one end of the frame, and extending contiguous therewith; and (c) prongs or teeth curved towards the back between their point and root. The answer challenges the validity and novelty of the patent and denies infringement. The object of the invention was to improve combs for women which were adapted to hold the hair in place at the back and side of the head. The primary purpose of the patentee was to invent a comb which would effectively lock the retainer to the hair by joining the frame or guard with the comb proper, and to impart a conformation or curvature to the prongs or teeth which would prevent the hair of the wearer, when arranged or dressed, from becoming disheveled. The specification, after stating the specific object of the patent, says:

"To this end, my invention consists essentially of a hair retainer, comprising a back and a comb attached to said back, at one end thereof, and extending contiguous with said back, and the prongs of said comb having, intermediate of their length, portions curved toward the back for the purpose of locking the comb to the hair."

The specification further states that the invention is not confined to any particular construction, shape, or form of the back or retainer. The prior art does not show a comb or device which has as efficiently retained the short hairs in place at the back of the head when the hair is dressed at the top of the head as the invention in suit. True, combs have been used from time immemorial which were quite as effective as coiffure clasps or pins, or, indeed, even to confine the loose or flying hairs, but none of the drawings and specifications of the various prior patents seem to have met the practical requirements or achieve the precise result of the patent in suit. For example, combs of the kind described in the Miller patent, No. 535,954, having a frame with four sides, and teeth projecting at different angles; hair fasteners with pin or curved prongs, as shown in the patent of Bates, No. 628,596; back

combs, with comparatively long, curved teeth, as shown in the Bechtold patent, No. 551,175; ornamental head combs, with straight teeth and embellished frames, like the Warring patent, No. 129,441—were very well known at the date of the invention. These combs, and others to which attention is called by the defendants, were generally designed to fasten and retain the hair in position when dressed on different parts of the head. None of them were especially adapted to hold the short hairs in place at the back or side of the head when the hair is combed upward and fastened at the top. In this respect, according to the undisputed evidence, the patent in suit was an improvement, and is apparently superior to those of preceding date. That it has achieved some degree of commercial success may well be assumed from the testimony of the various witnesses for the complainant who deal in commodities of this character. The degree of invention is slight. Though the claims of the patent are for a combination of elements taken from the prior art, yet, when these elements were united in the manner shown in the patent, a new and useful result followed. That a new and useful result was achieved is not seriously controverted. Therefore, in view of the extensive use of the invented article, the principle enunciated in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, and Topliff v. Topliff et al., 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, is thought to apply. The combs of the prior art do not securely keep the short hair from becoming unattached or loosened when dressed upward at the back of the head. By providing a device with prongs having intermediate of their lengths a curvature toward the back, "for the purpose of locking the retainer to the hair," together with a contiguous extension, as stated in the claims, the patentee seems to have met the exigencies of the situation. The combination of the prongs, curved between their point and root, and attached closely to the back of the frame, permits retaining the long and short hairs in place. For the reasons stated, the defendants' contention that the patent is void for want of invention is thought to be untenable.

The patent to Nowacke, No. 673,650, dated May 7, 1901, is a close approach to the invention in suit, but does not anticipate it. There the teeth are parallel with the back, and do not possess the curvature which manifestly is the principal feature of the Bechtold patent in controversy.

Both parties have given evidence tending to show that their respective inventions were completed and disclosed to the public prior to the date of their applications, namely, the application of complainant for patent, dated July 3, 1901, and the application of defendants for patent, dated August 23, 1901. The evidence, however, is not persuasive, and therefore neither the complainant nor the defendants are entitled to have the date of their invention carried back prior to the date of application. The parties to this litigation are competitors in business, and each has zealously striven to be the first to produce a comb which would achieve the result accomplished by the patent in suit. Under the circumstances, and in the light of the views heretofore expressed, I am not inclined to hold, however slight the invention, that the question is merely one of mechanical skill.

The remaining question is that of infringement. The device of the defendants has a back or frame similar to that of the complainant.

The comb attached to the back at the upper end extends contiguous therewith, and the prongs of the comb between their upper ends and points have portions curved toward the back. These elements, in my judgment, are identical with those constituting complainant's first claim. The curvature of the prongs is more strongly marked in defendants' device, and the points of the prongs, in relation to the back of the comb, diverge inwardly instead of outwardly. This feature substantially corresponds to the second claim of the patent. The slight difference in form of the curvature of the prongs is immaterial. The defendants have substantially appropriated the combination of the complainant's device, and the identical result is produced by its use.

The usual decree restraining the defendants from future infringements and for an accounting may be entered.

SIMMONS MFG. CO. v. SOUTHERN SPRING BED CO. et al.

(Circuit Court, N. D. Georgia. May 30, 1904.)

1. PATENTS—INFRINGEMENT—SPRING BED.

The Gail patent, No. 639,222, for a spring bed and seat bottom, is not for a pioneer invention, nor does it show such novelty or improvement over the structures of the prior art as to entitle it to a broad construction, or anything beyond the precise structure shown and described. As so construed, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 639,222 for a spring bed and seat bottom, granted to John F. Gail December 19, 1899. On final hearing.

Dyrenforth, Dyrenforth & Lee and Candler & Thompson, for complainant.

H. Smith and H. C. Peeples, for defendant Southern Spring Bed Co.

PARDEE, Circuit Judge. The case shows by proof and admission that all the elements entering into complainant's patented combination were old, and the combination itself appears to consist merely in bringing together the well-known spring and tie-rod of Mellon's patent of 1885, and the key rod and method of tying in McEntire's patent of 1881; and, so far as novelty of the claimed combination is concerned, the Patent Office might well have stood throughout upon the first decision of the examiner. The file wrapper shows that on the original presentation of Gail's application for patent, which presented some 17 different claims of combinations, the examiner decided as follows:

"Claims 1 to 10, inclusive, and 12, are rejected upon the patent to Mellon, No. 331,523, December 1, 1885, in connection with the patent to McEntire, No. 240,743, April 26, 1881, bed-bottoms of springs. The patent to Mellon shows the frame, springs and tie-rods having integral loops extending through two rings. The patent to McEntire shows a tie-rod having loops which connect adjacent springs, which is considered the equivalent of applicant's tie-rod, and a key-rod passing across the springs and through the loops of the tie-rod. There is believed to be no invention either in using the key-rod shown by Mc-

Entire with the tie-rods shown by Mellon; or in substituting the tie-rods shown by Mellon for the tie-rods shown by McEntire. It is considered immaterial whether the bead C^2 of applicant's loop passes through the ring of the adjacent spring from below or from above, but the patent to Bone, No. 582,895, May 18, 1897, bed-bottoms of springs, is cited to show a loop of this character passing through the ring of a spring from below, as claimed in certain of the claims.

"Claims 11, 13, 14, 15 and 16 are rejected upon Mellon, cited.

"Claim 17 is rejected upon the patents to Mellon and McEntire, cited, the bends, d, claimed therein, not conferring patentability thereon, being a common expedient and shown, for instance, in the patent to Laycock, No. 60,919, March 22, 1898, bed-bottoms of springs. C. A. Mason, Examiner.

"Underwood."

The amendments made thereafter were in inserting the words "single parallel" before the word "tie-rods" in the first ten and last claims, the word "adjacent" in part of the claims erasing claims 11, 12, 13, 14, 15, and 16, and inserting in lieu thereof and to the same tenor newly worded claims 11, 12, 13, and 14; and on these amendments and some argument the Patent Office allowed the patent substantially as originally claimed.

In my opinion, the improvement that was made by Gail in complainant's patent was a matter of mechanical skill, within easy reach of any well-instructed mechanic who had before him the McEntire patent, 347,743, of April 26, 1881, wherein the method of tying tie-rod and spring is fully indicated in the illustration; the patent of Smith, 269,442, December 19, 1882, wherein the single tie-rod is fully indicated; and the patent of Mellon, 331,523, of 1885, wherein the single parallel tie-rod, V-shaped to connect adjacent springs with the upturned loop to grasp the adjacent spring, was fully shown; to say nothing of 25 or 30 other patents in relation to spring bed bottoms issued between 1881 and December 19, 1899, the date of complainant's patent.

The case, as presented, is one for infringement, and does not require that the validity of complainant's patent shall be passed upon, because the alleged infringing bed-bottom does not interfere with defendant's, unless it should be shown that complainant's patent is a pioneer patent, or such a broad patent that it should be construed to cover mechanical equivalents; and, after having gone carefully through the evidence in the case, and examined attentively the numerous prior patents—bed-bottoms, bed springs, and spring beds—wherein all sorts of springs, tie-rods, and key-rods, such as complainant uses, have been well known and used in the art, I conclude that the complainant has neither a pioneer patent, nor a patent showing such novelty or improvement that it is entitled to any broad construction; and, at best, a patent only for exactly what Gail put together, in the way he put it together. The defendants use a less complicated tie-rod and a more complicated spring than the complainant, and there is some evidence tending to show that their result is better, because the inside springs in their bed are more firmly locked in position than are the inside springs of complainant's bed—an advantage claimed as to durability and noise.

The very able and exhaustive briefs filed with me show no decided conflict between able counsel as to the law applicable when the facts

are ascertained, and therefore I have not found it necessary to cite authorities, but I notice that Singer Manufacturing Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437, published since this case was argued, seems to be full authority for the decision herein rendered.

A decree may be entered dismissing complainant's bill, with costs.

WESTON ELECTRICAL INSTRUMENT CO. v. WHITNEY ELECTRICAL INSTRUMENT CO. et al.

(Circuit Court, S. D. New York. July 20, 1904.)

1. PATENTS—INFRINGEMENT—ELECTRICAL MEASURING INSTRUMENT.
The Weston patent, No. 392,387, for an electrical measuring apparatus, *held* valid and infringed on a motion for preliminary injunction.

In Equity. Suit for infringement of letters patent No. 392,387 for an electrical measuring apparatus, granted to Edward Weston November 6, 1888. On motion for preliminary injunction.

William Houston Kenyon, for plaintiff.
Clifton V. Edwards, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 392,387, dated November 6, 1888, and granted to Edward Weston, for an electrical measuring apparatus, which was adjudged to be valid in Weston Electrical Instrument Co. v. Jewell Electrical Instrument Co. et al. (in this court in March, 1904), 128 Fed. 939. It has now been heard upon a motion for a preliminary injunction.

The principal question made now is as to infringement. The parts of the defendant's instrument look quite differently from the corresponding parts of the instrument of the patent, but, notwithstanding these differences in form, they are there in the instrument, and do the same things in substantially the same way. This appears quite well from the description of the two instruments in parallel columns in the affidavit of Frank W. Roller (Defendants' Record on this motion, p. 3). The great thing to be done appears to have been to get the movable coil in its diamagnetic frame into a permanent magnetic field, compactly, and to carry the current to be measured from side to side through the coil, and move the coil against steady resistance to measure the current and record the measurement. Weston seems to have accomplished this by mounting the frame by pivots on nonconducting bridge pieces, and carrying the current to be measured to and from the movable coil through springs connected with the frame, furnishing steady resistance, and a pointer connected with the frame, and moving over a scale, to show the movement and the measurement of the current. Any electrical mechanic could provide the permanent magnetic field, and the form of it would not be material, except to permit the movement of the frame carrying the coil. The mounting of the frame on the bridge pieces by pivots, with its arrangement and connections, was the important part of Weston's patented invention. The defendants' instruments have the permanent magnetic field provided by a magnet

and core of different and perhaps better shapes in some respects, but permitting movement of the frame in an arc of a circle to carry a pointer moving over a scale to indicate the measurement of the current. If these changes of forms are even patentable improvements, the defendants have taken and used the invention of the patent in making and using those improvements. The difference in the form of the parts carrying the frame on pivots supported by the bridge pieces is of the same sort. It does not vary the mechanical operation of the parts. These differences do not, any or all of them, amount to doing the same thing in different ways, but leave the operative parts doing the same things in the same way.

According to these views, the motion should be granted.

LACOMBE, Circuit Judge. Upon re-examination of the record, I concur in the opinion above expressed by Judge WHEELER.

AMERICAN GRAPHOPHONE CO. v. LEEDS & CATLIN CO. et al.

(Circuit Court, S. D. New York. July 9, 1904.)

No. 8,570.

1. PATENTS—SUIT FOR INFRINGEMENT OF TWO PATENTS—MULTIFARIOUSNESS.

A bill for the infringement of two patents, although one is for a process and the other for a product, is not multifarious, where both relate to the same article and are capable of being conjointly infringed, as it is alleged in the bill they are by the defendant.

In Equity. Suit for infringement of patents. On demurrer to bill.

Philip Mauro and C. A. L. Massie, for complainant.

Louis Hicks, for defendants.

PLATT, District Judge. The demurrer raises various objections to the bill:

1. That the letters patent are void on their face for lack of invention. In the circumstances of the case, this attack is obviously futile, and my action thereon needs no explanation.

2. That it is multifarious, in that it involves the validity and infringement of two separate patents. The bill avers not only that they are capable of conjoint use, but that they are used conjointly by the complainant, and that the defendants jointly infringe both patents by their product. In a general sense, the demurrer should be taken to admit so important an allegation; but, as the patents themselves have become a part of the bill, it may be that if, upon inspection, there is a manifest inconsistency between the allegation and the meaning of the patents, a dismissal of the bill would be in order. No such situation appears in the case. The Macdonald patent covers, inter alia, a product, and the Jones patent is for a process, and both relate to sound records. If the

¶ 1. Pleading in patent infringement suits, see note to Caldwell v. Powell, 19 C. C. A. 595.

See Patents, vol. 38, Cent. Dig. § 518.

features of the two inventions can in any way be present and co-operate in a single article, nothing beyond calls for examination. In so far as my views may differ from those expressed in Cons. Elec. Lt. Co. v. Brush-Swan Elec. Lt. Co. (C. C.) 20 Fed. 502, I am unable to follow that case.

3. Certain formal averments relating to the Jones patent are said to be lacking, but the law invoked and the date of the Jones application refute the proposition.

In conclusion, verily the stars in their courses, aided possibly by forces less remote, seem to have fought against the complainant. This matter was heard about the middle of May. Since then a stress of affairs has kept me from the work which accumulated in the New York district. By reason thereof, the defendants have gained nearly two months of time. The demurrer deserved to be overruled in the day and time of the hearing.

Let the demurrer be overruled, and let defendants answer within 10 days.

LOUISVILLE & N. R. CO. v. COULTER, Auditor, et al.

(Circuit Court, E. D. Kentucky. November 9, 1903.)

No. 396.

1. TAXATION—ASSESSMENT—PERCENTAGE OF FAIR CASH VALUE.

Evidence considered, and *held* to sustain the claim of a complainant that property in Kentucky which was subject to equalization by the State Board of Equalization under the statute was assessed for taxation for the year 1902 at not to exceed 80 per cent. of its fair cash value, notwithstanding the requirement of the state Constitution that all property shall be assessed at its fair cash value.

2. SAME—RAILROADS—METHOD OF VALUATION OF PROPERTY.

Where the railroad commissioners of a state, in fixing the valuation of the property of a railroad company for purposes of taxation by the capitalization plan at a sum upon which the net earnings of the company would pay an annual dividend of 6 per cent., took into consideration the earnings for the four preceding years, which made the assessed value greater than it would have been if based on the earnings for five years instead of four, and greater than it would have been if based on the average market value of the stock and bonds of the company for the preceding five years, they cannot claim that such assessment was less than the fair cash value, on the ground that, if the earnings for the last year alone had been considered, or the highest market value of the stock and bonds at any time during such year taken, the result would have been a higher valuation; the only reasonable rule to pursue in general in such methods of valuation being to take into consideration a series of years, not less than five.

3. SAME—KENTUCKY STATUTE.

The provision of the Kentucky revenue act of November 11, 1892, p. 302, c. 103, art. 3, § 5, as amended by Act June 9, 1893, p. 991, c. 217, § 4, that in the assessment of the property of a railroad company "that proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this state bears to the lines owned, leased or controlled in this state and elsewhere shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state," requires the taking into consideration of a line of road owned and operated by a second company, but which is controlled

by the company being assessed through its ownership of a majority of the stock of such second company.

4. SAME—RIGHT TO ENJOIN COLLECTION OF TAX—UNDERVALUATION OF OTHER PROPERTY.

In order to entitle one whose property has been fully valued for taxation to complain of an undervaluation of other property and to relief in equity by having his own valuation cut down to an equality with that of the property undervalued, it is essential that the undervaluation should have been intentional, and that it should have been systematic or habitual, relating to a large species of property.

5. SAME.

Where it was shown that the tangible taxable property of all kinds subject to equalization by the State Board of Equalization under the laws of Kentucky, which constituted 77 per cent. of the taxable property of the state, was assessed for the year 1902 at not to exceed 80 per cent. of its fair cash value by the local assessing officers and the Board of Equalization, a railroad company whose intangible property was assessed by the Board of Valuation and Assessment at its full cash value is entitled to maintain a suit in equity in a federal court to enjoin such board from apportioning and certifying for collection so much of the tax as is in excess of that imposed on other taxpayers, as in violation of its constitutional right to the equal protection of the laws.

In Equity. Suit for injunction.

Helm, Bruce & Helm and T. B. Harrison, Jr., for complainant.
Henry L. Stone and William O. Davis, for defendants.

COCHRAN, District Judge. This is a suit to enjoin the defendants, members of the Board of Valuation and Assessment for this state, from apportioning and certifying a portion of an assessment for taxation of the intangible property of complainant in this state for the year 1902. The amount of that assessment is $10,974,899.50, and that portion thereof is all over $4,017,194.66. The ground upon which this relief is sought is that said assessment is based upon a valuation by defendants of complainant's entire property in this state at the sum of $33,788,724.50, whereas it should have been based upon a valuation thereof at not exceeding $27,030,979.66; that is, 80 per cent. of the former sum. The mode of assessing the intangible property of a corporation subject to assessment is first to value its entire property in this state, and then to deduct therefrom the assessment of its tangible property made by the officials who have to do therewith. The balance is the amount at which the intangible property should be assessed. The tangible property of complainant in this state was assessed by the railroad commissioners for the year 1902 at $23,013,825. This sum, deducted from the sum at which defendants have valued its entire property in this state for that year, leaves $10,974,899.50, the amount of said contemplated assessment of its intangible property. Deducting it from the sum at not exceeding which complainant contends it should be valued, leaves $4,017,154.66, the portion thereof that is not complained of.

The reason why complainant contends that its entire property in this state should not have been so valued, but should have been valued at

¶ 4. Persons entitled to injunction restraining or damages for wrongful enforcement of tax, see note to Bayles v. Dunn, 54 C. C. A. 550.
See Taxation, vol. 45, Cent. Dig. § 1234.

not exceeding the lesser sum, is not that its said property was not of that value, but that the taxable property in this state which is subject to the jurisdiction of the State Board of Equalization, and which constitutes the bulk of such property, was assessed for that year after the assessment thereof had been equalized by said board not at its value, but at not exceeding 80 per cent. thereof.

The taxable property in this state may be divided into tangible and intangible. Tangible property may itself be divided into that owned by steam railroad corporations, distilled spirits, and all other tangible property. Intangible property subject to assessment is limited to that of certain enumerated corporations, including steam railroad corporations. It is assessed by the Board of Valuation and Assessment, of which defendants are members, and no other officials have anything to do with its assessment. Its mode of assessment has been heretofore indicated. The total assessment thereof, including that in question herein, for the year 1902, amounted to the sum of $24,059,211. The tangible property of steam railroad corporations is assessed by the railroad commissioners, and no other officials have anything to do with its assessment. The total assessment thereof for that year amounted to the sum of $51,944,384. Distilled spirits are assessed by said Board of Valuation and Assessment, and the total amount thereof for said year amounted to $16,209,856. All other tangible property consists of three classes, to wit, lands, town lots, and personalty. And personalty is divided into that subject to equalization and that not so subject; that not so subject consisting of cash, accounts, notes, bonds, and stocks. This kind of tangible property is primarily assessed by the assessors of the various counties. The assessment made by each assessor is subject to the supervision of the board of supervisors in each county, which has power and whose duty it is to change any assessment to what it should properly be. And the assessment of each county, save as to personal property not subject to equalization, is subject to equalization by said Board of Equalization, which has power and whose duty it is to equalize the assessment of the various counties. It has nothing to do with equalizing particular assessments. It has only to do with equalizing the total assessments of lands, town lots, and personalty, in so far as it is subject to equalization, in each county with each other, and with the total assessments thereof in the other counties of the state. The total assessment of this kind of tangible property subject to equalization for the year 1902 amounted to the sum of $534,417,279; that not subject to equalization amounting to $64,412,354. It is this latter kind of tangible property, in so far as it is subject to equalization, which, as the figures show, constitutes more than 77 per cent. of the taxable property of the state, that complainant contends was not assessed for the year 1902 at more than 80 per cent. of its value. Defendants dispute this contention, and claim that it was assessed at its full value. At the outset, then, it is to be considered and determined which of the parties hereto is correct in this matter. If the defendants are, nothing else remains to be considered, and that is an end of this case.

It will aid in the solution of this question to first take a historical survey of the legislation of this state as to how tangible property of the kind under consideration, in so far as it is subject to equalization,

should be valued in assessing it for taxation, and as to who should value it. Before the third Constitution of this state—that of 1850—the only official who had anything to do with the assessment of property for taxation was styled a "commissioner." He made the primary and only assessment thereof. There was no board of supervisors or board of equalization in those days. The law required that he should assess property at its "fair and full value." By the act of 1831 (Acts 1831, p. 173, c. 726) an innovation was made in requiring the person listing his property for taxation to value it, and make oath that the value fixed by him was a "true, full, and faithful value of the same, to the best of his or her knowledge and belief." But this requirement as to the taxpayer making oath to the value of his property did not remain long in force. It was repealed by the act of 1838 (Acts 1837–38, p. 68, c. 585), which provides further that the commissioner, before entering upon the duties of his office, should take an oath that he would fix a fair and full value on all property listed for taxation. By the Constitution of 1850 provision was made for the office of assessor, as it has existed ever since, and by the Revised Statutes which went into force July 1, 1852, his duties were prescribed. He was required thereby to assess property at its "fair and full value." The taxpayer, in giving in his list, was required to make a statement as to its value; but it is doubtful, to say the least, whether he was required to make oath thereto. Provision was also made therein for the first time for the board of supervisors. It was to be composed of the judge and clerk of the county, and it was required to correct any errors of the assessor, whether in fact or in relation to the valuation of the property listed by him, and, if it was of the opinion that it had been incorrectly valued, to assess it at its "proper value." The assessor was required to attend the sessions of the board, and give evidence and information upon oath concerning the business before it when called on, and it had the power to compel attendance of witnesses before it to enable it to discharge its duties. The General Statutes which went into force December 1, 1873, reenacted these provisions, save that they provided that the board of supervisors should be composed of three discreet taxpayers, citizens of the county, appointed by the county court, any two of whom, after being sworn, should proceed to discharge its duties. By an act of date May 10, 1884 (1 Acts 1883–84, p. 151, c. 1336), provision was first made for the State Board of Equalization. It was provided thereby that the board should be composed of one person, having the qualifications of an elector, from each congressional district, elected by the qualified voters thereof, and the Auditor of the State; and that it should equalize the assessments of property for taxation in the several counties of the state by adding to or deducting from the assessments of each of the three classes of property or to or from the aggregate assessments of said classes in each county such a percentage as might be deemed equitable and just in order to make the assessments of the different classes of property in each county and in the various counties even or equal. It was expressly provided that the board should not have the power to reduce the aggregate assessments in the state, or to increase it except in such an amount as might be reasonably necessary to a just equalization

Then came the act of May 17, 1886 (1 Acts 1885–86, p. 140, c. 1233), a comprehensive one on the subject of revenue and taxation. It substantially re-enacted the provisions of the Revised and General Statutes in relation to the assessment of property for taxation hereinbefore referred to, but contained no provisions in relation to the State Board of Equalization. It made, however, certain additions to the provisions of said earlier statutes. It provided that the clerk of the county should, on or before September 15th of each year—the date as of which assessments were thereafter to be made—make and certify to the assessor a complete statement of all conveyances made the preceding year in the county, showing the names of the parties, the date of the conveyance, and the consideration, a true and exact copy whereof was thereafter to be sent to the auditor with the assessor's book; that the assessor, before proceeding to list the property of a person, should administer an oath to him to the effect, in addition to the list he was about to give being true and complete, as before, that he would value his property at the fair cash value; that, before the county court granted the assessor a certificate of allowance for his services, he should take in open court an oath that he had not received a list of taxable property and returned same until the person rendering the list had made oath to the truth and value of same, and that in no instance had he assessed any property at a greater or less sum than he deemed the fair cash value of the same; that the board of supervisors, whose membership was increased to five intelligent, discreet housekeepers, appointed as before, should, before performance of its duties, take an oath that it would in each instance where the property had not been assessed at a fair cash value, increase or decrease the valuation so as to make it conform to its fair cash value; and that said board should, in each and every case where property had not been correctly valued, value and equalize the same, and in every case should so correct the assessor's book as to have the said book to show the cash value of said property. This is the first act in which the words "fair cash value" are used to designate the value at which said property should be assessed, and it is used therein as synonymous with the words "fair and full value" in the former legislation.

In the case of Spalding v. Hill, 86 Ky. 656, 7 S. W. 27, decided shortly after the passage of this act, to wit, February 11, 1888, the Court of Appeals of Kentucky construed and determined the constitutionality of the previous act of May 10, 1884. It grew out of the action of the State Board of Equalization in raising the assessment of Marion county as to lands 13 per cent. and as to personalty 30 per cent. It was contended that it was unconstitutional, because it made no provision for notice to the taxpayer of a contemplated raise in an assessment, in order that they might be heard in regard thereto. It was held to be constitutional, because it specified the time and the place of the meeting of the board. As to the power conferred on the board by that act, Judge Bennett said that it was "its duty to examine into the assessments of the several counties, and, in case the assessment of one or more counties is found to be relatively higher or lower than other counties,

to equalize the taxes among the several counties according to the value of the property therein." And again he said: "But they have not the power to increase or decrease the total valuation of the state. Their power is limited to equalizing." This decision was followed in three months by another act on the subject of a State Board of Equalization, to wit, the act of May 4, 1888 (1 Acts 1887–88, p. 209, c. 1562). This act covered the ground anew. It changed the membership of the board to one person of the qualification theretofore prescribed from each appellate district of the state, to be appointed by the Governor, with the auditor as an ex officio member. It provided that the various county clerks of the state should, on or before the 1st day of January in each year, make and file with the auditor, for the use of said board, a tabulated statement, sworn to by them, of all sales of the absolute fee-simple title of real estate, as shown by the deedbooks in their respective counties—town lots being kept separate—made within one year immediately preceding the 15th of September previous, stating the price paid, with the terms and conditions, the number of acres, and the assessment of same for that year, and, if only a part of a tract of land or town lot had been sold, giving a short description of same, and stating what proportion same was of such tract of land or town lot; and that, if any clerk should fail so to do on or before the 1st day of February in each year, he should be fined upon indictment not less than $50 nor more than $200. The provisions thereof in relation to the duties of the board were to the effect that it should adopt 69 per cent. of cash value as the standard to which the assessments of lands and town lots should be made to conform, and should raise such assessments thereof as were below that percentage to that standard and lower such as were above thereto; that in ascertaining the actual percentage of assessment to cash value in any case to know whether it was below or above the standard it should take the aggregate assessment of tracts of land or town lots, as the case might be, in the tabulated statement relating to such case, and calculate what percentage aggregate assessments were of the aggregate prices at which same were sold; time payments being reduced to cash on the basis of 6 per cent. discount; and that in equalizing the personal property subject to equalization it should add to or subtract from the assessment thereof the average per cent. added to or subtracted from the assessments of the lands and town lots for the same county. It was expressly provided that in any county where there had not been as many as five sales of land in the year immediately preceding the previous 15th of September the assessment thereof should remain as fixed by the local assessing officials, and that the same rule should apply as to town lots. But as to counties where there had been five or more sales of lands and town lots, or either, the board was not required to accept the percentage that the aggregate assessment of lands or town lots sold were of the aggregate prices at which they had been sold on a cash basis as showing absolutely the true percentage of cash value at which all the lands and town lots in such counties had been assessed. It was only prima facie evidence

thereof. It was provided that after the board had raised or lowered the assessment of any county in accordance with the percentage shown by the tabulated statement thereof it should give notice of such action to the county judge, that he might appoint not exceeding five witnesses to appear before the board and testify under oath in reference to its action; and that then the board should revise its action or not, as it might think just and proper. This latter act was amended by an act approved May 27, 1890 (1 Acts 1889–90, p. 170, c. 1903), by which it was provided that the county judge and county attorney, as well as the county clerk, should swear to the correctness of the tabulated statement as to sales; that the board should have authority to obtain and use any other evidence of values, and whether or not the property conveyed had been assessed at a greater per cent. of its actual value than in cases where property had not been conveyed; that the percentage at which property as to be equalized should be 70 per cent.; and that the per cent. to be added or subtracted in equalizing assessments of personalty should be the per cent. added to or subtracted from the assessment of lands alone.

Thus stood the law when the Constitution of 1891 went into force. It was in quite an inconsistent shape. The taxpayer was required to give his property in under oath at its fair cash value; the assessor was required to swear that he would assess it at that value, to so assess it; and, before he could get his pay, to swear that he had so assessed it; and the supervisors were required to swear that, if they found that the assessor had not so assessed it, they would correct his error, and to so assess it. On the other hand, the Board of Equalization was required to equalize it in masses at 70 per cent. of its fair cash value. That Constitution was a radical departure from the Constitution of 1850 in its provisions in relation to taxation. The former had few, if any, provisions on that subject. The latter had quite a number. Amongst them was one (section 172) prescribing the value at which "all property not exempted from taxation" should be "assessed for taxation," and a criterion of such value. That value was the "fair cash value," and that criterion was "the price it would bring at a fair voluntary sale." As to the effect of this constitutional provision on existing law, Judge Day, in the case of Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299, said:

"It established a rule for taxation inconsistent with the prior statutes, and must be taken as repealing those statutes which are in conflict with the constitutional provisions."

This could only have had reference to the provisions of the act of 1888 as amended by the act of 1890, for they were the only prior statutes prescribing a different rule, and therefore inconsistent or in conflict with that provision. It would seem, however, that it did not repeal those statutes in toto, but simply substituted a different standard of equalization, to wit, the fair cash value, instead of 70 per cent. thereof. This was so held by the Court of Appeals of Kentucky in the case of Louisville R. Co. v. Com. (Ky.) 49 S. W. 486. Judge Paynter there said:

"The act creating the Board of Equalization and Assessment is not in force in so far as section 172 of the Constitution and section 4028 of the Kentucky Statutes are in conflict therewith. In other words, the Board of Valuation and Assessment cannot equalize except upon a basis of the cash value of the property assessed."

The next Legislature after the adoption of said Constitution enacted a comprehensive law on the subject of revenue and taxation, which went into force November 11, 1892. Acts 1892, p. 277, c. 103. It contained a general provision (section 4020, Ky. St. 1903) to the effect that all property in this state not exempt from taxation should be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale. The special provisions therein in regard to the taxpayer, the assessor, and the board of supervisors were substantially the same as in the said act of May 17, 1886, save that in each instance it was the fair cash value, estimated at the price it would bring at a fair voluntary sale, that the property was to be valued in assessing it; that the oath of the taxpayer was to be in writing, and signed by him, and the assessor was required to read it over to him before signing it, and to make oath beforehand that he would administer the prescribed oath to him, and afterwards that he had done so; and a penalty was prescribed for the assessor violating this requirement, and the taxpayer was made liable to punishment for false swearing if he made a false statement in his oath. No provision was contained in this act in relation to the State Board of Equalization.

And finally came the act of March 29, 1902 (Acts 1902, p. 281, c. 128). It, too, is a comprehensive one on the subject of revenue and taxation. It contains all the provisions of the acts of May 17, 1886 (1 Acts 1885–86, p. 140, c. 1233), and November 11, 1892 (Acts 1891–93, p. 277, c. 103), hereinbefore referred to, but it goes beyond them in that in article 16 thereof it covers the ground of a State Board of Equalization—the same covered by the acts of May 10, 1884, and May 4, 1888, as amended by the act of 1890. This article consists of the same provisions as the act of May 4, 1888, as so amended, save that as to the qualifications of the appointed members of the board it is provided that no person should be eligible to appointment who was under 30 years old, and that he should be a housekeeper, and the owner of real estate located in this state. Like the act of May 27, 1890, it provides that the board shall equalize assessments at 70 per cent. of fair cash value. Of course, in so far it is a violation of said constitutional provision. But in it we have a continuance of the legislative inconsistency of requiring the taxpayer and one set of officials to value property in assessing it for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale, and another set of officials to equalize the primary assessments thereof on the basis of 70 per cent. of the fair cash value of the property assessed.

Such, then, has been the legislation in this state since before the Constitution of 1850 as to the value at which and the persons by whom property, assessments of which have since May 10, 1884, been subject to equalization by the equalizers, should be assessed. The only period of time that there was valid legislation in existence provid-

ing for the assessment of said property at less than its full and fair or fair cash value was from May 4, 1888, the date when the second act in relation to the equalizers became effective, and September 28, 1891, the date as of which the present Constitution took effect. During this period the legislation, so far as it related to the primary assessments by the assessors and correction thereof by the supervisors, required, as it has always required, that they should be at the full and fair or fair cash value of the property assessed. It was only the legislation in relation to the equalizers requiring them to equalize said assessments after such correction, first at 69 per cent, and then at 70 per cent. of its fair cash value, that provided for the assessment of said property at less than its full and fair or fair cash value. Said legislation was regulative in its character. It is evidential also. It indicates that, though the legislation in existence when it was passed, and which had been in existence for many years prior thereto, provided said property should be assessed at its full and fair or fair cash value, it was not in fact so assessed in the aggregate at more than 70 per cent. thereof; for it is inconceivable that the Legislature would have provided for an equalization on the basis of 70 per cent. if said property was then being or had theretofore been assessed in the aggregate at a greater percentage of its full and fair or fair cash value. This indication that said property had not theretofore been fairly assessed is borne out by a statement of the Court of Appeals of Kentucky through Judge Bennett in the case of Spalding v. Hill, supra, decided three months before the passage of said legislation, as to the necessity which caused the passage of the previous act of May 4, 1884. It is in these words:

"It is the settled doctrine of this state that for the purpose of taxation property must be assessed according to its true value; that equality of burden is essential to the correct administration of the government. But it is a fact known by all that for years past the grossest inequalities have existed in the values fixed upon all kinds of property by the county assessors, and that the county boards of supervisors have failed to correct the evil. In some counties it is said that assessors secure their election by pledges made to assess the property in the county, or certain kinds of it, at a low value. In creating the State Board of Equalization the object was to correct this evil, and to have the assessment of taxes in the several counties equalized according to the value of the property therein, so that the state government might be supported by just and equal taxation."

Further, there is in the act of May 4, 1888, a note of helplessness and despair, to wit, that it was regarded by the Legislature that it was well-nigh impossible by mere legislation, no matter how stringent, to secure an assessment of said property at its fair cash value. It is hard to understand why it was not provided that the equalizers should exercise a supervision over the action of the assessors as corrected by the supervisors, and bring the assessment of each class of said property in each county up to its fair cash value, and in that way bring about an equalization on any other idea than that it was felt that this could not readily be brought about by mere legislation.

So forcible is the evidence thus afforded as to these two matters, confirmed, to a certain extent, as to one of them, by the opinion

of the Court of Appeals of Kentucky, through Judge Bennett, that it seems that it should be accepted as conclusive in regard thereto. This being so, the question which we have to determine, to wit, as to whether said property was assessed, after it had been equalized, for the year 1902 at its fair cash value, or at not more than 80 per cent. thereof, may be put in another form. It is this: Had section 172 of the Constitution of 1891 and the stringent provisions of the act of November 11, 1892, been able, by the year 1902, to accomplish that which the legislation prior to the act of May 4, 1888, had been unable to accomplish, to wit, to secure an assessment of said property at its fair cash value? Had those laws, by that time, become written in the inward parts of taxpayers and assessing officials, so as to bring about a change in their settled habit in the matter of assessing property for taxation—so settled that the Legislature felt forced to recognize it—a change from the habit of assessing at 70 per cent. of fair cash value to the habit of assessing at full and fair cash value? As to such a great change being thus brought about one cannot help but be sceptical, and the aid which this historical survey brings to the solution of the question in hand is in inducing this attitude of scepticism towards the claim that said property was assessed for the year 1902 at its fair cash value. This attitude is strengthened by the evidence as to how relative to fair cash value said property was assessed, after equalization had, for the years 1893, 1894, 1895, and 1896, which was subsequent to the taking effect of the Constitution of 1891 and the act of November 11, 1892. It consists of the affidavits and depositions of L. C. Norman, auditor for 1893, 1894, and 1895, and S. H. Stone, auditor for 1896, and the affidavits of J. S. Phelps, an equalizer for 1893, 1894, and 1895, John S. Murray, an equalizer for 1894, and L. C. Pritchard, Hancock Taylor, and Ben D. Ringo, equalizers for the years 1895 and 1896. These seems to be all the surviving members of the State Board of Equalization for those years. There is no other evidence bearing upon its action as to those years. It is to the effect that said board equalized the assessments of said property in accordance with the requirement of said statute of May 4, 1888, as amended by the act of May 27, 1890, the same as if it had not been affected by said constitutional provision and act of November 11, 1892; i. e., at 70 per cent. of its fair cash value. Hancock Taylor states that 80 per cent. of the prices at which the real estate sold according to the reports of the county clerks was assumed at its fair cash value, and the assessments were equalized on the basis of 70 per cent. thereof. As to the years 1897 and 1898 the evidence is not uniform. The question as to those years was involved in the case of Louisville Trust Co. v. Stone, supra, and in the opinion therein all the evidence introduced in that case bearing on that question is fully set forth. Some of it has been introduced herein. The conclusion of the court as to the effect of that evidence is binding upon this court. Though it denied the complainant therein the relief sought, it did not do so because its conclusion in regard thereto was not that said property had been assessed after equalization had for those years at its fair cash value. It was impressed by complainant's

contention that it had not been. In referring thereto Judge Day said, "There is much force in this argument." Its conclusion was simply that complainant's contention had not been made out "by the convincing proof required." As to the years 1899, 1900, and 1901, there is no evidence directly bearing thereon as to how, relative to value, said property was assessed after equalization had. But though, because of the conclusion in Louisville Trust Co. v. Stone, as to the years 1897 and 1898, and the absence of direct evidence as to the years 1899, 1900, and 1901, we cannot, so far as our investigation has thus far progressed, take position as to how said property for said years was assessed after equalization had, the evidence as to the years 1893, 1894, 1895, and 1896 is sufficient to warrant the conclusion that for those years it was so assessed at not more than 70 per cent. of its fair cash value. This fact we say strengthens the attitude of scepticism towards the claim put forward herein that for the year 1902 said property was assessed after equalization had at its fair cash value, induced by the historical survey we have made.

We are warranted, therefore, in entering upon a consideration of the evidence bearing upon the question as to the valuation at which said property after equalization had was assessed for that year from this standpoint of incredulity. That evidence, in our opinion, shows beyond question that it was so assessed at not more than 80 per cent. of its fair cash value. It is possible that the assessments have been worked up 10 per cent.—that is, from 70 to 80 per cent.—but certainly not higher than 80 per cent. That this is so results from a comparison of the total assessments of said property after equalization had for the year 1902 with the year 1891. However it may have been after the latter year because of said Constitution and act of November 11, 1892, it is certain that for said year said property was not assessed after equalization had at more than 70 per cent. of its fair cash value. The then existing law, as to whose validity there can be no question, required that assessments should be equalized on a 70 per cent. basis. There is no evidence tending to rebut the presumption that the law was complied with in this particular. L. C. Norman, auditor for that year, testified that it was. In the report of the equalizers for the year 1896, is this answer to certain criticisms of a "few public speakers and newspapers of the state"—evidently made in the campaign in the fall of 1895 for state officers—to wit:

"The principal charge brought against this board, and to which it objects, is, in effect, that 'unreasonable and unlawful additions have been made to the assessed valuation in the state, that revenue may be created to refill an empty treasury.' The facts and figures disproving any such charge are these: For the years 1889, '90, '91, and '92—the last four years under the law which requires all real estate to be assessed at 70 per cent. of its 'fair cash value'—the average equalized value of lands in this state was $237,888,310. It will be admitted that lands are very rarely, if ever, either assessed or equalized for taxation at more than the law requires. Then it is safe to assume that the average equalized value above given was not greater than '70 per cent. of the fair cash value' of lands in this state. Now, if $237,888,310 was only 70 per cent. of the average 'fair cash value' of said lands for the years 1889, '90, '91, '92, then it necessarily follows that the 'average fair cash value' of lands for

those years was $339,840,404, which amount is $85,023,275, or more than 33 per cent. greater than $254,817,129, the amount at which the board has this year equalized the value of the lands of the state for taxation."

Indeed, it seems to be conceded by defendants that said property was not assessed, after equalization had for the year 1891, at more than 70 per cent. of its fair cash value. Another fact which seems to be conceded is that there was as much property in quantity, and it was of as great a fair cash value, in 1902 as in 1891. There is no reason to contend the contrary. For some reason there was a less acreage of lands assessed in 1902 than 1891. In 1891 there were 25,095,554 acres and in 1902 24,416,479 acres, or 679,075 acres less. But the town lots were more. In 1891 there were 82,483 and in 1902 114,420, or 21,987 more. As to personalty subject to equalization, the only items as to which quantity is given are live stock, stores, diamonds, and steamboats. The quantity of live stock and diamonds was greater in 1902 than in 1891, and of stores and steamboats less. As to the comparative fair cash value of the assessable property subject to equalization of the two years the only evidence is affidavits of five individuals, residents of Louisville, and experienced real estate men, to the effect that the value of the lands in the state had increased from 1891 to 1902 20 to 25 per cent. Accepting as facts, therefore, that said property was assessed in 1891 after equalization had at not more than 70 per cent. of its fair cash value, and that in 1902 it was at least of as great a fair cash value as it was in 1891—both of which are practically conceded by defendants—a comparison of the assessments after equalization had for the two years yields this result:

For the year 1891, the assessments of the different classes were as follows, to wit:

Lands	$236,133,808
Town lots	155,496,486
Personalty subject to equalization	89,300,329
Total of all	$480,930,623

For the year 1902, they were as follows, to wit:

Lands	$258,040,303
Town lots	203,819,427
Personalty subject to equalization	72,557,539
Total of all	$534,417,269

If, then, $480,930,623 was 70 per cent. of the fair cash value in 1891, then $687,043,747 was the full fair cash value. Eighty per cent. of the latter sum is $549,634,997.60, or $15,217,718.60 more than the assessment for the year 1902. Or, limiting the comparison to the assessments of lands, the largest of the three classes, and making it by the acre, we have this result: Lands after equalization had were assessed in 1891 at $9.58 per acre, and in 1902 at $10.57 per acre. If $9.58 per acre was 70 per cent. of the fair cash value of lands in 1891, then the full fair cash value was $13.68 per acre. Eighty per cent. thereof is $10.94 per acre, or 37 cents per acre more than in 1902. In the year 1896, when, in defense of the attacks made on it the previous fall, it was shown by the equalizers how

favorable to the taxpayers the assessment of that year had been as compared with the assessment of 1891, the assessment of lands was at $10.81 per acre, or 24 cents per acre more than 1902. The total assessment of personalty not subject to equalization in 1891 was $55,941,616, as against $64,412,354 in 1902.

The conclusion announced as to the question in hand results also from a consideration of the evidence bearing more directly on it. There were furnished to the equalizers for use in making the equalization for the year 1902 tabulated statements as to lands from 116 of the 119 counties of the state, and as to town lots from 112. After the equalizers had purged them of such sales as they had reason to believe were for fictitious considerations, of commissioners' sales, of exchanges, and of conveyances for natural love and affection, the number of sales of land exceeded 9,500, of which over 4,000 were cash sales, and of town lots exceeding 7,250, of which over 2,275 were cash sales. There is no good reason to doubt that the sales that were not entirely for cash were, in so far as not for cash, for that which was equivalent thereto, to wit, interest-bearing notes. The lowest number of sales from any one county was 12 of lands alone from Jackson county. In 77 of the 115 counties furnishing tabulated statements as to lands the percentage that the total of the assessments of the lands sold was of the total of the prices at which same sold was 80 and under, and in 39 it was over 80. In 24 of the latter it was over 85; in 12 over 90; in 5 over 95; in 2 just 100; and in three over 100, the percentages of which 3 were, respectively, 114, 116, and 133. In 1 of the 77 counties where the percentage was 80 and under it was under 50, to wit, 46; in 8 it was under 60; in 24 it was under 70; in 67 it was under 80; and in 10 it was just 80. In 67 of the 112 counties furnishing such statements as to town lots the percentage that the total of the assessments of the town lots sold was of the total of the prices at which same sold was 80 and under, and in the other 45 it was over 80. In 28 of the latter the percentage was over 85; in 15 over 90; in 11 over 95; in 6 just 100; and in 3 over 100, the percentages of which 3 were, respectively, 104, 120, and 149. In 2 of the 67 counties where the percentage was 80 and under it was under 60; in 14 it was under 70; in 52 it was under 80; and in 15 it was just 80. In 29 of the counties furnishing such statements as to both lands and town lots the percentage was above 80 as to both; in 6 of these the percentage was exactly the same as to both; and in 13 thereof the percentages were within 1 and 2 per cent. of each other. This is what these tabulated statements show as to the action of the local assessing officials as to lands and town lots sold in the counties furnishing them. There is evidence to the effect that in some, if not in many, of those counties lands and town lots not sold were assessed at a less percentage of fair cash value than those that were sold; or, in other words, that those sold were purposely assessed at a greater percentage than those not sold, in order to affect the action of the equalizers, and prevent them from raising the assessment of the county in which it was done. That in the course of the assessment of property for taxation in this state local assessing

officials have so acted as to prevent their respective counties from bearing their just proportion of the burden of state taxation was directly charged by the Court of Appeals through Judge Bennett in the case of Spalding v. Hill, supra. It was this fact that brought about the creation of the State Board of Equalization. That soon after its creation it was realized that lands and town lots sold might purposely, for the reason stated, be assessed by said officials at a greater percentage than lands and town lots not sold is evident from the provision in the act of May 27, 1890, that the equalizers were authorized to obtain and use other evidence than the tabulated statements as to whether property not sold had been assessed at as great a percentage of its actual value as that sold. That in fact the assessments of lands and town lots sold were assessed at a greater percentage than those not sold for the year 1902 in certain of the counties is shown by the evidence. An assessor for a certain county, whose term of office covered the years 1898, 1899, 1900, and 1901, and who, therefore, made the assessment for the year 1902 in the fall of 1901 for his county, states in an affidavit that during his term of office it was the rule to assess the real estate in his county at about 60 per cent. of what it would, in the opinion of the assessor and supervisors, bring at a fair voluntary sale—this being supposed to meet the constitutional and statutory requirement of fair cash value; that the only exception to this rule was in the case of transfers of real estate; that this property was assessed at 80 per cent. of the purchase price for the year in which the transfer was made, and that the next year the assessment was lowered to the 60 per cent. basis. The object intended to be accomplished by this method of procedure is thus stated by him:

"The object of this was to make a showing on the transfers which would keep the State Board of Equalization from raising the entire county; it being deemed good business to let a few transfers bear for one year the increase, rather than the entire assessable property of the county."

Still further, the chairman of the equalizers for the year 1902 on direct examination testified that sometimes the transfer sheets were doctored by the supervisors or by the assessor of a county, and rendered wholly worthless as evidence before them; and, when asked on cross-examination as to what he meant by saying that certain transfer sheets had been doctored by said officials, he testified that those officials had concluded that this element of evidence sometimes led to counties being raised by the equalizers, and, in order to obviate this, the assessor, when he found that a man had bought a piece of property for a certain price—say, $2,500—he would insist on the purchaser listing it at exactly what he had paid for it, and where that was overlooked by the assessor it was attended to by the supervisors; that he was sure that in the year 1902 there were several counties that had been listed exactly at the prices recited in the transfers; and that his board "rapped the knuckles" of those fellows about the matter, and indicated that they could not deceive it in that way. This testimony is concurred in by that of other of the equalizers. And in their report for the year 1902 the equalizers have this to say concerning this practice, to wit:

"We desire also to call attention to the injustice practiced in some of the counties of the state of listing the lands and lots sold during the year at a valuation out of any proportion to the valuation fixed upon the other lands and lots in the same county. The price which real estate in a community brings upon the market affords a very fine index to the correct valuation of property in that locality, and should greatly aid the assessor and supervisors in arriving at a fair valuation not only of the property transferred, but of other property similarly situated. It is manifestly unjust, however, to require the owner of real estate which has been sold during the year to list it at its full cash value, and at the same time allow his neighbors, with property equally valuable, to escape with valuations grossly out of proportion. Nor does this injustice in any way enable the counties practicing it to escape detection by this board, where their other property is not valued up with the transferred realty. By a system gradually perfected and elaborated by years of experience and study of the question, this board has found it possible always to detect an effort to escape the just operation of the law by this species of 'doctoring' the list of transferred property. The custom is so manifestly unjust both to a class of taxpayers and to this board that we trust this year the supervisors will see that the real estate not sold in the several counties is listed as well as that portion of it which is transferred."

Just to what extent the assessments for the year 1902 were doctored in this way the evidence does not disclose. The fact that in as many as 29 of the counties where the percentage of assessment to fair cash value exceeded 80 this applied to both assessment of lands and town lots, that in 6 of these the assessments of lands and town lots were exactly of the same percentage, and in 13 others they were within 1 and 2 per cent. of each other, is calculated to make one suspicious as to the assessments of a large majority of the counties whose percentage exceeded 80. But that the doctoring was not confined to those counties whose percentage exceeded 80 is shown by the affidavit of the assessor referred to, the percentage of whose county, according to his statement, was 80 as to all real estate sold, but according to other evidence in the record was 78 as to lands and 75 as to town lots.

In view, then, of the presence in the assessments of lands and town lots sold and embraced in the tabulated statements of this element of doctoring, it is reasonable to conclude that in but few, if any, of the counties furnishing such statements, were the assessments of lands and town lots not sold by the local assessing officials at a greater percentage of fair cash value than the average percentage of fair cash value at which all the lands and town lots sold in all of said counties were assessed. This percentage may be ascertained in either of two ways. One is by adding together the percentages of the various counties, and dividing their sum by the total number of counties. According to this method the average percentage as to lands was 77 and as to town lots 80. The other is by adding together the prices and assessments of all the lands and town lots sold, and ascertaining the percentage that the sum of the latter is of the sum of the former. The total of the prices of the lands sold was $13,235,249, of which $3,917,874 was for cash sales; and the total of the assessments of said lands was $10,381,009, or 78 per cent. of the former sum. The total of the prices of town lots sold was $10,257,710, of which $1,827,189 was for cash sales. The total of the assessments of said town lots was $8,140,721, or 79 per cent.

of the former sum. So that the average percentage, according to this method, is 78 as to lands and 79 as to town lots.

It is likewise reasonable to conclude that in those counties furnishing tabulated statements personal estate subject to equalization was assessed by the local assessing officials at no greater percentage of fair cash value than real estate, and that in those counties not furnishing such statements, of which there were three that furnished no statement as to lands and seven that furnished none as to town lots, all of the assessable property subject to equalization was assessed at no greater percentage of fair cash value than either of the average percentages given above. The upshot of this line of reasoning, therefore, is that, so far as the action of the local assessing officials was concerned in relation to the assessment for 1902, but little, if any, of said property outside of that whose assessments were doctored in the manner indicated, was assessed by them at a greater percentage of fair cash value than 80.

Then, as to the action of the equalizers in relation thereto. Heretofore the tabulated statements have been availed of to determine the percentage of fair cash value at which the real estate embraced in them was assessed by the local assessing officials, and as a basis of inference as to the percentage of fair cash value at which the real estate not embraced in them and personal estate subject to equalization was so assessed. They may be availed of for another purpose, and that in connection with the matter in hand; i. e., action of the equalizers. They contained, after being purged as aforesaid, a statement of the cash prices which the lands and town lots embraced in them brought at fair voluntary sales, and hence show the fair cash value thereof. If, then, the average fair cash value of the lands and town lots not embraced in them can properly be assumed to be the same as the average fair cash value of the lands and town lots embraced in them, the fair cash value of all the lands and town lots in each of said counties can be readily obtained. Having in this way obtained the fair cash value of all such lands and town lots, the total assessments thereof after equalization had can be compared therewith, and the action of the equalizers as to the percentage of fair cash value at which they put the assessments can be determined. Pursuing this course, the result is that in all but 17 of the 116 counties furnishing tabulated statements as to lands sold for the year 1902 the assessments of lands therein after equalization had were 80 per cent. and under of the fair cash value thereof. As to the 17, a comparison of the final assessments of lands therein with such assessments thereof for the year 1891 and with the average of the assessments thereof for the previous five years indicates that the average of the fair cash value of the lands sold therein was below the average fair cash value of all the lands of said counties, just as undoubtedly in the counties where the percentage was greatly less than 80 the average of the fair cash value of the land sold must have been greater than the average fair cash value of all the lands of said counties. This indicates that in all cases the average fair cash value shown by the tabulated statements cannot be accepted as the average fair cash value of all the lands and town lots in the counties fur-

nishing such statements, and that, therefore, a comparison of the final assessments of all the lands and town lots in such counties with the fair cash value thereof, ascertained in this way, cannot be accepted as showing the exact percentage of fair cash value at which the lands and town lots were assessed after equalization had in every county. But it is reasonable to conclude that in but few, if any, counties the percentage that the final assessments were of the fair cash value of the lands therein exceeded but little, if any, the average of all the percentages ascertained in this way. The average of all such percentages was 70. The record does not disclose the separate percentages as to town lots for the counties furnishing tabulated statements ascertained in this way. But the average thereof is shown to have been 82. This average is slightly in excess of 80, but, in view of the other circumstances bearing on the action of the equalizers, it is not out of the way to treat the percentage as to town lots after such action was had at not exceeding 80. It is reasonable to conclude that personalty subject to equalization in such counties, and property subject thereto in counties not furnishing tabulated statements, were assessed after equalization had at not exceeding 80 per cent. If so, then all the property in this state subject to equalization after equalization had was assessed for the year 1902 at not more than 80 per cent. of its fair cash value.

But a comparison of the assessment of 1902 with that of 1891, and the line of reasoning just pursued, are not the only considerations that lead us to the conclusion which we have announced. It is what one would expect from the course of procedure followed by the equalizers as shown by the evidence. So far as they made use of the tabulated statements at all in determining what their action should be, it was upon an 80 per cent. basis; i. e., they treated 80 per cent. prices shown by the statements as the fair cash value of the lands and town lots embraced in them, and compared therewith the assessments thereof by the local assessing officials in order to determine the percentage of fair cash value at which they had made their assessments. This they did in every case. The evidence is uniform to this effect. Such is the testimony of 6 of the 7 appointed equalizers, of the auditor, of 2 of the secretaries of the board, and of 46 of citizens of 28 different counties, who appeared before the equalizers to protest against tentative action on their part. There is no evidence to the contrary. But as a matter of fact they made but little use of the tabulated statements, even on this 80 per cent. basis. Instead of using these statements, the main guides they availed themselves of in determining what their action should be were the previous years' assessments, and the average of the previous five years' assessments, or of the previous four years' assessments, and that of 1902. The evidence does not make clear which of these two alternatives is true. That such was their course of procedure we know from their own statements in this case under oath and a detailed consideration of their work. Their testimony in regard to the tabulated statements is as follows: One equalizer testified that those statements were very little help to them, and afforded very little information; another that he had never, in his work on the

board, considered them of much importance, but considered them very unreliable and misleading; another that they made up their minds that they were unreliable; another that they made very little use of them, and did not have much faith in them; and another that they did not consider them very valuable. As to whether their characterization of these statements is justified by anything shown definitely in regard to them will be considered further on. Then, as to what a detailed consideration of their work shows. Take the 77 counties of the 116 furnishing statements as to lands where the percentage was 80 or under. There were only 10 of them just 80; the other 67 were under 80. We have no account of action as to 3 of them by the equalizers. They did not raise all of the other 64 to 80, which they would have done had they been controlled by the tabulated statements on the 80 per cent. basis. There were 16 of these 64 under 80 which they did not raise at all. In all of these 16 save 1 the assessments as made by the local assessing officials were the same or greater than the previous year's final assessment. On the other hand, there were 48 of the 64 under 80 which they did raise. In 32 of these 48 counties the assessments as made by said officials were less than the previous year's final assessment. They raised 6 of them not as high as that assessment, 11 of them just as high, 9 of them only 1 per cent. higher, 2 of them just 2 per cent. higher, and only 4 of them more than 2 per cent. In the case of these 4 the assessments so raised were considerably less than 80 per cent. of the prices shown by the statements. In only 16 of said 48 under 80 which they did raise were the assessments as great or greater than the previous year's assessments. In one half of these the assessments were greatly less than 80 per cent. of said prices, and the other half, which were not so greatly less, were raised just to 80 per cent. As to the 10 that were just 80, no raise was made as to 8 of them. In these the assessments as made by local officials were as great or greater than previous year's assessments except in but one case, and it was just 2 per cent. less. The other two were raised, and the assessments in these cases were less than previous year's assessments. The equalizers raised one just to that assessment and the other short of it. Then take the 39 counties of the 115 furnishing statements as to lands which showed a percentage in excess of 80. In 19 of these there was no raise made, and in all of these but 3 the assessments as made by said officials were as great or greater than the previous year's assessments. Where greater, they were, as a rule, only slightly greater. In 2 of the 3 that were not as great they lacked only 1 per cent. of being as great. In the other 20 of said 39 counties a raise was made, but in all but 1 of these assessments as made by said officials were less than the previous year's assessments. As a rule, the 19 that were less were raised to the previous year's assessments. Only 4 were raised to more than these assessments. Of these 3 were raised 1 per cent. and the other 2 per cent. Or, putting the matter in another way: In 42 counties no raise was made at all, and of these only 5 were not as great or greater than the previous year's assessments. In 70 counties a raise was made, and of these only 17 were as great or

greater than the previous year's assessments. The other 53 in which raises were made were less than the previous year's assessments, and of these 34 were not raised greater than said previous year's assessments, 12 were raised 1 per cent. greater, 3 were raised 2 per cent. greater, and only 4 in excess of 2 per cent. greater.

The result of this detailed consideration of the work of the equalizers in relation to lands is to bear out their testimony that they gave but little effect to the tabulated statements, even on the 80 per cent. basis, and to show that their action was practically controlled and determined by the previous year's assessment. A like consideration of their work as to town lots will show substantially the same result, and a comparison with the five-year average as to both lands and town lots will not differ greatly from the comparison with the previous year's assessment.

The attitude of the equalizers towards previous assessments, and how they regarded them, is indicated by the testimony of one of them that they assumed that property had theretofore been assessed at its fair value, and of another that they presumed that it had been assessed in previous years on a 100 per cent. basis. How unwarranted this assumption or presumption was is shown by the consideration that in previous years down to and including the year 1896—for at least four years after the Constitution of 1891 and the act of November 11, 1892, went into effect—property subject to equalization had been assessed at not more than 70 per cent. of its fair cash value; that the evidence does not warrant the conclusion that between 1896 and 1902 there was any material change in the percentage of valuation at which property was assessed; and that if in those years the equalizers acted upon the same assumption or presumption, and looked back to previous years' assessments, rather than to the tabulated statements, as the guides for their action, property for said years as well as for the previous years could not have been assessed at its fair value, or on a 100 per cent. basis, but must have been assessed at not much, if any, greater per cent. of its value than 70 per cent.

It is questionable whether the equalizers had the right to make use of these previous years' assessments to any extent in determining what their action should be. If there is any authority at all for their use thereof for this purpose, it is to be found in the provision in the act of May 27, 1890, incorporated in section 6, art. 16, p. 388, of the act of March 29, 1902, that the equalizers should have authority to obtain and use other evidence as to values than said tabulated statements. But if authority so to use said previous years' assessments was thus conferred upon the equalizers, it certainly was not intended that they should practically set aside the tabulated statements, and depend almost entirely upon previous years' assessments, in determining what their action should be. It was expressly provided that, if there had not been as many as five sales of land in any county, the assessment of lands and personalty should remain as fixed by the local assessing officials, and that the same rule should apply as to town lots. It could not have been intended that, where there were not the requisite number of sales, there was no jurisdic-

tion to act at all, and yet, where there was that number or more, the equalizers had the right to disregard them, and be controlled in their action by previous assessments. The importance attached to them is evidenced by the provisions made to secure their accuracy. And one cannot avoid the conviction that, where they were accurate and genuine, it was intended that they should be well-nigh controlling. This method of determining fair cash value was in existence at the adoption of the Constitution of 1891, and when the test of fair cash value was prescribed therein to be the price which property would bring at a fair voluntary sale it is reasonable to infer that this method of determining that fact was had in view, and thereby sanctioned. That instrument was the beginning of a new era in the matter of taxation in this state. It contemplated a change in the value at which property should be assessed for taxation, and it is inconsistent with this view that thereafter assessing officials should look back at former years' assessments, and be governed by them in determining how, relative to value, property should be assessed.

The evidence discloses no justification for the treatment afforded these statements by the equalizers, or for the characterization of them made in their testimony herein. One accounts for their placing them upon the 80 per cent. basis, so far as they used them at all, by the fact that in them were sales and conveyances of the kind of which they purged them as hereinbefore stated. This, however, will not do, for they were not put on that basis until after they had been so purged. Another accounts for their action in this particular on the ground that many of the sales were upon time, and it did not appear in many, if not in a large majority, of instances that the deferred payments bore interest. Neither will this do. In only two instances did it appear affirmatively that the deferred payments bore no interest. As a rule, the statement as to the terms of payments of the consideration was briefly "cash and notes" or "cash." It is reasonable to infer, nothing else appearing, that these notes bore interest, and hence were equivalent to cash.

It is to be noted that in the report of the proceedings of the equalizers for the year 1902 a communication is addressed to the county clerks, and their attention is called to the provisions of the act of March 29, 1902, prescribing their duties in relation to the equalizers. They are called upon to carefully, accurately, and promptly make out and furnish to the auditor the tabulated statements; but nowhere is their attention directed to the fact that these statements which had been furnished were not sufficiently definite as to the terms of payment of the consideration so as to enable the equalizers to determine the cash prices at which the property listed had been sold, and requesting them to make them more definite in this particular. It is hard to understand why, if the equalizers had felt much difficulty along this line, they would not have directed the attention of the county clerks to it, in order that it might be removed as to the future work of the equalizers. But if either of these two reasons, or any other conceivable one, was sufficient justification for the equalizers concluding that 80 per cent. of the prices at which the real estate was represented as having been sold was the fair cash value

thereof, they showed by their action that they did not put much faith in any such conclusion. In many of the counties where the percentage was under 80 they did not raise their assessments at all, and in but few of those that they did raise did they raise them to the 80 per cent. Then, if this conclusion was warranted, all counties whose percentage was above 80 should have been lowered to that percentage. As stated, there were 39 counties that were above 80 per cent. as to land and 45 as to town lots, yet not in a single instance did they lower the assessment of a county. That they did not do so shows that they could not have had any faith in their conclusion that 80 per cent. of the prices at which the property sold was the fair cash value thereof. There is less reason in the evidence for their having set them aside entirely, as they seem to have done substantially. The only possible justification for their having done so was the testimony of witnesses before them, sent there by the county judges in response to tentative action, of which notice was given as provided in the statute. But, though they testified fully in regard to their action, no one of them has referred to any reason given by any witness as to why any tabulated statement should be set aside. According to the testimony of the chief secretary of the board, none of these witnesses were sworn, and their main function seems to have been as advocates, rather than witnesses. In the report of the board they are generally termed a committee, rather than witnesses. Then they appeared from 57 counties only, and the equalizers, in their treatment of these tabulated statements, made no difference between those from counties sending witnesses and those not sending them. The fact, then, that in determining what their action should be, the equalizers, so far as they used said statements at all, did so on the 80 per cent. basis, and that their action was not affected by them even on this basis, but was principally controlled by the previous assessments, was calculated to bring about the very result which the other evidence shows was brought about, and itself conduces to show that it was brought about.

Such, then, are the reasons upon which we base our conclusion that the property in this state subject to jurisdiction of the State Board of Equalization was assessed after equalization had at not more than 80 per cent. of its fair cash value. The only things to the contrary are the testimony by affidavit of 25 assessors, stating in general language that they assessed the property of their counties at the fair cash value thereof, and the testimony by deposition of 6 of the 7 appointed equalizers that they equalized the assessments subject to their jurisdiction on the basis of the fair cash value of the property assessed. Testing the truth of the testimony of these assessors by the showing made by the tabulated statements as to the percentage which the assessments of the lands and town lots embraced in them bore to the cash prices at which they sold, we have this result: In only one county was the percentage as much as 100. As to this county the percentage was that much as to both lands and town lots, and according to the testimony of the equalizers the assessment as to this county was doctored in the manner indicated. In the other counties the percentages as to land range from 60 to 93

per cent., only 7 of them being above 80 per cent.; and as to town lots they range from 68 to 90 per cent., only 11 of them being above 80 per cent. Testing that testimony as to lands by the percentage of assessment to fair cash value on the basis that the lands sold were of the average cash value of all lands in the county, we have this result: In no county was the percentage as much as 100, and in but three of them was it in excess of 80, being as to those three, respectively, 83, 93, and 94. And, strange to say, of the assessors thus testifying is the one who in another affidavit, given on behalf of complainant, stated that the assessment of the real estate sold in his county had been doctored by him as heretofore stated.

Then as to the testimony of the equalizers. However sincere they may have been in their belief that they equalized the assessments on the basis of the fair cash value of the property assessed, and by whatever assumptions or presumptions they induced such belief on their part, it seems to us that it is as certain as certain can be that they did not do so, and that, on the contrary, they equalized them on the basis of not exceeding 80 per cent. Our real conviction is that it is liberal to say that they equalized them on a basis as great as that.

But, in order that complainant may be entitled to the relief which it seeks, it is not sufficient that such be the fact. It is essential that its property in this state should have been valued by the Board of Valuation and Assessment at its full fair cash value in the process of determining the amount at which its intangible property should be assessed. Here complainant and defendants exchange positions. The former contends that its said property was so valued; the latter that it was not. This dispute, therefore, demands settlement at our hands.

The determination of the fair cash value of that portion of complainant's property located in this state cannot be readily accomplished. All that can be expected is an approximation more or less near thereto. Its determination involves the determination of two sub-matters. One is the fair cash value of all complainant's property, and the other the proportion thereof belonging to this state. Two ways of ascertaining the fair cash value of such properties have been resorted to in the course of valuing them for taxation. One is known as the "stock and bond plan," and the other as the "capitalization plan." According to the former, the market value of the stock and bonds of the corporation owning the property is ascertained, and, as such stock and bonds represent every interest in the property, such valuation is assumed to be the value of the property. According to the other, the net income derived by the corporation from the property is ascertained, and such sum as that is 6 per cent. of is assumed to be such value. The particulars in which these two methods, especially the stock and bond one, do or may come short of leading one to the fair cash value of the property, have been fully set forth by Judge Clark in the case of Railroad & Telephone Co. v. Board of Equalizers (C. C.) 85 Fed. 311, and by Judge Grosscup in the case of Chicago U. T. Co. v. State Board of Equalization (C. C.) 112 Fed. 607. In the former case Judge Clark expressed preference for the capitalization plan. Both have been used by the Board of Valuation and Assessment of this state. The capitalization

plan was pursued by it in making the assessments of the Henderson Bridge Company, involved in the case of Henderson Bridge Co. v. Com., 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73; Same v. Negley (Ky.) 63 S. W. 989. The stock and bond plan was pursued in making the assessment of the property of the Covington & Cincinnati Bridge Company, involved in the case of Com. v. Covington & C. Bridge Co. (Ky.) 70 S. W. 849. In the latter case Judge Hobson, in referring to the action of the board in the first Henderson Bridge Case said:

"But this action of that board did not prevent another board for another year from adopting a different line if the law warranted it. There is nothing, therefore, in any of these cases, determining that the board did not have a right to adopt another basis of assessment."

In the view we take of this case we do not find it necessary to express a preference between these two plans. It does seem to us, however, reasonable to hold that, if the stock and bond plan is adopted, the Board of Valuation and Assessment should, as a rule, not confine itself to the market value of the stock and bonds at the moment of assessment, or even to the average market value thereof for a year previous thereto, or, if the capitalization plan is adopted, it should not, as a rule, confine itself to the net income for the year previous to the date of assessment; but that in each case it should look to the average showing made by a series of years—say, not less than five. This because this is what we conceive that one proposing to purchase such a property would do in order to determine its fair cash value, and what he could afford to give for it, and we think a board of valuation and assessment in making a valuation thereof for taxation should place itself in the shoes of such a person. It should always hold before itself that the ultimate thing which it is attempting to do is to determine the fair cash value of the property in question, and that the market value of the stock and bonds or the net earnings are simply aids to that end. And that either may be a real aid to such an end, it is essential that it should cover a sufficient period to show the settled conditions of things. In the decision of Judge Grosscup, referred to above, he expressed the opinion that under the stock and bond plan a five-year period should be adopted. In saying that the showing of a series of years—and that for as many as five years—should be looked to, we would not be understood as laying down any hard and fast rule to be applied in every case. It is possible that in some cases it would not be reasonable so to do, and perhaps it is beyond our province to be laying down any rules for the guidance of said board. All that we would be understood as saying is that, in our opinion, it is reasonable, as a rule, to pursue such a course in making the valuation of such property for taxation, and that, if such a course is pursued, it cannot be said, nothing else appearing, that the result does not represent the fair cash value of the property.

Then, as to the plan to be pursued in ascertaining the proportion of the fair cash value of the entire property of complainant which properly belongs to this state. If the mileage of its property in and out of this state were of like character and equal value, no doubt

the proper plan to be pursued would be to ascertain what proportion the mileage in the state was of the entire mileage, and adopt that proportion of the fair cash value of the entire property as the fair cash value of that part in this state. The Legislature of this state at first acted upon the idea that in all cases of this kind the mileage in and out of the state should be assumed to be of like character and equal value, and by section 5 of article 3 (chapter 103, p. 302) of the act of November 11, 1892, provided as follows:

"That proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this state bears to the lines owned, leased or controlled in this state and elsewhere shall be the value of the corporate franchise of such corporation liable for taxation in this state."

But by the amendment thereto of June 9, 1893 (Acts 1893, p. 991, c. 217, § 4), it was enacted that the words "considered in fixing" should be inserted after the words "shall be," so that it was provided that such proportion should be considered in fixing such value, rather than should be the value thereof. This amendment was, no doubt, passed in order that the board should not be bound absolutely to accept such proportion of the cash value of the entire property as the value of that part of it in this state, and might be at liberty, in determining the value of such part, to consider the difference in character and value, if any, between the mileage in and out of this state.

Having thus indicated the matters to be determined in ascertaining the fair cash value of complainant's property in this state and the methods to be pursued in determining them, it is in order now to consider whether the defendants valued said property at its fair cash value. They put the fair cash value of the entire property at the sum of $129,566,663. They ascertained such to be its fair cash value on the capitalization plan, and in pursuing this method took into consideration the average net earnings of the entire property for the preceding four years; in other words, they capitalized the average net earnings for said four years. So doing, it gave the sum at which they valued the entire property. Had they taken into consideration the average net earnings for five years, and capitalized it, the valuation of the entire property would have been $7,625,447 less than what they put it at. Had they adopted the stock and bond plan, and taken into consideration, according to showing made by Financial Chronicle, as stated by counsel for complainant in their brief, the average market value of the stock and bonds for the preceding five years, the valuation of the entire property would have been $6,326,003 less than what they put it at. It seems that in making the tentative assessment they adopted the stock and bond plan, but considered only the average market value of the stock and bonds for the preceding year. This gave a valuation of $138,178,660, or $8,611,997 in excess of what they finally decided upon. But, after hearing complainant, they decided upon the capitalization plan on the four-year basis. And, as stated, had they pursued either plan on the five-year basis, it would have given a valuation less than that which they made. There is hardly room, then, for defendants to contend that the fair cash value of complainant's entire property was

in excess of the sum at which they fixed it when acting as a board. And the only grounds upon which they now contend that it was more are not tenable upon any reasonable view of the matter. Those grounds are that the fair cash value of said property will be shown to be considerably in excess of the sum at which it was put if the stock and bond plan is adopted, and the highest market value of the stock within a year previous or its value on the date of assessment is alone considered, or if the capitalization plan is followed, and the net earnings for the previous year are alone regarded. But, as indicated above, it is, as a rule, not reasonable to limit the consideration of either plan to so short a period, and there is nothing in this case to show that it should be treated as an exception to the rule.

Then, as to the proportion of the fair cash value of the entire property, which defendants took as the fair cash value of that part thereof in this state. They took 26 per cent. thereof. The facts in regard to this matter are these: Complainant operated in Kentucky 1,192.34 miles of road. It owned the Cecelia Branches, leased to the Illinois Central, and 46 miles long; the Clarksville & Princeton Division, leased to the Illinois Central, and 20.7 miles long; and a part of the Paducah & Memphis Line, leased to the Nashville, Chattanooga & St. Louis Railway, and 49.23 miles long; and controlled in a certain sense, if not in that of the statute, a part of the Nashville, Chattanooga & St. Louis Railway, 8.06 miles long. Adding these four sums to the mileage operated, makes a total of 1,316.33 miles of railroad operated, owned, leased, or controlled by complainant in this state. Out of this state complainant operated 2,238.86 miles of road. It owned the rest of the Paducah & Memphis Line, leased as above stated, 204.97 miles long. It held under a lease the Georgia Railroad, a one-half interest in which it had sublet to the Atlantic Coast Line, 624 miles long; and it controlled as aforesaid the rest of the Nashville, Chattanooga & St. Louis Railway, 933.60 miles long. Adding these three sums to the mileage operated, makes a total of 4,001.43 miles of railroad operated, owned, leased, or controlled outside of the state. Adding the mileage in and out of the state together makes a total mileage of 5,317.76. The per cent. that the mileage in Kentucky is of this sum is 24.75, or 1.25 per cent. less than the defendants took. They contend, however, that the mileage of the Georgia Railway and that of the Nashville, Chattanooga & St. Louis Railway Company should not be treated as part of complainant's mileage under the statute. If both are deducted, the percentage is 34.86; if the mileage alone of the latter is deducted, the percentage is 29.89; if the mileage alone of the former is deducted, the percentage is 27.87. So that it must be maintained that both mileages should be included in order to warrant a percentage as low as 26, though the whole of both mileages is not essential to bring it that low.

As to the Nashville, Chattanooga & St. Louis Railway Company, it is not contended that it was operated, owned, or leased by it. The right to include it is based solely upon the claim that it was controlled by complainant. The facts in regard to its control are that it owns over three-fifths of its capital stock, and thereby elects

its directors, and through them dictates and controls its policy. By virtue of said ownership it is entitled to share in the net earnings of said railroad, and said stock is pledged as security for part of its bonded indebtedness. The defendants contend that this railroad is not controlled by complainant within the meaning of the statute. They cite a number of authorities which they claim support this contention. They are principally to the effect that where one corporation owns the majority or the entire capital stock of another corporation, there is no merger of the latter into the former; that each is a separate entity; and that the former is not responsible for the contracts or torts of the latter. This is undoubtedly true, but we cannot see that this throws any light upon the sense in which the word "controls" is used in the statute in question. The only case cited which there is room to claim bears upon the proper construction of that word as so used is the case of Pullman Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499. In that case the construction of a contract between the Missouri Pacific Railway Company and the Pullman Palace Car Company was involved. The former corporation had agreed to use the latter's cars on "its own line of road and all roads which it now controls or may hereafter control by ownership, lease, or otherwise." The question was whether the Missouri Pacific Railway Company, a new corporation of the same name as that which made the contract with the Pullman Palace Car Company, formed by a consolidation of it with other corporations, was bound by that contract to use said car company's cars upon the railroad of the St. Louis, Iron Mountain & Southern Company, all but a small part of the stock of which it had acquired. It was held that it was not bound to do so, and that on two grounds. One was that the new railway company was only bound to carry out the contract as to roads controlled by the old one, and not as to roads controlled by it. The other was that the ownership or acquisition of the majority of the stock of another railroad with all its incidents was not a control within the meaning of that word as used in the contract. But that case is not an authority for the position that within the meaning of the statute the word "control," as there used, does not include such a relation to a railroad. In that contract the word "operate" was not used at all, and particularly was it not used in juxtaposition with the word "control," as in the statute. There was, therefore, nothing in the contract to prevent it being given the sense of "operate." On the other hand, it is evident that it was used therein in that sense. The roads upon which the railway company was to use said cars were those it controlled "by ownership, lease, or otherwise"; i. e., roads which it operated by virtue of ownership, lease, or some other contract. Besides, there was no reason why the word "control" should have been held to embrace a relationship to another railroad of the kind in question. How different here. The four words, "operated," "owned," "leased," and "controlled" are used in juxtaposition, and referred to in the alternative. Each, therefore, should be given some meaning not embraced in the other. "Controlled," therefore, cannot mean "operated." And the only distinct

meaning which can be given to it is such as to embrace a relationship of the kind in question. And it was reasonable for the Legislature to have intended that, where such a relationship existed, the mileage of such corporation so controlled should be included in determining fair cash value of the entire property. The ownership of the majority of the stock of another railroad corporation with the indirect control arising therefrom adds to the fair cash value of the entire property, a portion of which is to be allotted to this state for assessment. The stock and bonds of the controlling corporation are increased in value thereby. If dividends are received on the stock, they represent a portion of the net earnings of the controlled corporation, and go to swell the net earnings from which, on the capitalization plan, the fair cash value of the whole property is ascertained. Nor are such dividends the only contribution which the controlled corporation makes to the net earnings of the controlling corporation. It is a feeder to other railroads, both in and out of the state, operated, owned, or leased by it, and in this way helps out those net earnings. It may be thought, though, that it is unreasonable to include the entire mileage, and that only such proportion thereof should be included as the stock owned by the controlling corporation bears to the whole stock. This, however, is not a consideration for excluding such relationship from the statute, but for the board in determining the percentage of the entire valuation that should be allotted to this state. But it cannot be said that, in the absence of an investigation as to the values of the different portions of a railroad system, and the contributions which they make to the value of the whole, it would be unreasonable for the board to include the entire mileage. For it is possible that a proportionate part of one portion of such system may be equal in value to the entire part of another portion on the mileage basis, and contribute as much or more to the value of the whole. Our conclusion, therefore, is that a relationship of the kind in question is within the meaning of the statute. This view of the matter receives support from the following extract from the opinion of Judge Thayer in the case of United States v. Northern Securities Co. (C. C.) 120 Fed. 721, to wit:

"It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain control of the Chicago, Burlington & Quincy Railroad. And, so long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts. The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in Pearsall v. Great Northern Railway, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. Pennsylvania R. Co. v. Commonwealth (Pa.) 7 Atl. 368, 371; Farmers' Loan & Trust Co. v. New York & N. Ry. Co., 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In opposition to this view counsel cite Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 587, 596, 6 Sup.

Ct. 194, 29 L. Ed. 499, but in that case the meaning of the word 'controlled,' as used in private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the anti-trust act, when the point involved is whether the ownership of all the stock of two competing and parallel railroads vest the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership."

Then, as to the Georgia Railroad. That comes within the strict terms of the statute. It was leased to the complainant. The only possible question could be as to whether the whole or only one-half of the mileage should be included. If the entire mileage of the Nashville, Chattanooga & St. Louis Railway and one-half that of the Georgia Railroad are included, then the percentage that the Kentucky mileage is to the whole mileage is 26.13, or just $^{18}/_{100}$ more than the board put it at. If only that proportion of the former mileage which complainant's stock bore to the total stock and one-half of the latter is included, the percentage is 28.03.

In view of all considerations, the determination of the fair cash value of that portion of complainant's property being at best a matter of great difficulty, we feel constrained to hold that such fair cash value did not exceed the per cent. of the fair cash value of the whole property at which the defendants fixed it when acting as a board. According to their testimony herein, they fixed it as the fair cash value thereof. The auditor testifies that they fixed the franchise at what they conceived to be its full value, and the treasurer that the value they fixed they adopted as the true value of the property. The Secretary of State testified that they arrived at it as 100 per cent. of the value, but that they used the most liberal means of reaching 100 per cent., and that it was fixed lower than, in his judgment, it ought to have been.

The result, then, of our consideration of the two matters of fact that are in question herein is that the property in this state subject to equalization after equalization had was assessed for the year 1902 at not exceeding 80 per cent. of its fair cash value by those who had to do with its assessment—first the local assessing officials, and then the State Board of Equalization; and that complainant's intangible property in this state has been assessed for that year at its fair cash value—at least at what must be accepted as its fair cash value—by the Board of Valuation and Assessment. There is here, then, a distinction between complainant and the owners of the former property of at least 20 per cent. Is or not this a denial to complainant of the equal protection of the laws within the meaning of those words in the fourteenth amendment to the federal Constitution, and hence an unlawful discrimination against it, which entitles it to the relief which it seeks? There is a difference or distinction between the owners of property subject to taxation in the valuation at which it is assessed that is not a violation of the fourteenth amendment, and therefore an illegal discrimination; and, on the other hand, there is such a difference or distinction that is. The question here is, on which side of the line does the difference or distinction involved herein belong? The rule on the subject has been laid down by the Sixth Circuit Court of Appeals in the cases of Taylor v. Louisville & N. R. Co., 88 Fed. 350, 31 C. C. A. 537; Louisville

Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299. In the former case Judge Taft said:

"Equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained; * * * in other words, what may be called 'sporadic cases of discrimination' cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which neeessarily affect an unjust discrimination against the species of property of which the complainant is an owner. The reason for this distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal, and it cannot be justified except on the ground of an obvious violation of law, or something equivalent to fraud. It does not where the injury complained of arises only from the erroneous, but honest, judgment of the lawfully constituted tax tribunal. The interference by the chancellor in the case at bar and in the Cummings Case rests on something equivalent to fraud in the tribunal imposing the tax. The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law by uniformly undervaluing certain classes of property, the assessment by other boards of the other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault or intentional discrimination."

In the other case Judge Day said:

"It may be conceded that, if the allegations of the bill are made out, there exists in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects an injurious discrimination against the property of which the plaintiff is the owner, and a bill in equity will be to restrain such illegal discrimination, and in such cases federal jurisdiction will arise because of the equal protection of the laws guarantied by the fourteenth amendment."

These two decisions are binding upon us as to what is the true rule applicable to such cases. Counsel for defendants cite a number of authorities, principally from the Supreme Court of the United States, in which the rule is laid down in different phraseology. It is unnecessary for us to consider these cases, and see whether they lay down any different rule, for those cases were considered in the two specially referred to, and it was therein determined that the rule as herein laid down was authorized and required by those cases. From these statements of the rule we gather that, in order that one whose property has been fully valued may complain of an undervaluation of other property, and entitled to have the valuation of his property cut down to such undervaluation, two things are essential. One is that the undervaluation should have been intentional. By this is meant that the valuation at less than the full value should have been intended. This,

and nothing more. The other is that the undervaluation should have been systematic or habitual; i. e., relate to a large species of property. An undervaluation that is intentional, but that is not systematic or habitual, cannot be complained of by such person. Possibly he could not complain of one that was systematic or habitual if it was not intentional. But it is hardly probable that an undervaluation could be systematic or habitual, and not be intentional. Probably, then, the essential features of an illegal discrimination of the character under consideration is that there should have been a systematic or habitual undervaluation. An undervaluation that is not so cannot be complained of though intentional, and an undervaluation that is so cannot but be intentional. Just how large the class to which the undervaluation relates must be it is not necessary to determine, for there can be no question but that the class undervalued here was large enough. Counsel for defendants seem to urge that it is essential that there should have been an agreement or combination between the different officers making the undervaluation to undervalue in order that the discrimination may be illegal. It is sufficient that, as a matter of fact, they systematically and habitually undervalue that portion of the property with which they have to do, even though there be no understanding or agreement between them so to do. Counsel for defendants seem further to urge that it is essential that the complainant have company; or, in other words, that it is not sufficient that a single taxpayer be fully valued, but the others belonging to the same class must have been fully valued also. We do not think so. The fact that all of his own class have been undervalued also but makes his case the stronger.

The quotations cited from certain authorities which lend color to these two positions should be construed in the light of the facts of the particular cases in which the language quoted was used.

Does this case, then, present an illegal discrimination within the requirements of the rule as thus laid down? We think it does. The property subject to equalization, being 77 per cent. of the taxable property in this state, was systematically, habitually, and intentionally undervalued to at least the extent of 20 per cent. for the year 1902, first by the local assessing officials and then by the equalizers. Not only this, but the Legislature of the state, by its latest expression on the subject, provided that it should be undervalued as much as 30 per cent. by the equalizers. So far as complainant having company in being fully valued is concerned, that is immaterial, as we have stated. But, though the evidence does not disclose how, relative to value, the intangible property of other corporations subject to the jurisdiction of the Board of Valuation and Assessment was assessed for the same year, it is reasonable to infer that they have been assessed on the same basis as complainant; i. e., at what the board considered to be the full value of said property. It is so alleged in the bill, and there is no evidence to the contrary.

It remains to consider several reasons urged by counsel for defendants why, notwithstanding the conclusions already reached, the complainant should be denied the relief it seeks.

1. It is claimed that the bill does not allege facts sufficient to bring the discrimination complained of within the rule as to what is essen-

tial to constitute illegal discrimination in such cases; or, in other words, that it is not alleged that the undervaluation of the property subject to equalization was systematically, habitually, and intentionally made. It is true that these words are not used, and the bill might have been fuller in this particular. It does, however, use language that is equivalent thereto. It alleges that the assessors of the various counties in the state uniformly assessed said property below its value, in many instances below 50 per cent., in over 90 per cent. below 80 per cent., and in very few counties above its value; and that the equalizers undertook to equalize all assessments coming before them on the basis of 80 per cent., but in reality did not equalize them at above 80 per cent. of their value. According to these allegations, the assessments of said property after equalization could not but have been systematically, habitually, and intentionally undervalued.

2. It is claimed that the bill should be dismissed because before bringing suit complainant did not pay or tender the amount which would be coming to the various counties, cities, towns, and taxing districts on account of that portion of the assessment of the intangible property not complained of herein. It did pay the amount of the tax due thereon to the state, but did not pay or tender to said local divisions the amounts which would be coming to them, respectively, on account of said portion of the assessment. Complainant advances two reasons why it was not bound to make such tender. One is that there has been no apportionment of said assessment, or any part thereof, by the Board of Valuation and Assessment, whose duty it was to make the apportionment. Hence the taxes on account of said portion of said assessment cannot be said to be due, and the amount thereof is not ascertainable until said apportionment. The other is that the question as to whether such an assessment is subject to apportionment had been put in suit, and had not then been decided by the court. We presume that reference is had to the case of Southern Ry. in Kentucky v. Coulter (Ky.) 68 S. W. 873. This case, however, was decided by the Court of Appeals June 10, 1902, which was before the bringing of this suit. But we think that for the first reason the point urged by defendants in this particular is not well taken.

3. It is urged that the ordinary taxpayers of the state have paid 50 cents on the $100 under the act of March 29, 1902, and complainant only 47½ cents, and that, therefore, complainant should not be entitled to the relief it seeks. This makes a difference only of $250 on the million, and is insignificant as compared with the difference complained of herein. But, to say the least, it is questionable whether the ordinary taxpayers were bound to pay more than 47½ cents, and it will take a lawsuit to settle the question. We do not think that complainant should be denied relief sought on this ground.

This disposes of every question made in this case. We are aware that perfect uniformity and perfect equality of taxation is a baseless dream; that the fourteenth amendment was not intended to compel the states to adopt an iron or cast-iron rule of equal taxation, and that, as said by Mr. Justice Harlan in the case of King v. Mullins, 171 U. S. 436, 18 Sup. Ct. 925, 43 L. Ed. 214: "The judiciaries should be very reluctant to interfere with the taxing system of a state, and should

never do so unless that which the state attempts to do is a palpable violation of the constitutional rights of the owners of property." The way we view it, to permit the valuation of complainant's intangible property as made to stand would be a palpable violation of its rights. It is an attempt to make it pay on a 100 per cent. valuation when the bulk of the taxpayers pay on not exceeding an 80 per cent. valuation. This of itself is sufficient to require that this court should intervene. Particularly is this so when it is considered that there is a possibility, at least, that the valuation of its intangible property may include the skill and efficiency with which its affairs are managed, and the personalty of individuals not subject to equalization largely escapes taxation at all.

We conclude, therefore, that complainant is entitled to the relief it seeks.

RYTTENBERG v. SCHEFER et al.

(District Court, S. D. New York. May 23, 1904.)

1. USURY—COMMISSIONS FOR USE OF CREDIT.
   A commission charged by one commission house to another for the use of its credit under an arrangement by which it guarantied all consignments sent to the second house did not constitute usury.

2. BANKRUPTCY—PREFERENCE.
   A bankrupt cannot be held to have given a preference, recoverable by his trustee, because of sums collected by a creditor after the bankruptcy from third persons under a contract which had been in force between the bankrupt and the creditor for a number of years.

3. CONTRACT—VALIDITY.
   A contract by which a bankrupt commission firm, some years before its bankruptcy, agreed to do all its business through another firm, obtaining the benefit of the latter's credit, *held* not invalid, as a scheme to hinder, delay, or defraud its creditors.

4. BANKRUPTCY—JURISDICTION OF COURTS—SUIT BY TRUSTEE.
   A court of bankruptcy has jurisdiction by consent of a suit by a trustee to recover a fund for the estate, under Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], where the defendant appears generally and answers to the merits.

5. FACTORS—LIEN—EFFECT OF CONTRACT BETWEEN COMMISSION HOUSES.
   A commission firm some years before its bankruptcy entered into a contract by which it agreed to do all its business through defendants, composing a second firm, to whom all goods should be consigned, and in whose name all sales and collections were to be made. Defendants were to make advances on consignments, and be responsible therefor. A lease for premises occupied by the bankrupt was assigned to defendants, but the rent therefor was to be paid by the bankrupt, which was to continue to occupy them and carry on the business therein at its own expense. At the time of the bankruptcy there were goods on the premises or in warehouse in the bankrupt's name, some of which had been consigned in defendants' name, and some purchased by the bankrupt, but on all of which defendants had made advances. There were also accounts due for goods sold, made payable to defendants by directions on the invoices sent to purchasers. *Held*, that the consigned goods were in the possession of defendants, who had a lien thereon, as well as on the accounts due for such goods sold, for their advances and charges, but that goods bought by the bankrupt must be considered as having been in its own possession—the

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¶ 1. See Usury, vol. 47, Cent. Dig. § 72.

premises being its own, as between it and defendants—and that defendants, lacking possession, had no lien either upon such goods, or accounts due for those sold, although, as in case of the other accounts, there was a direction on the invoices that they should be paid to defendants, and the bankrupt rendered a periodical statement to defendants, in which all goods were treated as having been consigned to defendants, and all accounts as being their property.

6. EQUITABLE LIEN—INVALIDITY OF LEGAL LIEN.

Where parties attempted by an agreement to give one a factor's lien on property of the other, but such agreement did not create a lien, because possession of the property remained in the debtor, an equitable lien will not arise, although the agreement was made in good faith.

In Equity.

Morris J. Hirsch (Benjamin N. Cardozo and Herbert H. Maass, of counsel), for complainant.

Carter, Hughes, Rounds & Schurman (Charles E. Hughes and Richard E. Dwight, of counsel), for defendants.

HOLT, District Judge. This is a suit in equity brought by the trustee of the firm of Radon & Co., bankrupts, against the members of the firm of Schefer, Schramm & Vogel, to determine the ownership of a fund. Radon & Co. were engaged in the business of commission merchants and dealers in woolen goods, in the city of New York. On December 7, 1897, they made a written agreement with the firm of Schefer, Schramm & Vogel, who were commission merchants in New York, which agreement provided as follows:

"1. Radon & Co. agree to transact all their business through Schefer, Schramm & Vogel. The lease of the premises at 530 Broadway, now occupied by Radon & Co. shall be assigned to Schefer, Schramm & Vogel. All goods at present consigned or owned by Radon & Co. shall be consigned by their respective owners to Schefer, Schramm & Vogel as factors for sale upon commission.

"2. Schefer, Schramm & Vogel agree, on the request of Radon & Co., to advance to the respective consignors two-thirds of the net market value of the goods respectively consigned. Account sales shall be furnished to said consignors monthly and Schefer, Schramm & Vogel agree to discount such sales for the respective consignors.

"Schefer, Schramm & Vogel shall be entitled to a commission of two and one-half per cent. on the net amounts of sales, and interest in the accounts current with said consignors shall be charged and credited at the rate of six per cent. per annum.

"3. Radon & Co. agree to take charge of all said consigned goods for Schefer, Schramm & Vogel and of the sale of said goods, and shall defray all the expenses incident to such sale or to the business conducted at 530 Broadway, including the rent of said premises and the premiums for insurance on the said consigned goods, and shall reimburse Schefer, Schramm & Vogel for all payments made by them for any such expenses. But all sales shall be under the supervision of Schefer, Schramm & Vogel and shall be made in their name and on their behalf, and all goods sold shall be charged on bill heads reading 'Bought of Schefer, Schramm & Vogel.' The terms of sale shall in no case exceed four months from date of bills. Radon & Co. shall furnish to Schefer, Schramm & Vogel monthly accounts of sales made for the respective consignors.

"4. Schefer, Schramm & Vogel do not assume the risk of overadvances and Radon & Co. shall be liable to Schefer, Schramm & Vogel for any loss which may accrue by any such overadvances. An account shall be kept between Schefer, Schramm & Vogel and Radon & Co. which shall be called 'Radon & Co. Guarantee Account.' In this account Radon & Co. shall be charged with

the net amounts of the account sales furnished by them to Schefer, Schramm & Vogel as aforesaid and also with the rent of said premises and premiums for insurance on said consigned goods and with any moneys paid by Schefer, Schramm & Vogel to Radon & Co., or on their behalf, to defray the expenses of the business conducted at 530 Broadway, or for any other purpose in connection therewith, and also with the commissions of Schefer, Schramm & Vogel payable as aforesaid. Radon & Co. shall be credited in said account with all payments upon the sales therein charged as aforesaid and they shall also be credited in said account with all commissions charged to consignors in their respective accounts current with Schefer, Schramm & Vogel.

"Radon & Co. shall at all times pay to Schefer, Schramm & Vogel, for credit to said guarantee account, a sufficient amount of money so that the debit of said account shall at no time exceed seventy-five per cent. of the solvent accounts then outstanding and representing the sales made as aforesaid in the department under the charge of Radon & Co.

"Interest shall be charged and credited in said guarantee account at the rate of six per cent. per annum.

"5. Radon & Co. shall be responsible for the stock of consigned goods of which they shall take charge as aforesaid, and for the management of the sales thereof, and they agree to furnish to Schefer, Schramm & Vogel letters from said consignors in which they shall respectively agree that Radon & Co. shall have the management of their sales and that Radon & Co. alone shall be responsible to them for such management, and that the responsibility of Schefer, Schramm & Vogel to said consignors shall be strictly limited to the financial part of the business entrusted to them as factors as aforesaid.

"6. This agreement shall continue in force for one year from January 1st, 1898, and after said date it shall continue subject to termination by either party upon six months' notice in writing."

Radon & Co. continued to transact business at 530 Broadway for about a year and a half after the making of this agreement, and then removed to 32 Greene street, and continued business there until April 14, 1903. On that day they filed a voluntary petition in bankruptcy, and a receiver was appointed, who on April 15th qualified and took possession of the merchandise at 32 Greene street, and in a warehouse at 41 Thirteenth avenue. Schefer, Schramm & Vogel claimed to have a lien upon such merchandise and the outstanding accounts under the above agreement; and thereafter, under an order of this court, entered upon the consent of all the parties, the merchandise was sold, and the proceeds thereof, together with the proceeds of the outstanding accounts collected by the defendants, were deposited in a trust company, subject to the order of this court. Subsequently, by like consent and order, the money so deposited was delivered to the defendants; they giving a bond to pay to the plaintiff any amount which might be ultimately found to belong to the bankrupt estate.

In pursuance of the above agreement, the lease of the premises occupied by the bankrupts at 530 Broadway, and later of those at 32 Greene street, was assigned by Radon & Co. to Schefer, Schramm & Vogel. Schefer, Schramm & Vogel thereafter paid the rent to the landlord, and charged it to Radon & Co. in their account. Each of these premises consisted of an upper floor. On the street entrance were placed signs of "Radon & Co." On the entrance door of the floor rented were placed two signs—one "Radon & Co.," and below that "Schefer, Schramm & Vogel, Annex." The merchandise shipped by manufacturers was invoiced to Schefer, Schramm & Vogel, and on its arrival at New York was delivered and kept at Radon & Co.'s place of business. Goods were also purchased by Radon & Co., and

delivered and kept at their place of business. The consignment business gradually diminished, and the purchases by Radon & Co. gradually increased, so that for several years before the failure, and at the time of the failure, most of the goods on hand were goods purchased by Radon & Co. The bills for mechandise sold, whether consigned or purchased, had printed on them at the top "Radon & Co., Woolen Commission Merchants, 32 Greene Street," at one side, and "Bought of Schefer, Schramm & Vogel, 476 & 478 Broome Street," on the other side. Later an additional notice was stamped in red ink on the bills for goods sold, as follows:

"When making remittances to Messrs. Schefer, Schramm & Vogel, please mention 'For Department Radon & Co.' All other communications kindly address direct to Radon & Co., 32 Greene Street, New York."

The payment of these bills was generally made to Schefer, Schramm & Vogel directly by the customers. Occasionally Radon & Co. received the payments, in which case they at once turned them over to the defendants. Detailed statements of all goods received from consignors, and of those purchased by the bankrupts, and also statements of all outstanding accounts for sales of goods, either owned by Radon & Co., or consigned to the defendants, were sent to Schefer, Schramm & Vogel by Radon & Co., at first monthly and afterwards quarterly. These statements were at first headed, "Messrs. Schefer, Schramm & Vogel, Stock of Goods consigned by Radon & Co." The headings were afterwards shortened to "Messrs. Schefer, Schramm & Vogel, Radon & Co. Acct.," or similar forms. On the basis of these statements, Schefer, Schramm & Vogel made their advances to Radon & Co. of 66⅔ per cent. on the goods purchased, and of 75 per cent. of the outstanding accounts. The 66⅔ per cent. of the value of the goods consigned by manufacturers was remitted directly to the consignors by Schefer, Schramm & Vogel. When these goods were sold, Schefer, Schramm & Vogel guarantied the sale, and placed the amount of the sale to the credit of the consignor, deducting 7 per cent. commission for their services and guaranty. The net amount so credited to the consignor was charged against Radon & Co., and they were credited with all collections for goods sold. Radon & Co. were also charged with a commission of 2½ per cent. on all sales made of goods either purchased by them or consigned by manufacturers, with the advances made to them on account of stock and outstanding accounts, with interest on the advances at 6 per cent., with the rent of the premises occupied by them, and with any other expenses paid by the defendants in connection with the business of Radon & Co.

At different times part of the stock on hand was deposited in a warehouse at 41 Thirteenth avenue, for convenience, and the warehouse receipts taken in the name of Radon & Co., with the defendants' knowledge and consent. All the stock, whether at 530 Broadway or 32 Greene street, or in the warehouse, was insured by Radon & Co., "Loss, if any, payable to Schefer, Schramm & Vogel"; the insurance premiums being paid by Radon & Co.

The amounts realized since the bankruptcy from the sale of the goods at 32 Greene street was $11,288.47; and of the goods at the

warehouse, $4,880.26. The amount collected on the outstanding accounts was $20,804.62, making a total of $36,973.35. Radon & Co. owe the defendants $48,699.27, and owe the unsecured creditors about the same amount. The question in this case, therefore, is whether all of the assets shall be paid to Schefer, Schramm & Vogel, or shall be distributed ratably among all the creditors.

Several grounds of recovery are alleged in the complaint, some of which, in my opinion, are clearly untenable.

It is urged that the agreement was usurious; the claim being that the 2½ per cent. paid to the defendants as commissions was in fact usury. Aside from the well-settled general rule that a court of equity will not set aside a usurious contract, except on the condition of paying the amount actually due, less the usury (Rogers v. Rathbun, 1 Johns. Ch. 367), and the fact that this rule still applies in New York in the case of a trustee in bankruptcy, notwithstanding the statute abrogating it as to the original borrower (Wheelock v. Lee, 64 N. Y. 242), in my opinion on the merits there was no usury. Schefer, Schramm & Vogel guarantied the consignments, and permitted Radon & Co. to have the benefit of the name and credit of their house under the arrangement made. The contract was a genuine business arrangement, of mutual advantage to both parties, and not a mere cloak to cover usury.

The complainant also claims to recover all moneys collected under the contract by the defendants within four months before the bankruptcy, and since, on the ground that such moneys constituted a preference under the bankrupt act. As to all amounts collected during the four months before the bankruptcy, the evidence, in my opinion, does not establish that the defendants knew or had reasonable cause to believe that it was intended thereby to give a preference. As to moneys collected after the bankruptcy, and the appointment and qualification of the receiver, there could be no preference. A preference, in its legal as well as in its ordinary sense, implies a party who prefers; but a bankrupt, after the appointment of a receiver, cannot, by doing or omitting anything, prefer anybody. He has no longer any title to any property with which he can prefer any creditor, and in fact Radon & Co. did not then do anything to enable the defendants to collect the money.

The complaint alleges that the agreement was void because executed pursuant to a fraudulent scheme and conspiracy to hinder, delay, and defraud creditors. I think there is nothing in the evidence to suggest any fraud, either in fact or in law. The arrangement was a mutually advantageous business arrangement between the parties. It not only was not executed furtively or secretly, but every effort was made to give the arrangement notoriety. It was a perfectly fair and valid transaction, as between the parties, so long as each of them continued solvent. It is the change in their status caused by the bankruptcy of Radon & Co. that gives rise to the serious questions in this case. In my opinion, the claim that the agreement was void as a scheme to hinder, delay, and defraud creditors is entirely untenable.

It may be suggested that, if the plaintiff cannot recover on the ground of a preference or a fraudulent transfer, this court has no jurisdiction. But consent confers jurisdiction in suits by a trustee relating to the bankrupt estate. Bankr. Act July 1, 1898, c. 541, § 23,

30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]; Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. And the defendants, by appearing generally and answering on the merits, consented. Moreover, the suit may be regarded as one to distribute a fund in court.

The serious question in this case is whether at the time of the bankruptcy the defendants had a valid lien on the goods and on the outstanding accounts.

I will consider first the case of the goods which were consigned by manufacturers, and the outstanding accounts representing such goods, and then the goods purchased by Radon & Co., and the accounts representing them.

After the execution of the contract between Radon & Co., and the defendants, the different manufacturers who were accustomed to consign goods to Radon & Co. consigned their goods directly to the defendants. The invoices were made out in the name of the defendants, and sent to the defendants, and the advances were made by the defendants sending their checks directly to the consignors. The goods, when they reached New York, were deposited in the place where Radon & Co. did business; and those which were on hand at the time of the bankruptcy were either there, or in the warehouse in which Radon & Co. had deposited them with the consent of the defendants. Upon these facts, I am not able to see that Radon & Co. had any title to or interest in the goods so consigned. They were invoiced directly to the defendants. If, as defendants claim, the premises at 32 Greene street were the premises of the defendants under the assignment of the lease, then they were kept in the premises, and were in the actual possession of the defendants. If, on the other hand, Radon & Co. are to be regarded as the tenants and occupants of those premises, then the arrangement by which Schefer, Schramm & Vogel deposited the goods in the custody of Radon & Co. did not differ in its essential respects from any arrangement which they might have made with the owners of a warehouse or with any other parties to deposit the goods in their custody. Radon & Co. held them simply as an agent or depository for the defendants. It was a pure case of a consignment of goods to a factor acting under a del credere commission, who had a lien on the goods for his advances. Schefer, Schramm & Vogel had the right of possession. There are cases which hold that a factor, having made advances, has the rights of a vendee. Grosvenor v. Phillips, 2 Hill, 147; Bailey v. Hudson R. R. Co., 49 N. Y. 70. Such a factor can maintain replevin or trover for the goods, but, of course, a factor is not an actual vendee. The relation between the principal and the factor is fiduciary. The title to the goods, until sold, remains in the principal; and when sold the proceeds belong to the principal, subject to the lien of the factor for advances and other charges. Baker v. New York Nat. Exchange Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150; Matter of Chambers, 17 App. Div. 343, 45 N. Y. Supp. 264. The entire title and right of possession, therefore, was either in the consignors or in Schefer, Schramm & Vogel. If the goods while at Radon & Co.'s store had been levied upon on an execution against Radon & Co., the levy would, in my opinion, have been good for nothing. If the premises are to be regarded as those of Radon & Co., they were goods held by them as an

agent or trustee for the defendants, and their trustee in bankruptcy, upon his appointment, took no title to them.

I think the same conclusion must be reached as to the outstanding accounts for the sales of such consigned goods. The goods when sold by Radon & Co. were invoiced as bought of Schefer, Schramm & Vogel, and the purchasers were directed to pay the price to Schefer, Schramm & Vogel. There is no evidence that in the case of this class of goods the purchaser supposed he was buying the goods of Radon & Co. Radon & Co., before the contract with the defendants, had been acting as commission agents for the same or similar manufacturers. But if any purchaser supposed he was purchasing from Radon & Co. merchandise belonging to Raden & Co., I cannot see that that would make any difference. If Radon & Co. had undertaken to sell these consigned goods as their own, they could not have given title as against the consignor, any more than a warehouse keeper could give such title. As against Schefer, Schramm & Vogel, it is possible that Radon & Co.'s general authority to sell would have enabled the purchaser to obtain title as against their claim; but in that case it could be only in the case of a purchase in good faith, for full value paid. From any point of view, I think that the outstanding accounts for goods consigned by third parties are to be considered as in the possession of the defendants, and that the complainant took no title to them.

The case of the goods bought by Radon & Co. stands on quite a different footing. When the contract between Radon & Co. and the defendants was made, Radon & Co. were accustomed to make small purchases on their own account. Thereafter their method of doing business changed. The consignments diminished, and their individual purchases largely increased. When Radon & Co. purchased goods themselves, they bought directly from the sellers, and paid for them with their own checks. The goods were delivered by the sellers to Radon & Co. at the premises where they did business. Such goods as were unsold at the time of the bankruptcy were either at such premises, or had been placed in a warehouse; the warehouse receipts being taken in the name of Radon & Co. Schefer, Schramm & Vogel claim a lien upon these goods. The substantial facts on which they base that claim are that the lease was assigned to Schefer, Schramm & Vogel; that the name of Schefer, Schramm & Vogel was placed on the door; that, by the agreement, Radon & Co. were to consign the goods to Schefer, Schramm & Vogel, as factors, for sale on commission; that Radon & Co. rendered monthly statements purporting to consign these goods to the defendants; and that the defendants made advances on the goods to Radon & Co.

The contract between Radon & Co. and the defendants contains no explicit agreement in reference to a lien. It is a contract by which Radon & Co. agree to transact all their business through the defendants, and that all their goods should be consigned to the defendants, as factors, for sale upon commission. The defendants' claim in this case is based on an inference that they have the same lien upon the goods which remained at Radon & Co.'s store and at the warehouse which they would have had if the goods had been delivered to them at their own store for sale on commission. But it is elementary law

that a factor's lien is purely that of a pledgee, and that possession, either actual or constructive, is essential to the validity of a pledge. There can be no question in this case that there was no actual possession, unless on the ground that the premises were the premises of Schefer, Schramm & Vogel.

The defendants claim that the premises were in their possession, because of the assignment of the lease by Radon & Co. to them, and because the defendants paid the landlord the rent. But by a contemporaneous agreement it was agreed, in substance, that the defendants should permit Radon & Co. to continue to occupy the premises, and charge them in the account current with the rent paid. The old, familiar rule of law is that an assignee of a lease by assigning it frees himself from all liability. The defendants paid the rent to the landlord, but I think, if the landlord had sued them for the rent, and they had contested their liability for it, it is doubtful whether the landlord could recover. Without determining, however, the strict question of law, I think that, in this suit in equity, Radon & Co. must be deemed to have been in possession of those premises, and not Schefer, Schramm & Vogel. A court of equity looks through the form to the substance. The substance of this transaction was that Radon & Co., having a lease of the premises, made an agreement to obtain the assistance of Schefer, Schramm & Vogel in financing their business. For that purpose, Schefer, Schramm & Vogel agreed to make advances to them, and both parties wanted to give the defendants such a lien as a commission merchant usually has, while leaving the goods in the custody of Radon & Co. As one step taken to apparently comply with the rule that possession is essential to a pledge, Radon & Co. made a formal assignment of the lease; but it was part of an agreement by which it was understood that Radon & Co. were to continue their occupation of the premises, and were in fact to pay the rent. If the defendants had undertaken to turn Radon & Co. out of the premises and use them for their own purposes, I think that any court of equity would have enjoined them.

The fact that the name of Schefer, Schramm & Vogel was placed on the door seems to me indecisive. The name of Radon & Co. was alone on the door at the street entrance, and was on the door at the entrance to the floor which they occupied. Below it on the floor entrance was the sign, "Schefer, Schramm & Vogel, Annex." I do not think that these signs indicated with any clearness who was the tenant or the actual occupant of the premises. If there were any distinction to be drawn, I should infer that it might be a little in favor of Radon & Co., who had occupied the premises before. They were apparently Radon & Co.'s principal place of business, and the term "Annex" tended to indicate that they were used for some subsidiary purpose by Schefer, Schramm & Vogel. I think the signs are entitled to very little weight as evidence in determining who was in the possession and occupancy of the premises, and they certainly do not affirmatively establish that Schefer, Schramm & Vogel were in possession of the premises, and that Radon & Co. were not.

The fact that every month Radon & Co. rendered a statement to the defendants of the goods in their store, which described the goods

substantially as being consigned by Radon & Co. to Schefer, Schramm & Vogel, in my opinoin, did not effect a consignment. To "consign" means to deliver into the care and control of another; to intrust or commit. A man cannot consign a thing to another by merely saying that he consigns it, any more than he can deliver it by mere words. The attempt of Radon & Co. to consign these goods to the defendants by sending them a statement in which they said that they did so, in my opinion, was entirely futile. The goods were not thereby consigned. They remained in the possession and custody of Radon & Co., and not of Schefer, Schramm & Vogel.

The fact that the defendants made advances on these goods to Radon & Co. has no bearing on the question whether Radon & Co. held them in pledge. The fact that it is stated in the agreement that all sales were to be made under the supervision of the defendants is immaterial. They were not in fact made under such supervision. The defendants had no representative on the premises, and in fact exercised no supervision over the sales.

My conclusion is, therefore, that the defendants had no lien on the goods on hand at the time of the bankruptcy which had been purchased by Radon & Co. The question remains whether they had a lien on the outstanding accounts representing goods purchased by Radon & Co. that had been sold. These goods were sold by Radon & Co. to purchasers. The defendants had nothing to do with such sales. When the contract of sale was made, the obligation of the purchaser was to pay the price to Radon & Co. The defendants claim that they had a lien on these accounts on the grounds already discussed in regard to their claim of lien on the unsold goods which had been purchased by Radon & Co., and on the additional grounds that, pursuant to the agreement, these goods were invoiced to the purchaser on bill heads reading, "Bought of Schefer, Schramm & Vogel;" that such invoices contained at the foot a direction to the purchaser to make remittances in payment to Schefer, Schramm & Vogel; and that, by the terms of the contract, all sales were to be made under the supervision of Schefer, Schramm & Vogel, in their name and on their behalf. The fact that the goods were invoiced on bill heads which had at the top, "Bought of Schefer, Schramm & Vogel," and at the foot a suggestion that the remittances in payment should be sent to Schefer, Schramm & Vogel, did not change the fact that the contract originally was between Radon & Co. and the purchasers. A purchaser, after the receipt of such an invoice, might safely remit the proceeds to Schefer, Schramm & Vogel, if he saw fit, but he might decline to do so if he saw fit. He had made no contract with Schefer, Schramm & Vogel. His contract had been made with Radon & Co., and if he had refused to pay to Schefer, Schramm & Vogel, and had made a proper tender of the amount due to Radon & Co., he would have complied with his contract, and no action could have been brought against him by Schefer, Schramm & Vogel to recover the purchase price. Moreover, so far as the invoice is concerned, there was nothing delivered to the defendants conferring any rights upon them. The direction at the foot authorizing remittances to be made to Schefer, Schramm & Vogel was noth-

ing more than a consent or direction for such a payment, which in law was revocable at any time as between Radon & Co. and the purchaser of the goods.

The fact that these accounts were included in the monthly statement rendered by Radon & Co. to the defendants is perhaps the strongest piece of evidence in the case in favor of the defendants' claim. But I do not think that the rendition of such a statement amounted to a transfer of the claim. There was no formal assignment of the account. There was nothing delivered to the defendants which, in my opinion, would have constituted sufficient evidence to enable the defendants to maintain a suit against the purchasers of the goods on the ground that they owned the claim. It was an attempt in the case of the accounts, as in the case of the goods, to transfer something by saying that it was transferred, without actually doing anything sufficient to transfer it.

The defendants claim that, if there was no pledge at common law in this case, there was an equitable lien. Courts have undoubtedly gone far in some cases to uphold an equitable lien for the protection of parties who have made advances under agreements for liens. It is difficult to reconcile all the cases. But in my opinion, under all the circumstances of this case, there is no adequate proof of an equitable lien. In the first place, it must be borne in mind that there was no specific agreement for an equitable lien. The agreement was simply that Radon & Co. should do their business through the defendants, and that all their goods, whether consigned or owned, should be consigned to the defendants as factors for sale upon commission. The entire claim of the defendants for a lien is based on the assumption that they did act as factors, and that Radon & Co. did consign all the goods which they had to them, and that therefore they have the lien which the law gives a factor on the goods and the accounts. The arrangement undoubtedly was made in entire good faith. The parties supposed that what was done had the effect in law to give the defendants a factor's lien. But in my opinion, it did not give such a lien in respect to the proceeds of the goods that Radon & Co. purchased. All the cases which have been called to my attention in which the facts are somewhat similar to those of this case, and in which an equitable lien has been upheld, are cases in which either there was a specific agreement for a mortgage or a lien of some kind, or the goods, although remaining about the premises of the party giving the lien, were set apart in a lot or room leased to the party to whom the lien was to be given, and were delivered into the custody and control of an agent of the person to whom the lien was to be given.

The simple fact in this case is that Radon & Co. wanted to obtain advances without delivering possession of the property, and Schefer, Schramm & Vogel wanted to acquire a lien without taking possession of the property. It was one of the numerous attempts to give a lien by owners of property while retaining the apparent ownership of it. The law denies any validity to such arrangements whenever bankruptcy occurs and the rights of general creditors are involved. As is well stated in the leading case of Casey v. Cavaroc, 96 U. S. 467, 24

L. Ed. 779, the opinion in which contains a very able discussion of the general principles applicable to the decision in this case:

"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

Undoubtedly, in certain cases, if the legal possession of securities pledged has once passed, it is competent for the pledgee to permit the pledgor, as his agent, to temporarily resume possession of the securities for convenience of collection. Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Carter v. Arguimbau, 31 Abb. N. C. 3. But there must be first a transfer of possession. See Re Rodgers, 125 Fed. 169, 60 C. C. A. 567; Moors v. Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460; Nisbit v. Macon Bk. & Trust Co. (C. C.) 12 Fed. 686; Porter v. Parmley, 52 N. Y. 185; Tedesco v. Oppenheimer, 15 Misc. Rep. 522, 37 N. Y. Supp. 1073.

My conclusion is that the plaintiff is entitled to recover the amount of the proceeds of the goods which Radon & Co. purchased, whether sold before or after the bankruptcy. I do not recall that there is any evidence in the case which fixes the exact amount of the proceeds of such goods, as distinguished from the proceeds of the consigned goods. If the parties cannot agree upon that amount, there should be a reference to ascertain the amount.

UNITED STATES v. YORK.

(Circuit Court, S. D. New York. June 17, 1904.)

1. NATURALIZATION—OFFENSES—AIDING OR ABETTING—STATUTES—CONSTRUCTION.

Rev. St. § 5424 [U. S. Comp. St. 1901, p. 3668], declares that every person applying to be admitted as a citizen, or appearing as a witness for such person, who knowingly personates any other than himself, or falsely appears in the name of a deceased person, etc., shall be punished by fine or imprisonment, or both; section 5425 [page 3669] prohibits the use of a false certificate of citizenship, etc., on pain of similar punishment; section 5426 [page 3669] prohibits the use of a false certificate, etc., as evidence of a right to vote, on a similar penalty; and section 5427 [page 3670] declares that every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made a felony, etc., shall be punished in the same manner and to the same extent as the principal party. *Held*, that since, by reason of the inadvertent failure of the revisers of the statutes to define a felony, the offense described by sections 5424–5426 [pages 3668, 3669] was not a felony, the inadvertent use of the word "felony" in section 5427 [page 3670] might be disregarded as surplusage, and such use of an inaccurate term did not affect the validity of an indictment under section 5427.

2. SAME.

Rev. St. § 5424 [U. S. Comp. St. 1901, p. 3668] provides that every person applying to be admitted a citizen or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person or in an assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, etc., required or authorized by law relating to or providing for the naturaliza-

tion of aliens, or who utters, sells, disposes of, or uses as true or genuine, or for any unlawful purpose, any false, forged, antedated, or counterfeit oath, etc., or sells or disposes of to any person other than the person for whom it was originally issued any certificate of citizenship, etc., shall be punished. *Held*, that the word "who," as so used, and whenever used in the section, referred to the initial "every person," which related to the words "applying to be admitted a citizen or appearing as a witness for any such person," and hence the section did not include the uttering of a forged naturalization certificate by a person other than the person applying therefor, or appearing as a witness for the person so applying.

3. SAME—STATUTES—REPUNCTUATION.

Where a statute defining a criminal offense is grammatically accurate, and its meaning is not obscure, its scope cannot be extended by repunctuation.

Joel M. Marx, Sp. Asst. U. S. Atty.
Kellogg & Rose, for defendant.

THOMAS, District Judge. The defendant is indicted under sections 5424 and 5427 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3669, 3670]. The first count illustrates the several counts. It charges that the defendant "did knowingly and intentionally and feloniously aid and abet" one Bunoro "to do and commit the said felony in manner and form aforesaid." The felony which the defendant, York, is charged with thus aiding and abetting, is charged earlier in the indictment as follows: That such Bunoro "did feloniously utter as true a certain false and forged certificate, purporting to be a certificate authorized by the laws of the United States of America relating to and providing for the naturalization of aliens, knowing the same to be false and forged, the tenor whereof is as follows." Thereupon is set out a certificate of naturalization purporting to have been issued to one Donato Caggiano, and conforming to that usually issued by the District Court for the Southern District of New York to a person successfully applying for admission to citizenship.

The first question presented arises out of the revision of the statutes in 1874. Sections 5424, 5425, 5426, and 5427 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3668–3670] are a revision of part of section 2 of chapter 254 of the act of Congress of July 13, 1870 (16 Stat. 254), with certain changes of phraseology to be hereafter noted. Such section 2, after describing the offenses, continues:

"Every person so offending shall be deemed and adjudged guilty of felony, and, on conviction thereof, shall be sentenced to be imprisoned and kept at hard labor for a period not less than one year or more than five years, or be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or both such punishments may be imposed, in the discretion of the court. And every person who shall knowingly and intentionally aid or abet any person in the commission of any such felony, or attempt to do any act hereby made felony, or counsel, advise, or procure, or attempt to procure, the commission thereof, shall be liable to indictment and punishment in the same manner and to the same extent as the principal party guilty of such felony, and such person may be tried and convicted thereof without the previous conviction of such principal."

Section 5424, which relates to some of the offenses provided for in section 2 of the act of 1870, does not of itself provide for punishing one

who aids and abets the same. This is also true of section 5426. Section 5425 relates to certain other offenses provided for in section 2 of the act of 1870, but specifically provides for the punishment of one who aids or assists or participates in the commission of some of such offenses. Section 5427 provides as follows:

"Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises, or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party."

Thus it will be seen that while section 2 of the act of 1870 denounced all offenses therein named as felonies, and provided a general clause for the punishment of a person knowingly and intentionally aiding or abetting the same, section 5424 and section 5426 of the Revised Statutes make no provision for one aiding or abetting, while section 5425 does specifically make such provision; and thereupon follows section 5427, with its general provision for punishing any person who aids or abets any felony denounced in the three sections preceding it, or who does "any act therein made felony."

It is urged that the indictment in the present action cannot be maintained under section 5424, because that does not contain within itself any provision for punishing one aiding or abetting, and that section 5427 is not applicable to section 5424, inasmuch as no offense therein described is denounced as felony, nor is any act in section 5424 described "therein made felony."

The defendant is indicted for aiding another in the uttering as true a false certificate. The Circuit Court of Appeals for the Third Circuit, in the case of Berkowitz v. United States, 93 Fed. 452, 35 C. C. A. 379, decided that such offense was not a felony. It is urged by the United States that the court did not read section 5427 in connection with the three preceding sections, and that, had it done so, it would have decided that all of the offenses named in the three preceding sections were felonies. This court may not presume that the Appellate Court overlooked section 5427, for it is difficult to conclude that, after discussing the earlier law, it omitted consideration of all the sections based upon it.

The precise situation is this: Offenses specifically made felonies under the act of 1870 are not unless by section 5427 made felonies at all by the Revised Statutes, nor can a person be punished for aiding or abetting those named in section 5424 and section 5426, and, it may be, some offenses named in section 5425, if the word "felony" be regarded as used in its strict legal meaning. The history of the revision shows clearly the cause of the use of the word "felony" in section 5427. The revisers, in their first draft of the revision, as reported to the House committee, reported certain definitions (see Report of Revisers U. S. Statutes, vol. 2, p. 2561), and, among others, one as follows: "A felony under any law of the United States, is a crime, punishable with death, or by imprisonment at hard labor." Chapter 1, § 2. This definition, if adopted by Congress, obviated the necessity of specifically denouncing as felonies the offenses named in sections 5424–5426, as section 2 of the act of 1870 had done. The House committee and Congress did not adopt such definition, but finally did adopt sections 5424–5427, as re-

ported by the revisers and the House committee. Therefore the system proposed by the revisers was disturbed, so that the offenses named in sections 5424–5426 ceased to be felonies, as they had been named under the act of 1870, but section 5427 was not changed. Hence none of the offenses in sections 5424–5426 are felonies, and section 5427, made applicable to them alone, has no application to them, if the word "felony," as used in section 5427, must be given its strict legal meaning. It is argued with much force that the court should give it such meaning, and thereby hold that section 5427 performs no office in the revision as adopted. But when the history of the legislation is considered, this view is not deemed obligatory. It is quite obvious that Congress intended to make section 5427 applicable to three sections that precede it, and to the offenses therein named. If it failed to do so, it is because it called such offenses by the wrong name. It called them by the wrong name because it inadvertently omitted to observe the result of omitting the revisers' definition of "felony." But inasmuch as it is clear that section 5427 was intended to have some effect, inasmuch as it is in terms related to the three preceding sections, and must cover the offenses named in those sections, or none, and inasmuch as the phraseology used in section 5427 is substantially that used in section 2 of the act of 1870, and inasmuch as the reason that led to the erroneous use of the word "felony" in section 5427 is clear, it seems a warranted conclusion that the misuse of the word "felony" in section 5427 may be disregarded. In other words, Congress inadvertently described offenses as felonies that it had refused to make felonies. It does not seem the better judgment to hold that this inaccurate use of a term should be regarded as showing the intention of Congress, when the section otherwise, and the history of the revision, point clearly to a different intention. There seems little opportunity for discussion. If Congress calls an offense a "felony" when it is a misdemeanor, or a "misdemeanor" when it is a felony, and this technical misdescription defeats punishment, the defendant's demurrer on this ground should be sustained. But mere use of an inaccurate term for an offense should not have such effect, and, for the reasons above given, it would be peculiarly improper to give it such effect in the present case.

But another grave objection to the indictment remains, and in this instance both the revisers and Congress have left a serious gap to be bridged by judicial interpretation before a most important part of section 5424 can be made applicable to the present case, or to other grave acts which, as it is urged, should be contained within it, and which were contained in section 2 of the act of 1870. The revisers and Congress, with apparent deliberation, have omitted words from the new section that were within the earlier law. Section 5424 provides:

"Every person applying to be admitted a citizen or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person, or in an assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by law, relating to or providing for the naturalization of aliens; or who utters, sells, disposes of, or uses as true or genuine, or for any unlawful purpose, any false, forged, ante-dated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or

proceeding above specified; or sells or disposes of to any person other than the person for whom it was originally issued any certificate of citizenship, or certificate showing any person to be admitted a citizen, shall be punished by imprisonment at hard labor not less than one year, nor more than five years, or by a fine of not less than three hundred nor more than one thousand dollars, or by both such fine and imprisonment."

It will be observed that after the word "or," and before the words "who utters," etc., are omitted the words "every person," with which the section opens. The same omission occurs in the third auxiliary clause of the section. Hence "who," as so used, and wherever used in the section, refers to the initial "every person." But such words "every person" are modified by the words "applying to be admitted a citizen, or appearing as a witness for any such person." Hence, as the section literally reads, a person uttering a certificate can only be punished in case he was a "person applying to be admitted a citizen, or appearing as a witness for any such person." The indictment does not charge that Bunoro, the principal, was either a "person applying to be admitted a citizen, or appearing as a witness for any such person," and it was admitted upon the argument that he was not such person. In section 2 of the act of 1870 the language is:

"If any person applying to be admitted a citizen, or appearing as a witness for any such person shall knowingly personate any such person, * * * or if any person shall falsely make, forge, or counterfeit any oath, affirmation, notice, affidavit, certificate," etc.

That is, before each "who" in each auxiliary clause in the former section the words "any person" are repeated without the qualifying words. The revisers and Congress with apparent intention have omitted to repeat the words "every person" in any auxiliary clause, but have left each relative "who" referring to "every person applying to be admitted a citizen, or appearing as a witness for any such person." Hence, to sustain the indictment, the court must reinstate before each "who" the words "any person," so carefully used in the former act, and painstakingly omitted from section 5424, except at the beginning thereof, where the words "every person" are used. The section, in fit terms, limits the persons punishable to a certain class. The question is whether the court may interpolate in a penal statute words which the revisers and Congress have twice rejected, and by such interpolation bring under its penalty new classes of offenses. The government vehemently urges that, unless the effect of the old statute be given to the new, persons punishable under the old law may escape. It is a sufficient answer that the responsibility rests upon the revisers and Congress.

In United States v. Goldenberg, 168 U. S. 95, 102, 18 Sup. Ct. 3, 42 L. Ed. 394, it is said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true, there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

In United States v. Harris, 177 U. S. 309, 20 Sup. Ct. 611, 44 L. Ed. 780, it is said:

"Giving all proper force to the contention of the counsel of the government that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the Legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

Mr. Chief Justice Shiras, in delivering the opinion of the court in the above case, quotes the language of Mr. Chief Justice Marshall in United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37, as follows:

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the Legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this: That, though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. The maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the Legislature obviously used them, would comprehend. The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases."

In Lake County v. Rollins, 130 U. S. 670, 9 Sup. Ct. 652, 32 L. Ed. 1060, Mr. Justice Lamar said:

"To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it."

There are occasions when earlier statutes can be consulted. The Supreme Court has stated the rule. In United States v. Bowen, 100 U. S. 513, 25 L. Ed. 631, it is said:

"The Revised Statutes must be treated as the legislative declaration of the statute law on subjects which they embrace on the 1st day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision."

This is approved in Vietor v. Arthur, 104 U. S. 498, 26 L. Ed. 633:

"The decisive question is whether section 728 is to be construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it was taken, to show that it was the intention of Congress to limit it to the cases named in such prior act. The general rule is perfectly well settled that where a statute is of doubtful meaning, and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." Hamilton v. Rathbone, 175 U. S. 419, 20 Sup. Ct. 155, 44 L. Ed. 219.

The subordinate clause of the sentence in section 5424 relates to a—

"Person applying to be admitted a citizen, or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person, or in an assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens."

Now, observe how the second clause (the one in question) specifically refers to the acts enumerated in the first clause. It proceeds "or who utters, sells, disposes of, or uses as true or genuine, or for any unlawful purpose, any false, forged, antedated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified"; and the section continues, "or sells or disposes of to any person other than the person for whom it was originally issued any certificate of citizenship, or certificate showing any person to be admitted a citizen." The section is harmonious in its several parts. "Every person applying," etc., is forbidden to personate, to falsely appear in the name of another, or in a fictitious name, to falsely make, to forge, to counterfeit, any oath, notice, etc., or to utter, sell, dispose of, to use as true, any such papers, or to sell any certificate, etc. The intention is that a person applying, etc., shall not personate, nor make false naturalization papers; that he shall not utter, sell, or use the same, nor sell or dispose of any certificate. The section is free from all ambiguity. It is grammatically correct. Its provisions are consistent one with another. They are applicable to cases that might arise. They do not cover all classes of offenders included in the act of 1870. If it be admitted that they should cover such classes, yet they plainly do not. The revisers and Congress could not have read the section without observing the omission. They deliberately took out words from the earlier act that were palpably necessary to cover such offenses. This court is not permitted to interpolate words that the revisers and Congress rejected. The section is sensible. It is accurate. If the public welfare demands that it should be broader, the power rests alone with Congress to amplify it.

The court recognizes with what care the learned counsel for the government has marshaled and submitted the rules of construction and the sustaining authorities. But in the present case there is no occasion for resorting to rules of construction. Their aid is neither required nor justified, because the language of section 5424 is plain. There is no

doubt of its meaning. It is free from ambiguity. The Legislature means what it says, and its words declare its meaning. Why look beyond the words in such case? The government insists that the meaning is obscure. That is the vice of its argument. The meaning is unclouded.

It is finally urged that the section should be repunctuated to give the words a meaning that they do not now express. The proposition is to repunctuate a statute so as to include classes that are clearly excluded, when there is not the slightest evidence on the face of the statute of an intent to include them. The proposition is to punctuate the section so as to make it read as if it contained the very words that were in the old statute, which words the revisers and Congress have omitted. The situation is this: The earlier statute contained words that included various classes of offenders. The revisers and Congress omitted some of them. The proposal is that the section be repunctuated so that it will be equivalent to a statute with the omitted words present. That would be grave interference with legislative action. The extent to which counsel for the government asks the court to go in the matter of reconstruction of the statute is illustrated by the following extract from his argument:

"Every person, [comma inserted] applying to be admitted a citizen [comma omitted] or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person, or in an assumed and fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or, [comma inserted] who utters, sells," etc.

The government advocates the change as follows:

"By thus transposing the comma in the first portion of this section, it would be clear that the first clause was intended to cover every person who applies to be admitted a citizen, or appears as a witness and knowingly personates, etc., and the second clause as thus punctuated ('or, who utters, sells,' etc.) would relate to the principal subject 'every person,' and would clearly mean 'or every person who utters, sells,' etc. The entire sentence, grammatically analyzed, is a simple, declarative sentence; the subject being 'person,' the predicate being 'punished,' and the object 'imprisonment'; the subject being qualified by the complex adjective clauses 'applying to be admitted a citizen' and 'knowingly personating,' etc., and the second of the complex qualifying clauses being 'who utters, sells,' etc."

It is at least doubtful whether this repunctuation would demand or even justify the construction urged by the government. In any case, it is considered that the plain reading of the section, and the intention of the Congress as gathered from it, should not be thwarted by such corruption of the text.

Counsel for the government has just now brought to the attention of the court the decision of Judge Butler upon the trial of an indictment against certain persons charged with conspiracy under section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], based upon section 5424 [page 3668] thereof; the charge being conspiracy to defraud the United States by uttering as true false certificates of naturalization. It appears that Lindsay, one of the defendants, was tried alone on this indictment; that he filed a demurrer upon the ground that none of the

three men named in the indictment was "a person applying to be admitted as a citizen, or appearing as a witness for such person"; that Judge Butler overruled the demurrer, and Lindsay was found guilty; that subsequently the same point was raised upon a motion in arrest of judgment, and that Judge Butler again passed upon the question and dismissed the motion; and that later Merrick, another of the defendants, pleaded guilty to the indictment. Judge Butler wrote no opinion, nor is the court advised of the ground of his decision, nor has the indictment or record been presented to the court. So far as appears, the question now raised may not have been presented by the indictment.

In any case, it is the plain duty of the court to sustain the demurrer to the indictment in the action at bar.

KIRK v. UNITED STATES et al.

(Circuit Court, N. D. New York. June 21, 1904.)

1. FEDERAL COURTS—BAIL—SCIRE FACIAS—JURISDICTION.
Under Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], providing that the Supreme, Circuit, and District Courts shall have power to issue writs of scire facias agreeable to the usages and principles of law, the District Court has jurisdiction to issue such writ to enforce a forfeited recognizance or bail bond.

2. SAME—PRACTICE.
Since the federal statutes do not expressly indicate the practice to be followed on scire facias on a forfeited recognizance or bail bond, resort must be had to the procedure which obtained at common law.

3. SAME—EXECUTION.
Where scire facias is issued against bail, an execution cannot be awarded against the defendant who has not been personally served with process until there have been two returns of nihil to the writ.

4. SAME.
Scire facias on a forfeited recognizance being in the nature of an original action, unless the surety has voluntarily submitted himself to the jurisdiction of the court out of which the writ issued, he must be personally served in the district of the court issuing the writ.

5. SAME—SUCCESSIVE RETURNS OF NIHIL.
In scire facias on a forfeited recognizance two returns nihil on successive writs are equivalent to personal service on the defendant only where the defendant in scire facias is domiciled or found within the jurisdiction of the court where the writ issues.

6. SAME—BREACH OF BOND—BAIL TO APPEAR.
A bail bond bound the principal to appear at a certain term of court to be held on a date specified, and from day to day and from term to term to which the case should be continued, and then and there to answer such matters as should be objected against him, and to abide and perform the orders of the court, and not to depart without leave. An indictment having been returned at such term, to which defendant pleaded not guilty, the case was set for trial on March 17, 1902, defendant however being informed that another indictment would probably be returned against him. Such indictment having been presented, defendant was directed to appear to answer the same on March 6th, and, failing to appear, his recognizance was duly forfeited on the succeeding day, and, he again failing to appear on March 17th, the former forfeiture was confirmed. *Held*

¶ 3. See Bail, vol. 5, Cent. Dig. §§ 376, 416.

that, all of such dates being within the same term, it was the duty of defendant's surety to produce him, as ordered by the court, on March 6th, notwithstanding a later date had been fixed for the trial on the indictment first presented, and hence the confirmation of the forfeiture on March 17th was proper.

7. SAME—JUDGMENT—ENTRY.

A surety on a bail bond obligating the defendant to appear from day to day during a particular term and from term to term cannot object that a forfeiture of such recognizance was not entered on the precise day of the term when the principal was obliged to appear.

8. SAME—ACTIONS AGAINST THE UNITED STATES.

Since the United States cannot be sued by an individual except as permitted by the acts of Congress, a bill was not maintainable jointly against the United States and the United States marshal to restrain the seizure of complainant's property on a judgment in favor of the United States on a forfeited recognizance.

See 124 Fed. 324.

Kellogg & Rose, for the United States.
George B. Curtiss and Taylor L. Arms, for defendant.

HAZEL, District Judge. This suit is for an injunction to restrain and enjoin the United States and C. D. McDougall, as United States marshal for the Northern District of New York, from seizing the property of the complainant pursuant to an execution in favor of the United States issued out of the United States District Court for the Eastern Division of the Southern District of Georgia. The writ of execution was dated January 12, 1903. It was issued in a scire facias proceeding instituted on March 17, 1902. It is essential to a complete understanding of the controversy that the salient facts be briefly stated. They are substantially as follows: On January 20, 1902, in New York City, the complainant became surety upon a recognizance for the appearance of one John F. Gaynor, who had been there arrested upon a warrant issued by United States Commissioner Shields, and who admitted the accused to bail to appear before the Georgia court in conformity to section 1014 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 716]. The information before the commissioner was based on an indictment by the grand jury of the Georgia district charging said Gaynor and others with the crime of conspiracy, in violation of section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676]. Proceedings were had for the removal of the accused before a commissioner in the territorial district where the defendants were found. Pending the execution of the commissioner's order of removal, Gaynor made application for a writ of habeas corpus. This was denied by the Circuit Court for the Southern District of New York. An appeal to the Supreme Court of the United States resulted in affirming this decision. The recognizance which is the basis of this suit was filed in the office of the clerk for the Eastern Division, Southern District of Georgia, on January 22, 1902, and recites that Gaynor and others were charged with conspiracy to defraud the United States of large sums of money by devising a fraudulent scheme to present false accounts to an officer of the United States; that the prohibited offense was committed on January 1, 1897, within the Eastern Division of the

Southern District of Georgia; that an indictment had been found by a grand jury of said district against Gaynor; and, further, that probable cause existed for believing him guilty of the offense charged. It was stated in the recognizance that the accused had been held to answer by the commissioner in the district where the indictment was found. The condition of the recognizance was in the following words:

"Now, therefore, the condition of this recognizance is such that, if the said John F. Gaynor shall personally appear at the term of the District Court of the United States for the Eastern Division of the Southern District of Georgia, to be holden on the second Tuesday in February, 1902, and from day to day and from term to term should the case be continued, and then and there to answer to such matters and things as have or shall be objected against him, and to stand to, abide, and perform the orders of the court, and not depart the said court without leave, then this recognizance to be void; otherwise to remain in full force and virtue."

Other facts appearing may be stated chronologically. On February 11, 1902, Gaynor personally and by counsel appeared before the proper court having jurisdiction of the accused, and filed a plea in abatement to the indictment. A demurrer to the plea having been interposed by the government, the court, on February 17, 1902, sustained the same. Thereupon the defendant demurred to the indictment. Subsequently, on February 24th, the court overruled the demurrer as to counts 1 to 8, inclusive, and sustained it as to counts 9 and 10. The defendant Gaynor then entered a plea of not guilty to the indictment. During the discussion between the court and counsel regarding the time of trial, it was, in effect, stated by the court that in all probability another indictment against the accused persons would be found by the grand jury in attendance at that term of court, and therefore notice should be taken of such impending action. These observations by the court resulted in a general discussion between court and counsel on both sides touching notice to the defendant of any future action by the grand jury, and fixing the time of trial of the indictment to which the defendants had that day entered a plea of not guilty. Finally, March 17, 1902, a date in the same term, was named by the court for the trial upon this indictment, No. 322. On February 28th, at the same term, another indictment was presented to the court by the grand jury against Gaynor and others (No. 371), charging them with conspiracy to defraud the United States. Thereupon the defendants were directed by order duly entered and served on counsel for defendants to personally appear on March 6, 1902, to plead thereto. Such order in terms directed the attorneys for the defendants "to stand to, abide, and perform the orders of the court in the premises." The accused Gaynor did not appear on the date appointed. His counsel, however, were present in court. His surety was admonished to produce his principal, but he failed to do so. Counsel for defendants asserted their belief that Gaynor would appear on the following day, and accordingly moved a continuance, which was granted. On the next day the recognizance in question was estreated on account of Gaynor's default in appearing. It was accordingly decreed by the court that the United States recover judgment against Gaynor and his surety in the sum of $40,000, the amount of the forfeited recognizance, unless cause be shown at the succeeding term why such decree and judgment should not be made final. A writ of scire facias was di-

rected to issue to the marshal of the Southern District of Georgia and to the marshals of the United States for service upon Gaynor and Kirk, principal and surety, respectively. On March 17, 1902, the day set for the trial on the first indictment, as above mentioned, on account of Gaynor's absence from court, the surety being first called upon, as required by the rules and practice of the court, to produce his principal, the bond was again estreated, and the prior estreatment proceedings confirmed. The writ of scire facias was made returnable at the May term of court. Personal service thereof upon the surety was not made in the state of Georgia or within the territorial district of the court which directed its issuance, but the complainant was served on April 5, 1902, at the city of Syracuse, state of New York, which has been his continuous residence. An alias writ of scire facias was issued on July 17, 1902. The marshal for the Southern District of Georgia made return of "Not found" to both writs. No plea or answer was interposed to stay the final mandate of said court, and judgment was entered in favor of the United States. In accordance with section 986 [U. S. Comp. St. 1901, p. 708] an execution was issued to the marshals of the United States directing such officers to levy upon the property of the complainant wherever found. No attempt is here made to set forth the facts with as much detail or as comprehensively as they appear in the exhaustive opinion of Judge Ray granting an injunction pendente lite. For a full statement of such facts reference is directed to that decision, which may be found reported as Kirk v. United States (C. C.) 124 Fed. 324.

It will be noted from the practically undisputed facts that two writs of scire facias were issued against the complainant and his bail, and were returned nihil by the marshal of the district to which they were issued. The legal propositions involved are of much importance, as no strictly parallel and reported authority is found in the courts of the United States to guide their determination. It is contended by the complainant, among other things, that, as the surety was not found within the state of Georgia, he never having submitted himself to the jurisdiction of the court, and owning no property in that state, the sci. fa. could have no extraterritorial effect as a basis for a personal judgment; hence the writ of execution was without legal force and effect. This question will first be considered. That the court had jurisdiction to enforce a forfeited recognizance or bail bond by writ of scire facias or by action must be conceded. Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163. See, also, section 716, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 580]. Whether, admitting the power and jurisdiction of the court to enforce the judgment on scire facias, such proceeding bound the surety, who was neither personally served with process in the state where such steps were instituted nor domiciled therein, and who did not appear or submit himself to the jurisdiction of the court otherwise than by joining in the recognizance, is a point not free from difficulty. Scire facias proceedings in a civil case are in the nature of an original action to the extent of enabling the defendant to plead. U. S. v. Payne, 147 U. S. 692, 13 Sup. Ct. 442, 37 L. Ed. 332; Winder v. Caldwell, 14 How. 442, 14 L. Ed. 487. The writ in every case must apprise the defendants of the facts on which it is based, and the averments therein contained may be con-

troverted or avoided. Irregularities may be taken advantage of in the usual way, and a trial had upon the issues presented by the writ and the answer filed, as in an action. U. S. v. Winstead (D. C.) 12 Fed. 50; U. S. v. Van Fossen, 1 Dill. 406, Fed. Cas. No. 16,607; U. S. v. McGlashen (C. C.) 66 Fed. 537; People v. Quigg, 59 N. Y. 83. The point that no tribunal has power or authority to extend its process beyond the boundary of its district for the purpose of bringing either a person or property within the scope of its jurisdiction is technically correct, and needs no citation of authorities. It may be doubted, however, whether this elementary principle of law has been violated by the procedure adopted in this sci. fa. proceeding. The writ which issued upon the forfeited recognizance is unquestionably a judicial writ, and founded on the record of the court. It must be issued out of the court wherein the recognizance was estreated. The federal statutes do not expressly indicate the practice by which the remedy may be enforced, and therefore resort must be had to the course of the common law to discover the method of procedure. U. S. v. Insley, 54 Fed. 221, 4 C. C. A. 296; Hunt v. U. S., 166 U. S. 424, 17 Sup. Ct. 609, 41 L. Ed. 1063. The statute declares the continuance of the remedy. It does not prescribe the form of process, nor limit the bounds of territorial jurisdiction to which it may be issued. The sci. fa. is a common-law writ, and not a statutory remedy to obtain a personal judgment, and based upon the particular proceeding to which it is applicable. At common law a recognizance possesses some of the qualities of a judgment. In England, when a recognizance was forfeited, it was the common practice to estreat the same, and remit it to the Court of Exchequer for collection. A writ of execution would follow against the person and property of the surety. No writ of scire facias was originally issued in a criminal case where the recognizance was properly forfeited, namely, where it appeared that the condition for the appearance of the accused was violated. If the question of forfeiture were in doubt, the practice required the issuance of the writ of scire facias. 2 Tidd, Pr. 1090; State v. Randolph, 22 Mo. 482. The later English cases seem to have adopted the practice of issuing scire facias before taking final action upon the recognizance. It has been held that the theory on which a proceeding of this character is founded rests primarily upon the fact, as has been observed, that the records of the court disclose that the principal and surety, by reason of their voluntary act, are already before the court. Although such writ is in the nature of an original process, it is only so regarded in the sense of its being the initial step to enforce the collection of the debt which was created by the default of the surety to produce his principal when legally called upon so to do. It is a fiction of the common law that a surety is personally in attendance upon the court whenever the accused, by order of the court, is bound to personally appear. Manifestly, such a presumption finds support in the practice which obliges the clerk to proclaim notice in open court to the surety in the absence of the principal to produce his principal or forfeit his bail. U. S. v. Dunbar, 83 Fed. 151, 27 C. C. A. 488. The trend of the earlier decisions is to the effect that the recognizance is a confession of a debt, and, when filed, it is made a record of the court, which binds the lands of the conusor or surety. No action to enforce

the bond upon a forfeiture was necessary, as execution issued upon the recognizance as a matter of course. Gildersleeve v. People, 10 Barb. 40; State v. Caldwell, 124 Mo. 513, 28 S. W. 4; People v. Quigg, 59 N. Y. 83; People v. Bennett, 136 N. Y. 484, 32 N. E. 1044. In the Gildersleeve Case a statute of the state of New York, which permitted judgment upon a forfeited recognizance to be entered of course without further proceeding, was held to be constitutional. The court reviewed the common-law cases, and held that the statute was merely declaratory of the adoption of that procedure by the Legislature. The later practice, and that which seems to be adopted through the enactment of section 716 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 580], provides for the issuance of the writ of sci. fa. on the judgment of forfeiture of the recognizance. As has been indicated, the defendant is entitled to notice and service upon him of the writ, so as to give him full and complete opportunity for defense. The practice seems to be, according to many authorities, that after scire facias against bail the execution cannot be awarded against a defendant who has not been personally served with process until there have been two returns of nihil to the writ. Graham v. State, 7 Blackf. (Ind.) 313; Foster's Scire Facias; 13 Tidd, Pr. 1090; Elasser v. Haines (N. J. Sup.) 18 Atl. 1095; McRae v. Mattoon, 13 Pick. 53. Such appears to be the holding of the cases arising under the common law. In the last-mentioned case the defendant against whom the writ issued resided in the state of North Carolina when he became bail and at the commencement of the proceedings. Subsequently he removed to the state of Massachusetts. His defense to the writ was that he had no notice of the proceedings against him as bail. The court held that a principal and surety upon a recognizance presumptively submit themselves to the jurisdiction of the court and the practice of the state. It was there further held that the defendant, to avoid liability, must take notice of his default and interpose his defense in the forum where the remedy was rightly instituted. The return of two nihils to the writs of scire facias was deemed equivalent to personal service upon the defendant. In Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163, it was held that, where a process was duly served, a forfeited recognizance may be enforced by sci. fa. proceedings. The Supreme Court of the United States affirmed the decision of the Circuit Court, and by implication, at least, approved its language in respect to the assertion that the proceedings upon which the form of action is founded must be duly served. In granting the temporary injunction herein, Judge Ray decided that there must be personal service of the writ in the district where the proceeding was instituted; that the sci. fa. is in the nature of an original action; and, unless the surety has voluntarily submitted himself to the jurisdiction of the court out of which the writ issued, he must be personally served in such district. He further held that, according to Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837, and Brown v. Wygant and Leeds, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284, the proposition was apparently settled that two returns nihil on successive writs are only applicable where the defendant in the sci. fa. is domiciled or found within the jurisdiction of the court where the writ issues. After revewing the cases above mention-

ed, which were civil in their nature, and to revive a judgment, he states his conclusions as follows:

"Two returns nihil are not equivalent to service, except where the writ issues lawfully out of the court in the jurisdiction where the defendant resides. Service in this manner, to be good service, assumes that the defendant resides within the jurisdiction of the court issuing the writ, but cannot be found. In such case two returns nihil are equivalent to personal service, but two returns nihil are not service when the defendant does not reside within the jurisdiction of the court issuing the writ. If this be true in a case for the recovery of a sum of money, where judgment was lawfully issued in the first instance on personal service, and the proceeding is to revive a judgment, how much more ought it to be true in a case where the scire facias proceeding is an original suit, or in the nature of an original suit, and the defendant does not reside within the jurisdiction of the court issuing it, and neither resides nor was within the jurisdiction of that court at the time the recognizance was executed, or default thereon taken, or when the writ issued?"

Undoubtedly the writ, in effect, determines the personal rights and obligations of the defendant, and I quite agree that it may, therefore, be doubted whether a constructive service in the nature of two returns nihil upon a nonresident is sufficient service, especially where the recognizance was entered in another state. See Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565. Scire facias against bail, however, it must still be said, is a proceeding sui generis, and general rules of procedure must be cited and followed with caution. The proposition, as will easily be appreciated, is of much importance, and, in view of the authorities, unsettled. In view of the exhaustive and comprehensive opinion of Judge Ray, whose illness has prevented him from sitting at final hearing, I have determined, notwithstanding some doubts arising in my own mind as to the correct practice upon scire facias against bail, to follow that decision. Moreover, an appeal from the decision of Judge Ray was sustained by the Circuit Court of Appeals on the ground that it was discretionary to grant the injunction during the pendency of the action, without disagreeing with the law applicable to this subject as laid down by the Circuit Court. Although such holding cannot strictly be regarded as sustained on appeal, it is thought, nevertheless, out of a proper deference to the opinion of Judge Ray, any doubts which the court at final hearing may have as to the soundness of the views there expressed should be resolved in favor of their correctness. The facts of the case are practically the same as they were assumed to be by Judge Ray. His reasoning, if sound, at preliminary hearing, must still be so considered. The prevailing rule of comity demands an acceptance of such reasoning and construction, unless the Circuit Court of Appeals, to which court an appeal is to be taken, as was stated at the argument, should finally give different settlement to the questions in dispute.

The next important point is whether the recognizance is void because it was declared estreated on March 7, 1902, prior to the date fixed for the trial by the order of February 24th. Judge Ray was of opinion that a serious question of fact was presented by this contention. He doubted the power of the court to make a valid order on March 17th confirming the prior decree forfeiting the recognizance. The evidence shows that after the date of trial was fixed under indictment No. 322

the grand jury found another indictment against the defendants of the same nature, and based upon facts arising out of the same transactions. Accordingly, the defendants were directed to appear on March 6, 1902, for the purpose of pleading to the new indictment, and to abide the directions of the court on both accusations. As has been stated, the recognizance was estreated on March 7th, to which date the matter was continued because of Gaynor's failure to respond when called upon to appear. On March 17th the recognizance was again estreated, or, rather, the former forfeiture was confirmed. It is now objected by the defendant that there was no valid judgment of forfeiture. This insistance is without merit. It is thought to be immaterial whether the forfeiture was on March 7th or 17th. The recognizance in terms bound the surety to produce his principal at that term of court, and from day to day thereafter as the court might direct. Waiving the point that, even if some degree of merit be found in the objection, it cannot be used to impeach the judgment collaterally, I am clearly of opinion that such objection must fail. Undoubtedly the court had the power to require the appearance of Gaynor on March 7th. It was the duty of his surety to produce him upon that date despite the fact that as to the first indictment a later day of trial had been determined upon. Suppose a change of the date of trial had been afterwards made without the consent of the defendants. Can it reasonably be claimed that the surety was not obliged to produce his principal at such time as might be fixed by the court. Certainly not. Assuming that the recognizance does not bind the surety to have his principal in court on all the charges which might arise from the conspiracy alleged to have been entered into on or about January 1, 1897, and was entered into merely to secure the attendance of the accused at the opening of court, and from day to day thereafter until the particular charge upon which the arrest was effected is disposed of, then such objection is still without force for the reason that the surety failed to appear on the 17th day of March, at which time the sci. fa. proceeding was instituted. Assuming the correctness of the proposition that the court obtained jurisdiction by reason of the recognizance and its forfeiture being a judgment of the court, I can conceive of no sound reason for concluding that the estreatment of the recognizance on March 17th is in fact ineffectual. The confirmation of the forfeiture must be given the effect intended. A surety cannot be permitted to escape personal liability on account of a technical omission to estreat a recognizance on the precise day when the principal was obliged to appear at any time during a particular term, or from term to term. The original estreatment and the order confirming the same were entered at the same term of court. The effect, therefore, of the confirmation or ratification of the prior order was in fact to estreat the recognizance because of Gaynor's fault in appearing on March 17th. As indicated above, the asserted facts on the motion for preliminary injunction as to the date of estreatment of the recognizance were thought by Judge Ray to be in serious conflict, and for that reason only have I deemed it necessary to state my views thereon. Such views are, nevertheless, controlled by the principles involved in the question of jurisdiction and the judgment in the sci. fa. proceeding. If it is a correct conclusion that the United States District Court for

the Eastern Division of the Southern District of Georgia was without power or authority, because of the circumstances of this case, to enforce the remedy which the government elected to pursue, then, of course, the date of forfeiture of the recognizance is immaterial, and the case must be determined in favor of complainant.

It would serve no useful object to pass on any other point submitted in the briefs, except to add that, assuming the proceedings in the state of Georgia to be invalid for want of jurisdiction, the remedy invoked by the complainant to restrain the collection of the execution was proper, and accordingly this court, in the exercise of its equity power, may afford relief. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565; Barrow v. Hunton, 99 U. S. 80, 25 L. Ed. 407; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870. These cases, it is thought, control the proposition that a party cannot enjoy the fruits of a judgment illegally obtained where, as here, no adequate remedy exists at law.

Another point may briefly be disposed of, namely, that the United States cannot be sued by an individual except as permitted by acts of Congress. U. S. v. McLemore, 4 How. 287, 11 L. Ed. 977; Hill et al. v. U. S., 9 How. 387, 13 L. Ed. 185. This was practically conceded at the hearing. My conclusion is that the complaint, as to the government of the United States, must be dismissed, with costs.

The threatened unlawful seizure of the property of the complainant by the defendant McDougall must be enjoined. U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. Judgment is therefore awarded in favor of the complainant against C. D. McDougall, as United States marshal for the Northern District of New York, as demanded in the bill, with costs.

EMPIRE MILL. & MIN. CO. v. TOMBSTONE MILL & MIN. CO.

(Circuit Court, D. Connecticut. July 1, 1904.)

No. 450.

1. MINES AND MINING—LOCATION OF CLAIM—ERRORS.

Where the locators of a mining claim mistook the direction of the vein manifested by the outcrop of ore on the surface, and laid out their claim crosswise instead of lengthwise of the vein, the original side lines of the claim became the legal end lines, and the original end lines became the legal side lines, so that the locators were entitled to follow the vein within the surface lines of the claim on its downward course into the earth so far as it departs from a perpendicular as to carry it underground beyond the legal side lines to a point where it shall be cut off by its legal end lines vertically extended perpendicularly in their own direction.

2. CONVERSION OF ORE—TRESPASS—ESTOPPEL—PLEADING.

Where, in an action to recover for the conversion of ore, plaintiff took the ground that defendant was a naked trespasser when he took away the ore underneath the surface lines of plaintiff's claim, plaintiff could not plead that defendant was estopped to claim the right to remove such ore under a contract between the parties for the development by defendant of plaintiff's mine.

3. CONTRACTS—MONEY PAID—MISAPPLICATION—RECOVERY.

Where plaintiff paid money to defendant under a contract by which defendant agreed to develop plaintiff's mine, but the money was in fact

expended by defendant in cutting inclines, drifts, etc., which either helped defendant directly in getting out its own ore, or developed workings which might have shown other ore belonging to defendant if they had not proved barren, plaintiff was entitled to recover the money so paid.

At Law.

Gross, Hyde & Shipman and L. P. Waldo Marvin, for plaintiff.
Stimson & Williams and John K. Beach, for defendant.

PLATT, District Judge. This is an action at law, demanding the proceeds obtained from certain ores alleged to have belonged to the plaintiff, and to have been taken without right by the defendant. Trial by jury was waived by stipulation, and the cause was heard by the court. The method of treatment may be novel, but it is hoped that it may be deemed excusable in the circumstances. The case has been on the docket nearly eight years, and its vicissitudes have been unusual. After the trial last fall, which covered practically a week, and was devoted to oral testimony and the introduction of depositions taken in the West, with many maps attached thereto, time was allotted the counsel for filing briefs. The original briefs were delayed, but finally appeared. Then followed a fusillade of replies and counter replies, until the court became satisfied that the subject was exhausted. It is believed that the court thoroughly appreciates the issues, but time forbids such analysis of the situation as that what shall be said can be accurately divided into conclusions of fact and conclusions of law. The views of the court both upon fact and upon law will be obvious, it is thought, when the following has been examined:

The Goodenough mining claim was located by the Schefferlin brothers and Richard Gird in the Tombstone district, in Arizona, on March 28, 1878. The laws of the United States and all local rules and regulations were complied with. Next easterly of the Goodenough lies the Hawkeye-Little Wonder claim, and then comes the Empire. The Goodenough was laid out, running 1,500 feet in an easterly and westerly direction; the northerly and southerly lines being parallel and about 458 feet apart. The plaintiff is the legal owner of the Empire claim, and the defendant is the legal owner of the Goodenough. The initial monument used by the locators was a post, with a tin can attached, and was placed at or near the Goodenough outcrop, and was still there shortly before the hearing, although the outcrop had been removed by the operations of mining. At the time of the location there were, in plain view upon the surface of the ground, just northerly of the Toughnut claim, three outcrops of ore. Upon plaintiff's map, Exhibit S, used at the hearing, they are marked, "Goodenough, Way-Up Vein, and Combination Outcrops." Toward the south the lines of the Toughnut claim stared the locators in the face, but they were free-handed toward the north. Section 2320, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1424], said, "No claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor," etc. They were obliged to assume that some place on the earth's surface represented the middle of the vein, and from that point they could measure no further northerly than the distance southerly to the Toughnut line. They placed that point at about the middle of the manifestation of ore

at the Way-Up outcrop, and measured off a distance toward the north equal to the distance to the Toughnut on the south. They placed their monument on what seemed to them to be the first appearance of the vein toward the east, and extended the claim far enough to the west to include the Combination outcrop, which might have been another manifestation of the vein. In their description of the claim they speak of crossing the vein with its easterly and westerly lines. From our present knowledge, it is doubtful whether the Combination outcrop is a part of the actual vein which exploitation has shown that they did locate upon, and it will be wise to eliminate it from our thoughts. It has been referred to because it had an influence upon the westwardly extension of the 1,500 feet of the claim, and for no other reason. There was a vein, lode, or ledge where the ore manifested itself at the Way-Up outcrop, but it happened to run the wrong way. It extended northerly and southerly across the Goodenough claim. It is a true vein, within the meaning of the statute. The courts have so found, and counsel concede it to be so. The contention is that the original location of the Goodenough was not made with reference to that vein. This position counsel for the plaintiff have occupied with consistency for many years, and, to do them justice, it is necessary to delve into the problem more extensively.

The development of the Tombstone district has enabled the expert to reach a pretty accurate conception of its geological formation. It is enough for our purpose to say that the underground workings disclose a series of anticlines and synclines. (The anticline is the crest of a ridge, and the syncline the lower portion.) These folds have been pressed together by some unknown original force. At and near the ground in dispute the ridges extend in an easterly and westerly direction. Across the folds, and substantially at right angles thereto, appear cracks, fissures, and crevices, into which from below saline waters were forced, containing ores in solution; and such waters, upon reaching the limestone, which is especially susceptible to their influences, overflowed, or, as it has been expressed, slopped over, from the crack, fissure, or crevice, and permeated the limestone in irregular shapes—at the point in question, largely to the easterly and somewhat northerly. The only indications upon the Goodenough which come up to the "vein, lode, or ledge" of the statute are found at the Way-Up crack or crevice, which cuts across the claim nearly at right angles; and the ore found in the anticlinal folds connects therewith, and is part of a system of irregular deposits, practically continuous. The original locators mistook the significance of the Goodenough and Way-Up outcrops, and laid out their claim parallel with the vein as they supposed it to exist. In fact, they were following the sloppings of the Way-Up crack as they permeated the limestone along the anticlinals, which could in no sense be dignified into the statutory "vein, lode, or ledge."

The present plaintiffs were forced to meet a similar question in the courts of Arizona in 1883. Among others, the experts now employed took opposite views of the question then. The facts about the original location were at that time the same, of course, as now. It was asserted by the expert witnesses that the claim was laid out upon bodies of ore which appeared in the limestone of the anticlines, and came above

the surface at the two outcrops described herein. They failed to establish the proposition. Now they are obliged to abandon the theory they then sought to establish, and adopt what may be called the "separate ledge theory." If the extensive mineralization and evidences of ore in place in the Way-Up case, contained between shale above and quartzite below, with frequent evidences of defined walls, etc., failed to reach the measure of the statutory vein, lode, or ledge, it is not easy to see how it can be expected that the insignificant results developed from the manifestation at the initial monument can fare any better.

Mr. Church struggled for the limestone ledge theory in the Way-Up case, and now, while still insisting that the claim was laid out upon the supposed limestone ledge running east and west, gravely permits the inference that, because the monument is upon a ledge which by later developments has been shown not to have been actually connected with the rest of the ores which slopped over from the Way-Up crevice, it follows that the locators had that ledge alone in their minds when they laid out the claim. In the same breath he says that the ledge on which the initial monument was placed is in a similar position to the other ores of the limestone, and is part of a system which is "essentially continuous." When the locators took their claim they were not selecting outcrops. They were claiming a location on a vein of which at least two possible manifestations were in sight, both in the blue limestone. Its length was extended in the direction which the outcrops indicated. They are manifestations of the same vein, and that vein has been found to run and does run nearly north and south. The original locators mistook the course of the vein upon which they were claiming, and staked out their claim based upon that misapprehension. This being so, the main point of law arising was settled when the issues raised by the demurrer were decided.

It is unwise to exchange mounts while traversing an extremely dangerous place. In the Way-Up case, Prof. Church would not have contended that the initial monument was on a separate ledge running parallel with the claim, because in such event he could not have maintained his position as to the extralateral rights on the Way-Up crack. The sloppings were then as now, in his view, essentially continuous. His limestone ledge theory was an absolute necessity, but it was equally important to join the location to that limestone ledge.

I am forced to find, as the judge did in the Way-Up case, that there is no ledge apexing in the Goodenough, except the one running north and south, and also find that the ore above ground at the initial monument and Way-Up were manifestations of that ledge.

I have studied with care the testimony of Howe and Staunton taken in the West in 1897. Plaintiffs were represented by counsel, and had every opportunity to probe the facts by personal examination, and to prepare their contention in reply. That evidence was offered by the defendants with two distinct purposes in mind: First, to demonstrate that a vein, lode, or ledge of ore exists running across the Goodenough in a northerly and southerly direction, crossing one or both original side lines. Second, to demonstrate that the workings toward the easterly original end line of the Goodenough are on ore, and are connected with the vein, lode, or ledge above described, and that they continue

on ore at different depths, across the easterly original end line, through the Hawkeye-Little Wonder and into the Empire. The initial monument seems to have been referred to only once. Mr. Howe says that two small circles on defendant's Exhibit No. 5 at the point H mark a point which "shows the location of the post No. 1, or the initial monument from which the official surveys of the Goodenough claim were made." It would seem that, after the depositions had been taken, it was, in the minds of counsel for the plaintiff, indisputable that both contentions had been established. It was therefore settled that the sloppings from the Way-Up crack could be traced on ore into the Empire ground. This situation drove the plaintiff to seek a new entrenchment. It was believed that the ore which found the surface at the point where the initial monument was placed could not be shown to be connected underground with the Way-Up crack. It ran for a little distance east and west, and there vanished. It had defined walls, and would serve for a vein. It was only necessary to establish that the original location was based upon that vein. In such circumstances, it is not easy to understand what reason counsel for the plaintiff has for complaining because certain indicia are absent from defendant's maps which were introduced at the Western depositions. Plaintiff's map Exhibit S gives no very definite pictorial illustration of the facts which Prof. Church presents in connection with the exploration, exploitation, and original assessment work which followed the location of the claim, and my attention is not called to anything more detailed and definite.

The plaintiff states one aspect of the law very fairly:

"All that the locator can do is to find ore, and lay out his claim parallel with the course of the vein as indicated by the surface outcrop, and take what subsequent development shows his location entitles him to."

I accept that doctrine, and act upon it. If the argument as to overlapping claims were in point, the locators could have taken more by going 300 feet northerly from the middle of the Way-Up. Defendant did not need at the outset to waste time in showing connection between the vein located and the vein it attempted to prove. That had been threshed out by plaintiff in the Way-Up case. As counsel say now, the only chance in the Way-Up was to show that the location was on the limestone ledge.

The contention is based primarily upon sections 2320 and 2322:

"Sec. 2320. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other." [U. S. Comp. St. 1901, p. 1424].

"Sec. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the

public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." [U. S. Comp. St. 1901, p. 1425.]

The decision upon the demurrer to the defendant's answer—(C. C.) 100 Fed. 910—settles the main question, and it is now practically conceded to be the law that if the locators mistook the direction of the vein, lode, or ledge manifested by the outcrops of ore upon the surface, and laid out their claim crosswise instead of lengthwise of the vein, lode, or ledge, then the original side lines of the claim become the legal end lines, and the original end lines become the legal side lines, and the locators shall have the right to follow the vein, lode, or ledge, outcropping within the surface lines of the claim, upon its downward course, if it so far departs from a perpendicular as to carry it underground beyond the legal side lines to a point where it shall be cut off by its legal end lines vertically extended in their own direction perpendicularly. The court has found as a fact that the mistake in location was made. That ends the case, unless some other point arises upon the pleadings and evidence.

Having taken the ground that defendant was a naked trespasser when it took away the ore from underneath the surface lines of the Empire claim, the plaintiff is not so situated as to make use of the principles of estoppel growing out of the contract of January 18, 1894, whether by deed or in pais. For convenience, the contract is inserted here:

"Articles of agreement made this 18th day of January A. D. 1894, between The Tombstone Mill & Mining Company of Connecticut by its General Manager, W. J. Cheyney, party of the first part, and the Empire Milling & Mining Company of Maine, by its President, party of the second part:

"First. That said party of the first part having opened up its mine to within a few feet of the dividing line between the properties of the two companies, affording an opportunity to exploit and develop the Empire mine, the property of the party of the second part, at a cost much less and in a shorter space of time than possible to be done through its own shaft or by any other method now known to the party of the second part and the party of the second part being desirous that the said exploiting and developing be done to the extent possible under an expenditure of ten thousand dollars ($10,000), the said party of the first part hereby agrees to undertake the said work for and on behalf of the party of the second part, and binds itself to prospect and develop the said Empire mine, using its best knowledge, skill and care, doing all the said work as thoroughly, perfectly and economically as if said work were being done on its own property, to report the result of its work as progress is made, and to complete said work by or before the first day

of March A. D. 1895, the said party of the second part to have all reasonable facilities afforded it for entering the property and inspecting the work, all for the consideration hereinafter named.

"Second. The party of the second part hereby agrees that the party of the first part shall have the right to repair and use the Empire shaft at its discretion and it hereby agrees and binds itself to pay to the party of the first part such sums of money as may be called for from time to time, the aggregate not to exceed the sum of ten thousand dollars ($10.000).

"Third. Should any marketable ore be extracted in the course of the aforesaid development it is hereby agreed that the said party of the first part shall sell the same on the same basis as it sells its own ores, accounting to the party of the second part therefor, and, in consideration of the covenants and agreements hereof it is mutually agreed that the party of the first part shall be allotted and paid such equitable portion of the proceeds of sale of said ores as may hereafter be agreed upon between the said parties.

"In witness whereof we have hereunto subscribed our names and affixed our seals the day and date before mentioned.

"[Seal.] The Tombstone Mill & Mining Company,
"By W. J. Cheyney, Its General Manager.

"[Seal.] The Empire Milling & Mining Company,
"By D. C. Cutler, President.
"H. S. Vanderbilt, A. C.,
"Empire M. & M. Co."

After entering into that contract, plaintiff paid $7,500 to the defendant, and in the fourth count of his complaint demands it back. The evidence shows that $2,500 was paid back to Mr. Cutler, plaintiff's president. He says that he accepted it as a personal loan, but it was paid by check to his order as president, was intended for the company, and ought to be credited to the defendant by the plaintiff. The balance, $5,000, is accounted for as having been expended on exploitation under the contract. As a matter of fact, it was expended in cutting inclines, drifts, winzes, etc., which either helped the defendant directly in getting at its own ore, or developed workings which might have shown other ore belonging to the defendant if they had not proved barren. On the principle that one cannot "eat his cake and have it," it would be unjust for the defendant to retain that money.

Let judgment be entered for the plaintiff for $5,000, with interest from March 30, 1897, and costs.

RONAN v. 155,453 FEET OF LUMBER et al.

(District Court, E. D. New York. January 8, 1904.)

1. SHIPPING—LIGHTERAGE OF CARGO—DEMURRAGE.

A steamship line contracted to carry a cargo of lumber to New York, and deliver it at any point directed, within the lighterage limits of the port. The owner directed a part of it delivered to a shipyard on Staten Island, which was outside the limits; and the carrier employed libelant's barge to make such delivery, charging the owner of the lumber with the cost of the extra towage. The barge, with all the lumber loaded thereon, was unable to get up to the dock at which lumber was delivered at the shipyard, and, the consignee declining to receive it elsewhere, she lay several days waiting until a part was taken off onto another boat. Both the steamship company and libelant knew the condition of the dock, and that

¶ 1. Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

the barge would certainly, or at least probably, be unable to reach it with the load placed on her, and it was verbally agreed between them that the company should not be liable for demurrage. *Held*, that the delay was due to the action of the steamship company and libelant in knowingly placing such a load on the barge that she probably could not reach the dock, and they could not cast the burden of their negligence on either the shipper or the consignee, and that libelant could not recover the demurrage from the steamship company, because of their agreement.

2. SAME.

A memorandum or writing delivered by the steamship company to the master of the barge after the lumber had been loaded thereon, apparently to be signed by the consignee and returned as a receipt, and which contained incomplete provisions with respect to demurrage for delay after the barge was "ready to deliver," but was not signed by either the steamship company or libelant, would not exclude proof of the parol agreement between them in that respect; nor could libelant claim that the barge was ready to deliver, when she could not reach the dock, as he knew she could not when the cargo was loaded.

In Admiralty. Suit to recover demurrage.

Peter S. Carter, for libelant.

Frank B. Sturges, for Burlee Dry Dock Co.

Edward L. Owen, for Vanderbilt.

Butler, Notman, Joline & Mynderse (Mr. Thacher, of counsel), for New York & Texas S. S. Co.

THOMAS, District Judge. Vanderbilt employed the Mallory Line (New York & Texas Steamship Company), for a stipulated through freight, to carry 239,000 feet of lumber to New York, and to deliver the same at any point directed, within the lighterage limits of the port. The shipper directed the carrier to deliver 155,453 feet of such lumber to the Burlee Dry Dock Company, whose place of business is on Staten Island. The Mallory Line employed Ronan, libelant, to make such delivery, and transshipped the lumber to the libelant's barge Herbert, and thereupon gave the master of the Herbert the following instrument (the description of the lumber is omitted, and the name of the Burlee Company was thereafter affixed):

"MALLORY LINE.

"(N. Y. & T. S. S. CO.)

"From Steamship San M
"Consignee Burlee Dry Dock
"At Port Richmond, S. I.
"One hundred & fifty-five thousand
six hundred & forty-three
(155,643) feet L W

"Voy. No. 3 New York ———— 190
"Received by Lighter.....
from Mallory Line (N. Y. & T. S. S. Co.)
the freight described hereon in good order on board:

.....

"Sign here
"Burlee Dry Dock Co.,
"Leslie.

"Unless discharged within the prescribed lay days, demurrage will be charged in accordance with the rules of the New York Produce Exchange, as follows:

"Rule 3. On parcels of merchandise of one hundred and fifty tons and over, on any one lighter or barge, the day on which the lighter or barge is ready to deliver and the two following working days (ending at 6 o'clock p. m. of the last day without regard to weather), shall be deemed lay days without charge. Parcels of merchandise under one hundred and fifty tons shall be allowed one day less.

"Rule 4. Demurrage at the rate of ten dollars per day may be charged on parcels of merchandise of fifty tons and under, on any one lighter or barge; fifteen dollars per day on parcels of over fifty tons and not exceeding one hundred tons; and twenty dollars per day on parcels of over one hundred tons.

"Rule 5. All extra towage incurred by order of merchant or employers in making a change in destination, or in making more than one delivery, shall be at the expense of the party so ordering."

When the lumber was reported to the Burlee Dry Dock Company, it was found that the excessive draft of the Herbert precluded unloading at the dock in Bodine's creek, where lumber usually was delivered to that company. There followed a delay from March 24th to April 3d, when the Mallory Line, at the request of Ronan's agent, sent down another boat to relieve the Herbera of something of her burden, and thereby allow her to get up to the dock in the creek, where she finished discharging on April 9th. Ronan brought suit against the Burlee Company for demurrage, the Burlee Company brought in Vanderbilt, and the latter brought in the Mallory Company. Is any demurrage due, and, if so, who should pay it?

Ronan and the Mallory Company contracted by parol for the Herbert's service before the writing was delivered, and stipulated that the latter should pay no demurrage for detention at the Burlee dock. This special exemption arose from the fact that both parties knew that there was difficulty expectable there in making delivery by the one vessel carrying such an amount of lumber. The Mallory Line stipulated to deliver within the lighterage limits. These limits were established by the Mallory Line, and Vanderbilt knew the extent of the carrier's obligation in that regard. Vanderbilt knew that Burlee's dock was without the lighterage limits, and that the expense of towing beyond the established lighterage limits would fall upon him; and, when the bill of $8 for such towage was presented to him by the Mallory Line, he paid the same, while the Mallory Line bore the expense of $1 per thousand feet for the services of the Herbert in carrying the lumber to the lighterage limits. Thus, as between Vanderbilt and the Mallory Line, the latter was not obliged, by its primary contract of shipping, to deliver at Burlee's dock. But now observe what Ronan and the Mallory Line did. The Mallory Line continued its service as carrier to the lighterage limits, and thereupon assumed a new obligation of towage beyond those limits for purposes of delivery at the dock. Both Ronan and the Mallory Line knew, or should have known, that the towage service could not be effected by the Herbert with the burden put upon her. The matter was discussed between them, so that, if Ronan did not know, he was warned, that there was risk, and that he must assume it. Notwithstanding this, Ronan received a cargo that could not be delivered, and which, as between himself and the Mallory Line, he verbally agreed to deliver at his own risk, and from the consequences of which, both before and after the service, he ab-

solved the Mallory Line. The question now discussed is not whether the parol agreement was merged in the writing above, but whether, in addition to presumed knowledge of conditions at Burlee's dock, Ronan and the Mallory Line did not actually know that the service could not be performed in the manner undertaken. If so, they had no right to attempt the service at the risk of Vanderbilt. He had a right to expect that the Mallory Line, while charging him for towage services, would employ a suitable vessel, fittingly loaded, to carry the lumber to a dock whose limitations the Mallory Line well knew from experience. Instead of this, the Mallory Line sent a vessel so heavily burdened that the towage could not be finished until she was later relieved of a portion of her load by the Mallory Line, which line now seeks to cast the consequences of its imprudent action upon the shipper. The facts are made so plain by the evidence offered by the Mallory Line that it would be inequitable to permit it to recover from an innocent shipper damages which it thus incurred. Mallory owed Vanderbilt the duty of lightering or towing with ordinary foresight, and it is of no consequence that Mallory employed Ronan, for, as between Mallory and Vanderbilt, the services were performed by Mallory. Ronan knew what the Mallory Line knew of the condition at Burlee's dock, and, with the information of the embarrassments fully in mind, assumed the service. Hence Vanderbilt is under no liability either to Ronan or the Mallory Line. So, also, as between the Mallory Line and Ronan, the former should be acquitted. Both entered with full knowledge into an impracticable undertaking. Both constructively and actually knew that the service could not be performed, and arranged that the Mallory Line should not be holden. Ronan's agent, Myers, who made the contract with the Mallory Line, testified that he agreed that the Mallory Line should not be held for this demurrage; and Ronan, verbally and by letter, confirmed such exemption after the question of liability arose. In fact, as late as April 16th, Ronan wrote Mallory as follows:

"We do not see why you should worry about this matter as your contract ceased when the lighter Herbert reported to the Burlee Dry Dock Co. They (B. D. D. Co.), being unable to furnish her a berth to discharge her lumber, which caused the delay, and we are therefore holding the lumber for our charges."

Here is an interpretation of the contract by Ronan himself. This was after the libel had been filed against the Burlee Company, and after the alleged breach of duty. But the libelant, in the face of this evidence, is understood to assert that the writing, improperly called a "bill of lading" (The Delaware, 81 U. S. 600, 20 L. Ed. 779), binds the Mallory Line for these demurrage charges. The circumstances under which the writing was given are imperfectly presented, but it would appear that it was handed to the captain of the Herbert, who was not a witness, after the delivery of the cargo to the Herbert. It is not shown to have been signed either by the master or agent of the Herbert. Printed at the head are the words "Mallory Line," underneath "N. Y. & T. S. S. Co.," and at the end appear two capital letters. What they are—whether the initials of the captain or some agent of the Mallory Line, or neither—does not appear. It is inferable that the paper is on

a form used by the Mallory Line. Hence, so far as it purports to embody the agreement between Ronan and the Mallory Line, the assent of the Mallory Line to its terms may be inferred. Saunderson v. Jackson, 3 Esp. 180 (2 B. & P. 238); Schneider v. Norris, 2 M. & S. 286. In fact, it was an incomplete memorandum, probably handed to the master of the Herbert for the purpose of showing the shipment and the consignee, and was intended to be signed by the Burlee Company upon receipt of the cargo, and thereupon returned to Mallory; thereby operating as evidence that Ronan had carried and delivered the goods, and that the consignee had received them. It may be used as evidence of the agreement, but, at least so far as it is incomplete, it does not preclude other parol evidence thereof (Renard v. Sampson, 12 N. Y. 561; Routledge v. Worthington Co., 119 N. Y. 592, 23 N. E. 1111; Barker v. Bradley, 42 N. Y. 316, 319, 1 Am. Rep. 521; Potter v. Hopkins, 25 Wend. 417; Juilliard v. Chaffee, 92 N. Y. 529), unless the law implies obligations that may not be shown by extrinsic evidence to have been waived (The Delaware, 81 U. S. 579, 20 L. Ed. 779).

In the case at bar, while the writing contains printed matter, that, "unless discharged within the prescribed lay days, demurrage will be charged in accordance with the rules of the New York Produce Exchange," yet rule 3, incorporated in the writing, only defines what shall be included in lay days, and rule 4 prescribes the daily compensation for delay. But it will be observed that the Herbert was not "ready to deliver," according to the rule incorporated in the writing, nor were any lay days prescribed in the writing. The Herbert was not ready, because she could not reach the place of delivery. Whose fault was that? Her owner knew that she could not be "ready to deliver" when he took the cargo. The Herbert was lightering a carrying ship that could not reach Burlee's dock to make delivery. The very purpose of using the Herbert was that she might reach a point that the ship could not reach. But shall the lighter be heard to say that her draft was too great to reach the dock and be ready for delivery, and that she could lie sluggishly outside and hold the freighter for indefinite delay? When there is added to this the lighter's knowledge that she could not be ready to make the delivery, or that there was risk that she could not, and that, in anticipation of the danger, she agreed that the carrier should not be liable for injury flowing from the conditions which disabled the lighter from readiness to deliver, upon what theory of justice or law can the carrier be held therefor, and how is the fragmentary writing produced the best evidence of the agreement between the parties? It is concluded that the libelant's attitude is not tenable.

The remaining question is whether the Burlee Company is liable for demurrage. It will be observed that the Herbert waited from March 24th, the date of its arrival at the vicinity of the Burlee dock, to April 3d, before her load was lightered, although she learned at once upon her arrival that she could not discharge on account of the draft. After learning this, it would seem that she should have procured relief within a reasonable time, and then demanded from the Burlee Company such damages as arose from any default on its part. The evidence tends to show that, after the Mallory Line sent a barge to lighten the load of the Herbert, the work was done in a day and a half.

King, the agent of the Mallory Line, states that, the day after the Herbert arrived at Burlee's dock, he heard from Mr. Myers, Ronan's agent, that there was trouble, but that the latter did not ask for help. He testified that Mr. Myers said:

"There wasn't enough water go up the slip, and they were trying to get Burlee to put some overboard, and then let the boat go up, and he would let me know in a day or two what they did, and I heard in three days after that. * * * He told me Ronan had sent Mr. Vanderbilt down there, and he could get no satisfaction. * * * Next time he came up to the office, and wanted to know if we couldn't do something to get the boat light; he had another load for her; Burlee was willing to do nothing—wouldn't let them put it overboard or do anything, in fact. Q. That is the time you sent the Hitchcock down there? A. Yes, sir."

Myers testified:

"Q. Please state the conversation you had with Mr. King when you found the Herbert, after arrival, couldn't discharge at Burlee's dry dock? A. The barge had been there seven or eight days, and the captain reported to me the lumber was in danger of sliding off the boat, the way she listed, with the bank on one side. I called up Mr. King, and told him there was no use trying to deliver the lumber; they wouldn't receive it; I was going to put it in storage; it was in danger of sliding off the barge, and the barge was being delayed; it was very expensive. Q. Did you ask him to assist you in the discharge of it? A. I don't remember asking him to assist me. Q. How long after the barge first arrived there, on the 24th of March, did you notify Mr. King you were not discharging the cargo? A. I believe, within a day or two after the barge arrived there, and we found we couldn't get to the dock; there wasn't sufficient water."

All this shows little diligence on the part of the Herbert. But it is urged on the part of the libelant that, although there was not sufficient water to go up to the dock by entering the Bodine creek, yet the cargo could have been lightened by the use of the barge's boom, whereby certain of the cargo could have been swung onto Dock B. Myers, Ronan's agent, states:

"That barge could swing 30 to 40 feet. It is a 65-foot boom, and could easily swing from 30 to 40 feet."

The water for 15 feet in front of Dock B was too shallow, but the suggestion on the trial is that the barge might have been brought up alongside the outer limit of the shallow part, and the lumber carried thus over on to the dock. Leslie, representing the Burlee Company, testified that the undertaking would have been dangerous, and that he did not think that it was practicable. If he had consented to it, assuming that his consent was asked, and there had been an accident to the barge, claim would have been made against the Burlee Company for insufficient dockage facility, and the claim would have been based upon its agreement to allow the discharge to take place at that point. However, the evidence shows the situation, and what happened. Conklin, Ronan's agent, testified that, when the barge Herbert arrived—

"I asked him [Leslie] where he was going to put that lumber, and he mentioned to put it in the mouth of the creek, where that other lumber was. I told him the boat wouldn't float in there; there wasn't water enough. He said he knew that, and he would have to get it there somehow or other; and we pulled in as close as we could. We couldn't get up there. There was a place to the end of the dock at the end of the bulkhead [meaning Dock B] that I thought we might take part off. * * * What did he say when you said you might take part of your cargo off at that place? A. He said 'No.' I

can't remember the exact words, but he give me to understand he wouldn't have it there; that he wanted it in the mouth of the creek. Q. Could the Herbert have gone to the place marked 'B' at the bulkhead and discharged part of her cargo? A. Part of her cargo; yes, sir. Q. What was the idea of your having her go to the place B on the diagram, at the bulkhead, to discharge part of the cargo? A. So as to take off part, and she would float in the creek, and we would thereby save several days' time. Q. Would Mr. Leslie allow you? A. He would not allow it. Q. So you did what? A. Waited until they sent a lighter to take some off. Q. That lightened up the Herbert, and you went into the creek? A. Yes, sir. Q. There would have been no difficulty with your barge, if she did lie aground at B, to discharge, would there? A. No, sir. Q. And the lumber that was eventually discharged from the Herbert on the dock at this creek, did it extend anywhere towards the bulkhead marked 'B'? A. Yes, sir."

Here is no suggestion of swinging the lumber across some indefinite space by use of the boom.

Upon cross-examination this witness stated that at the time he had the bow 30 feet from the corner of the bulkhead, and then:

"Q. What was the nearest you got the bow of the lighter to the bulkhead? A. To the front of the bulkhead? 30 feet. Q. What was the nearest the stern was at that time? A. Oh, further. I don't know how far."

He further states that he did not swing the stern around, because Leslie didn't want the stuff there. Leslie stated:

"I don't remember any conversation of that kind at all. We had some talk about the difference, but I don't remember that."

It further appears that that was not the place for the delivery of the lumber; that that portion of the dock was used for other purposes —that is, for boat building, and not for receiving lumber. Leslie testified: That Conklin came and told him that one of his boats was coming down there with 150,000 feet of lumber. "I said, 'How much water is she drawing?' I think he said, '9 or 10 feet.' I said, 'You know as well as I do she will never go up the creek.' We talked quite a little while, and I said: 'It can't possibly be she has 150,000 feet for us. If she has any for any one else, she better go take it off first'— and talked that way, of course. But he knew the creek just as well as I did, and knew she couldn't get up there." That a barge was discharging in the creek, and that the Herbert did not go on the bulkhead marked "B," but on the bulkhead that is marked "A." That at the southerly corner of the bulkhead marked "B" there was only 3 feet of water at high tide. That the bulkhead, running from south to north, was about 175 feet. That "we build our boats there, and launch them over there, and I presume there were boats building. I couldn't tell you just that day." That the reason he did not discharge at B was because it was too shallow. That the water at B is about 6 feet at high water, with a little more at the northerly corner. That where the water is 3 feet it is entirely dry at low water, and that along B it would be about 2 feet at low water, and about 7 feet at high water. That no yellow pine had been discharged, except in the creek, for three years. That a light cargo of lumber was discharged at the west end of B.

It is concluded that the Burlee Company was under no obligation to consent to the delivery of the lumber at an unaccustomed, inconvenient place, nor to consent to an attempt to deliver the lumber at a point in

front of Dock B, where it would be dangerous to allow the Herbert to lie. Conklin's theory upon the trial was that he would have swung the vessel around so that she might lie out at this distance, and discharge on a dock devoted to boat building. The fact is that the Herbert was sent there with such draft that she could not discharge in the usual way, and at the proper place, and Conklin's suggestion was that some unusual way and place might be adopted to discharge a portion of the load at a place where it did not belong. Even if there were no danger in it, and even if the Burlee Company might, in a spirit of undemandable helpfulness, have allowed the attempt to be made, at the risk of disturbing its boatbuilding, and at the inconvenience of receiving the lumber where it was not usually delivered, and from which place it must be removed, and at the risk of being charged with negligence if injury arose from the low water, it was not obliged to enter into such arrangement. It was in fact not obliged to make any experiments for the purpose of lifting Ronan and the Mallory Line—one or both—out of difficulty which they had, with full knowledge, brought upon themselves.

It is therefore concluded that the libel should be dismissed as to all the parties.

THE VALENTINE.

(District Court, E. D. New York. July 7, 1904.)

1. SHIPPING—LOSS OF CARGO—NEGLIGENCE—STATUTES.

Where the owner of a vessel, while in her home port, permitted all of her crew to leave for the night, except the fireman, cook, and a deck hand, and permitted them to sleep without maintaining a proper watch, and the fires to be banked so that no steam was available to work the pumps in case of an emergency, he was guilty of negligence, rendering the vessel liable for loss of cargo by the sinking of the vessel from injuries caused by an ice jam, notwithstanding the Harter act (Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), providing that, if the owner shall exercise due diligence to make the vessel seaworthy and properly manned, he shall not be liable for negligence in the navigation or management thereof, etc.

Richards & Heald (Charles M. Hough and Artemas Ward, Jr., of counsel), for libelants.

Butler, Notman, Joline & Mynderse (Frederick M. Brown, of counsel), for claimant.

THOMAS, District Judge. Harris undertook to transport certain boxes of tomatoes from Pier 42, Brooklyn, to Pier 32, North river, and for that purpose caused them to be loaded on the steam lighter Valentine. On March 6th, upon reaching Pier 32, in the early evening, as the Valentine's master testified, there was a vessel across the end of Pier 32, obstructing his entrance to the slip which had been prepared for him on the southerly side thereof, and for that reason he went to Pier 42, where the lighter was made fast outside of a barge lying on the northerly side of the pier. Shortly thereafter the captain and engineer of the lighter went home for the night; leaving on the vessel the cook, the fireman, and a deck hand. The wind was at the time northwest,

but shifted from 10 to 11 p. m. to the west, and thence to the southwest, where it remained; its velocity decreasing during the night from 13 miles at 8 p. m. to from 6 to 7 miles during the early hours of the following morning, while the temperature ranged from 34 degrees above zero at 8 p. m. to 29 degrees at 5 a. m. of March 7th. Broken ice was floating in the slip, and made its way between the Valentine and the barge alongside which she was lying. Maxon, who was at once cook and deck hand, stated that before he retired, which was at about 9 p. m., he tried to poke out the ice between the Valentine and the adjoining barge, but was unable to do so, as it kept floating in. He said there were "good, large pieces, probably weighing couple hundred pounds, some of them, and some of them less." During the night Maxon felt the Valentine, "time and again, surging back and forward, and brought up pretty heavy against the scow we was moored alongside of. I decided not to get up to see what was going on, because there was a man supposed to watch. * * * Q. Was the surging merely rising and falling, or bumping? A. Bumping, as she smashed against the side of the other boat. Q. A strong jar, was it? A. Yes, sir." The deckhand retired about the same time and slept. Another Norwegian—Olsen by name—was asked if he kept watch, and answered, "I kept the watch in one way, I did." His way was this: He went to bed at about 10 o'clock, but was in and out several times between 10 and 2 o'clock, but between 2 o'clock and the time of the sinking of the boat, which was about 4 o'clock in the morning, neither he nor any other person gave the slightest attention to the vessel. There was no steam in the boilers, so that the pump could not be worked. There was no way of sounding for water. By going below, the presence of water could be determined, but Olsen did not go below after 10 o'clock. Had he done so, the pumps could not be worked. The vessel sank. The men escaped, but much of the cargo was dumped overboard from beneath the fastened tarpaulin which covered it. Some of the cargo was rescued at the instance of the libelant's agent, who appeared early upon the scene the following morning, and some quite minor part of it was carried away by people who gathered it out of the slip. For the loss and injury to the cargo, the libel has been filed. Within a few days the vessel was raised, and later on a hole was discovered in the starboard side, in the neighborhood of her water line, as it would be with the cargo that she carried. The probabilities are that the ice between the two vessels, under the influence of the water disturbed by the wind and tide, together with the swells of neighboring vessels, caused the hole and the resulting accident. She was a very old boat, having been built in 1873, and rebuilt and repaired at various times thereafter, and was seaworthy, so far as the timber was concerned at the place where the hole was made. During the night the boat was practically deserted. She was substantially without a crew. She had no watchman, in any proper sense. The equipment for pumping the water was valueless, since it was inoperative. The negligence in the care of the cargo was gross.

The remaining question is whether the owners may be relieved by virtue of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]). Section 3 of the Harter act requires that the owner "shall exercise due diligence to make the said vessel in all

respects seaworthy and properly manned, equipped and supplied," and that in such case "neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, * * * be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried," etc.

The loss in the present case arose from fault in the management of the vessel at Pier 42, but the fault was not initiated there. At that place the lighter had no watchman during certain important hours of the night, and during his absence the cause of the sinking was at work, and the remnant of the crew awoke only to find the catastrophe present. But they slept according to a custom obtaining in their employment. Had there been a watchman awake, instead of asleep, he could not have sounded for water, but he could have gone below and looked for it, and discovered it if present. Had he discovered the leak, it may be that he could have rendered or procured aid. But if this were impossible, he could, under proper management, have started the pumps. But in the present case he could not have done this, for there was no steam, because the fires were banked. The water was cold, and it would have taken an hour and a half to get up steam. There was no engineer. There was no captain. The fireman was asleep throughout the whole night, and all this seems to have been according to rule. The master of the Valentine testified:

"Q. What is the customary mode of taking care of such a boat as the Valentine at night when she is not running? A. There is a certain amount of the crew that are supposed to stay around. The deck hand, cook, and fireman are supposed to stay around. The engineer and captain are always married men, and they go home at night when the boat is laid up; but they have a cook, deck hand, and fireman on, who are supposed to stay on board the boat. Q. Are you speaking now of the general custom, as you have known it for 25 years? A. Yes, sir; the general custom on all the lighters of New York Harbor. Q. Is it customary to maintain any person in charge, whose duty it is to stay awake? A. I have never known it to be. Q. Is it sufficient protection to have some person on board, even though he doesn't stay awake? A. It is for different reasons. For instance, the boat can be blowing off in the night, and nobody on board of her. The fireman knows enough to go down and regulate the fire, and oftentimes the boiler commences to blow, and you want somebody on board the boat that understands something, and that is why you always want somebody on board the boat that is familiar with the boiler. He can go down and regulate the fire, and see what is the matter. That is about the only reason why we ever keep anybody on board the lighters at night. The cook and deck hand generally stays on board."

Indeed, if the owner had equipped the vessel with a proper engine and boiler, he had suffered the practice to prevail of allowing it to become useless at night. If he had manned the lighter with proper engineer, captain, fireman, and watchman, which is improbable, he had unmanned the vessel by allowing the captain and the engineer to leave the vessel at night; and it seems that a watchman is not expected to remain awake continuously. When the lighter sprung aleak she had no commander, no engineer, no operative engine, no one to watch for the danger. If at the inception of the undertaking the lighter was "seaworthy, and properly manned, equipped, and supplied," at Forty-Second street she

was not properly manned, equipped, or supplied, and the owner apparently knew she would not be—did not expect her to be—for of a habitual practice of a vessel in her home port the owner may be presumed to have been aware. Indeed, one of the defenses is that what was done was done according to custom. But customary abandonment of equipment, departure of the crew, or disregard of service by the crew, does not create a right that may be asserted against cargo owners who confide their property to the vessel in reliance upon proper equipment and qualified crew. It is not understood that an owner is excused by the Harter act, if, after proper equipment and manning, he adopts a course of business that renders both inefficient. This is a case of a vessel without either proper equipment or manning at Pier 42, and it is so because the owner presumably consented that it should be so. Hence the negligent act of the crew and negligent condition of the lighter at Pier 42 must be regarded as premeditated and expected by the owner. The Harter act intends that owners may diligently equip and man their vessels and send them on their voyages, whereupon the shipowners and cargo owners must trust that their property will find safety in a vessel carefully provided and furnished, and in a crew vigilantly selected for their capacity and fidelity. But if the owners of the ship know that on the voyage, or at ports intermediate or otherwise, or on the seas, the fires will be banked, the water for steam allowed to get cold, and that the captain and engineer will go ashore, and the rest of the crew will go to sleep, and that there is no method of being forewarned of leaks, and that all equipment for avoiding injury therefrom will be rendered useless; and if the owners approve, suffer, or connive at such custom or practice, such vessel is not properly manned, nor do the owners intend that the initial equipment and crew shall perform the duties for which they are provided. If the Harter act was expected to absolve owners under such conditions, it goes beyond its present understood purpose, and allows them to make provision for negligent acts and omissions, and for undoing on the voyage what they have done before the voyage began.

Pursuant to these views, the libelant should have a decree.

In re TWEED.

(District Court, N. D. Iowa, C. D. August 1, 1904.)

No. 546.

1. BANKRUPTS—CONDITIONAL SALES—INVALIDITY—TITLE.

Orders for goods by which the purchaser agreed that all the goods on hand, and the proceeds of the sale of goods received under the contract, were held in trust, subject to the seller's order, until the buyer's obligations to the seller had been paid in full, title to remain in the seller until the price shall be paid in cash, etc., were in effect conditional sales, and, being void as against creditors of the buyer without notice, for want of record and acknowledgment as required by Code Iowa 1897, § 2905, the property purchased passed to the buyer's trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], declaring that such trustee shall acquire title to all prop-

erty which might have been transferred by the bankrupt, or levied on and sold under judicial process against him.

2. SAME—RESALE.
Where a buyer of carriages under a conditional sale thereafter executed an agreement by which he contracted to hold four of the carriages in trust for the seller, and that the money received from a sale of the goods should belong to the latter, such subsequent agreement, if treated as a resale of the carriages to the seller, was void as against purchasers or creditors of the buyer without notice, for failure to comply with Code Iowa 1897, § 2906, declaring that no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession, is valid against the vendor's existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed and acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides.

3. SEQUESTRATION OF BANKRUPT'S PROPERTY—PETITION—FILING.
The filing of a petition in bankruptcy operates as an attachment or sequestration of the bankrupt's property from the date of such filing, which sequestration applies to property held by the bankrupt under conditional contracts of purchase, the conditions of which are invalid for failure to comply with state statutes, as well as to property unconditionally owned by him.

4. SAME.
Where, at the time petitioner purchased certain carriages from the S. Co., which it had previously sold to the bankrupt under a conditional contract of sale, petitioner knew that the carriages were in the bankrupt's possession, he was charged with knowledge of the right of the bankrupt to sell the same, and of their liability to be levied on and sold under judicial process against the bankrupt, the conditional contracts being void for failure to acknowledge and record as required by Code Iowa 1897, § 2905, and hence petitioner having failed either to take possession, or have an instrument in writing transferring title to him signed, acknowledged, and recorded as provided by section 2906, he was not entitled to the carriages as against the bankrupt's trustee.

In Bankruptcy. On petition for review of the order of the referee denying the petition of H. J. Indvik, asking that he be adjudged owner and entitled to the possession of four carriages in the possession of the bankrupt at the time of the adjudication, and that the trustee be ordered to turn said property over to him.

Andrew Miller, for petitioner.

REED, District Judge. February 24, 1904, Torger G. Tweed, a dealer in carriages and farm implements at Forest City, Winnebago county, Iowa, was adjudged a bankrupt upon his own petition, filed February 23, 1904. A trustee of his estate was duly appointed, who has taken possession of the property of the bankrupt, including four carriages, which are involved in this controversy. March 31 and July 9, 1903, respectively, the bankrupt gave to the Staver Carriage Company, of Chicago, Ill., written orders for a number of carriages, including those in question, which orders were as follows:

"Staver Carriage Co., Chicago: Please ship the following goods at once, of the value herein specified, and for which we agree to give our notes, on your usual form, on receipt of invoice, payable as per terms stated below. * * *

"It is agreed that all goods on hand, and the proceeds of sales of goods received under this contract, whether in cash, notes, book accounts, or other proceeds, are to be held in trust for and subject to your order until we have paid in full all our obligations due or to become due to you. * * *

"Title to and ownership of all goods shipped under this contract shall remain vested in you until the price thereof shall be paid in cash, or until the notes given under this contract are paid; but nothing in this contract shall be deemed as releasing us from our obligation to pay for said goods, as per the notes hereby contemplated. * * *

"[Signed] T. G. Tweed."

The carriages so ordered were delivered by the carriage company in pursuance of these orders to the bankrupt, and accepted by him. The contracts were never acknowledged by either party thereto, and were never recorded as provided by section 2905, Code Iowa.

October 21, 1903, the Staver Carriage Company and the bankrupt made the following agreement in writing:

"Agreement between Staver Carriage Co., of the first part, and T. G. Tweed of the second part: That I, T. G. Tweed, will hold in trust four jobs of first party's make, viz., #656 carriage; 1 #160; 2 #100. The moneys for sale of said goods shall belong to the Carriage Co.

"[Signed] T. G. Tweed."

It is claimed that the consideration for this agreement is that the bankrupt was to have credit for the cost of the carriages so described, upon his notes or indebtedness to the carriage company. It was not acknowledged, and was never recorded. The carriages described in this writing are those involved in this controversy. They remained in the bankrupt's stock of goods after the writing was made until he was adjudged bankrupt, no change of possession having taken place. February 19, 1904, the petitioner, H. J. Indvik, claims to have purchased of the agent of the Staver Carriage Company these four carriages, and to have given his promissory note for $175 to said company therefor. The petitioner did not take possession of the carriages, but left them with the bankrupt. No memorandum or agreement in writing of the sale to the petitioner was made or signed by either the bankrupt or the carriage company. The carriages were taken possession of by the trustee upon his appointment and qualification, as part of the property of the bankrupt. They were not scheduled by the bankrupt as a part of his estate, and he testifies that he does not know that he was ever credited by the carriage company with their cost price upon his notes, or that he charged said company therewith upon his own books.

Section 2905, Code Iowa 1897, is as follows:

"No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages."

The orders or contracts of March 31st and July 9th, whereby the bankrupt obtained possession of these carriages, were in effect conditional sales thereof by the carriage company to this bankrupt; and, not having been acknowledged and recorded, the conditions are void, under this section, as against creditors or purchasers from the bankrupt without notice. Moline Plow Co. v. Braden, 71 Iowa, 141, 32 N. W. 247; Wright v. Barnard, 89 Iowa, 166, 56 N. W. 424; Norwegian Plow Co. v. Clark, 102 Iowa, 31, 70 N. W. 808. They are also void under section 67a of the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 564 [U. S.

Comp. St. 1901, p. 3449]. This being true, these carriages, prior to the filing of the petition in bankruptcy, might have been transferred by the bankrupt, or levied upon and sold under judicial process against him, and upon the adjudication of bankruptcy, the title to them would pass to the trustee upon his appointment and qualification. Section 70a (5), Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]).

The agreement of October 21st provides that the bankrupt shall hold these four carriages in trust for the carriage company, and the moneys for the sale of the goods shall belong to that company. This clearly contemplates that the bankrupt still had the right to sell the goods. There was no change of possession, and this agreement does not change the effect of the original contracts under which the bankrupt obtained the property.

If it be said that this transaction was a resale of these four carriages to the carriage company for the cost price thereof, to be credited upon the indebtedness of the bankrupt to that company, then the transaction would be within the provisions of another section of the Code of Iowa, which is as follows:

"Sec. 2906. No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides. * * *"

This not having been done, the title to or right of the carriage company in these four carriages might still have been defeated by a sale by the bankrupt, or seizure and sale under judicial process against him; and, as the property remained in the possession of the bankrupt at the time of the filing of the petition in bankruptcy, that filing was an attachment or sequestration from that time of all the property of the bankrupt for the benefit of his creditors. Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405. Such sequestration applies to property held by the bankrupt under conditional contracts of purchase, which conditions are invalid under statutes like section 2905 of the Code of Iowa, as well as to property unconditionally owned by him. In re Pekin Plow Co., 112 Fed. 308, 50 C. C. A. 257 (Court of Appeals of this circuit).

It is urged that the petitioner purchased these carriages from the Staver Carriage Company, and that the provisions of the Code of Iowa and the bankruptcy act above referred to have no application to this transaction. The bankrupt, however, was in possession of the property under conditional contracts for the sale thereof to him, which conditions are void as to creditors of and purchasers from the bankrupt without notice of such conditions. As to such, the title of these carriages was absolute in the bankrupt. To revest that title in the carriage company, and prevent its being transferred by, or seized and sold under judicial process against, the bankrupt, that company was required to either take possession of the carriages, or have an instrument in writing, signed, acknowledged, and recorded as provided by section 2905 of the Code of Iowa. Failing to do this, its right to the property might

still be defeated by a sale thereof by the bankrupt, or its seizure and sale under judicial process against him. When the petitioner, Indvik, purchased the property, he knew that it was in the possession of the bankrupt, and was thereby charged with knowledge of the right of the bankrupt to sell the same, and of its liability to be levied upon and sold under judicial process against him. To protect himself against such transfer or seizure and sale, the petitioner was required either to take possession of the property, or have an instrument in writing signed, acknowledged, and recorded as provided by section 2906 of the Code of Iowa. His failure to do this was his own fault, and the court cannot relieve him from the consequences thereof. The carriages, therefore, still remaining in the possession of the bankrupt at the time of the adjudication, the title to and right of possession of them passed to the trustee upon his appointment and qualification.

The order of the referee therefore must be, and is, approved.

GRIGGS, COOPER & CO. v. ERIE PRESERVING CO.

(Circuit Court, W. D. New York. July 5, 1904.)

No. 199.

1. TRADE-MARKS—INFRINGEMENT—INJUNCTION—JURISDICTION.
   A federal court has jurisdiction of a suit between citizens of different states to enjoin infringement of a trade-mark, though the actual value of the trade-mark is not alleged, and it is not averred that it will be destroyed by defendant's unlawful use.

2. SAME—ASSIGNMENT—RIGHT CONVEYED.
   An instrument reciting that F. grants, licenses, assigns, and sets over to G. and its successor in business the absolute and exclusive use of certain trade-marks, and all benefits and advantages to be derived therefrom and enjoyed therewith, in and to certain states, such absolute and exclusive use to be held and enjoyed by G. for its own use and behoof, but during such time only as it and its successors shall continue in business, as fully and entirely as it would have been held by F. had this agreement not been made; provided, however, that G. shall not use any label which shall imitate or conflict in color or design with the label used by F.; and provided that the agreement shall not prevent F. or its successors from using such trade-marks in said states, provided it shall not adopt any new label which shall imitate or conflict in color or design with the label of G.—does not give G. a mere license, but assigns the exclusive ownership and good will in the trade-marks, within the specified states, merely reserving to F. certain permissive rights of personal use; and so is sufficient to entitle G. to maintain a suit to enjoin infringement by a third person of the trade-marks in the specified states.

3. SAME—WHAT CONSTITUTES INFRINGEMENT.
   The words "Home Comfort" are an infringement of complainant's trade-mark "Home Brand," used on canned goods, the word "Home" being the essential feature of it.

Duell, Megrath & Warfield (Morphy, Ewing & Bradford, of counsel), for complainant.

Macomber & Ellis, for defendant.

HAZEL, District Judge. This is a bill in equity to restrain the defendant from using the words "Home Comfort" as a trade-mark

placed on canned fruits, jellies, and sauces. The complainant's trade-mark consists of the arbitrary words "Home Brand" for the same vendible commodity. The case was heard on the pleadings and an agreed statement of facts. The question of jurisdiction, which was raised, must, therefore, be determined from those papers. The allegation of diversity of citizenship between complainant and defendant, both of which are corporations, is not denied. Complainant's business is that of wholesale grocer at St. Paul, Minn. Defendant is a manufacturer of canned vegetables and fruits at Buffalo, N. Y., with trade connections throughout the United States. The amount in controversy, according to the bill, exceeds the sum of $2,000. The record does not specify the amount of damages sustained by the orator, and no claim to recover any amount was asserted on the hearing. The actual value of the orator's common-law rights to the trade-mark is not specifically stated or proved. Neither is it averred in the bill that its trade-mark will be destroyed by defendant's unlawful use thereof. Hence the objection is urged that the court is without jurisdiction. This point will first be briefly considered. It is not necessary that the amount of actual damages sustained be proved for this court to retain jurisdiction and decide the question of infringement. It is enough that the parties are citizens of different states, and that irreparable damage may be sustained by a continuance of the alleged wrongful acts of the defendant. The value of the object to be gained by a bill in equity is the test of jurisdiction. The injury from which relief is sought is the wrongful appropriation and infringement by defendant of complainant's arbitrarily selected word "Home" as a trade-mark. The remedy invokes the restraining power of the court. To restrain and enjoin future trespasses upon property rights in a proper case is one of the privileges conferred upon a court of equity, and the value derived from the exercise of such power is often difficult of ascertainment. Symonds v. Greene (C. C.) 28 Fed. 834; Johnston v. City of Pittsburg (C. C.) 106 Fed. 753; American Fisheries Co. v. Lennen (C. C.) 118 Fed. 869; Gannert v. Rupert (C. C. A.) 127 Fed. 962. The objection that the court is without jurisdiction is therefore overruled.

The record shows that in the year 1889 complainant's predecessor, Griggs, Cooper & Co., a partnership, manufactured and sold articles of merchandise, consisting of canned jellies, fruits, and sauces, under a common-law trade-mark "Home Brand." Except as hereinafter stated, such use and appropriated right has continued uninterrupted from that time, and on August 17, 1898, a trade-mark consisting of the arbitrary word "Home" was reregistered (No. 31,881) by complainant in the office of the United States Commissioner of Patents. The original registration was for the words "Home Brand." Soon afterwards complainant learned that Fry & Co., a Pennsylvania corporation, were the first to use and adopt a trade-mark "Home Brand" as a distinctive mark of identification for the manufacture and sale of canned jellies, fruits, etc. Such prior appropriation was dated some time in the year 1877. Accordingly, on June 9, 1900, complainant, by written assignment from Fry & Co., acquired an exclusive right to use the previously adopted marks "Home Brand" and "Home," as specifically appropriated within certain territory comprising the states of Minnesota,

Wisconsin, North Dakota, South Dakota, and Montana. The trade-marks mentioned and previously appropriated by Fry & Co. in the manner stated were registered in the office of the Commissioner of Patents. Their numbers are 51,130, registered September 4, 1877, and 11,850, reregistered January 6, 1885. The specification of the reregistered mark declares that the essential feature of the trade-mark "Home Brand" is the word "Home." The assignment from Fry & Co. to the complainant was in the following words:

"And the said party of the first part for itself and its successors, does hereby grant, license, assign and set over unto the said parties of the second part, and their successors in business the absolute and exclusive use of all and singular the hereinbefore mentioned trade-marks dated July 6, 1885, and March 29, 1892, and numbered respectively, 11,850, and 20,913, and all benefits and advantages to be derived therefrom and enjoyed therewith, in and to the several states of Minnesota, Wisconsin, North Dakota, South Dakota and Montana, but in no other place or places whatsoever, such absolute and exclusive use to be held and enjoyed by the said parties of the second part for their own use and behoof, but during such time only as they and their successors shall continue in business, as fully and entirely as the same would have been held by the said party of the first part had this agreement not been made: provided, however, and it is hereby further agreed by and between the parties hereto, that the said parties of the second part shall not during the term hereby granted, use or employ any label or labels relating to said trade-marks which shall imitate or in any manner conflict in color or design with the label or labels relating to the said trade-marks now used and enjoyed by the said party of the first part; and provided, further, that nothing in this agreement contained shall prevent the said party of the first part, or its successors, from using and enjoying the said trade-marks hereby assigned as aforesaid on the classes of goods heretofore mentioned in the said several states, or in any of them, provided the said first party shall not adopt or use any new label or labels not already used by it, which shall imitate or in any manner conflict in color or design with the label or labels relating to said trade-marks now used by the said parties of the second part."

The provisions appended to the assignment at the end of the clause just quoted in effect preserved to the assignor the right to use the trade-mark in the territory specified in the assignment on condition that no labels would be used or adopted by it in imitation of or similar to those employed by the transferee. The specific language employed is open to the reasonable construction that the intention of the assignor was to convey to Griggs, Cooper & Co., complainant, an absolute and exclusive ownership of the trade-mark "Home Brand," and the right to use the same in the sale of its vendible commodity in the localities mentioned in the assignment. The reservation to the transferror does not limit or qualify the alienation of the prior adopted mark to complainant and its successors in their business. I am of the opinion that complainant's right to use the trade-mark "Home Brand" depends solely upon the terms of the assignment from Fry & Co., irrespective of any asserted claim by complainant to prior adoption of the trade-mark "Home." The argument of the defendant proceeds upon the theory that Fry & Co., because of the limitations expressed in the assignment, did not convey an exclusive right to appropriate the distinctive mark by which its vendible goods were identified, and that the effect of the writing was to create a mere license which did not convey the good will or business of the transferror, and therefore complainant has no such exclusive right to the use of the words "Home Brand" or the word

"Home" as would permit recourse on the part of complainant to a court of equity for a violation of trade-mark rights. This proposition is thought unsound. The written agreement unquestionably carried with it a valuable concession which inured to the business advantage of the complainant corporation. On the other hand, the assignor parted with the exclusive ownership and good will in its arbitrarily selected trade-mark "Home Brand" within the territory specified in the assignment, merely reserving to itself, as we have seen, certain permissive rights in its personal use. The primary acquisition by Fry & Co. of the mark adopted to indicate its manufacture of the articles to which the same was appropriated was undeniably transferable (Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co., 95 Fed. 457, 37 C. C. A. 146; Kidd v. Johnson, 100 U. S. 619, 25 L. Ed. 769), and such assignment is sufficient to entitle complainant to the protection afforded to owners of trade-marks in like cases (Kinney Tobacco Co. v. Maller, 53 Hun, 344, 6 N. Y. Supp. 389). These conclusions lead to the question of infringement. It appears that the defendant has sold canned jellies, sauces, and fruits under a trade-mark designation the title of which is "Home Comfort," within the territory covered by the assignment to Griggs, Cooper & Co. The adoption of these words, as applied to a specified article, was subsequent to the appropriation and use by complainant of the arbitrary word "Home" as a trade-mark for its vendible goods of a similar character. In my judgment, the word "Home" was the essential feature of complainant's trade-mark, and therefore its use in connection with the word "Comfort" is a violation and infringement of complainant's exclusive right to employ that word as a distinctive mark of authenticity of the product of its manufacture and sale. The principle enunciated in New Home Sewing Machine Co. v. Bloomingdale (C. C.) 59 Fed. 284; Lever Bros. v. Pasfield (C. C.) 88 Fed. 484; N. K. Fairbank Co. v. Luckel King & Cake Soap Co., 102 Fed. 327, 42 C. C. A. 376; Gannert v. Rupert, supra—would seem to apply to this case. It further appears by the record that the word adopted by complainant to identify its goods has become well known to the purchasing public by that designation in the territory hereinbefore stated. It has been appropriated by the defendant to designate a similar commodity sold in the locality wherein complainant's trade-mark has become distinctively known. Although, as appears by the statement of facts, the complainant did not originally appropriate the trade-mark "Home," as applied to the article to which it is affixed, yet it obtained an undoubted right, at least as far as defendant is concerned, to its use under the assignment in the territory therein mentioned. Therefore, as has been observed, complainant is entitled to have such rights protected. The words "Home Comfort" are an infringement of the essential features of complainant's trade-mark. It was held in Saxlehner v. Eisner & Mendelson Co., 179 U. S., at page 33, 21 Sup. Ct. 7, 45 L. Ed. 60, that, in order to constitute infringement, it is not necessary that every word of a trade-mark should be appropriated, that, to establish infringement, it is sufficient if enough be taken to deceive the public in the purchase of the protected article. Defendant's trade-mark, as we have seen, is appropriated to vendible articles of a similar character which are sold in the same territory as complainant's articles.

It follows, therefore, that a decree must be entered, with costs, and an injunction restraining the defendant from infringing complainant's trade-mark in the states of Minnesota, Wisconsin, North Dakota, South Dakota, and Montana may issue.

ALDRICH v. BINGHAM.

(District Court, W. D. New York. April 20, 1904.)

1. NATIONAL BANKS—INSOLVENCY—STOCKHOLDERS' LIABILITY—ASSESSMENT—TRANSFERS—INFANT TRANSFEREES.

A transfer of stock in a national bank, while it was a going concern, to the stockholder's infant children, under five years of age, not legally liable to assume all the obligations of stockholders, did not relieve the father from his liability for assessments levied on the stock so transferred after the bank's insolvency.

2. SAME—BANKS—REORGANIZATION AS NATIONAL BANK—CONSENT OF THE STOCKHOLDERS—ESTOPPEL.

Where a stockholder in a state bank, after its reorganization as a national bank, accepted dividends on his individual shares, and in view of the tender age of certain children, to whom he had transferred part of his stock, it might be presumed that he also received dividend checks made payable by the bank to the order of such children, he was estopped to deny his liability for assessments levied on such stock by the comptroller on the insolvency of the bank on the ground that he did not expressly assent to the reorganization of the bank.

Hotchkiss & Bush, for plaintiff.
Daniel V. Murphy, for defendant.

HAZEL, District Judge. This is an action at law, brought by the complainant as receiver of the City National Bank of Buffalo, to enforce the individual liability of a stockholder imposed by section 5151 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3465]. The case has been heard on the pleadings and a written stipulation of facts. The City Bank of Buffalo was incorporated March 17, 1893, under the laws of the state of New York, and was subsequently, on January 26, 1898, reorganized under the national banking act. On April 15, 1893, prior to the reorganization, 27 shares of its stock were issued to the defendant, who thereafter, on September 15, 1896, surrendered the same to the bank, which thereupon, at the defendant's request, issued a certificate for 20 shares to the defendant and one for 7 shares to Charlotte May Bingham, an infant daughter of the defendant, under five years of age. On May 11, 1898, defendant's certificate was again surrendered to the bank, which thereupon, by the defendant's direction, reissued a certificate for 13 shares to the defendant and one for 7 shares to his daughter Helen Bingham, also an infant under the age of 5 years. A dividend was paid to all the stockholders, including the above-mentioned infants, by the bank, on January 2, 1901. Subsequently, on June 29, 1901, the bank, being in-

¶ 1. Liabilities of transferrors and transferees of corporate stock for assessments, see note to General Electric Co. v. International Specialty Co., 61 C. C. A. 332.

solvent, suspended, and passed into the possession of a receiver appointed by the Comptroller of the Currency. An assessment of 50 per cent. of the par value of each share was subsequently ordered, and the receiver made demand upon the defendant to pay his ratable share on the 14 shares of stock previously transferred by him to his infant children. Two questions are submitted for determination: First. Is the defendant liable upon the stock originally assessed to him and subsequently transferred by him to his infant children without fraud or collusion, the bank, through its executive officers, having admittedly had knowledge of the fact that the transferees were infants under the age of five years, and made dividend checks payable to the individual order of the infant stockholders? Second. Assuming the defendant's liability upon the stock so transferred by him, was he relieved from such liability and responsibility because the stock was originally issued by a state bank, he not having expressly assented to its reorganization as a national institution?

1. It is a well-established rule of law that a transfer of stock in a corporation must be made to a person or corporation not only legally capable of holding the stock transferred, but also to one who is legally bound to respond when assessments are made upon the stock, and who may lawfully assume the liabilities of the transferror in relation thereto. It need not necessarily have been transferred to a person who is responsible in the sense that he will be able to financially meet the liabilities imposed upon a stockholder, but it is essential that he shall be legally liable to assume such obligations, and not be at liberty to repudiate them. Upon this point the cases collated at the end of the opinion in Johnson v. Laflin, Fed. Cas. No. 7,393, which involve the liability of a transferror of stock in a national bank, are instructive. A résumé follows:

"An infant cannot become purchaser and transferee of shares so as to relieve transferror of liability as a shareholder (Nickalls v. Merry, L. R. 7 H. L. 530), even although the transfer to the infant be registered (Symons' Case, 5 Ch. App. 298; Weston's Case, Id. 614); but if the infant does not repudiate the transfer on coming of age, he may become liable, though holding as trustee for another (Mitchell's Case, L. R. 9 Eq. 363). The original shareholder remains a shareholder, even in cases where he is entirely innocent of the transaction, and not aware that the shares were being transferred to an infant. Lord Chancellor Hatherley, Weston's Case, 5 Ch. App. 614,620. But a subsequent registered transfer by an infant to an adult may relieve the original seller. Gooch's Case, 8 Ch. App. 266. A director who took stock in the name of his infant children held liable as a contributory. Ex parte Wilson, Id. 45."

The principle of law announced in Johnson v. Laflin to the effect that an infant cannot become purchaser and transferee of shares so as to relieve the transferror of liability as a shareholder has been many times approved, and is applicable to this case. Cook on Stock & Stockholders & Corporation Law, § 250. The right of a shareholder in a solvent national bank to make a valid and absolute transfer and sale of his shares to a person capable in law of holding the same, providing the act or sale is free from fraud, is beyond dispute. Cook on Stock & Stockholders & Corporation Law, § 255. The precise point raised in the present case has been adjudicated adverse to the defendant's contention in Foster v. Chase (C. C.) 75 Fed. 797, and Foster v. Wilson

(C. C.) 75 Fed. 797. The decisions of Judge Wheeler clearly and unmistakably hold that a father buying stock of a national bank in the name of his infant children becomes liable for the assessment because of the incapacity of his children to take the stock and assume consequent liability during their minority. It was there insisted by the defendant that his children were the shareholders, and therefore liable for the assessment. The court, however, held that assent is essential to becoming a shareholder, and that minors have not the legal capacity to make the necessary assent. There is nothing uncertain or ambiguous in the language employed. The doctrine enunciated in the English and American cases as cited above is approved and followed. True, the remedy sought, as defendant suggests, was in equity; but that may be owing to the fact that the suit was brought, not to recover the limit of liability, but to enforce a contribution by numerous stockholders, or only a proportional part thereof. Studebaker v. Perry, 184 U. S. 263, 22 Sup. Ct. 463, 46 L. Ed. 528.

It is vigorously contended that the case at bar is distinguishable from the cases to which attention has been called, and that, accordingly, the general rule is no guide for a proper determination of this controversy. It is insisted that the bank acquiesced in the transfer by the defendant, and recorded the same in its corporate stock book; that such transfer is voidable, and not void, at the election of the infant when he reaches full age. It is undoubtedly the law that, whenever a benefit to an infant is intended as a result of an act done, he has his election, on arriving at full age, either to affirm it or avoid it. From that proposition defendant argues that the transfer or gift was, in legal effect, absolute, and it is wholly out of the power of the transferror to reclaim it. The soundness of this contention is not debatable, nor, indeed, is it denied that generally it will not be presumed that an infant will seek to avoid its obligation because of his infancy. Continental National Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066. These propositions have little relevancy, conceding, as we must, that the liability of the shareholder in a national bank is not contractual, but rests on a statutory liability which the executive officers of a national bank cannot waive. Aldrich v. Skinner (C. C.) 98 Fed. 375; Aldrich v. McClaine, Id. 378; Witters v. Sowles (C. C.) 32 Fed. 767. The law properly imposes upon shareholders in a national bank a conditional liability as a protection and shield to depositors and general creditors. That protection cannot be removed by sales and transfers of stock to infants or other purchasers who cannot legally contract to accept the same. See Scott v. Deweese, 181 U. S. 220, 21 Sup. Ct. 585, 45 L. Ed. 822. The case of Lucas v. Coe (C. C.) 86 Fed. 972, decided by Judge Coxe, opinion not reported, does not disturb the conclusions here expressed, for the reason that that decision was based upon section 5152 of the Revised Statutes [U. S. Comp. St. 1901, p. 3465], which specially exempts from personal responsibility executors, administrators, guardians, or trustees. No claim is here made by the defendant for relief on that ground.

2. It is not disputed that the bank became subject to all the provisions of the Revised Statutes relating to national banks. The proposition that, as the defendant did not expressly assent to the conversion

of the bank into a national bank, he cannot, therefore, be held liable under the federal statute, is without force, and cannot be maintained. Assuming, without deciding, the materiality of this point, the defendant is nevertheless estopped from asserting his nonliability. It appears from the agreed facts that the later transfer was made after the organization of the bank as a national bank, and thereafter a dividend upon his individual shares was received and accepted by him. In view, moreover, of the tender age of the transferees, it may be presumed that the defendant received and accepted the dividend checks made payable by the bank to the order of his children. Hence his status is that of a shareholder in the national bank with such responsibilities as the law imposes in such case. Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531. It has been held that, where a state bank is converted into a national bank, there is no actual transfer of property from one bank to another, but rather a continuation of the same body under a changed jurisdiction. City Bank of Poughkeepsie v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513. Even if this were not so, it is thought the point made could not be sustained. Section 5154 of the Revised Statutes [U. S. Comp. St. 1901, p. 3466] clearly points out the way in which a state bank may become a national bank, and a shareholder who is called upon by the comptroller to respond to his liability as a shareholder is not permitted to deny the existence of the legal existence or validity of such corporation. Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168.

The plaintiff is therefore entitled to recover the amount demanded in the complaint, with interest and costs.

In re BEAVERS.

(Circuit Court, E. D. New York. June 29, 1904.)

1. CRIMINAL LAW—BAIL—EXONERATION—REMOVAL OF ACCUSED.
   Where accused was prevented from appearing to answer an indictment for a federal offense in a certain district by reason of his having been removed by the court for trial under an indictment in another district, such removal operated to exonerate the bail for his appearance.

2. SAME—OBJECTIONS TO REMOVAL.
   Where, pending a hearing for the removal of an accused from one federal district to another, an application for removal to a third district was filed, the government, though not entitled to pursue both antagonistic proceedings for removal, was entitled to drop the one last commenced, and, after securing custody and arraignment of accused in the district to which removal was first asked, prosecute a new proceeding to remove him to the district to which a removal was desired to be effectuated by the second proceeding.

3. SAME—SEVERAL PROCEEDINGS FOR REMOVAL—DISCONTINUANCE—ELECTION.
   Where a federal prisoner was removed to a certain district for trial on an indictment pending against him in such district, he could not object to a second proceeding by the United States to remove him to another district for trial on an indictment pending against him in such district before he had been tried on the indictment in the district to which he was first removed; such removal not being prejudicial to his rights.

See 125 Fed. 988.

Morgan & Seabury (William M. Seabury, of counsel), for petitioner.
Charles H. Robb, Asst. Atty. Gen., and William J. Youngs, U. S. Atty.

THOMAS, District Judge. In Re Beavers (D. C.) 125 Fed. 988, it appears from the opinion of Judge Holt as follows:

"The petitioner was indicted by the federal grand jury in the Eastern District of New York. A warrant for his arrest was issued by the judge of that district, * * * but he was not found within that district. An application was thereupon made to Samuel M. Hitchcock, a United States commissioner in the Southern District, for a warrant for his arrest and removal. A warrant was issued by the commissioner, under which the petitioner was arrested and brought before him. The petitioner demanded an examination, and gave bail for his appearance before the commissioner. Subsequent to the finding of the indictment in the Eastern District of New York, another indictment against the petitioner was found by the grand jury of the District of Columbia. A bench warrant was issued by the Supreme Court of the District of Columbia for his arrest under the indictment, but, not being found within the District of Columbia, another application was made to Commissioner Hitchcock, in the Southern District of New York, for his arrest and removal under the second indictment. A warrant on this second application was issued by the commissioner, under which he was arrested by the marshal of the Southern District of New York, and brought before the commissioner. The petitioner thereupon demanded an examination, and was again admitted to bail by the commissioner. The bail given upon the second arrest under the warrant issued upon the indictment in the District of Columbia subsequently surrendered the petitioner to the marshal for the Southern District of New York, and thereupon the petitioner filed a petition in this court for this writ of habeas corpus, alleging that his second arrest was illegal."

The learned judge determined that the arrest on the second warrant should be vacated. Thereafter such proceedings were had that the defendant, at all times resisting, was ordered to be removed to the Eastern District of New York, and gave bail for his appearance in the Circuit Court held in that district. He duly appeared, and, being arraigned for pleading to three indictments found against him by the grand jury for the Eastern District of New York, moved to quash the indictments, and for a bill of particulars. But before such motions were heard, the defendant, after this court was duly advised of the purpose so to do, was arrested upon a warrant issued by a United States commissioner for the Eastern District of New York for the purpose of removing him to the District of Columbia. He was not physically detained upon such warrant pending the inquiry before the commissioner. The Circuit Court for the Eastern District of New York deferred the hearing of the motions pending the hearing before the commissioner, for the purpose of allowing the warrant to be served upon the defendant, and to permit the proceedings to continue before the commissioner. Thereafter the petitioner applied for a writ of habeas corpus, which was granted by this court; the petitioner having been surrendered to the marshal, who thereupon brought him to the court pursuant to the writ. The parties have been heard. The learned counsel for the petitioner has, by oral argument and brief, clearly set forth the petitioner's position, which is that the commissioner had no power to issue the warrant, pending the disposition of the indictment in the Eastern District, for the purpose of removing the petitioner to the District of Columbia, and that,

even if such power existed, the court should not allow such proceedings for removal until justice in its own jurisdiction shall have been administered. The contention that the commissioner has no power to entertain the proceeding is sought to be supported upon the well-known principle that the justice of one sovereignty must be satisfied before it will yield to the demands of another government for the purpose of administering its justice. Perhaps the true statement is this: It is within the power of a government, acting through the proper department thereof, to refuse to surrender either property or persons to another government while the administration of justice within its own borders demands their presence. Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287. A state has full power to demand that a person arrested upon a civil or criminal process within its border shall remain amenable to its courts until there has been due administration of justice therein. But it will be observed that the exercise of this power is at the will of the state itself, expressed through its proper officers or tribunals, and that the person apprehended may not constrain such government, so having jurisdiction, to exercise its will, although for the purpose of preserving his bail from forfeiture, or to save other default, he or his sureties should resist any attempt of any government to remove him from the control of the jurisdiction to which he is primarily bounden. But if he has not done or suffered anything bringing him in default, or if the government first acquiring jurisdiction consents to his removal, and the defendant by removal is prevented from meeting his obligation to such government, he is no longer bound to respond. The rule of continuing obligation to the state having the person or thing in its actual or constructive control is not for the benefit of the defendant, but for the protection of public justice within that state. It is a right that it alone may assert, although it is clearly the duty of the defendant to ask it to assert such right, that his bond may be relieved in case of refusal or waiver. In Taylor v. Taintor, supra, Mr. Justice Swayne states:

"It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law. Where the principal dies before the day of performance, the case is within the first category. Where the court before which the principal is bound to appear is abolished without qualification, the case is within the second. If the principal is arrested in the state where the obligation is given, and sent out of the state by the Governor, upon the requisition of the Governor of another state, it is within the third. In such cases the Governor acts in his official character, and represents the sovereignty of the state in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion. But if he act, and the fugitive is surrendered, the state whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once ipso facto lose their binding effect."

Observe the words, "In such cases the Governor acts in his official character, and represents the sovereignty of the state," etc. It is quite clear that it is for the Governor of the state, upon requisition, to determine whether the public justice of his state shall be administered, before permitting the defendant to be subjected to the

laws and tribunals of another state. He acts for the state, and his act binds the state in its several departments. But even if it be within the power of a court having jurisdiction of a defendant to thwart the command of the executive, as the defendant claims was done in Hobbs v. State, 22 S. W. 1035, 40 Am. St. Rep. 782, by the Court of Criminal Appeals of Texas, yet the court itself has the power to subject its own administration to that of a foreign state. But wherever the power of removal may reside, the question involved is whether one government shall yield precedence to another, in the matter of the custody of the same defendant, for the purposes of trial. In the case at bar no such question exists. The United States is the common sovereign, whose judicial power is vested in courts created by the Constitution or laws made pursuant thereto, and for convenience judicial departments and districts, subdividing the whole territory, have been established. The accuser in each artificial division of territory, wherein there is a localized court, is the same. Its general penal statutes are usually common to the whole public domain. Its justice alone is to be administered. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." But the sovereignty offended in criminal cases is always the United States, and the courts to whom the Constitution and Congress have confided the inquiry belong to one of the principal departments in which the governmental power resides. But the court acts only when the sovereign accuses, and the only constitutional limitation upon the general government, as to locality of action, is that the accused shall be tried "by an impartial jury of the state and district wherein the crime shall have been committed." Article 6, Amendments. Hence the national government is one sovereign, common to all judicial districts. Whether the laws have been violated in the Eastern District of New York, or the District of Columbia, the same political body has been offended. It alone seeks vindication. Hence it is quite obvious that no question can arise similar to that where one government seeks to take a person from another jurisdiction, and each demands vindication of its own justice. But as a state may consent to make its own demand secondary to that of another state, so the United States may yield, or may decline to yield, its rights first to vindicate its law, and surrender the accused to another power. Much the more may it select in what order it will prosecute offenses against itself. As in the case of a person seized by the state for violation of its laws, the state, and not the person, may determine whether the criminal justice of that state shall be first administered, before the surrender of the offender to another government for trial. So the federal government may determine the order of priority of trials for offenses against it, or whether there shall be any trial at all. The relative power of the executive or court to decide the order of arraignment does not seem difficult. If the executive department, acting through the Department of Justice, seeks the aid of the court to effect a removal to another district, it would be quite within the power of the court to retain the control of the defendant for the purpose of trial within its

district. But Congress has vested the initial power of prosecution in the District Attorney (section 771, U. S. Rev. St. [U. S. Comp. St. 1901, p. 601]), and has subjected him to the "general superintendence and direction" of the Attorney General (section 362, U. S. Rev. St. [U. S. Comp. St. 1901, p. 208]), who in his turn is the head of the "executive department to be known as the Department of Justice" (section 346, U. S. Rev. St. [U. S. Comp. St. 1901, p. 202]). And when, as in the present instance, the Attorney General asks that the defendant be removed to another district to meet an indictment against him there found, and the district attorney of this district co-operates for such removal, the court may, at least in the exercise of a sound judgment, permit such removal upon a proper case being made therefor. This does not mean that a defendant may be removed to another district, under conditions which would disturb the due administration of justice in the court where the defendant is held at the time, nor where the removal would work an injustice to the defendant in respect to the indictment pending in such court. In the case at bar it does not appear that the defendant will be injured by the removal, as to the indictment in this court. It is true that the Constitution gives him a right to a speedy trial, but it gives him a right to a speedy trial in the District of Columbia, as well as in the Eastern District of New York. The Constitution does not assure him the speedier trial in this district, nor enable him to select the court in which he shall first be tried. The vigor of his late struggle to prevent removal to this district does not harmonize with a desire for a speedy trial here. His absence defeated a possible trial at the May term, and another opportunity will not occur before October. The administration of justice elsewhere should not be delayed by his tardy appearance in this court.

Judge Holt held that the two proceedings in the Southern District for removal to two several and distinct districts could not concur. The learned judge did not decide that, after his removal to this district should have been perfected, he could not be removed to the District of Columbia, but pointed out that it was illogical to ask the commissioner to hold him for removal in two different directions at the same time. It may be that the learned judge would have been justified in deciding that the commissioner was simply asked to hold the defendant for removal, but that he had no power to order removal, and that the question of the district to which he should be sent should await application to the court for his actual removal. But Judge Holt's solution of the question before him was direct, convenient, and practical. Why should the same commissioner be engaged in determining the question of holding for removal to different districts, when the defendant could be removed to but one; and why should the government and the defendant be at the expense and difficulty of determining the matter of a double removal, when but a single removal was possible? Moreover, as this court had first asked for his removal to this district, it was quite within the power of the District Court for the Southern District of New York to award priority to such demand. It will, however, be noticed that the government was not asking that court to award priority to the

court in the District of Columbia; but to allow the commissioner to conduct two separate proceedings, looking to the removal of the defendant in two opposite directions. The government, at the instance of district attorneys of two distinct districts, was pursuing two antagonistic inquiries at the same time, when it was evident that one or the other of the inquiries must prove useless. It is not perceived that the question decided by Judge Holt has any bearing upon the power of this court to release its control of the defendant. It is in its discretion to retain him for trial, or to send him elsewhere for arraignment. The Executive Department asks that he be sent elsewhere. No valid reason appears for rejecting its advice. It is urged that the government elected to remove the defendant to this district, and that it should be bound by it. The proceeding for removal to this district was first taken, and that for removal to the District of Columbia followed. Judge Holt held that the second could not proceed with the first pending. Therefore he vacated the arrest in the second proceeding. Thereupon the government had the alternative of dropping the proceeding for removal to this district, and renewing the other, or of pursuing the first, bringing the defendant to this district, securing his custody and arraignment here, and thereafter removing him to the District of Columbia for arraignment on the indictment there. In this manner an orderly opportunity of bringing the defendant into the several courts, where he was accused, was secured. In any case it is considered that the government is not precluded now from instituting proceedings for removal to the other district. This court was advised by the district attorney of the proposed removal proceedings, and acquiesced in them. In view of the defendant being under bail for his continuing appearance at this court, the commissioner neither required him to give bail, nor to be imprisoned. As regards the commissioner, the defendant was free, and delivered himself up to the marshal, that he might be brought up on this writ. This may have no legal importance, but illustrates that he was not burdened. It is concluded that the commissioner has power to entertain the proceedings before him, and that this court is advised of no state of fact that requires it, in its discretion, to vacate or restrain them.

The writ should be dismissed.

In re BUTTERWICK.

(District Court, M. D. Pennsylvania. June 29, 1904.)

No. 410.

1. BANKRUPTCY ACT—PROPERTY PASSING TO TRUSTEE—RIGHTS OF EXECUTION CREDITORS—LOCAL LAW.

By Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], the trustee is vested by operation of law with the title of the bankrupt, as of the date when he was adjudged a bankrupt, to, inter alia, all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The trustee, by this, does not simply

stand in the shoes of the bankrupt, but is invested with the rights of his execution creditors as well; and this is to be determined by the local law.

2. SAME—CONDITIONAL SALES—RECLAMATION OF GOODS FOR NONPAYMENT OF PRICE.

Where, therefore, in a case arising in Pennsylvania, goods are sold and delivered to a bankrupt at a specified price and on definite terms, a superadded agreement that the title shall remain in the seller until the price is paid is without avail as against creditors, and the goods cannot be reclaimed by the seller; the title to them vesting in the trustee.

In Bankruptcy. On certificate from M. H. Taggart, referee.

Edward S. Gearhart, for Grand Rapids Show Case Co., claimants.
Charles M. Clement, for trustee.

ARCHBALD, District Judge. In the possession of the bankrupt at the time of filing his petition were four show cases, now in the hands of the trustee, which were obtained from the Grand Rapids Show Case Company, and are claimed by them as their property. These goods were ordered by the bankrupt of that company October 9, 1903, after the usual business solicitation on their part, the price being fixed at $210. A few days later, and before the order was filled, the following agreement was executed by the bankrupt:

"As per our order of October 9 given the Grand Rapids Show Case Co. of Grand Rapids, Mich., for show cases I hereby agree that the title to the said furniture shall be theirs until the full amount of purchase price has been paid.

"Oct. 14, 1903. N. H. Butterwick."

The goods were shipped November 28th upon the following invoice:

"Grand Rapids, Mich., 11/28/03.

"Grand Rapids Show Case Co.

"Sold to Mr. N. H. Butterwick, Danville, Pa.

"4-6 ft. 60 Display Cases 28¼" wide, 1 PC. Bevel Tops.....

"1 PC. Sheet Fronts, Mirror Doors, 4 Electric Reflectors..... $210 00

"Terms: ½ Jan. 1 ¼ Jan. 20 ¼ Feb. 10."

The terms given in the invoice were so fixed as to enable the bankrupt to pay out of the holiday trade; but before a single remittance had been made, on January 2, 1904, he went into voluntary bankruptcy, leaving the Show Case Company in the lurch. The question is whether they or the trustee is entitled to the goods.

By section 70 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]) the trustee is vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt to all "(5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." That is to say, the trustee does not stand simply in the shoes of the bankrupt, but is invested with the rights of his execution creditors; and the question in the present instance therefore is whether the show cases which are sought to be reclaimed could have been successfully subjected, while in the hands of the bankrupt, to levy and sale upon execution against him. This is to be determined by the local law (Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986), with regard to which, as applied to this case, there can be no doubt. The show cases

were furnished to the bankrupt at a specified price and on definite terms of payment, and the agreement, in the face of this, that title should not pass until they were paid for, was a clumsy attempt to retain a lien for the price notwithstanding the delivery, which, as to creditors, was fraudulent and void. The decisions in Pennsylvania upon this subject are numerous, an extended review of which may be found in Ott v. Sweatmann, 166 Pa. 217, 31 Atl. 102. The liability to creditors in any given case in this state turns on the question whether the transaction is a conditional sale or a bailment, with regard to which it is consistently held that, to constitute the latter, by which the goods are exempt, they must have been delivered for a definite term and purpose, with a provision, express or implied, for their return at its end. But where, on the other hand, the transaction between the parties is essentially a sale, the superadded agreement that the ownership shall remain in the seller, notwithstanding a delivery, until the price is paid, is without avail as against creditors, and the property may be seized and sold. Stadtfelt v. Huntsman, 92 Pa. 53, 37 Am. Rep. 661; Farquhar v. McAlevy, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497. The latter beyond question is the status here. That the transaction was understood to be a sale is unmistakably shown, not only by the original negotiations, but by the invoice, which assumes the form of a memorandum bill for the goods upon definite terms and prices. No doubt, as argued, the original intention could be modified while the contract was still in an executory stage (Stiles v. Seaton, 200 Pa. 114, 49 Atl. 774); but it would have to be changed radically from what here appears to enable these parties to maintain their claim. They have nothing but the bare agreement that title should not pass until the show cases had been paid for—a condition which did not in any respect change the character of the transaction as a sale.

The case was properly disposed of by the referee, and his action is affirmed.

THE SACRAMENTO.

(District Court, E. D. Wisconsin. July 5, 1904.)

1. ADMIRALTY—COLLISION—LIMITED LIABILITY PETITION—FAULT—CONTEST.
   Where a petition in admiralty to limit the liability of a vessel and cargo for collision, as authorized by Admiralty Rules 54–57, failed to state the facts and circumstances by reason of which exemption from liability was claimed, as required by rule 56, the petition was insufficient to entitle petitioner to contest the question of fault on the part of its vessel.

2. SAME—GENERAL MARITIME LAW.
   Except as adopted by statute, the general maritime law is not the law of the United States.

On exception to the petition by Ohio Transportation Company, as owner of steamer Gladstone and bailee for cargo, and by the underwriters, as well, on such cargo, in respect of petitioner's allegations for leave to contest liability.

¶ 1. Limitation of shipowner's liability, see note to The Longfellow, 45 C. C. A. 387.

C. E. Kremer, for petitioner.

Goulder, Holding & Masten and Church, McMurdy & Sherman, for respondent.

SEAMAN, District Judge. These proceedings are instituted by the owner of the Sacramento to limit liability arising out of a collision whereby the steamer Gladstone and her cargo suffered damage, and in the absence of a libel or suit on behalf of the vessel or cargo so damaged. Leave is sought in the petition to contest therein the liability of the Sacramento, or owner, for such loss, and this twofold aspect of the petition is clearly authorized by the admiralty rules (54, 55, 56, and 57) adopted by the Supreme Court to carry out the provisions of the liability limitation act of 1851 (Rev. St. §§ 4283, 4285 [U. S. Comp. St. 1901, pp. 2943, 2944]). But the exception is directed to the manifest noncompliance with rule 56, which requires the petitioner to "state the facts and circumstances by reason of which exemption from liability is claimed," if liberty is sought to contest the question of fault. The only contention in answer to this objection is that the rule was not intended for, and is not applicable to, the case of proceedings commenced by the owner to limit liability, when no libel or suit for recovery is pending. It is argued that the rules were formulated in reference alone to cases wherein the vessel is libeled or the owner sued; that the independent proceeding by the owner was not then contemplated, nor recognized until the decision of Judge Blodgett in the Alpena Case, 8 Fed. 280, affirmed in Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066. I am satisfied that this contention is untenable, and that rule 56 plainly governs the petition under consideration. The meaning of these rules, if otherwise open to question, is settled by the terms of rule 57, which, in its original form (13 Wall. xiii), authorized the filing of the petition before the vessel was libeled, and, as amended in 1889 (130 U. S. Append. ii, 9 Sup. Ct. iii, 32 L. Ed. 1085), was applied to cases where the owners were not sued, or were sued in another district. In the Alpena Case, supra, the construction arose under the original rule, and was called for only by reason of the omission to mention suits in personam. The act of 1851, alike with the early English law, adopted the general maritime rule for limited liability of vessel owners, but, unlike the English law, imposed no requirement for confession of fault on the part of the vessel as a condition precedent. Norwich Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585. Except as adopted by statute, the general maritime law is not the law of either country. The Scotland, 105 U. S. 24, 28, 26 L. Ed. 1001. In recognition of the distinction thus appearing in the act of Congress, rule 56 was prepared "to relieve shipowners from the English rule of practice" above mentioned, which "was deemed to be a very onerous requirement." The Benefactor, 103 U. S. 239, 243, 26 L. Ed. 351. The power of the Supreme Court to thus provide and establish the procedure and conditions for leave to contest liability of the vessel is unquestionable (Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 593, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038), and I am of opinion that the rule in question not only intended to require the petitioner who initiated the proceedings to state the facts upon

which exemption was claimed before leave could be obtained to contest liability, but that the requirement is as reasonable in the one case as in the other. The applicability of rule 56 is expressly stated in Benedict's Admiralty, § 566, and recognized by Judge Hanford in The Trader (D. C.) 129 Fed. 462, 471.

The objection urged that the petitioner is thus "obliged to plead a negative" is without force, as the practice in the admiralty requires such statement of the facts in all pleadings, and in both libel and answer in collision cases the issues must be so stated. Whether the final issue of liability arises upon the allegations of the petition, or is made up independently upon the filing of claims, is a question not presented by the exception, though suggested upon the argument. The only question raised is the sufficiency of the petition to reserve to the owners the right to contest fault on the part of the Sacramento, and upon the view stated it is plainly insufficient, so that the exception is well taken. I deem it just, however, to indicate my impression of the bearing of the rule upon the final issue, namely, that the allegation to that end which the rule demands appears to be intended by way of full disclosure of the grounds of contest, as a prima facie test of bona fides, and not to frame the issue for such contest, wherein the affirmative may justly rest upon the party claiming recovery of damages for alleged fault. In other words, the purpose seems to be to preserve the right of contest, rather than to initiate the issue thereupon. As mentioned in the case of The Benefactor, 103 U. S. 241, 26 L. Ed. 351, the petitioners, who there filed their application to limit liability, after answering the libels, "restate the facts and circumstances on which they relied in their answers to the libels for exemption from all liability."

The exceptions to the petition are sustained accordingly, with leave to the petitioner to amend within 20 days.

THE LILLIAN.

(District Court, E. D. Pennsylvania. August 1, 1904.)

No. 14.

1. SHIPPING ARTICLES—STATUTES—APPLICATION.
   Rev. St. § 4511 [U. S. Comp. St. 1901, p. 3068], prescribing the provisions necessary to be inserted in shipping articles, applies to contracts for shipping of crews for American vessels engaged in coastwise trade, and in trade between ports of the United States and the Dominion of Canada.

2. SAME—SEAMEN'S WAGES—CONTRACTS.
   A provision of a contract for seamen's services that "the crew shall make no claim for wages or provisions while the vessel is detained by ice prior to departure" was reasonable, and was not in violation of Rev. St. § 4511 [U. S. Comp. St. 1901, p. 3068], specifying the provisions necessary to be inserted in such contracts, and declaring in subdivision 8 [page 3069] that "any stipulations in reference to advance and allotment of wages or other matter not contrary to law" may be inserted.

3. SAME.
   Such stipulation was not void under Rev. St. § 4524 [U. S. Comp. St. 1901, p. 3076], providing that a seaman's right to wages and provisions shall be taken to commence either at the time when he commenced his

work, or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens.

In Admiralty.

E. William Pyle and Joseph Hill Brinton, for libelant.
W. H. G. Gould, for respondent.

HOLLAND, District Judge. The libelant claims wages from January 21 to February 10, 1904, at the rate of $40 per month, upon shipping articles signed by him on January 26, 1904. The respondent admits wages due at that rate from February 1 to February 10, 1904. The disagreement between the parties arises out of the following state of facts: The libelant agreed with Capt. Campbell, of the bark Lillian, to ship with him as mate for a voyage from Philadelphia to Charleston, S. C., for a term of time not exceeding three calendar months, at the rate of $40 per month. Subsequently the shipping articles were executed. The dates mentioned in the articles as of the time of execution by the parties are incorrect and irregular, but it is not necessary to consider this feature of the case, as it does not alter the rights of the parties; and, while some comment was made upon these irregularities at the argument, neither party seriously urged it as effecting the rights of either the libelant or respondent. It is conceded that the libelant, by the terms of the articles of shipment, was to be on board January 21st; and it is further conceded that he complied with this part of the contract, and remained on board up until the 10th day of February, when the vessel stranded and went aground on the Bermuda Islands, was a total loss, and was abandoned by her crew, and the voyage was broken up and terminated. The libelant returned to Philadelphia, and claimed wages from January 21 until February 10, 1904. The articles contained a clause that "the crew shall make no claim for wages or provision while the vessel is detained by ice prior to departure," and as the Lillian did not leave the port at Philadelphia until February 1st, by reason of ice in the Delaware river, the respondent answers that wages cannot be claimed until February 1st. To avoid the effect of this clause, the libelant avers that the delay was not caused by ice in the river, and, even if it was, the clause above referred to is inserted in violation of section 4511, Rev. St. [U. S. Comp. St. 1901, p. 3068], and that he is entitled to wages from the time he was required to be on board, in accordance with the provisions of Rev. St. § 4524 [U. S. Comp. St. 1901, p. 3076].

An examination of the evidence convinces me that the Lillian was detained until the 1st of February by reason of ice in the river, and if the libelant is bound by his contract not to claim wages prior to the departure of the vessel, if detained by ice in the river, then this rule must be dismissed. The provisions of section 4511, Rev. St. by the acts of August 19, 1890, February 18, 1895, and March 3, 1897 [U. S. Comp. St. 1901, p. 3069], have been extended and made applicable to contracts for shipping of crews for American vessels engaged in the coastwise trade, and in trade between ports of the United States and Dominion of Canada. The Occidental (D. C.) 87 Fed. 485. This section requires an agreement in writing to be executed by the master of a vessel and the seamen who ship with him before he starts on a voyage,

requiring certain matters to be specifically set forth for the purpose of protecting seamen against imposition, misunderstanding, and their own improvidence. These provisions necessary to be inserted in shipping articles are set forth in eight subdivisions of this section of the Revised Statutes, and are essential to a valid article of agreement. There is nothing, however, to indicate that other reasonable provisions cannot be entered into and inserted in the agreement. In fact, the eighth subdivision makes provision for this in the following language: "Any stipulations in reference to advance and allotment of wages, or other matter not contrary to law," may be inserted. The agreement not to claim wages if the vessel was detained by reason of ice is not unreasonable, and, if inserted with the knowledge and understanding of libelant, it is part of the contract as binding upon him as the other provisions therein contained. While seamen are the wards of the nation, and many provisions have been enacted for their protection, there is nothing to indicate that any reasonable contract, not contrary to law, into which they enter with full knowledge of its meaning and effect, can be afterward repudiated by them. The Samuel Ober (D. C.) 15 Fed. 621; The Zack Chandler (D. C.) 7 Fed. 684; The L. B. Snow (D. C.) 15 Fed. 282; Boulton v. Moore (C. C.) 14 Fed. 922.

There is nothing in the case of The Bark Shetland et al. v. Johnson, 31 Wash. Law Rep. 411, cited by libelant, in conflict with this view. There was no provision in the agreement in that case either like or similar to the one in this suit. The shipping articles were signed on the 29th day of January, 1902, by the seamen, to go on board the Shetland as seamen for the proposed voyage. The spaces where the time the seamen were to go on board should have been inserted were left blank. The master subsequently filled in "February 26, 1902." As the seamen had been detained for this voyage from January 29, 1902, until the vessel left Wilmington, on February 26th, the court held they were entitled to wages for that time, notwithstanding the fact that the agreement, as subsequently perfected by the master without their consent, showed a later date on which they were to be on board; nor do we think that section 4524, Rev. St. [U. S. Comp. St. 1901, p. 3076], nullifies this provision in the agreement. It provides:

"A seaman's right to wages and provision shall be taken to commence either at the time at which he commences work, or at the time specified in the agreement for his commencement of work, or presence on board, whichever first happens."

This section fixes the time when the seamen's right to wages, specified in an agreement, shall be taken to commence, which is either at the "time at which he commences work," or "at the time specified in the agreement for the commencement of work," or "his presence on board," whichever happens first; but there is nothing to indicate it is different from any other right, and cannot be waived when it is deemed prudent to do so, by a reasonable stipulation between the captain and the seamen, and inserted in the shipping articles, that the wages agreed upon shall not begin until a certain date in the future. It is a guarantied right to every person that he shall be able to enter into such contracts as he may see fit, and any act of Congress or rule of law invoked in derogation of this right must be critically examined and strictly con-

strued. Section 4524, Rev. St., establishes the time at which wages of a seaman begin under articles of shipment, in the absence of any reasonable stipulation therein contained; but we do not think it warrants a construction that takes from a seaman his right of contracting as to when he shall begin to claim his wages, so long as the agreement is reasonable and for the mutual benefit of master and seamen. It enables vessels in these northern, ice-bound climates in winter to contract with crews, and take chances of going out to sea at any time the ice-bound channels became navigable, if they can arrange with their men to take the same chances with themselves, whereas, if this privilege of contracting on this point is denied, the master might be deterred from entering into a contract with a crew because of the uncertainty of navigation and the certainty to pay wages, and both vessel and men during the winter season would be deprived of employment by reason of the fact that the law prevented the execution of a valid agreement on the subject as to when the seamen should claim wages. This would be extending protection to the wards of the nation in a manner greatly to their detriment. We do not think this section warrants this construction.

The amount due from February 1st to February 10th, less deductions, is conceded to be $8.33. This amount has been duly tendered the libelant. Judgment will therefore be entered for the sum of $8.33 in favor of the libelant and against the respondent, without costs.

UNITED STATES v. RADFORD et al.

(District Court, W. D. New York. April 13, 1904.)

1. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

In a prosecution for conspiracy to defraud the United States, H. testified that he had given a deed in blank to defendant, as agent, with the understanding that the latter should endeavor to sell the land and account for the proceeds. It was conceded at the trial that defendant had inserted the name of his codefendant as grantee in the deed in order to qualify him as bail. On H.'s testimony being given, defendant claimed surprise on the ground that H. had delivered the deed to one S., as agent, who had sold the property to defendant for a valuable consideration, and sought a continuance to obtain S.'s testimony, which was denied. After the trial, H. made affidavit that he had been mistaken in his testimony, and both he and S. testified that the deed had been delivered to S., and not to defendant. *Held*, that defendant was entitled to a new trial on the ground of newly discovered evidence.

2. SAME—LACHES.

Where, after defendant had been convicted of conspiracy to defraud the United States, it developed that certain material testimony given against him, which was highly prejudicial, was false, and it was probable that, but for such evidence, the trial might have terminated differently, defendant's laches in applying for a new trial on the ground of newly discovered evidence was not sufficient to justify a denial thereof.

Charles H. Browne, U. S. Atty.
Thomas W. Pelham, for defendant Radford.

HAZEL, District Judge. This application for a new trial upon newly discovered evidence is based chiefly upon affidavits showing that the

testimony of one Hambler, at the trial of the defendant Radford, who was jointly indicted and tried with two confederates, Parrish and McLaren, for the crime of conspiracy to defraud the United States, was untrue. Hambler gave direct evidence showing that in the year 1896 he delivered a deed in blank covering 540 acres of land situate in the state of Virginia, to the defendant Radford, as agent, with the understanding that Radford should endeavor to sell the same, and upon a sale should insert in the deed the name of the grantee, and account for the proceeds of the sale to Hambler. It was practically conceded at the trial that in February, 1902, for the purpose of enabling the codefendant, Parrish, to qualify as bail, Radford inserted the name of Parrish as grantee in this deed, which was thereupon duly recorded. Later, on the same day, Parrish appeared before a United States commissioner and made oath that he was worth several thousand dollars over and above all his liabilities, and was the owner of the land described in the Hambler deed, and of other property enumerated in the justification. He was thereupon accepted as bail for several detained Chinese persons claimed by the government to be unlawfully in the United States. Soon afterwards, the Chinese persons failing to appear for trial, the bail bond was estreated. The government instituted an action upon the bond against Parrish, recovered judgment, and, an execution thereon being returned nulla bona, caused Radford, Parrish, and McLaren, upon sufficient evidence showing probable cause, to be indicted for conspiracy to defraud the United States. A trial was had upon the indictment in December, 1902, resulting in the conviction of Radford and Parrish only. Thereupon Radford appealed from the judgment of conviction to the Circuit Court of Appeals. The conviction was sustained. 129 Fed. 49. The grounds for a new trial, as stated by defendant, are that the witness Hambler, in his testimony, was mistaken upon a material point in the case, namely, that, instead of the deed having been delivered in blank by him personally to Radford, it was in fact delivered to one Story, as agent, to sell the property, and to render an account of the proceeds of the sale. In his affidavit, verified January 5, 1903, very soon after the trial, Hambler states that, as a result of correspondence passing between Story and himself, which correspondence was shown him since the trial, he has become fully convinced that his testimony regarding Radford was wholly erroneous, and a mistake of fact. It appears further from the affidavit, the truthfulness of which is not here controverted, that it was to Story, and not to Radford, that the above-mentioned deed in blank was delivered. It was claimed at the trial by the defendant Radford that he was surprised by the testimony of Hambler, and immediately effort was made to procure the attendance of said Story, who resided in the city of New York, to whom it was asserted that the deed in fact was delivered by Hambler, and who in turn delivered the same, for a valid consideration, to Radford. Story's testimony, however, was not obtained, though faithful efforts were made during the trial by the defendant to procure his attendance as a witness. At the close of the defendant's case, an affidavit was presented to the court showing that the absent witness was unable to attend on account of illness, and asking for a continuance of the case, to the end that his testimony be taken by commission. This request was

denied. The purpose and effect of Hambler's testimony was to show that the transfer by Radford to Parrish was unauthorized, and that no consideration passed, or, if the conveyance was for a consideration, there manifestly was a conversion of the proceeds by Radford. It is quite apparent that the jury concluded that the transaction was in furtherance of the unlawful conspiracy.

It is contended by the government that the testimony of Hambler was merely cumulative, and, conceding it to have been untrue, it is nevertheless insufficient to grant a new trial. The mistaken testimony of Hambler, however, considered in its entirety, was of a different character, though it also tended to establish the wrongful intent of the defendant. By implication, at least, it conveyed to the mind of the jury that Radford had committed another offense. It tended to show that, as Hambler's agent and trustee, Radford had sold the property in question, and, though eight months had expired since the conveyance to Parrish, he had failed to account for the proceeds of such sale, or to notify the owner that the property had been transferred to Parrish. In the circumstances, it may well be that such testimony was considered by the jury as strongly supporting the proofs already in the case as to the defendant's fraudulent intent, and hence may have tended to remove a reasonable doubt, if such doubt existed in the mind of the jury, relative to other material facts claimed to have been proved by the government. The witness, who was 70 years of age and of patriarchal appearance, gave his testimony in a direct and positive manner, accompanied by such emphasis as unquestionably led to the belief that he had been greatly injured by the acts of the defendant. He repeatedly testified that Radford was the man to whom six years before he had given the deed in blank for the purpose of sale, and no notice had been given him of the disposition of the property. His credibility was not impeached, and, because of the absence of Story, was not in conflict. A careful consideration of his testimony, in connection with the emphasis accompanying its delivery, satisfies me that its effect was prejudicial to the defendant in the mind of the jury. Although much material evidence outside of the Hambler testimony to show the conspiracy, overt acts, and unlawful intent is disclosed by the record, there was also evidence in behalf of defendants from which the jury could have arrived at a different determination. It is quite probable that the trial might have terminated differently, had the jury not been influenced by the untruthful testimony to which reference has been made. The responsibility of granting a new trial in a criminal case is a grave one, and I have not arrived at the conclusions herein expressed without misgivings. In courts of the United States a motion for a new trial is addressed to the sound discretion of the court, and where it appears to the court in a criminal case that harmful results are probable, by reason of the mistaken testimony of a truthful witness, the ends of justice are doubtless best promoted by allowing a new trial. It is undoubtedly true that this application should have been made earlier. It was within defendant's power to move for a new trial on the same affidavits now before the court very soon after the trial. His neglect to do so, however, in view of the peculiar circumstances of the case, ought not to deprive him of the right to another trial, where it appears, as here, that

important material evidence was received upon the trial, which is now shown to have been untruthful, and which facts have prejudiced the defendant's rights.

Motion by defendant Radford for a new trial is granted.

HAVANA CITY RY. CO. v. CEBALLOS.

(Circuit Court, S. D. New York. July 20, 1904.)

1. BREACH OF TRUST.

P. assigned to complainant his interest in a concession by a city for a horse car line, and agreed to make proper transfer by deed when the city should grant the right to use electricity as a motive power for the road. Defendant received the assignment to hold in escrow in accordance with such agreement. *Held*, that P. never having acquired the right to use electricity as a motive power, and having informed complainant that he could not secure such right, which was an essential condition to the contract of assignment, there was no breach of trust by defendant in thereafter proceeding in the matter for himself, he not having conspired with P. or any one else to prevent complainant from getting its full concession for horse and electric power.

In Equity.

C. G. Patterson, for complainant.

Adams & Adams, for defendant.

PLATT, District Judge. This is an action in equity, asking for an accounting. The gravamen of the charge is that the defendant agreed to act for the complainant as its agent and trustee for a special purpose, and took advantage of his position to deal in the subject-matter of the agency and trust to his own profit, and to the exclusion of his principal. The record has been examined with interest by reason of defendant's contention that the complainant company has for one reason and another been so treated by its controlling spirit, Mr. Alexander, that nothing remains of sufficient materiality to fill the role of a party in a court of equity. It sets forth a case of promotion and stock management which is somewhat unique, and a close analysis might serve to so dissect and dismember the original entity as to leave nothing of substance existing. Furthermore, the story tends to cast a shadow of suspicion upon the immaculate purity of the corporation's doings. The court will not, however, attempt to grasp all the side lights and shades which the story suggests. It will be assumed, for the purpose in hand at this moment, that the complainant corporation exists; that its hands are clean; that its stock has not drifted into a control which fails to sanction the present suit; that it was not ultra vires for the corporation to acquire the concession of the Cuban railroad, and to build and manage the same after obtaining it; and we then approach its relations with the defendant, and the rights which it has as against him, to inquire whether or not, on the pleadings and proofs, a cause of action can be found. It is thought that a brief statement will indicate the natural answer. Prior to October 22, 1895, Francisco Pla, of Havana, Cuba, had become the owner of a preliminary concession to construct and

operate a line of horse car railway upon certain streets in the city of Havana. On the above day he assigned his interests in such concession by this assignment:

"80 Wall St., New York, Oct. 22, 1895.

"For value hereby received I hereby sell, assign and transfer unto the Havana City Railway Company of West Virginia U. S. A., all my right, title and interest into the concession for a horse car line heretofore granted by the City of Havana to Manuel De La Torre, upon the plans filed by Col. J. Ruiz and agree to follow this assignment by proper transfer by Deed to said Co. when said Havana authorities shall grant Electricity as a motive power for said road.

Fr. Pl'y Picabia."

Defendant then at once signed the following receipt:

"80 Wall St., New York, Oct. 22, 1895.

"I have received from Mr. F. Pla, of Havana, Cuba, an assignment to you of the horse car concession granted by the City of Havana to Manuel De La Torre, which I am to hold in escrow in accordance with the terms of the agreement made yesterday between your company and Mr. Pla, which trust I hereby accept.

"[Sgd] J. M. Ceballos."

Hugh Alexander, president of complainant, prepared both documents. Pla never acquired the right to use electricity as a motive power. The time never arrived, therefore, for following the assignment of the preliminary concession by a proper deed which would vest the concession positively in the plaintiff, and Mr. Alexander so concedes in plain set terms. On August 24, 1897, Mr. Pla wrote Alexander that he could not secure the change of motive power, which was an essential condition to the contract of October 22, 1895, and that he might, therefore, consider the agreement canceled. If that were the exact situation, this cause would be without purpose. After August 24, 1897, the papers held by defendant in escrow were of no value, unless they might have been helpful to the complainant in a suit against Pla for breach of his contract; but complainant did not wish them for that purpose, and has refrained from bringing any such action. No fiduciary relation any longer existed as between complainant and defendant, and no valid reason appears which would preclude the defendant from negotiating on his account for the concession. There was only one chance to hold defendant, and that was to allege and prove that he induced Pla to refrain from adding electric power to the concession, so that he could not be compelled to make the deed to the plaintiff, and then proceeded to deal with him in the same matter. That allegation was made, and probably saved the complaint from an earlier dismissal; but the proofs do not, so far as I can read them, support the allegation. And, too, after Pla notified Alexander that the agreement was canceled, the latter proceeded to deal in the concession as if it were actually in hand and available as an underlying security (although his Spanish lawyer advised him otherwise), and he took in quite a number of thousand dollars based upon such an insecure foundation. And, last of all, Alexander was willing to settle up the entire affair with Pla for $5,000 cash. The complainant company kept no books; but if it had kept books, and Alexander had settled with Pla for $5,000, and if that amount had found its way into those books, it is not unlikely that it would have been charged to expense. I cannot find a scintilla of proof which dem-

onstrates that defendant conspired with Pla, or anybody else, to prevent the plaintiff from gaining its full concession to both horse and electric power in the city of Havana.

Let the complaint be dismissed, with costs.

THE SANTIAGO.

(District Court, W. D. New York. March 30, 1904.)

1. SHIPPING—LONGSHOREMEN—INJURIES—SAFE PLACE TO WORK.

Where the watchman of a ship was charged with the duty of lighting the hold or furnishing lights to the stevedores to enable them to safely reach the hold in which they were working, and there is no evidence that the watchman, in the performance of such duty, was in the employ of an independent contractor, it will be presumed that the watchman continued in the employ of the ship, which was chargeable with his negligence in failing to light the hold for the benefit of a longshoreman employed by the head stevedore; such negligence being proximate cause of his injuries.

In Admiralty.

George H. Kennedy, for libelant.

Charles W. Strong, for respondent.

HAZEL, District Judge. The libelant seeks to recover damages for personal injuries received while employed as a stevedore upon the barge Santiago. The evidence establishes that the watchman of the ship was charged with the duty of lighting the hold, or at least with the duty of supplying candles or lights to the stevedores to enable them to safely reach the place in which they were to work. The respondent does not controvert this fact. His failure to furnish light is therefore negligence attributable to the ship, for which the libelant, a longshoreman in the employ of the head stevedore, is entitled to recover against the vessel. The Slingsby, 120 Fed. 748, 57 C. C. A. 52. The evidence upon the subject of the presence of the watchman is clear enough, and, in the absence of a showing that he was in the employ pro hac vice of an independent contractor, it may be presumed that the watchman continued in the employ of the ship. Accordingly no special contract existed between the vessel and the head stevedore governing the manner in which the cargo should be unloaded, or the liability and responsibility arising from failure to discharge a duty owing to the stevedores employed. In the circumstances of this case, it was the undoubted duty of the vessel to have the hatches lighted to protect the libelant, a longshoreman, in the place in which he was to work, or at least to supply him with candles or lights for his use in descending to the interior of the ship. The case is quite distinguishable from The Auchenarden (D. C.) 100 Fed. 895, and The Saratoga, 94 Fed. 221, 36 C. C. A. 208, cited by respondent. In the case first cited the contractor, to whom the ship was turned over for unloading, was fully informed as to the condition of a hatchway, and his duty to warn his individual stevedores of the danger of such hatchway. Under such circumstances, it was undoubtedly the duty of the master to protect his employés from any danger owing to a

defective hatchway. In The Saratoga, lanterns were provided by the ship, but the workmen did not avail themselves of their use. The burden of proof under the present facts is upon the ship to show that lights were furnished, so that the men could perform the work in the hold with safety to themselves, or to show that it had an independent contract with the head stevedore which relieved the vessel from such obligation. In the absence of such a contract, the libelant was performing a maritime service for the ship, and therefore the duty rested upon the owners of the vessel to provide a safe and suitable place for the libelant to work in. The Rheola (C. C.) 19 Fed. 926; The Anaces, 93 Fed. 240, 34 C. C. A. 558. The evidence shows that the employés and their foreman, Nagel, looked to the watchman of the ship to furnish the lights. It may be fairly implied from the evidence on this subject that the vessel owners did not transfer the duty which they owed to the libelant to provide him with a reasonably safe place to work by means of a contract or agreement with a third party. The record satisfactorily shows that the proximate cause of the accident to the libelant was the unlighted condition of the hold. Had lights, candles, or lanterns been supplied to the men before going below, or if, by usage or custom, the stevedores were obliged to supply themselves with candles or lights for their use in the hold of the vessel, a different question would be presented. No suggestion is found in the testimony, other than that the watchman of the vessel was the person relied on to furnish lights. The evidence does not satisfy me of libelant's concurring negligence. It follows that the injuries resulted entirely from the absence of a proper degree of care and diligence on the part of the libeled ship. Fortunately the injuries sustained, though painful, were not of a permanent character. Consideration of the evidence upon this point leads to the conclusion that $350 would fairly compensate libelant for the loss of time and medical expenses paid or incurred, as well as the pain which he was obliged to endure.

So ordered, with costs.

CONSOLIDATED DENTAL MFG. CO. v. HOLLIDAY et al.

HOLLIDAY et al. v. CONSOLIDATED DENTAL MFG. CO.

(Circuit Court, N. D. Georgia. May 19, 1904.)

No. 1,178.

1. CONTRACTS—AMBIGUITY—PAROL EVIDENCE.

Where written contracts were not only ambiguous in respect to what was stated therein, but also in respect to matters omitted, and were incomplete as to vital matters necessary to render them working contracts, it was proper to admit parol evidence to show how the contracts had been construed by the parties for a period of seven years during which they carried on business.

In Equity.

¶ 1. See Evidence, vol. 20, Cent. Dig. § 2129.

Fulton Colville, for Consolidated Dental Mfg. Co.

Major Hughes and Dorsey, Brewster & Howell, for R. A. Holliday and others.

PARDEE, Circuit Judge. After a full examination of the evidence in the case and the arguments submitted, I have concluded that the exceptions to the master's report should be overruled. In my opinion, the master has properly construed the formal written contracts between the parties in regard to the matter of expenses of the business carried on by the defendants in the so-called "branch houses," and has properly ruled the contracts to be ambiguous as to who should control and be responsible for the said expense. The contracts, as written and signed, may have embodied all that the parties thereto had then formulated and agreed to, but the nature of the business contemplated, and the actual conduct of the parties immediately following, show that neither of the parties had an idea that the agreements and responsibilities of each were all to be found within the four corners of the written contracts; and it may be well said of the said written contracts that they are not only ambiguous in respect to what is stated, but because of matters not stated, and are silent and incomplete as to vital matters necessary to render them working contracts. That this was well understood by the parties appears from the fact that almost the first letter offered by the defendants shows that immediately after the contract some working arrangements were entered into in the president's office; and the evidence shows that, besides the question of expenses, the matters of territory to be covered by business of branch houses, the fixing of trade and list prices, the maximum of goods to be consigned by complainant, the purchase and sale of goods from outside houses, and the minor questions of deposit under second contract, interest, and insurance, were all left open for agreement as occasion might arise. In this view of the case, it seems clear that the rulings of the master admitting evidence to show how, during a period of seven years, the parties had understood, construed, and carried out the contracts, were correct, and should be approved.

Considering the evidence, it is clear to my mind that the understanding between the parties from the beginning was that the services to be furnished by the defendants were to include all the expenses of handling and selling the goods furnished by the complainant. That this was the understanding and construction of the defendants clearly appears from statements in letters and accounts emanating from them. And from the showing made the presumption is strong that it would still more clearly appear from the defendants' books kept prior to 1901, which appear to have mysteriously disappeared since this litigation was begun.

As to the accounting by the master, the complainant makes no objection. From the examination I have given it, I am satisfied that it is more favorable to the defendants than they were strictly entitled to.

It is by no means clear to me that the defendants should not have been charged with some interest. If there had been opposition

thereto by the complainant, I seriously doubt whether the defendants were entitled to be credited with full amount of book accounts turned over. There were over $15,000 of them in amount, and although, by the contract, the defendants substantially guarantied them, there is a large percentage noncollectible. And it is not to be overlooked that these accounts included not only the trade price of the goods sold, but the defendants' profits. As the master has stated the account, of course the amounts of cash drawn out by the defendants after March 1, 1903, and, as appears by the cashbook, mainly, if not entirely, derived from collection of the accounts charged in full to the complainant, should be charged to the defendants.

A decree may be entered in favor of the complainant overruling all exceptions to the master's report, and approving and confirming the same, dismissing the defendants' cross-bill, and for a money judgment against the defendants for the sum of $2,360.88, with interest from 8th of May, 1903, at 7 per cent., and for all costs of suit. Complainant's original bill to be retained for settlement of receiver's accounts and compensation.

In re KANE.

(District Court, N. D. New York. May 9, 1904.)

No. 1,276.

1. BANKRUPTCY—ADVERSE CLAIMS—COURTS—JURISDICTION.
A bankruptcy court has jurisdiction to determine in the first instance whether an asserted adverse claim to property claimed by the bankrupt's trustee is colorable or actual.

2. SAME—SUMMARY PROCEEDINGS.
Where an adverse claim to property claimed by a bankrupt's trustee is colorable merely, or clearly a nullity, the referee has jurisdiction to require a surrender of the property to the trustee in bankruptcy, or to determine such adverse claim by summary proceedings; but, if it appears that the claim is asserted in good faith, and substantiated by verified pleadings or oral testimony, the issue can be determined only by a plenary suit.

In Bankruptcy.

T. S. Fagan (H. D. Bailey, of counsel), for trustee.
Henry J. Speck, for National State Bank of Troy.

HAZEL, District Judge. Certain questions have been certified to the court for decision by Referee King. Upon the petition of the trustee in bankruptcy, an order was issued by the referee directing the National State Bank of Troy to show cause why certain moneys of which the bankrupt is the owner, and which came into the possession of the bank after the bankruptcy proceedings were instituted, should not be paid over to the trustee. On behalf of the bank an answer, later a proposed answer, and finally a demurrer to the jurisdiction, were

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 447.

filed. The attorney for the trustee moved the court to cancel from the files the demurrer on the ground that an answer joining issue had previously been filed, and therefore no special plea to the jurisdiction of the court should be entertained. It was stated by counsel for the bank at the preliminary hearing that, if the referee decided the jurisdictional point adversely to his contention, he desired to file an amended answer traversing the allegations set forth in the petition. The ruling upon these questions was reserved by the referee. Subsequently he decided that the bankruptcy court had authority and jurisdiction in a summary proceeding to compel the delivery to the trustee of money or other property belonging to the bankrupt, where it appears that such property is merely held as agent or bailee, and where it is withheld from the possession of the trustee. This holding is justified by the decisions. Louisville Trust Co. v. Cominger, 184 U. S. 25, 22 Sup. Ct. 293, 46 L. Ed. 413; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; In re Knickerbocker (D. C.) 121 Fed. 1004; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620. The referee is quite right when he says the bankruptcy court has jurisdiction to determine in the first instance whether an asserted adverse claim to property is colorable or actual. If it be clearly a nullity, the referee has jurisdiction, and may by summary process require the surrender of the property so withheld to the trustee in bankruptcy. On the other hand, should evidence of a claimant satisfy the referee that an adverse right to such possession and control is asserted in good faith, and there is reasonable cause for believing that the intention of the claimant is to protect an asserted right of ownership and control, then the petition of the trustee should be dismissed. The remedy of the trustee for the recovery of the property may then be found in a plenary suit instituted in the proper tribunal. The determination of the respective rights of the parties demands judicial investigation by the referee to ascertain the facts. Both sides are heard, and evidence may be taken, though the conclusions of the court may be based upon the pleadings or affidavits presented to him. He must exercise a sound judicial discretion in the determination of questions of this character, to the end that no injustice be done to either party. If he is satisfied, either from personal knowledge of the facts or from testimony, that an order to show cause ought to be directed to a person charged with having in his possession property belonging to the bankrupt estate, the essential inquiry upon return of the order to show cause, if an adverse claim is made, is whether such claim is colorable or fictitious. In short, if it is a colorable claim, it should be set aside, and the claimant summarily directed to deliver the property to the trustee; but if, as already indicated, the claim is asserted in good faith, substantiated by verified pleadings or by oral testimony, then the objection to the jurisdiction of the court is controlling. In such an event the property is no longer constructively in the possession of the bankrupt and subject to the order of the bankruptcy court.

The certificate of the referee apparently submits the following question for my decision: Was the decision proper, overruling the objection to the jurisdiction of the court, and allowing the National State Bank to interpose its proposed amended answer? This question is an-

swered in the affirmative. I am unable to perceive from an examination of the record any cogent reason for passing upon any other question found in the voluminous briefs submitted by counsel.

In re LEVIN.

(District Court, S. D. New York. February, 1904.)

1. BANKRUPTCY—EXAMINATION OF BANKRUPT—PRIVILEGE—CRIMINATING QUESTIONS.

Where a bankrupt was under indictment at the time he was examined before the referee, and was asked as to the accuracy of a creditor's proof of claim, to identify his signatures to certain notes filed by another creditor, whether he knew a third creditor, and whether he was a salesman in the bankrupt's employ, and to identify his checkbook, after testifying that he could tell whether or not a claim had been paid by reference to his checks, the answers to such questions could not by any possibility incriminate him, and hence he was not entitled to refuse to answer on the ground that his answers might so tend.

In Bankruptcy. On certificate of referee.

The following is the opinion of Dexter, Referee:

I, Stanley W. Dexter, one of the referees of said court in bankruptcy, do hereby certify that, in the course of the hearing of said cause before me, the following questions arose, pertinent to the said proceeding, as appears in the copy of the stenographer's record herewith submitted:

(1) The witness declined to answer a question as to the accuracy of the proof of claim of the Consolidated Gas Company for $4.30; stating that he declined to answer—adopting the suggestion of his attorney—on the ground that the answer might tend to incriminate or degrade him. His attorney objected on the ground that the bankrupt was under indictment, and is defendant in several criminal proceedings, and that he need not testify in this proceeding, upon the ground that it would tend to incriminate him. I directed the witness to answer, and he refused.

(2) The witness' attention was called to the claim of Hyman Schlesinger for $850, based on promissory notes, and he was asked to look at the notes and state whether or not the signatures to the notes were his signatures. He declined to answer upon the ground that it would tend to degrade or incriminate him. I directed the witness to answer, and he still refused to answer.

(3) The witness was asked to look at the claim of Abram A. Klasky, and was asked whether he knew Klasky, and refused to answer upon the same grounds. He also refused to answer the question whether or not Klasky was a salesman in his employ. I directed him to answer, and he declined upon the same ground.

(4) In the first part of the examination of the witness, the witness was shown proof of claim filed by Stern Bros., of West Twenty-Third street, for $276.61. He examined the claim, and stated that he knew he was indebted to Stern Bros., but could not state the amount. He believed, however, that one bill was paid, but could not tell which bill, except by reference to the checks in his trunk, which was then in the possession of the trustee. Subsequently the checkbook was handed to him, and he was asked to identify the checkbook, and refused to do so, although directed so to do by me.

(5) Before the bankrupt raised any question of privilege, his counsel objected to his testifying in the proceeding at all, on the ground that the bankrupt was under indictment, and that any answers given in this proceeding might tend to degrade or incriminate him. The bankrupt adopted the suggestion of his counsel, although he stated that he did not know whether or not it would tend to incriminate him.

(6) The bankrupt was asked the following question: "Q. Mr. Levin, are you prepared to say that the answer to any of the questions that have been asked

you will tend to degrade or incriminate you?" and the witness said, "I decline to answer that." I directed him to answer, and he refused.

And the said questions are certified to the judge for his opinion thereof, with the recommendation that the bankrupt be punished and be committed for contempt of court.

Julius Henry Cohen, for the motion.
Leonard Bronner, opposed.

HOLT, District Judge. As I understand the rule, if the question is of such a description that the answer may or may not criminate the witness, he can refuse to answer (Judge Marshall's opinion on Burr's trial, 25 Fed. Cas. 39); but if the court is convinced that the answer to the question cannot by any possibility criminate him, and especially if the witness does not swear that he believes that it would, it is the duty of the court to compel him to answer. Otherwise every bankrupt can absolutely refuse to be examined at all. I think that each of the questions put could not by any possibility call for answers which would criminate the bankrupt. Referee's rulings affirmed.

Motion to punish for contempt granted, unless the bankrupt answers the questions before the referee at a meeting to be fixed by the referee.

McARTHUR BROS. CO., Limited, v. 622,714 FEET OF LUMBER.

McARTHUR v. 836,693 FEET OF LUMBER.

(District Court, W. D. New York. March 31, 1904.)

Nos. 102, 103.

1. ADMIRALTY—DEMURRAGE—DELAY IN LADING—FAULT.
   Libelants of a cargo were not entitled to recover demurrage for delay in loading where the proof showed that whatever delay arose was owing to the failure of the steamer and tow to arrive as scheduled, by reason of which other vessels arrived, and were loaded in turn at the dock, in accordance with the customs of the port.

2. SAME—DISCHARGE—REASONABLE DISPATCH—DELAY.
   Where, by the exercise of customary diligence and promptitude, a steamer and tow could have been unloaded 2½ days earlier than the discharge was effected, the consignee was liable for the delay.

In Admiralty.

Harvey L. Brown, for libelants.
Moot, Sprague, Brownell & Marcy, for respondents.

HAZEL, District Judge. The libelants are not entitled to recover demurrage for delay in loading the steamer Tecumseh and barge Marengo at Parry Sound. The proofs show that whatever delay arose at that port was owing to the failure of the steamer and tow to arrive, as scheduled, on November 8, 1901. They arrived two days later. Meanwhile other vessels arrived, and were loaded in turn at the dock

¶ 1. See Shipping, vol. 44, Cent. Dig. §§ 572, 587.
Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

where the Tecumseh and barge were to take cargo. By universal rule, such vessels were entitled to priority in loading. Empire Co. v. Phila. & R. Coal & Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Williscroft v. Cargo of Cyrenian (D. C.) 123 Fed. 169. The subsequent loading of libelant's steamer and tow was in the usual order of precedence, and, considering the limited facilities of the port, was accomplished with all reasonable promptitude. The Tecumseh and her tow, the Marengo, arrived at the respondent's dock in Erie Basin at Buffalo, N. Y., the port of discharge, at 9 o'clock in the forenoon of November 26, 1901, and immediately tendered delivery of their cargo of lumber to the claimant, who was the consignee. According to the evidence, a reasonable time, under favorable conditions, in which a steamer and barge could have been unloaded, was three days. Unloading, however, was not begun on the Tecumseh until November 30th, and on the barge not until December 2d. There was some delay on account of the prior arrival of other lumber-carrying vessels, which, as already stated, were entitled to be unloaded in turn ahead of libelant's steamer and tow. Other evidence is found in the record to show that the cargo, in view of the circumstances, was discharged, with reasonable diligence. Consideration of the entire case, however, is certainly persuasive that both ships could have been unloaded with less delay. The respondent is chargeable with knowledge of the arrival of the Tecumseh and Marengo, and, although the promptitude with which the vessels were to be unloaded was not expressly stipulated, nevertheless the charterers impliedly agreed to unload the cargo within a reasonable time, and in accordance with custom and usage of the port. Cargo was not discharged until December 6th. As already stated, there was some delay because of unusually congested conditions at Buffalo, owing to the approaching close of the season of navigation. A fair preponderance of the evidence shows that there was an unreasonable delay of 2½ days through failure of the consignee to provide necessary facilities for a speedier discharge of the cargoes carried by the libelant's vessels. Libelants had the right to expect that cargo would be discharged with reasonable dispatch, and, further, that when unloading commenced the lumber would be moved with customary diligence and promptitude, unless prevented by extraordinary conditions. No such conditions are shown by the proofs as will justify denying to libelants demurrage for delay held to be unreasonable. It appears that the lien for demurrage has not been waived or abandoned. The evidence of Capt. Smith, a disinterested witness for libelants, shows that the earning capacity of the Tecumseh is $61 per day, and that of the Marengo $29 per day. Some evidence was given by respondents to the effect that the crew of the Marengo was discharged on arrival of the barge at this port. Such evidence has not sufficient weight to negative the testimony of Capt. Smith that, despite the lateness of the season, the barge had an earning capacity in the amount stated.

I therefore decide that libelants are entitled to recover damages as follows: On the libels filed in behalf of the Tecumseh, $152.50; and in the case of the Marengo, $72.50—besides costs in each case.

In re COHEN.

(District Court, D. Massachusetts. February, 1904.)

1. BANKRUPTCY—TRUSTEES—APPOINTMENT BY REFEREE.
Where, at the first meeting of the creditors of a bankrupt, the referee found it impracticable to pass on the validity of the claims there presented, because the validity of a large number of them was attacked by other creditors, and therefore continued the consideration thereof, it being impossible to select a trustee in the ordinary manner, it was proper for the referee to appoint a trustee of his own selection, as authorized by Bankr. Act July 1, 1898, c. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438].

2. SAME—PETITION FOR REVIEW—EVIDENCE.
Where, on petition by creditors for review of an order appointing a trustee for a bankrupt, the creditors desire a review of the evidence, they should either have the evidence before the referee taken down stenographically, and by him certified to the judge, or should specifically point out to the referee the testimony which they wish summarized, and should ask him to certify specific findings of fact.

3. SAME—CONTINUANCE.
Where, at the first meeting of creditors of a bankrupt, disputes as to the validity of certain claims arose, the right to continue the hearing of such contests was within the discretion of the referee.

The following is the opinion of Olmstead, Referee:

This was a petition to review the action of the referee in appointing a trustee of said estate. The proceedings were begun by an involuntary petition, and a receiver had been appointed by the honorable judge of the District Court before adjudication under circumstances which had not been, in the opinion of the referee, fully disclosed to the court. Subsequently a petition was filed by certain creditors represented by Mr. Blanchard for the appointment of a co-receiver; alleging grounds which, to the referee, seemed to warrant the immediate appointment of an additional receiver. The facts as developed at the various stages of this proceeding were that the debtor had, prior to the filing of the involuntary petition, absconded, and that soon after meetings of his creditors were held, and a proposition of settlement on the basis of 33 per cent. was made. The liabilities are in the neighborhood of $10,000. The assets of the estate will probably realize about half that sum. The original proposition to pay 33 per cent. was not carried out, and was soon after followed by the involuntary petition. The petitioning creditors were represented by William Charak, Esq., whose brother was an indorser or surety for the debtor in a large sum. Mr. Charak secured the appointment of his brother-in-law, Mr. Reinherz, as receiver. This case is a pretty good illustration of the evil practice, which had become too common, of purchasing the claims of creditors either immediately before or after the filing of bankruptcy petitions. It is the observation of the referee that creditors, upon the announcement of a failure, become panic-stricken, and are often willing to accept sums which may be offered for their claims far below their real value, and this condition of mind is frequently taken advantage of by designing persons. The scheme which seems to have been contemplated by the parties interested in purchasing these claims was to make an offer of 33 per cent., when the estate would probably pay, with careful administration, between 40 and 50 cents on the dollar, and thus secure the purchase of these claims for the benefit and gain of the purchasers. In other words, what was the interested parties' gain became the creditors' loss. The only safe course, under the ample guaranty of the bankrupt law, is for creditors never to sell their claims until after an appraisal has been had by the regular, sworn appraisers of the court. Then the creditors

¶ 2. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

know what the true value of the estate is, what they may expect, and what is the true worth of their claims. An appraisal had been made before the adjudication, but by appraisers suggested by the parties interested in the purchase of these claims, and such appraisal may not have afforded the same guaranties of accuracy to the creditors which an appraisal made by entirely disinterested appraisers would have furnished. When the first offer of 33 per cent. either fell through or was withdrawn, an involuntary petition was filed, and the Charaks undertook to purchase the claims of creditors, with a view, as was stated, of having the petition dismissed. The experience of the referee is to the effect that creditors, after the filing of a petition, and especially where a prior offer had been withdrawn, which offer in this case may or may not have been a bogus one, are generally willing to accept the best offer made them under the circumstances. The referee is of the opinion, from the testimony introduced at the first meeting of creditors, that the purpose of Mr. Charak and his brother in purchasing these claims was to protect themselves on the guaranty made to the debtor. In other words, there appears in this case to have been an attempt to manipulate the status of creditors, and to speculate on prospective dividends —a practice which certainly, after the filing of petitions, it seems to the referee, should be discouraged. In view of these facts and other facts set forth in the petition for a co-receiver, the referee was impelled to appoint a co-receiver in order that a thorough investigation might be made. Accordingly he selected A. K. Cohen, Esq., a well-known and reputable attorney, to act with Mr. Reinherz. Mr. Cohen has faithfully discharged his duty, and conferred with the referee in the administration of the estate. At the first meeting of creditors, William Charak, Esq., represented a large number of claims, to which objection was made by Mr. Blanchard, representing another faction of creditors. On the one side were the creditors represented by Mr. Blanchard. On the other were the large number represented by Mr. Charak. Mr. Blanchard called several witnesses to the stand, who testified that claims represented by them had been sold to Mr. Charak. The primary purpose of the choice of a trustee is that the creditors shall have an honest and able representative. After the reference of a bankruptcy petition, the referee is the magistrate administering the "estates in his charge." Bankr. Act July 1, 1898, c. 541, § 29c, cl. 3, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]. Upon him devolves the principal and a heavy responsibility in the administration of estates which are conducted "under the direction of the court." Bankr. Act, § 47a (2), 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]. In the proof and allowance of claims the bankruptcy act also gives the referee a large discretion. Section 57d, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443] provides that upon objection the consideration of claims may be "continued for cause by the court upon its own motion." In view of the extraordinary facts developed in this case, the referee decided that the only proper course to pursue was to take the administration of this estate into his own hands, and appoint a trustee of his own choosing. He accordingly suspended all the claims presented for the trustee to investigate, and appointed Lee M. Friedman, Esq., a well-known and reputable attorney, as the trustee, who has since qualified. In order that partiality might not seem to be shown towards the creditors represented by Mr. Blanchard, the referee refrained from appointing A. K. Cohen, Esq., as trustee; preferring, under the extraordinary circumstances of this case, to take a third and entirely independent person.

The course pursued by the referee was thus a direct course, but the same result might have been accomplished by another but more indirect course. The referee has sometimes refused to approve, as general order 13 authorizes him to do, the choice of a candidate as not a competent person; and, inasmuch as these claims were represented by Mr. Charak, whose action in purchasing claims, either himself or by his brother, did not meet with the approval of the court, the referee would have been justified in refusing to approve of the candidate voted for by the creditors represented by Mr. Charak; and, inasmuch as there was no hope of Mr. Blanchard's faction and Mr. Charak agreeing on a candidate, the referee, in all probability, would have been called upon, from the failure of the creditors to make a choice in this contingency, to appoint a trustee. It seemed, however, to him more advisable, in view of

the peculiar and irregular methods employed in this proceeding, to take the more direct course, as above indicated.

Lee M. Friedman, trustee.
John H. Blanchard, for objecting creditors.
William Charak, for receiver.

LOWELL, District Judge. At the first meeting of creditors, sundry claims were presented for proof, and all those presented by parties now appealing from the decision of the referee were there contested. In view of all these circumstances, more fully set out in his certificate, that officer found it impracticable at that meeting to pass upon the validity of the claims there presented, and continued their consideration. See section 57d, Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]. As it thus became impossible to proceed to the election of a trustee in the ordinary manner, the referee appointed a trustee, as provided in section 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]. The circumstances were unusual, and the referee did not deem it expedient to postpone the election until the contested claims had been passed upon, and an adjourned meeting could be had. No injustice was thus done to creditors, for, after the validity of their claims has been established, they can ask the court for the removal of the trustee thus appointed, without allegation or proof of his dishonesty or inefficiency. In disposing of their petition for removal, the court would bear in mind the unusual circumstances of the trustee's original appointment, and would protect the rights which creditors ordinarily possess in choosing a trustee of the bankrupt estate. The referee, indeed, could have continued the administration of the estate by the receivers already appointed, or by other receivers substituted for these, but he deemed it for the best interests of the estate that the title to the bankrupt's property should be vested immediately in a trustee. While administration by a receiver ordinarily accomplishes much the same result as administration by a trustee, yet circumstances may well exist to make the latter desirable. If at the first meeting all claims offered for proof are in dispute, and it is impracticable at that time to settle the dispute, it appears to be within the discretion of the referee to appoint a trustee under section 44. The judgment of the referee is therefore affirmed.

Creditors prayed a recommittal of the certificate in order that the referee might certify additional facts and evidence. If the appellants desire that the judge shall weigh the evidence and determine questions of fact, they should ordinarily procure that the evidence before the referee is taken down stenographically, and by him certified to the judge. If this be deemed inadvisable on account of expense or other reasons, the parties should specifically point out to the referee that testimony which they wish him to summarize in his report, and they should ask him for specific findings of fact on which they may rely at the hearing before the judge. Nothing of the sort was done here, and the appellants are therefore left to depend upon the summary of evidence and the findings of fact contained in the certificate. In order that the appellants should lose nothing substantial by their oversight, the court

has inquired of the referee concerning one additional finding especially desired by the appellants, namely, that certain creditors named were a majority in number and amount of claims presented, and that no evidence was given before the referee attacking the validity or genuineness of their claims. The court is informed by the referee, as sufficiently appears from the certificate, that the validity and genuineness of all these claims was contested before him. If there was a contest, and the referee continued consideration of the claims, it is immaterial that no evidence impeaching their validity was presented at the first meeting. Continuance was within the referee's discretion.

DALY v. QUINLAN.

(District Court, E. D. New York. July 7, 1904.)

1. NAVIGABLE WATERS—DOCKS—PROJECTING ROCKS—DAMAGES TO VESSELS—NEGLIGENCE.

Where the owner of a dock failed for two years after dredging the space along the dock to examine the same for obstructions, or to use reasonable care to provide and maintain a safe bottom for boats coming to the dock, though he was notified of a pointed rock lying in such bottom, and rising some 18 inches above the bed of the sea, he was guilty of negligence rendering him liable for injuries to a vessel caused by her settling on such rock with the falling of the tide.

Carpenter, Park & Symmers, for libelant.
Martin A. Ryan, for respondent.

THOMAS, District Judge. This action is to recover damages for injuries to libelant's boat caused by a rock adjacent to respondent's dock, upon which the vessel settled with the falling tide. Although the boat was old, and it would not have been prudent to allow her to rest on a hard bottom, yet a pointed rock, rising some 18 inches above the bed of the sea, caused the injury. It is not expectable that a vessel, old or new, should meet with such rock. About two years before this, Quinlan, the owner, had caused the space along the dock to be dredged. After that had been done, one of the dredgers, in reply to Quinlan's inquiry, took measurements, and said, "I guess you have got 10 feet all along here—10½." Quinlan said, "Are you sure?" He said, "Yes." From that time forward for two years no inspection of the bottom was made, although the respondent's foreman was notified the year before the accident that there was a rock about 24 feet off the bulkhead. Thereupon the foreman ascertained the presence of such rock, and reported to Quinlan. There is evidence that during the two years after the dredging the libelant's boat, on a single occasion, and other boats drawing as much or more than libelant's boat, had been to the dock without injury, and even that they rested on the bottom without injury. It was the duty of the respondent to use reasonable care

¶ 1. See Wharves, vol. 48, Cent. Dig. § 37.

to provide a safe bottom for boats coming to his dock, and to use the same care to maintain the bottom in proper condition. There is not the slightest evidence of any inspection or care in the matter of maintaining the bottom in good condition. It seems to have been the idea of the respondent that he could wait until boats lying at or approaching his dock met with obstruction, before taking any steps to find or to remove the same. This is not the care contemplated by law. It was his duty to use ordinary care to anticipate injury, and to keep the space about his dock under surveillance, for he knew that the bed was liable to change under the action of the water. He showed no vigilance, but awaited events. Such conduct, observed through two years, does not show proper care.

The libelant should have a decree.

THE OUR FRIEND.

THE MAJESTIC.

(District Court, E. D. Pennsylvania. August 1, 1904.)

No. 134.

1. ADMIRALTY—COLLISION—LIBEL IN FORMA PAUPERIS.

Where libelant, in a proceeding in admiralty for collision resulting in the loss of libelant's sloop, tackle, apparel, and furniture, alleged that by reason of his poverty he was unable to defray the expense of litigation, and prayed that process might issue and be served in forma pauperis, as authorized by Act Cong. July 20, 1892, c. 209, § 1, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706], and there was no proof that libelant's sworn statement as to his poverty was false, the fact that he purchased the sloop for $500 was insufficient to establish that he possessed property at the time the suit was instituted, or had acquired any since that time, justifying the court in requiring him to give security for costs.

In Admiralty.

Joseph Hill Brinton, for libelant.

Willard M. Harris, for respondent.

HOLLAND, District Judge. This is a petition to compel the owner of the libelant sloop to enter security for costs. It appears that on or about the 30th day of May, 1904, the tug Majestic collided with libelant's sloop, as a result of which the sloop was totally wrecked, and her tackle, apparel, and furniture, together with the provisions and other articles aboard, were destroyed, the total value of which is claimed to be $600. The libelant, in his libel, alleges that, by reason of his poverty, he is unable to defray the expense of litigation, and prays that process may issue and be served in forma pauperis, in accordance with the provisions of the act of Congress of July 20, 1892, c. 209, § 1, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706]. The petition filed by respondent, requesting that the libelant be required to enter security, avers that the libelant paid $500 for the sloop, for the destruction of which he seeks to recover in this suit, and that he was engaged in the

fishing business, showing conclusively that he had not brought himself within the exceptions in favor of poor seamen. The answer to this petition denies that the libelant has any other property other than the sloop that is alleged to have been wrecked, and is therefore unable to give security for costs. There are no depositions taken by the petitioner to show that the libelant made a false statement in his libel when he swore that, by reason of poverty, he was unable to defray the expense of litigation. The fact that the libelant purchased a sloop for $500 is no evidence that he was possessed of property at the institution of the suit, or has acquired any since that time, enabling him to give security in this case. There is nothing to show that he has any property outside of what he had invested in his catboat, and this, he alleges, is a total loss, by reason of the collision. It may be that the admiralty court can require a libelant to enter security in a case under this act, where the libelant, who by reason of his poverty was unable to pay costs and enter security at the time the suit was instituted and the writ issued, has become possessed of property subsequently and before the termination of the suit; but where a litigant brings an action in forma pauperis under this act, and at the time of the institution of the suit he has sufficient property to pay costs and enter security, and that afterwards is made to appear to the satisfaction of the court, the proper proceeding is, we think, under the fourth section of this act, to dismiss such cause, where it is made to appear that the allegation of poverty is untrue, or if the court is satisfied that the alleged cause of action is frivolous or malicious.

As there is no evidence here to sustain an allegation that the libelant has subsequently to the bringing of the suit become possessed of sufficient property to enable him to pay the costs or enter security for the same, the petition is dismissed.

UNITED STATES v. FLEITMANN & CO.

(Circuit Court, S. D. New York. June 1, 1904.)

No. 3,376.

1. CUSTOMS DUTIES—SUFFICIENCY OF PROTEST—STATEMENT OF OBJECTIONS.

Certain importers protested against the payment of duty on silk goods that had been classified under a paragraph of the tariff act relating to silk trimmings and similar goods; alleging in their protest that the articles should have been classified at the rate of 50 per cent. ad valorem, under another paragraph, which provides that rate for silk bandings, cords, etc. It appeared that neither the paragraph under which the assessment was made, nor that cited by the importers in their protest, was applicable to the merchandise, but that it should have been classified under a third paragraph, relating to manufactures of silk not specially provided for, prescribing the same rate of duty as the paragraph cited in the protest. *Held*, that the protest should be sustained, as satisfying the requirement of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], that an importer shall, in making a protest, set "forth therein distinctly and specifically * * * the reasons for his objections."

Application for review of a decision of the Board of General Appraisers reversing the assessment of duty by the collector of customs at the port of New York on merchandise imported by Fleitmann & Co.

The only question that the board passed on was whether the protest which the importers had filed with the collector of customs satisfied the requirements of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], where it is prescribed that an importer shall, in making a protest, set forth therein "distinctly and specifically * * * the reasons for his objections." Note United States v. Bayersdorfer (C. C. A.) 126 Fed. 732, and United States v. Knowles (C. C. A.) 126 Fed. 737. It appeared that the merchandise had been improperly classified under paragraph 390, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], relating to silk trimmings and similar merchandise, and that it was correctly classifiable under paragraph 391, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], at the rate of 50 per cent. ad valorem. The claim of the importers, however, was that "said goods are dutiable only at the rate of 50 per cent. ad valorem, under paragraph 389 of the Tariff Act of 1897." Said paragraph 389 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]) relates to silk bandings, bone casings, etc., while paragraph 390, under which classification should have been made, relates to manufactures of silk not specially provided for.

Henry A. Wise, Asst. U. S. Atty.

Benjamin Barker, Jr., for importers.

TOWNSEND, Circuit Judge. The decision of the Board of Appraisers is affirmed on the authority of U. S. v. Shea, Smith & Co., 114 Fed. 39, 51 C. C. A. 664; U. S. v. Salambier, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167; and Allen v. U. S. (C. C.) 127 Fed. 777.

In re SANBORN.

(District Court, W. D. New York. April 12, 1904.)

No. 1,265.

1. BANKRUPTCY—DISCHARGE—OPPOSITION—DISCONTINUANCE—COLLUSION.

Where, on an application for a bankrupt's discharge, it appeared that certain creditors had opposed the discharge, and had applied for time to file specifications, but, though the time had expired, the specifications had not been filed, and the referee, in a supplemental report, had refused a certificate of conformity required by bankruptcy rule 10, the facts tended to create a presumption or a suspicion that some act had been done by or on behalf of the bankrupt to secure the discontinuance of the opposition, justifying the refusal of the bankrupt's discharge pending a further report by the referee.

In Bankruptcy.

Plumley & Plumley, for the bankrupt.

HAZEL, District Judge. It appears by the records of this court that there has been opposition by various creditors to the discharge of the bankrupt. Requests for extensions of time to file specifications in opposition to a discharge were heretofore made, and granted by this court, but as yet no specifications have been filed, though the time to do so has now expired. The referee, in a supplemental report, has re-

fused the certificate of conformity required by rule 10. The facts therefore give rise to the presumption or suspicion that some act was done either by or on behalf of the bankrupt to secure the discontinuance of such opposition, or that the objecting creditors have been induced to withdraw the same, and to allow the discharge to be granted. It has been held that, if the opposition of the creditor is bought off, it is such a fraud, under the bankrupt act, as would warrant vacating a discharge. In re Dietz (D. C.) 97 Fed. 563. There is no doubt that the court has the power to refuse a discharge to a bankrupt where the entire proceeding is a palpable fraud upon the creditors. Without now determining that question, I believe a proper disposition at this time of the application of the bankrupt for discharge, in view of the prima facie showing of fraud, is to refer the matter back to the referee, with instructions to ascertain and report whether opposition to the discharge has actually been abandoned by the creditors, and whether such abandonment was induced in consideration of payment or part payment of their claims.

The discharge of the bankrupt will accordingly be withheld until the further report of the referee on the questions now submitted to him.

TIFFANY v. UNITED STATES.

(Circuit Court, S. D. New York. May 23, 1904.)

No. 3,272.

1. CUSTOMS DUTIES—CLASSIFICATION—SILVER HAND BAGS—JEWELRY.

Women's silver hand bags or purses, used for holding money, articles of wearing apparel, etc., are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "articles commonly known as jewelry," but are dutiable as articles of silver under paragraph 193 of said act, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

On application for review of a decision of the Board of General Appraisers. The merchandise consisted of so-called "aumoniers," imported by C. L. Tiffany at the port of New York, and classified under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "articles commonly known as jewelry." These articles were composed of silver wire, partly oxidized, with a clasp, ring, and chains of the same material, and were intended to be used as hand bags or purses for holding money, articles of wearing apparel, etc. On the authority of a former decision (G. A. 4,829, T. D. 22,688), the board affirmed the collector's assessment of duty.

William B. Coughtry, for importer.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question comprises hand bags or purses carried by women on the arm, in the hand,

or suspended from the belt, and used for holding money, articles of wearing apparel, tickets, and similar articles. They were assessed for duty under the provisions of paragraph 434 of the act of 1897 as "articles commonly known as jewelry." The importer protested, claiming that they were dutiable under the provisions of paragraph 193 of said act as "articles composed of silver." The uncontradicted testimony of witnesses from various branches of trade, including dealers in jewelry, fancy goods, silverware, and of salesmen in the department stores, shows that these articles are not commonly known as jewelry, and are not manufactured in jewelry factories, or sold as articles of jewelry.

The decision of the Board of General Appraisers is reversed.

NARETTI v. SCULLY.

(District Court, E. D. Pennsylvania. July 30, 1904.)

No. 1.

1. JUDGMENTS—RELEASE—ANSWER—AMENDMENT.

Where, on an issue as to the validity of a release of a judgment, the answer alleged that the release was executed without consideration, but the release showed on its face that a consideration was paid, and the depositions failed to sustain the answer, but tended to show that libelant was coerced into executing the release through fear of imprisonment, the latter would be permitted to amend his answer so as to attack the validity of the release on that ground.

In Admiralty. Upon a rule to show cause why clerk should not file a release, the libelant was permitted to amend his answer.

Joseph Hill Brinton, for libelant.
George Hart, for respondent.

HOLLAND, District Judge. In the matter of the petition of John Scully, by his attorney, George Hart, for a rule on the clerk to file a release of a judgment against the said respondent in the above-mentioned case, I have carefully read the depositions on both sides. The petition alleges the execution of the release of this judgment, and the filing of the same with the clerk. The libelant alleges, as a matter of defense, that there was no consideration for the execution of the same, but the release shows upon its face that there was a consideration paid. It is duly executed, and properly witnessed before a notary public, although its execution is denied by the libelant. The facts in this case are rather extraordinary, and call for a thorough investigation. Papers properly and legally executed cannot be set aside without proper proceedings had, and deliberate consideration of the same. The depositions of respondent fail to sustain the answer, but, taken together with those of the libelant, they would indicate that the libelant was coerced into executing this release through fear of imprisonment. If that is the case, the answer should fully state the facts as they really are, and attack the validity of the release upon such grounds as will

enable the court to investigate its validity, and depositions taken to ascertain the exact truth in the matter.

The libelant is therefore allowed to amend his answer, in accordance with the facts as stated at the argument, and as indicated in the depositions, on or before September 1st.

THE R. C. VEIT.

THE CHIEF.

(District Court, E. D. Pennsylvania. July 30, 1904.)

No. 40.

1. ADMIRALTY—REGISTRY—DEPOSITS—SUBSTITUTION OF BOND.

Where a fund has been deposited in the registry of a federal District Court, in admiralty, a motion for leave to withdraw a portion of the fund and substitute a bond therefor will not be granted; the practice in such cases being to distribute the fund in the registry in accordance with the provisions of admiralty rules 57 and 58.

In Admiralty. Motion to take out fund in the registry denied.

Francis S. Laws, for libelant.

J. Warren Coulston, for respondent.

HOLLAND, District Judge. This is a motion on behalf of the respondent to be allowed to take out a portion or the whole of a fund remaining in the registry of the court, and to substitute a bond for such amount as is taken out. The practice heretofore, in cases of this kind, in this district, so far back as it can be ascertained, has been to distribute the fund in the registry in accordance with the provisions of the rules of court Nos. 57 and 58 in admiralty. Numerous applications have been made, which have heretofore been refused. I am not, therefore, inclined by this order to establish a new practice.

The application is therefore refused.

JAMES v. GRAY. In re JAMES et al. Ex parte JAMES.

(Circuit Court of Appeals, First Circuit. July 6, 1904.)

No. 494.

1. BANKRUPTCY—PROVABLE DEBTS—LOAN BY WIFE TO HUSBAND.
A loan made by a wife to her husband from her separate estate is provable as a debt against his estate in bankruptcy without regard to its enforceability under the law of the state, the contract being valid in equity, by the principles of which courts of bankruptcy are governed; and there is no distinction in such respect between an estate to the wife's separate use, as known to the chancery courts, and a separate estate created by statute.

Aldrich, District Judge, dissenting.

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

Joseph H. Beale (Beale, Hutchings & Beale, on the brief), for appellant.

Lee M. Friedman (Morse & Friedman, on the brief), for appellee.

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

PUTNAM, Circuit Judge. This is a case of a bankrupt partnership. Proof of a claim of $20,469.46 for money loaned the partnership was offered by the wife of one of the bankrupt partners, and rejected by the District Court on the strength of In re Talbot, 110 Fed. 924. In re Talbot rested on Woodward v. Spurr, 141 Mass. 283, 6 N. E. 521, and Bank v. Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447. The District Court also made reference to Clark v. Patterson, 158 Mass. 388, 33 N. E. 589, 35 Am. St. Rep. 498.

All the transactions were in Massachusetts, and all the parties are residents of that state. The common and statutory laws of Massachusetts relating to this loan are, as we will see, in harmony with the common-law text writers and authorities, so that, so far as they are concerned, the claim could not be allowed in either the federal or state courts, because, on the ground of the unity of the persons of the husband and wife, no contract could ever exist. Therefore, if we had no separate estate as known to the chancery courts, and no statutory separate estate, the decision of the District Court would necessarily be affirmed.

The case involves the statutes which were re-enacted in Rev. Laws Mass. 1902, c. 153, §§ 1, 2, as follows:

"Section 1. The real and personal property of a woman shall upon her marriage remain her separate property, and a married woman may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if she were sole. But no conveyance by a married woman of real property shall, except as provided in section 36, extinguish or impair her husband's tenancy by the curtesy by statute or his rights to curtesy which existed at the time this chapter takes effect in such property unless he joins in the conveyance or otherwise releases his said rights.

"Sec. 2. A married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, except that she shall not be authorized hereby to make contracts with her husband."

It will be observed that, unlike the statutes of many states, this legislation does not enlarge the common law so far as contracts between husband and wife are concerned. If any relief is found, it must be on equitable principles, treating the property vested in the wife under the statute as a separate estate in equity, or analogous thereto. The existing statutes in bankruptcy make no special provision in reference to claims of this character; but that full equitable principles are accepted by the courts in bankruptcy was determined by us in Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, and in Franklin Chase et al., Petitioners, 124 Fed. 753, 59 C. C. A. 629. There can be no question that equitable claims, as, for instance, claims arising out of a breach of trust in the technical sense of the word "trust," are provable under Act July 1, 1898, c. 541, § 63, 30 Stat. 562, 563 [U. S. Comp. St. 1901, p. 3447]. They are to be regarded either as "unliquidated claims" or as claims founded "upon a contract, express or implied," because every trust involves such a contract. There never has been any question on this score in the United States, and in England the rule is the same. Williams' Bankruptcy Practice (7th Ed. 1898) at page 120, says:

"A breach of trust, although it would afford a good ground for an action of tort for unliquidated damages, is always, even without express enactment, held to create a debt in equity."

The learned author makes this observation as part of his description of debts provable in bankruptcy. At pages 36 and 37 the learned author, speaking of the words describing provable debts in the act of 1869, "due at law and in equity," says:

"These words do not appear in the present act, but it would not seem that the law has been changed by the omission of them."

In Ex parte Wells, 2 M., D. & De G. 504, the value of a legacy of stock, bequeathed to the wife's separate use, but transferred to the name of her husband, who sold it out and became bankrupt, was held provable. In Ex parte Greer, 2 D. & Ch. 113, it was decided that the income of an estate settled in trust for the wife might be used by the husband with her consent without creating a debt, yet the whole theory of the case was that, if the principal had been so used, it would create a debt provable in bankruptcy. These decisions are in all respects analogous, as they arise with reference to a claim of a married woman against her husband in connection with her separate estate.

It must be conceded that the decisions of the Supreme Judicial Court of Massachusetts, which have been referred to by the learned judge of the District Court, would, if they controlled this court, compel us to sustain his decree. Clark v. Patterson, 158 Mass. 388, 33 N. E. 589, 35 Am. St. Rep. 498, was a bill in equity, brought by a wife against a partnership of which her husband was a member, for relief with reference to a loan made to the partnership from her separate estate. The court held that relief could not be granted even in equity, stating, at page 391, 158 Mass., page 591, 33 N. E., 35 Am. St. Rep. 498, that the note was void as between the original parties, having been given to a wife by a partnership of which her husband was a member, and, with a citation of prior decisions of the same court, adds that equity does

not relieve in such a case. The reason for this decision appears in Woodward v. Spurr, 141 Mass. 283, 286, 6 N. E. 521, where it was held that, with reference to the rights of a wife having a separate estate against her husband with regard to that estate, relief, even in equity, will not be granted on an alleged debt strictly contractual, nor unless there are some elements of spoliation on the part of the husband, or elements raising a trust on his part, either express, implied, or resulting, or something analogous thereto.

We should also refer to the expressions of the then Chief Justice Gray, earlier than any decisions already referred to, found in Atlantic National Bank v. Tavener, 130 Mass. 407. This was in 1881, subsequent to the enactment of any statute the substance of which is found in the sections which we have cited from chapter 153 of the Revised Laws, which could possibly affect the case now before us. We shall have occasion to turn again to this case; but for the present, we notice only the fact, stated at page 409, that, while it had not then been determined in Massachusetts whether a loan by a wife to her husband from her separate property creates an equity in her favor, "it has generally, if not unanimously, been decided in the affirmative by other courts." That such is the general rule which the federal courts will apply in equity, notwithstanding any local decisions, cannot be questioned. It is so stated by all the text writers to whom we look for the general rules of the equity law. The latest English work, and a very satisfactory one, Eversley's Law of the Domestic Relations (2d Ed. 1896), giving the law as it was before the modern legislation in England, says at page 291:

"But in equity a married woman was permitted to contract with her husband in respect to her separate estate, and sue him with regard to it."

Again, at page 297, the author says:

"A husband formerly at common law could not make a valid loan to his wife, both because it was in the nature of a contract, and whatever property might have passed by delivery reverted to him in virtue of his marital right. But in equity the husband was enabled to sue his wife in respect to her separate estate. The husband can make a valid loan to his wife of property, whether specific chattels or other things. * * * In equity the capacity of a wife who had a separate estate to make a valid loan to her husband was clearly recognized, and she might have sued her husband, or proved against his estate after death, like any other creditor."

The same rule, so far as concerns loans by the wife to her husband from her separate estate, was authoritatively held by Lord Westbury in Woodward v. Woodward, 3 De G., J. & S. 671, 674. We will observe that any suggestion that there can be no transactions between husband and wife enforceable in equity, except through the medium of a trustee or some other third person, finds no support in the authorities, and was positively ignored in Woodward v. Woodward, where the loan was a direct one.

The same rules were stated in Wallingsford v. Allen, 10 Pet. 583, 593, 9 L. Ed. 542. The opinion rendered by Mr. Justice Wayne says:

"Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution, before it will confirm them. But it does sustain them, when a clear and satisfactory case is made out that the property

is to be applied to the separate use of the wife. * * * In More v. Freeman, Bunb. 205, it was determined that articles of agreement between husband and wife are binding in equity without the intervention of a trustee."

More v. Freeman was decided in 1726. It was affirmed by the House of Lords, as appears at page 207, and has apparently been ever since regarded as authoritative. These expressions in Wallingsford v. Allen, in connection with the other decisions of the Supreme Court to which we will hereafter refer, like the English authorities which we have cited, require that we should disregard the limitations established in Massachusetts, so far as they bear upon any considerations dealt with in courts of equity with reference to the case before us. Therefore it is an established proposition that the claim offered in proof must be allowed, if it came from the separate estate of the wife in any sense in which the chancery courts can accept that expression.

We are left, then, to determine this condition. The case does not expressly show from what estate the funds were advanced by the proponent of the claim offered for proof, in that it does not expressly appear whether they came from her separate estate in any sense which the rules of equity or the statutes recognize. The record stands on the certificate of the referee, which states as follows:

"Upon hearing the defense offered, I find as a fact that the money had been advanced by Mrs. James to the firm as set forth in the account."

Thereupon he allowed the claim, which proceeding was reversed by the District Court on a point of law only. Thus the presumption is that the funds so loaned came from such an estate as Mrs. James could control in her own right. If it also appeared that the loans were made from an estate vested to her separate use according to the chancery rules, we would have occasion to go no further. There is no statement in the record expressly or impliedly assuming such an equitable separate estate, and therefore for us to accept its existence from what appears before us involves too violent a presumption. Taking the record together, the reasonable construction of it is that the loan was made from an estate vesting in Mrs. James in accordance with chapter 153 of the Revised Laws.

As, therefore, in order to sustain the proof of debt, we must proceed under the rules of the chancery courts, it is necessary for us to determine that those courts hold, or would hold, that an estate of personal property vested in a married woman in accordance with the statutory provision which we have cited would be regarded by them as, for all substantial purposes, the same as an estate vested for separate uses according to the equity rules, and be protected substantially to the same extent and in like manner. On the reason of the thing there can be no distinction. The underlying purpose of the Legislature to secure the interests of married women could not otherwise be made effective. The case at bar is a striking illustration that, unless equity thus regards the statutory estate, the anxiety of the Legislature in behalf of married women would fail, in most significant cases, of accomplishing a practical result. Of course, this observation would not apply to legislation which expressly authorized contracts between husband and wife and common-law suits between them.

Section 2 of chapter 153 neither aids this case nor tends otherwise. It vests in married women the right to make contracts independently of any question of holding separate estates. It contains a limitation forbidding her to make contracts with her husband; but as this, also, has no relation to a "separate estate" or "separate property," it is to be regarded only as a limitation on the general authority to make contracts, and therefore is an exception in favor of the common law only, and does not at all concern the chancery rules. This provision existed at the time of the decision in Atlantic National Bank v. Tavener, 130 Mass. 407, already cited. The question there was with reference to a loan from a married woman to her husband, without any intimation that the loan was from an estate vested for her separate use under the general rules in equity. In this respect the record stands precisely as it does at bar, and the presumption is that the loan was made from property vested in her in accordance with the Massachusetts statutes. Yet the opinion discusses, as we have already said, the extent of the rules in equity with reference to transactions concerning an estate vested to the separate use of a married woman, without making any distinction of the kind we are considering. This discussion would have been superfluous, unless the court assumed that, in equity, property held in accordance with the statute was to be regarded the same as an estate in express trust to the separate use of the wife.

Various other decisions tend to show that the Supreme Judicial Court of Massachusetts makes no distinction with reference to the equity rules under discussion, as limited by it, between a statutory estate and an estate vested by a deed of trust, or otherwise, for the sole use of a married woman. Among others is Willard v. Eastham, 15 Gray, 328, 335, 79 Am. Dec. 366. Throughout this opinion, which held that, as the law then stood, the statutory separate estate of a married woman could not be charged for a debt contracted by her, unless it in some way related to that estate, the discussion takes up and applies, especially at page 335, without discrimination, the rules recognized by the equity courts. The same is the fact with reference to Lombard v. Morse, 155 Mass. 136, 140, 29 N. E. 205, 14 L. R. A. 273. Frankel v. Frankel, 173 Mass. 214, 53 N. E. 398, 73 Am. St. Rep. 266, is a marked case in this particular, wherein it was held that a bill in equity may be had by a wife against her husband to recover her separate property obtained from her by his fraud and coercion. An examination of the record in the clerk's office discloses that the proceeding originated out of real estate in Boston of which the wife was seised in fee in her sole right. The opinion, at page 215, after referring to the fact that according to the statutes of Massachusetts the wife could not maintain an action at law against her husband, adds that, unless the bill could be maintained, she would be without a remedy, and that that of itself would be a sufficient reason for a decree in her favor. It continues that the statutes do not forbid suits between husband and wife, but simply provide that they shall not be construed to authorize them; and it adds:

"It would seem, therefore, that equitable remedies may be availed of as between husband and wife, in cases where they apply."

These authorities establish that, in the view of the Supreme Judicial Court, the statutory estate is to be construed for all the purposes we have in hand the same as an estate vested under a trust deed.

Our observations in reference to the decisions of the Supreme Judicial Court of Massachusetts, if we correctly understand them, aid the result which we have reached, because it is of assistance if that court has assumed that the statutes of that state are to be construed as vesting estates subject to equitable rules. Yet, even if we were mistaken in that respect, the result could not change our conclusion. It would not bar the federal courts from applying their own equitable rules according to their own methods of procedure. Examining what has been determined by those courts, the result seems to be clear. In Ankeney v. Hannon, 147 U. S. 118, 128, 13 Sup. Ct. 206, 37 L. Ed. 105 et seq., the court considered, discussed, and settled, on the rules of the chancery, questions with reference to an estate vested in the wife under state statutes which, in substance, so far as any present issues are concerned, were the same as those of Massachusetts; and this it did in a manner which impliedly holds that there is no distinction, so far as those rules are concerned, of the class which we are discussing. Indeed, on this point and on the entire case, Sykes v. Chadwick, 18 Wall. 141, 148, 21 L. Ed. 824, seems to be most persuasive in favor of the proponent of the proof of debt before us. It is true that, in this case, which came from the Supreme Court of the District of Columbia, there was a reference to a statute of the District regulating the rights of property of married women; and, both in the syllabus and in some citations, it seems to have been thought that the decision rested on the local statutes, and not on the general rules of equity. An examination of the facts and of the opinion, however, shows that the reverse of this is necessarily true, except to the limited extent otherwise which we will hereafter state. The transaction began with an inchoate right of dower, which existed only at common law, or by statute affirming or modifying the common law. The wife joined with her husband in a sale of the property, releasing her inchoate right, and obtaining in exchange therefor a promissory note signed by her husband and the purchaser. According to the strict rules of the common law, the note was joint, and void; but, under a statute of the District of Columbia, the only statute relied on by the counsel, it became a several obligation, so that a suit against the promisor other than the husband was successfully maintained by the wife, according to the judgment both of the Supreme Court of the District and the Supreme Court of the United States. The portion of the opinion with which we have to do is at page 148, 18 Wall., 21 L. Ed. 826. This refers to a statute of the District, which, so far as we are concerned, is substantially, if not in literal terms, the same as section 1 of chapter 153 of the Revised Laws of Massachusetts. It states that by force thereof the plaintiff acquired the capacity at law to receive property to her separate use. This expression, "to her separate use," was borrowed by the court from the chancery, because the phraseology of the statute is like that of the Massachusetts act, "separate property." The opinion proceeds:

"Having this capacity, she did receive and acquire, for a good and valid consideration moving from herself, the promissory note in question. This note,

then, being her separate property, not acquired by gift or conveyance from her husband in the sense in which the statute uses those terms, she is entitled to the benefit of the statute in reference to the exclusive possession and enjoyment of the note, and to the exclusive right of suing upon it. As to it, she is relieved from the incapacity which the common law imposed upon her, and is as if she were unmarried. The technical reasons, therefore, which at the common law rendered void a note or other obligation made by the husband to the wife, no longer exist in this case; and if there are still any such reasons which would compel the plaintiff, in enforcing the note as against her husband, to seek the aid of a court of equity, there are none to prevent her from suing the defendant upon it in a court of law."

At page 146, 18 Wall., 21 L. Ed. 826, the opinion elaborates what is said at page 148, 18 Wall., 21 L. Ed. 826, in reference to the necessity of the aid of a court of equity if the plaintiff had sought to proceed against her husband. It goes into the whole question of the rules of chancery which we have been discussing; and at page 147, 18 Wall., 21 L. Ed. 826, it says:

"We may therefore regard the transaction under consideration as valid and binding in equity, both on the defendant and the husband of the plaintiff."

Therefore, although the suit was brought under a statute of the District which allowed a severance, and so was at common law, yet the transaction was regarded by the court as binding in equity as between the wife and the husband, and this without the interposition of a trustee, or other third person, and though dealing with what was the estate of the wife at common law and under the statute. The trend of the opinion supports the conclusion that, on questions like this before us, there is no distinction under the chancery rules arising out of the formal nature of the wife's separate estate, with reference to whether it vested at common law or by statute or in equity.

The result of the authorities is summed up in Pomeroy's Equity Jurisdiction (2d Ed. 1892). In sections 79 and 80, the author points out the fact that the late married women's acts of various states have, most of them, superseded the necessity of applying the chancery rules. Legislation of this kind he describes as the first class. Then he adds, in section 79, as follows:

"By the second class, which prevails in most of the states, the wife's capacity is limited to agreements made with reference to her property. These contracts are wholly equitable in their nature and obligation, and can only be enforced by an equitable action against the property itself, and not against the wife personally."

In section 80 he observes:

"In all the other states where the wife's contracts are not yet made legal, the equitable jurisdiction is to a certain extent enlarged. It is no longer confined in its operation to her separate equitable estate held in trust for her by an express or implied trustee. It reaches to and operates upon all her property of which she holds the full legal title and interest. While the wife's power to make contracts which shall be a charge upon her property is not increased, the property thus affected, and which can be reached by a court of equity, is all which the wife holds in her own name and right by a legal title."

He repeats, and somewhat elaborates, to the same effect in section 1099. Therefore the authorities are in harmony with the natural, underlying principles which suggest no reason why the chancery courts

should not protect an estate vested in, or for the benefit of, the wife, equally, whether at the common law, or by statute, or under a deed of trust for her separate use.

The case may be summarized as follows: While the federal courts are required by the statutes creating them to accept, as rules of decision in trials at common law, the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise provide, their proceedings in equity suits, involving equitable rights, cannot be impaired by the local rules of the different states in which they sit. The principles of equity as applied by them are the same everywhere in the United States. Of course, there may necessarily exist exceptional circumstances, as, for example, in Louisiana, where there never has been any law of uses and trusts as in England, so there can be no such thing as an estate limited to the separate use of the wife. There the whole topic of the rights and obligations of the wife is a part of the Code or statutory law of the state. So, also, if any state, say Massachusetts, had peculiar legislation relating to estates vested to the separate use of the wife, that legislation might have to be regarded by the federal courts in equity as well as at law. Such exceptional cases ordinarily fall within those chancery rules which relate to giving special remedies for rights existing only at common law or under a statute. The general rule which we state is well laid down in Curtis' Jurisdiction of the United States Courts (1880) 13, 14, and strikingly illustrated in Russell v. Southard, 12 How. 138, 147, 13 L. Ed. 927, Neves v. Scott, 13 How. 268, 271, 14 L. Ed. 140, Babcock v. Wyman, 19 How. 289, 299, 300, 301, 15 L. Ed. 644, Brick v. Brick, 98 U. S. 514, 516, 25 L. Ed. 256, and Kirby v. Lake Shore Railroad, 120 U. S. 130, 137, 138, 7 Sup. Ct. 430, 30 L. Ed. 569. Even in Massachusetts it appears, as we have already shown, that the topic which we are discussing is recognized as one concerning a right in equity limited or regulated in accordance with rules peculiar to that state. We refer to this as merely illustrating our proposition. It could not control it, because, under the decisions of the Supreme Court, it remains for the federal courts, not only to occupy the field of equitable rights according to their own rules, but also to determine what are the boundaries of that field.

The first question to be determined in the case at bar is whether an equitable right is involved. We find that the real issue presented is whether, under the federal bankruptcy statutes, which permit the allowance of equitable claims, a loan by a wife to her husband from property secured to her by the Massachusetts statutes creates an equity in her favor. This is a question of general equity. The Massachusetts courts hold that the general principles of equity jurisprudence are to be applied to the statutory separate estates of married women, the same as to an estate vested in trust for her separate use under the general rules of law. The only difference between the Massachusetts courts and courts elsewhere, with respect to the particular question now under consideration, is that the former hold to a limited rule; so that all courts agree that the general topic relates to an equitable right, and the only distinction is that the local treatment of it is peculiar. In cases where parties seek in equity only a concurrent remedy to enforce a legal right, the right is ordinarily determined by the common law of

the state where the litigation is pending; but, as we have seen, this proceeding asserts an equitable right, so that we are not bound by the local rule.

As the record comes to us, we are justified in holding that it authorizes us to make a final disposition of the case. There is nothing to suggest that the findings of the referee, or the assumptions which we have made, are not in conformity with the substantial facts.

The decree of the District Court is reversed; the case is remanded to that court, with directions to allow the proof offered by the appellant, Clitheroe D. James, as a valid proof of an unsecured claim against the partnership estate, and against the several estates of the individual partners, so far as such several estates are subject to the jurisdiction of the District Court in bankruptcy, subject to the rules for marshaling between partnership and individual estates; and the appellant recovers her costs of appeal.

ALDRICH, District Judge (dissenting). I cannot agree with the conclusion reached in the majority opinion. I do not understand that the rule which contemplates that equity jurisdiction, practice, and procedure in the federal courts, based upon the English chancery system, shall be uniform throughout the United States, goes so far as to create a legal or equitable status in respect to the property rights of married women within a given state different from that which exists under the local laws thereof. I do not understand that federal equity accords to married women within a state power to contract or a property status distinctly different and beyond that which exists in equity as administered by the state courts under its own statutory equity and common-law system.

The federal government never committed itself altogether to the idea of an adoption bodily of English chancery rights, or of the English limitations upon equitable rights, or to the idea of adopting bodily the prospective expansion and growth of the English chancery doctrines, to the end that the same should be imposed upon a state, contrary to its own idea of domestic relations and property rights. No state is bound to adopt the measures of supposed equitable reform inaugurated in another jurisdiction. The legal and equitable status of the property rights of married women in a given state is not regulated by general law or by general principles of equity. It rests upon local statutes and local law. It was the English doctrine as to scope of jurisdiction and the English system of practice and procedure that was adopted, and the adoption related to the situation as it then existed, and any subsequent enlargement or limitation of the English system by statute or otherwise must be excluded when we are considering what was actually adopted at the inauguration of our government. For a discussion of this question I will refer to Fontain v. Ravenel, 17 How. 369, 394, 395, 15 L. Ed. 80, and Alger v. Anderson (C. C.) 92 Fed. 696. As said by Chief Justice Taney in Meade v. Beale, Taney, 339, 361, Fed. Cas. No. 9,371:

"So, too, as relates to the jurisdiction of the Circuit Court sitting as a court of chancery. It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by

the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right. The rule applies to the remedy, and not the right; and it does not follow that every right given by the English law, and which, at the time the Constitution was adopted, might have been enforced in the court of chancery, can also be enforced in a court of the United States. The right must be given by the law of the state, or of the United States. It is the form of remedy for which the Constitution provides; and, if a complainant has no right, the Circuit Court, sitting as a court of chancery, has nothing to remedy in any form of proceeding.

"In the case before the court, the question is: Is the bequest which the complainants claim a valid one by the laws of Maryland? It is a question which, in its nature, necessarily depends upon the laws of the respective states. Some of the states sanction devises of this description, some do not, and undoubtedly it depends upon every state to determine for itself to whom, in what form, and by what instrument any property within its borders may pass by devise or otherwise."

The present enlarged rights of married women in England, both at law and in equity, principally resulted from removal by statutory enactment of disabilities which the old common law imposed upon the wife by reason of the marital relations. The same is true in respect to the rights and liabilities of married women in the various states. The rights of married women, varying largely in the different states, have resulted from legislation extending the rights of the wife upon such grounds of public policy as each state has seen fit to adopt. It has never been understood that the property rights and liabilities of married women in a given state were regulated by the law of England or by the law of any other state.

It is conceded by the majority opinion that the claim of the wife in the case at bar would have no standing either at law or in equity in the state courts of Massachusetts. Indeed, section 1 of the Massachusetts statute, referred to in the majority opinion, expressly declares that the wife shall not be authorized thereby to make contracts with her husband, thus statutorily declaring it to be the policy of the state that contracts between husband and wife shall not be recognized and upheld in that jurisdiction. Moreover, in Woodward v. Spurr, 141 Mass. 283, 287, 6 N. E. 521, which was an equity proceeding involving a local insolvency law, which provided for the proof of equitable liabilities against insolvent estates, and in which the state statute in question was under consideration, it was expressly said:

"When contracts are themselves not authorized, validity cannot be imparted to them by affording a remedy for the breach of them through the medium of a court of equity."

Thus expressly and emphatically repudiating the idea of an enforceable equitable status founded upon considerations of trust in a case like this in the courts of Massachusetts.

Fleitas v. Richardson, 147 U. S. 550, 555, 13 Sup. Ct. 495, 37 L. Ed. 276, was an equity proceeding involving the claim of a wife against her husband, who had been discharged in bankruptcy, and not only was the law of the state with respect to the right and the local idea of trust relations recognized, but the right and the provability of the claim were made distinctly to rest upon the state law of Louisiana.

While I do not question for the purposes of this case that a claim

of the character of the one in question is now enforceable in equity in England and in nearly all of the states of the Union, and at law perhaps in some of the states, I cannot concur in the idea that the bankruptcy act was intended to create substantive rights to married women beyond those existing under the law of the state in which the married woman resides.

The proceeding here is to adjust the rights between local creditors in respect to a bankrupt estate in the state of their residence. There is no diverse citizenship, and therefore could be no regulation of the rights in question by the federal courts unless under the bankruptcy law. Therefore, if the view of my Brethren is sound, under the bankruptcy law, with no diverse citizenship, the wife has a property right of the value of $20,000, while, if the bankruptcy law were to be repealed, she would have no right enforceable at law or in equity either in the state or federal courts. Giving a status to the claim of a married woman against the estate of her husband in bankruptcy different from that which exists under the local law impairs the substantive rights of the other creditors as they exist under the laws of the state, and is therefore inequitable as to them. It would be inequitable and unwarrantable in the state courts, because against the policy and contrary to the law of the state, and therefore not founded upon a legal or equitable right or remedy enforceable in that jurisdiction, and inequitable in the federal courts because, in the absence of diverse citizenship, the federal courts, in the exercise of general equity power independent of bankruptcy, would have no jurisdiction, equitable or otherwise, to establish and maintain the right.

It is difficult for me to adopt the view that the bankruptcy law was intended to create a property or contract right as between local creditors, either in a legal or an equitable sense, beyond that which obtains according to the rules of property existing under the laws of the state. If the conclusion of the majority is sound, there exist in Massachusetts two rules of property in respect to married women—one rule, distinctly and deliberately expressed, established by its statutes, construed by the highest court of the state, regulating the rights of married women, and another and a very different rule of property, administered in the same jurisdiction by the federal courts, a condition, in my opinion, never contemplated under our system of federal and state governments, in respect to parties residing in the same state and whose property rights are based upon local law.

English and American decisions in other jurisdictions, as to claims of married women enforceable in equity, have no bearing, as it seems to me, upon a situation involving a Massachusetts statute, Massachusetts decisions, a Massachusetts estate, and Massachusetts creditors only. The property rights of married women in Massachusetts are established upon grounds of public policy, upon which the state is entitled to stand. It has been repeatedly decided by the highest court of the state that a claim of this character, even under insolvency conditions, has no legal standing, either at law or in equity, as against the other creditors. Such decisions are based upon the rules of common law and equity as modified and enlarged by the statutes of Massachusetts. As there expressed by its highest court, the rights of mar-

ried women are based upon "the rule of the common law which has been declared and recognized by the Legislature." Bank v. Tyndale, 176 Mass. 547, 550, 57 N. E. 1022, 51 L. R. A. 447; Clark v. Patterson, 158 Mass. 388, 33 N. E. 589, 35 Am. St. Rep. 498; Woodward v. Spurr, 141 Mass. 283, 6 N. E. 521; Fowle v. Torrey, 135 Mass. 87.

When our government was established, and the common law of England, so far as not inconsistent with our institutions, was adopted by the governments of the various states, and when the English chancery system was adopted by the federal government, and for a long time thereafter, a claim of a married woman like the one in question had no standing in that country at law, or in equity it is believed, in a suit by the wife against the husband or his estate upon a naked loan relieved from relations and considerations of trust; but, however that may be, it is clear, even if otherwise, now that for many years the claim of a married woman had no standing there either at law, or in equity as administered in bankruptcy proceedings, where the claim of the wife was strictly contractual and where creditor interests were involved, as is the case here. Robson's Bankruptcy (6th Ed.) 475, and cases cited. In re Beale, 4 Ch. 249. According to Taney, as has been already said, in order to have an equitable remedy, there must be a right based upon federal or state law; and, as said by Lord Eldon, in Dewdney, Ex parte, 15 Ves. 479, 498, in discussing the English doctrine as to equitable claims in bankruptcy:

"Upon the whole, my opinion as to the general point is that in the consideration of this statute a commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment, and that the objection upon the statute [statute of limitations] is competent to the creditors * * * regarding the claim of each creditor as a suit depending."

Indeed, section 23a of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]), conferring law and equity jurisdiction upon the Circuit Courts in bankruptcy matters, adopts the idea expressed by Lord Eldon that the right as between the parties should be regulated according to law and equity in the same manner and to the same extent as though bankruptcy proceedings had not been instituted, thus making the right or the claim depend upon its original status of enforceability or nonenforceability at law or in equity under general equity powers, independent of the bankruptcy law; and under this standard there was no right enforceable under the state law, and no equity jurisdiction or right cognizable in the federal courts, in the absence, as is the case here, of diverse citizenship. The question in this case is therefore a very plain and simple one. Was the claim, independent of the bankrupt law, based upon a right enforceable in the state under its laws, or in the federal courts under their general equity powers? And surely this question must be solved in the negative.

It thus results in the case at hand that we have a situation where the claim of the wife was not recognized by the local statutes of Massachusetts and not enforceable in its courts, and where there is no equity jurisdiction in the federal courts in the absence of diverse citizenship,

and therefore no equitable right enforceable in such courts under their general equity powers independent of the bankruptcy law. And the consequence is that the majority opinion departs from and goes contrary to the idea expressed by Lord Eldon that creditors have a right to object to an equitable claim, not cognizable and not enforceable either at law or in equity, and accords to a creditor wife a right and a status not recognized by the state law, a right and a status not enforceable in the federal courts of equity under their general equity powers, and one with which they could have nothing to do, independent of the bankruptcy law and bankruptcy proceedings.

Under our distribution of governmental functions between the federal and state governments, and especially in view of the recognition by the federal government of the power of the state (under certain limited and expressly defined constitutional restrictions not material here) to establish and regulate rules of property within its jurisdiction, it results clearly and necessarily that the legal and equitable status of property rights of married women in a given state is regulated by local law; that is to say, by the old common law modified and enlarged by such judicial innovations and such legal and equitable statutory reforms as it has seen fit to adopt, and by such, if any, of the modern ideas and expanded rules of common law and equity adopted in other jurisdictions as the Legislature and the courts of the state in question have seen fit to recognize and declare.

While a state may not, by statutory enactment or otherwise, place any restrictions upon federal equity practice and procedure, which is uniform throughout the United States, or impede or impair its jurisdiction, which is likewise uniform, it may regulate property rights within its jurisdiction, and the laws of the state regulating such rights are regarded by federal courts as rules of decision in respect to property rights so regulated by the local law. And, as said by Woods, Circuit Judge, in Mitchell v. Lippincott, 17 Fed. Cas. 503, 506 (Fed. Cas. No. 9,665), which was an equity proceeding:

"If the rule is ever to be applied to any case, it seems to me the construction of the married women's law is a proper case for its application."

The Supreme Court, in affirming the decision of Judge Woods, 94 U. S. 767, 770, 24 L. Ed. 315, in referring to the state law, and the state decisions, said:

"This construction is a rule of property of the state, and we are as much bound by it as if it were a part of the statute. It is our duty to apply the law of the state as if we were sitting there as a local court, and this case were before us as such a tribunal."

Again, referring to the local statute:

"Where the intent to exclude the marital rights of the husband is doubtful or equivocal, or rests on speculation, the statute intervenes and fixes the character of the estate."

Mr. Justice Curtis, in Neves v. Scott, 13 How. 268, 271, 14 L. Ed. 140, while holding that the Supreme Court, upon general questions of equity, would not be bound by the decisions of the Supreme Court of Georgia, in the absence of a statute, a custom, or a local law, in effect recognized the idea of the right of a state to regulate legal and equitable property rights by local statutory law.

While the leading aspect of the principle that the federal courts regard as rules of decision the decisions of state courts has reference to the construction of statutes and decisions affecting titles to real property, the rule is by no means limited to such subjects; for it includes as well the exposition of the local common law of a state by its highest courts, like preferences between creditors, as in Parker v. Phetteplace, 2 Cliff. 70, Fed. Cas. No. 10,746, like questions of possession of personal property, as in Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542, like questions relating to executions, as in United States v. Morrison, 4 Pet. 124, 7 L. Ed. 804, the construction of wills, as in Smith v. Shriver, 3 Wall. Jr. 219, Fed. Cas. No. 13,108, the equitable rights of married women, as in Mitchell v. Lippincott, 1 Cent. Law J. 265, the validity of a mortgage not truly describing the debt intended to be secured, as in Townsend v. Todd, 91 U. S. 452, 23 L. Ed. 413, the power of a corporation to issue bonds, as in Thomas v. County of Scotland, 3 Dill. 7, Fed. Cas. No. 13,909, as to the time when a corporation was formed, as in Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102, and in respect to many other subjects relating to property rights within a state. See, also, 1 Bates on Federal Equity, §§ 6–10; Bump's Federal Procedure, pp. 416–420.

Nothing could be more disturbing or hurtful to a community than the existence within its domain of two sets of law or two measures of equity respecting property rights; and this would be especially so with respect to a system which undertakes to regulate the social, domestic, and property status between the sexes, and the rights of a married woman as between her husband and creditors, who, in reliance upon the local law regulating the rights of property, deal with him in the ordinary course of business within the bounds of the state which creates and maintains its own local system of law and jurisprudence.

I cannot conceive, aside from diverse citizenship or a federal statute expressly creating a right, that the federal courts are, or ought to be, charged with any responsibility in the adjustment of property rights, equitable or otherwise, within a state between its citizens. The idea that such a right or responsibility exists contravenes a fundamental theory as to the distribution of power between the federal and state governments. It is a strained, startling, and subversive construction that carries a bankrupt law, intended only to distribute the assets of a bankrupt estate between local creditors, according to the right or equity as existing independent of the bankrupt law, to the point of creating a substantive, enforceable, federal right, which shall override the positive law and the public policy of a state with respect to the legal and equitable status of married women in property situations, domestic affairs, and business conditions relating to property rights within a state.

It must be always borne in mind, of course, that the issue here is not one alone between the married woman and her husband, but involves as well the equitable rights of creditors. This element distinguishes this case from equitable proceedings to protect the separate estate of the wife as against the husband.

The Massachusetts statute and the Massachusetts cases have established a local rule of property which the federal courts are bound to

recognize and enforce. It is said in Walker v. Walker, 9 Wall. 743, 754, 19 L. Ed. 814:

"The Circuit Courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different states, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens."

And in Ewing v. City of St. Louis, 5 Wall. 413, 419, 18 L. Ed. 657, which was an equity proceeding, it is said:

"The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former."

I agree with the reasoning of Judge Lowell in Re Talbot (D. C.) 110 Fed. 924, which he adopted as the ground for disallowing the claim in question.

BOISE CITY IRR. & LAND CO. v. CLARK et al., County Com'rs.

(Circuit Court of Appeals, Ninth Circuit. May 31, 1904.)

No. 999.

1. APPEAL—DECISIONS REVIEWABLE—DECREE ADJUDICATING PRINCIPLE.
   A decree affirming an order of a municipal body fixing maximum rates to be charged by an irrigation company for water furnished consumers during a certain year may be reviewed on appeal, although the year has expired, where, under the statute, such rate continues until changed, or where some question of law is involved, the decision of which may affect the future action of the authorities.

2. IRRIGATION COMPANIES—STATE REGULATION OF CHARGES—CONSTITUTIONALITY OF MAXIMUM RATES.
   Under the Constitution of Idaho, which declares the use of all waters appropriated for sale, rental, or distribution to be a public use, and the right to collect compensation therefor a franchise, which cannot be exercised except by authority of, and in the manner prescribed by, law, and which authorizes the Legislature to provide, as it has done, for the fixing of maximum rates to be charged for water so sold, an irrigation company appropriating water for sale has no authority to make a distinction between its consumers, and, while supplying some with water under private contracts at low rates, attack the validity of maximum rates fixed by the county commissioners under the statute, on the ground that, as applied to its other consumers, they will not yield a reasonable return on its investment, but will amount to a taking of its property without compensation. In determining the reasonableness of such rates, they must be considered as applicable to all its consumers.

3. SAME.
   A maximum rate to be charged by an irrigation company for water furnished to consumers, fixed by county commissioners as provided by statute, is not unconstitutional, as depriving the company of its property without compensation, because it will not produce sufficient revenue above expenses and fixed charges to pay a reasonable income on the money invested by the company, where its plant was constructed on a larger scale and at a greater expense than necessary to supply its present customers, and was intended to supply a greater number than it has as yet obtained.

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Fremont Wood and Edgar Wilson, for appellant.
Alfred A. Fraser, for appellees.

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

ROSS, Circuit Judge. The appellant is a New Jersey corporation, and brought the present suit in the court below against the county commissioners of Ada county, Idaho, sitting as a board of water commissioners, to obtain a decree annulling an order made by the commission fixing a maximum rate to be charged by the complainant for water delivered from its canal system to consumers thereof for the irrigating season of the year 1901. The provisions of the Constitution and statutes of the state of Idaho bearing upon the question are as follows:

Section 1 of article 15 of the state Constitution declares:

"The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution; also of all waters originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law."

Section 2 of the same article of the Constitution provides that:

"The right to collect tolls for compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by the authority of or in the manner prescribed by law."

Section 6 of the same article declares that:

"The Legislature shall provide by law the manner in which reasonable maximum rates may be established, to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose."

In pursuance of those provisions of the Constitution of the state, its Legislature enacted, in its Civil Code, as follows:

"Sec. 2579. Standard of Measurement of Water. A cubic foot of water per second of time shall be the legal standard for the measurement of water in this state."

"Sec. 2595. Duty of Owner of Canal to Keep Flow of Water. Every person, company or corporation owning or controlling any ditch, canal or conduit for the purpose of irrigation shall, during the time from April 1st to the 1st day of November of each year keep a flow of water therein, sufficient to the requirements of such persons as are properly entitled to the use of water therefrom: provided, however, that when the public streams or other natural water sources from which the water is obtained are too low and inadequate for that purpose, then such ditch, canal or conduit shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priority from the streams or other natural sources, as provided by law.

"Sec. 2596. Owner of Canal must Have Same Ready to Deliver, When. The owners or persons in control of any ditch, canal or conduit used for irrigation purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water.

"Sec. 2597. Appointment of Water Master—His Duty. It shall be the duty of those owning or controlling any ditch, canal or conduit to appoint a superintendent, or water master, whose duty it shall be to measure the water from such ditch, canal or conduit through the outlets of those entitled thereto, according to his pro rata share, and no account or demand for the use of such

water during any time such superintendent or water master is not so employed is valid or collectible.

"Sec. 2598. Liability for Failure to Deliver Water. Any superintendent or any person having control or charge of the said ditch, canal or conduit, who shall willfully neglect or refuse to deliver water as in this chapter provided, and the owner or owners of such ditch, canal or conduit, shall be liable in damages to the person or persons deprived of the use of water to which he or they was or were entitled as herein provided.

"Sec. 2599. Water must be Furnished upon Demand. Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof: provided, that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to by reason of having complied with the laws in regard to the appropriation of the public waters of this state.

"Sec. 2600. Manner of Distribution—Amount to be Used. Any person or persons owning or controlling land which has or has not been irrigated from any such canal, shall on or before January 1st of any year, inform the owner or person in control of such canal whether or not he desires the water from said canal for the irrigation of land during the succeeding season, stating also the quantity of water needed. In distributing water from any such canal, ditch or conduit during any season, preference shall be given to those applications for water for land irrigated from said canal the preceding season, and a surplus of water, if any there be, shall be distributed to the lands in the numerical order of the applications for it. But no demand for the purchase of a so-called 'perpetual water right,' or any contract fixing the annual charges or the quantity of waters to be used per acre shall be imposed as a condition precedent to the delivery of water annually, as provided in this chapter; but the consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land, and the annual charges to be made and to be fixed under the further provisions of this chapter, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered."

"Sec. 2605. Boards of Water Commissioners. The boards of county commissioners of the respective counties of this state are hereby created boards of water commissioners, with power to enforce the provisions of this chapter, and for the better discharge of their duties they shall have authority to make such other regulations to secure the equal and fair distribution of water in accordance with the rights of priority of appropriation as may in their judgment be needed in their respective counties: provided, such regulations shall not be in violation of any part of this chapter, or other laws of the state, but merely supplementary to and necessary to enforce the provisions of this chapter and general laws on the subject of irrigation."

"Sec. 2608. County Commissioners to Hear Applications. The county commissioners of each county now organized, and of each county to be hereafter organized in this state shall, at their regular session in January of each year and at such other sessions as they, in their discretion may deem proper, hear and consider all applications which may be made to them by any party or parties interested in either furnishing or delivering for compensation, or by any person or persons using or consuming water for irrigation or other beneficial purpose or purposes from any ditch, canal or conduit, the whole or any part of which shall be in such county, which application shall be supported by such affidavit as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a maximum rate of compensation for water thereafter delivered from such ditch, canal or conduit within such county: provided, that when any ditch, canal or conduit shall extend into two or more counties, the county commissioners of each of such counties shall fix the maximum rate for water used in that county."

Sections 2609 and 2610 provide for the making of the order and the issuance and service of the notice bringing in all interested parties.

"Sec. 2611. May Adjourn Hearing—What Evidence to be Received—Attendance of Witnesses—Order of Board. Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary; but when in session they shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well as concerning the original cost and present value of the works and structure of such ditch, canal or conduit, as well as the cost and expense of maintaining and operating the same, and all matters which may affect the establishment of reasonable maximum rates for water to be furnished and delivered therefrom, and they may issue subpœnas for witnesses which subpœnas shall be served in the same manner in which subpœnas are served in civil cases; and said board may also issue subpœnas for the production of all books and papers required before them. The district court of the proper county, or the judge thereof in vacation, may in case of refusal to obey the subpœnas of the board of county commissioners, compel obedience thereto, or punish for refusal to obey after hearing, as in cases of attachment for contempt of such district court. Upon hearing and considering all the evidence and facts and matters involved in the case, said board of county commissioners shall enter an order describing the ditch, canal or conduit, or other waterworks in question with sufficient certainty, and fixing a just and reasonable maximum rate of compensation for water thereafter delivered from such ditch or other waterworks as last aforesaid within the county in which said commissioners act; and such rate shall not be changed within one year from the time when such rates shall be so fixed: provided, that an appeal or writ of error shall lie in behalf of the proprietor of such works, or any person using or claiming to be entitled to use water therefrom, for review in the district court.

"Sec. 2612. In Fixing Rates, What to be Considered. In fixing rates at which water shall be furnished, the board of commissioners shall take into consideration the cost of the works, the expenses of keeping the same in repair, and all other conditions that affect the cost to deliver the same. Whenever it shall appear to the board of county commissioners from competent evidence that any consumer or consumers of water distributed through any ditch or canal, is or are entitled to the distribution or use of any water therefrom, at not to exceed a proportionate amount of the actual cost of maintenance and operation of said ditch or canal, they shall upon request of such person or persons so entitled, fix the rate per cubic foot per second to be charged to such consumer or consumers, for the current year."

Under the foregoing provisions of the Constitution and statutes of Idaho the commissioners acted in fixing the rate of which the appellant complains. It insists that the rate as so fixed is too low to admit of just compensation for the services rendered, and, indeed, amounts to a practical confiscation of the defendant's property, contrary to the provisions of the Constitution of the United States. The court below, upon consideration of the evidence introduced on the hearing, said that the "rate fixed is somewhat too low," but held that it would not be justified in annulling it.

It appears that the water in question was appropriated by the predecessors in interest of the appellant, under and in pursuance of the constitutional and statutory provisions of the state, from the Boise river, and conducted by a canal and its various branches through a portion of Ada county, and into a portion of Canyon county, of the state, and thence distributed to consumers for beneficial uses; about four-fifths of the construction, maintenance, and cost of the system being in Ada county, and one-fifth in the county of Canyon.

It is contended on the part of the appellees that, as the period for

which the rate in question was fixed has expired, the case has become but little, if any, more than a moot case; but the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.

Prior to the enactment of the state statute making a cubic foot of water per second the legal standard for the measurement of water in Idaho, the appellant had furnished its consumers with water at $1.50 per acre, and afterwards at $75 per cubic foot per second, or $1.50 per inch; there being practically 50 miner's inches in a cubic foot of water. The income derivable under the order complained of was stated in the evidence on the part of the complainant at $29,869, and was accepted as correct by the court below; but it appears from the appellant's own evidence that it distributed water to 2,750 acres of land under so-called perpetual water rights, growing out of private contracts, 385 acres of which were furnished practically free, 580 acres at 15 cents an acre, and 600 acres at 65 cents an acre. These 1,565 of the 2,750 acres would, at the rate fixed by the board of commissioners, yield the appellant $2,014.56, of which it makes no account, to say nothing of the yield at the same rate from the remaining 1,185 acres of the 2,750 acres. All of these 2,750 acres supplied with the water in question by the appellant should, in our opinion, be counted at the rate fixed by the order of the commissioners, in estimating the amount derivable therefrom by the appellant; any and all contracts made by it or its predecessors in interest to the contrary notwithstanding. If 1,565 acres can be supplied under private contract at from nothing to 65 cents an acre, and the balance of the land supplied by the system be made to pay a rate which will yield fair interest on the actual value of the entire property, then, clearly, any other number of acres, less than the whole, can be likewise supplied under private agreement, and thus practically the entire burden of supplying the necessary revenue be placed upon a comparatively small part of the land supplied. Nothing can be clearer than that the supplying of any portion of the land under the system at anything less than the regularly established rate adds to the burden of the other land which is thereby called upon to make good "just compensation" for the use of the property.

Where any distinction between the consumers of the waters in question is authorized to be made, we are unable to understand. Those waters were appropriated from a public stream of the state, for sale, rental, and distribution, under and by virtue of the Constitution of the state, declaring, in express terms, that the use of all such waters so appropriated is a public use, and subject to regulation and control of the state in the manner prescribed by law; that the Legislature of the state shall provide by law the manner in which maximum rates may be established, to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose; and that the right to collect compensation for the use of any such water supplied to any county, city, or town, or water district, or to the inhabitants thereof, "is a franchise, and cannot

be exercised except by the authority of or in the manner prescribed by law."

The case of San Diego Land & Town Company v. City of National City (C. C.) 74 Fed. 79, presented the question, among others, whether that company had the legal right to demand and receive a sum of money in addition to the annual rates it was authorized to charge, as a condition upon which it would furnish water appropriated by it under similar provisions of the Constitution and laws of the state of California, to the persons for whose use the appropriation was made. The thing for which that company demanded a sum of money in addition to the annual rates it was by law authorized to charge it designated as a "water right," and it was there said:

"It does not change the essence of the thing for which the complainant demands a sum of money to call it a 'water right,' or to say, as it does, that the charge is imposed for the purpose of reimbursing complainant in part for the outlay to which it has been subjected. It is demanding a sum of money for doing what the Constitution and laws of California authorized it to appropriate water within its limits, conferred upon it the great power of eminent domain, and the franchise to distribute and sell the water so appropriated, not only to those needing it for purposes of irrigation, but also to the cities and towns, and their inhabitants, within its flow, for which it was given the right to charge rates to be established by law, and nothing else. No authority can anywhere be found for any charge for the so-called water right. The state permitted the water in question to be appropriated for distribution and sale for purposes of irrigation, and for domestic and other beneficial uses; conferring upon the appropriator the great powers mentioned, and compensating it for its outlay by the fixed annual rates. The complainant was not obliged to avail itself of the offer of the state, but, choosing, as it did, to accept the benefits conferred by the Constitution and laws of California, it accepted them, charged with the corresponding burden. Appropriating, as it did, the water in question for distribution and sale, it thereupon became, according to the express declaration of the Constitution, charged with a public use. 'Whenever,' said the Supreme Court of California in McCrary v. Beaudry, 67 Cal. 120, 121, 7 Pac. 265, 'water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner. Water appropriated for distribution and sale is ipso facto devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.'"

The same views were expressed and amplified in the subsequent case of Lanning v. Osborne (C. C.) 76 Fed. 319, and, in effect, find strong support in the very recent decision of the Supreme Court of the United States in the case of The County of Stanislaus, in the State of California, et al., Appellants, v. The San Joaquin & Kings River Canal & Irrigation Company, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406, which involved, among other things, the question whether a water company incorporated under an act of the Legislature of the state of California enacted in 1862 (St. 1862, p. 540, c. 417), and providing that "every company organized as aforesaid shall have power, and the same is hereby granted * * * to establish, collect, and receive rates, water rents, or tolls which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the board of supervisors so low as to yield to the stockholders less than one and one half per cent. per month

upon the capital actually invested" (section 3, p. 541), constituted a contract between the state and the water company, which was protected by the Constitution of the United States. After citing various cases, the Supreme Court said:

"It is true that the cases cited involved questions of alleged contracts for exemption from taxation, in regard to which it has been said that no presumption exists in favor of a contract by a state to exempt lands from taxation, and that every reasonable doubt should be resolved against it. Statutes of California providing that the use of all water appropriated for sale, rental, or distribution should be a public use, and subject to public regulation and control, are valid. San Diego, etc., Co. v. National City, 174 U. S. 739 [19 Sup. Ct. 804, 43 L. Ed. 1154]. And companies formed for the purpose of furnishing water for irrigation purposes have been held, in that state, to be public municipal corporations, and the use of the water for the purposes mentioned a public use. See cases cited in Fallbrook Irrigation District v. Bradley, 164 U. S. 111, 139 [17 Sup. Ct. 56, 41 L. Ed. 369]. To regulate or establish rates for which water will be supplied is, in its nature, the execution of one of the powers of the state, and the right of the state so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain. Owensboro v. Owensboro Waterworks Company, 191 U. S. 358 [24 Sup. Ct. 82, 48 L. Ed. 217]. In our judgment, the language of the act of 1862 did not amount to a contract that the rates for the use of water should never be lowered below the amount provided for in that act."

Certainly, if an express provision in the charter of a company to the effect that the rates to be charged by it should never be reduced by the municipal body below a stated amount is void for the reason that it is an interference with the power of the state to regulate or establish rates for which such water shall be supplied, a fortiori such state power cannot be interfered with by any contract between such company and a private person, and a fortiori they also are void for precisely the same reason.

The court below, upon the evidence introduced, fixed the value of the property at the time of the service in question at $250,000, and the cost of maintenance of the plant for the year 1901 at $20,000. Some of the claims of the appellant bearing upon the value of the plant and the cost of maintenance are undoubtedly extravagant, and some of them are very indefinite and uncertain. If it be conceded that the amounts fixed by the court below in respect to these matters are too low, yet a large increase in both the value of the property and in the cost of the maintenance of the plant may be allowed, and still sufficient compensation be derivable under the order of the board of commissioners in question to answer the constitutional requirement, for the amount derivable from the 2,750 acres, at the established rate, is to be accounted for and counted, as above held. The rule by which the courts must be governed in such cases was stated by the Supreme Court in San Diego Land & Town Company v. City of National City, 174 U. S. 753, 19 Sup. Ct. 810, 43 L. Ed. 1154, in these words:

"That it was competent for the state of California to declare that the use of all water appropriated for sale, rental, or distribution should be a public use, and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county, or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily, and with-

out reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use, for the state cannot, by any of its agences, legislative, executive, or judicial, withhold from the owners of private property just compensation for its own use. That would be a deprivation of property without due process of law. Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Smyth v. Ames, 169 U. S. 466, 524, 18 Sup. Ct. 418, 42 L. Ed. 819. But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Moreover, it appears from the testimony of the manager of the appellant company, in answer to a question by its counsel as to why the property had not in the past been made to pay "fixed maintenance charges, interest upon its bonded indebtedness, and a reasonable interest upon the additional investment necessitated in the construction of the property," that:

"The main cause of the delay is the fact that the country has not settled up as fast as they expected. They have always expected that the amount of land put under irrigation would increase more rapidly, and so put it in shape that it would pay. Another point was the strong disposition on the part of the consumers against any increase of rate, manifested at different times; and the owners of the canal were averse to increasing the rate, in hopes that the amount of land under irrigation would increase, or the company [country] settle up faster."

"If a plant is built," said the Supreme Court in San Diego Land & Town Company v. Jasper, 189 U. S. 439, 446, 23 Sup. Ct. 571, 47 L. Ed. 892, "for a larger area than it finds itself able to supply, or, apart from that, if it does not as yet have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return."

The judgment is affirmed.

FIRST NAT. BANK OF MILES CITY v. STATE NAT. BANK OF MILES CITY.

In re McINTIRE et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,008.

1. PARTNERSHIP—DEBTS OF PREVIOUS FIRM—LIABILITY—EVIDENCE.

A partnership agreement provided that the incoming partner should pay $2,500 in cash, and execute to the other partner, who had an established business, notes for the remainder of the purchase price of a half interest in the business, to be determined by an inventory thereafter to be taken. The original partner took sole charge of the financial and accounting part of the business. The inventory was not taken, and the notes were not executed, but the parties continued to do business as partners on an equal

basis. The original partner represented to the incoming partner that his indebtedness only amounted to about $10,000, when in fact it exceeded $30,000; and shortly thereafter he borrowed $10,000 from defendant bank, which he represented to his partner was for the firm's benefit, but which he in fact paid on his personal indebtedness to complainant bank, and thereafter, without his partner's knowledge, executed two notes to complainant in renewal of other notes, a part of his personal indebtedness. *Held*, that the incoming partner did not agree to assume any part of the indebtedness of the old firm, and that the notes so renewed were not chargeable against the new firm's assets in bankruptcy.

2. SAME—NOTICE.

Where a bank had knowledge of facts putting it on inquiry as to whether a member of a firm largely indebted to the bank was authorized to execute notes in the firm name to secure such pre-existing indebtedness, the bank was not entitled to prove such notes as against the firm's assets, in the absence of such authority, notwithstanding the partner executing the notes had implied power, as a member of an ordinary trading firm, to execute notes in the name of the firm.

3. SAME—RATIFICATION.

Where an incoming partner had no knowledge until a very short time before bankruptcy proceedings against the firm were instituted that his partner had executed firm notes to secure the partner's pre-existing indebtedness to a bank, and the books of the firm, if examined by such partner, would not have disclosed the execution of such notes, such incoming partner did not ratify their execution, so as to justify their allowance as a claim against the firm's assets.

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

Appellant and appellee were creditors of the firm of McIntire & Middleton, bankrupts. In the proceedings in bankruptcy, appellant filed its claim upon overdrafts and notes against McIntire & Middleton amounting to $18,378.21, principal. The referee allowed the claim, including the interest thereon, in the sum of $19,012.21. The appellee herein then moved the referee to expunge and disallow the claim of appellant upon the ground that they were liabilities of the McIntire Mercantile Company incurred prior to the formation of the partnership of McIntire & Middleton, and had not been ratified. Upon this motion the referee in bankruptcy reduced the claim of appellant to the sum of $15,920.34. Appellee took an appeal to the District Court, and the decision of the referee was affirmed as to the claims allowed, except two notes—one for $2,500, and the other for $4,000—the allowance of which by the referee was reversed. From this order and judgment the appeal to this court is taken.

The facts in the record may be briefly stated as follows: For a number of years prior to July 1, 1900, H. W. McIntire was engaged in business at Miles City, Mont. He afterwards adopted and used the trade-name of McIntire Mercantile Company, and continued the use thereof, as its sole proprietor, and as the owner of its entire stock in trade, until the formation of the partnership between himself and Fred F. Middleton. The new firm of McIntire & Middleton commenced to do business about July 1, but the articles of partnership were not reduced to writing and executed between the parties thereto until July 10, 1900. The agreement of partnership was produced at the hearing, and offered and received as evidence. From the terms thereof, it appears that the partnership was to continue for the term of five years; that the firm name was to be McIntire & Middleton, and they were to engage in the business of buying, selling, and dealing in all kinds of merchandise in Custer county, Mont., at wholesale and retail. Each of the partners was to bestow and give his full time, labor, skill, knowledge, and services to the business of the firm. At the time of the formation of this partnership the entire stock of goods, wares, and merchandise of the aforesaid McIntire Mercantile Company was the property of H. W. McIntire, its sole proprietor, and the same was to be taken over by the new firm of McIntire & Middleton. An inventory and valuation of this stock was to be made, and, when so made and ascertained, Middleton was to

acquire a half interest therein by the payment of $2,500 in cash, and executing to McIntire promissory notes for the remainder of the purchase price of said half interest. Middleton paid the $2,500 in cash, and the firm of McIntire & Middleton went into possession of the stock of merchandise. During the time McIntire was engaged in business, he became and was heavily involved in debt. Most of his indebtedness was held against him by the First National Bank of Miles City. Its form was promissory notes executed either in his individual name, or in the name of the McIntire Mercantile Company. About $20,000 of this indebtedness was in existence at the time of the formation of the firm of McIntire & Middleton. In the division of the work to be done by the partners in the firm, McIntire undertook to keep the books, and took sole charge and assumed control of the financial and accounting part of the business, and Middleton gave his attention to the management of the sale department.

The court below, in its opinion, said: "As to the notes for $2,500 and $4,000, respectively, which are claimed to be firm liabilities of McIntire & Middleton, and which have been allowed by the referee as claims against the estate of said bankrupts, it appears from the evidence that both of these notes are renewals of notes for the same amounts due to the First National Bank from the McIntire Mercantile Company. It is claimed that the firm of McIntire & Middleton assumed these liabilities of the McIntire Mercantile Company at the time of the formation of this firm. I fail to find sufficient evidence in the record to support this claim. No consideration appears to have passed from the First National Bank to McIntire & Middleton for such assumption. The fact that McIntire deposited the funds of McIntire & Middleton in said bank would not establish this. Certainly the act of assumption of the payment of these notes must be the act of all the partners. McIntire alone would have no authority, by virtue of his partnership relation with Middleton, to make such a contract."

T. J. Porter and Davis, Kellogg & Severance, for appellant.

O. F. Goddard, for appellee.

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

HAWLEY, District Judge (after making the foregoing statement). The questions involved in this case must be determined upon the conclusions which should be drawn from the testimony as to whether or not the partnership agreed to be entered into between McIntire and Middleton was ever consummated by them in accordance with their agreement. Were the two notes referred to in the opinion renewal notes of the McIntire Mercantile Company, and, if so, were they ever authorized or ratified by Middleton, so as to be valid notes against the partnership, if one existed? In short, did the court err in its findings as to the evidence? Did it err in reversing the decision of the referee concerning the two notes—one of $2,500, and the other of $4,000?

The contention of appellant is (1) that the business of the firm of McIntire & Middleton was the continuation, without interruption, of a going business hitherto carried on by H. W. McIntire under the name of the McIntire Mercantile Company; (2) that the mode of conducting the business of the firm clearly shows an intention on the part of both members of the firm to assume all of the indebtedness of the McIntire Mercantile Company, including that represented by the notes; (3) that the evidence, under the rule of law applicable to such cases, is sufficient to require a finding that the indebtedness of the McIntire Mercantile Company, including that represented by the notes in question, was assumed by the firm.

The difficulties encountered and doubts entertained in endeavoring to ascertain the true facts are attributable to the lax methods and careless manner in which the business affairs of McIntire & Middleton were transacted. If business principles had been adopted at the start; if, after the terms of partnership had been agreed upon, an inventory of the stock of goods owned by McIntire had been taken, and the value thereof determined, and Middleton had given his notes in compliance with his agreement, and the books opened under the firm name of McIntire & Middleton, and an account opened with the appellant bank under the firm name—much of the mist of uncertainty which now exists would never have occurred. We are, however, compelled to deal with the testimony as we find it, unsatisfactory as it is, and determine, as best we can, the true inwardness of the transactions, and the rights and liabilities of the respective parties.

The contention of appellant that the partnership was never consummated cannot be sustained. The partnership agreement was in writing. Under it the parties commenced and conducted the business. The statement of facts shows that the partnership was an existing one. It was not, as appellant argues, "suspended in the air," because Middleton had never given the notes to McIntire for the amount due upon his purchase of a one-half interest in the stock of goods. These notes were not given because no inventory had been completed, and until that was done it could not be ascertained what the amount was. From the statement it is also shown that the two notes here in controversy were given as renewal notes of an indebtedness due from H. W. McIntire, individually, under the trade-name of the McIntire Mercantile Company. The national bank knew this to be the fact. McIntire knew it. Both so testified.

The pivotal point of dispute or conflict in the evidence is whether or not the firm of McIntire & Middleton assumed the payment of the indebtedness due by McIntire to the National Bank; secondly, whether the firm, in its methods of transacting business, did not justify such an assumption; and, thirdly, by its conduct ratify the acts of McIntire in giving the two notes in the firm name.

One transaction that is relied upon by appellant to support its contention that the firm of McIntire & Middleton assumed the indebtedness of the McIntire Mercantile Company to the appellant bank is that McIntire had promised appellant that, if the partnership of McIntire & Middleton was organized, it would pay appellant $10,000 very soon. Now, it appears that the State Bank, appellee herein, had been approached by McIntire, with the knowledge of Middleton, and conversations had with reference to the amount of money which appellee would agree to allow the firm to overdraw or loan if it should open an account and transact the firm's business through the bank, and the bank agreed to the sum of $10,000. McIntire very soon thereafter, in July, 1900, went to the State Bank and borrowed $5,000 on account of McIntire & Middleton, and took this money over to the National Bank, and there deposited it to the credit of the McIntire Mercantile Company. In December, 1900, or January, 1901, McIntire borrowed on account of McIntire & Middleton another $5,000 from the State Bank, and deposited it with the First National Bank to the credit of the Mc-

Intire Mercantile Company. It is not shown, except by inference from the evasive testimony of McIntire, that Middleton had any knowledge of how this money was to be applied. The extent of Middleton's knowledge in this matter, as shown by the record, is to the effect that he knew McIntire drew some money from the State Bank—as he supposed, to pay debts owing by the firm of McIntire & Middleton; he did not know that McIntire used the money, or any part of it, to pay the debts of the McIntire Mercantile Company.

There were certain checks drawn and notes given to the appellant bank, signed by the firm name of McIntire & Middleton, for debts due by the firm; and some of them, at least, were known by the bank to be for debts of the firm, which are relied upon to show an assumption of the debt due the bank by the McIntire Mercantile Company. The bank itself, by allowing these matters to be mixed up with the accounts of McIntire, and not opening an account with McIntire & Middleton, and keeping the accounts separate, contributed to the conditions of which it now seeks to avail itself. It could not have been misled upon its own irregular conduct touching these matters. Neither the appellant nor McIntire was able to give any sensible reason for the method adopted of keeping the accounts together.

Notwithstanding these facts, it may, for the purposes of this opinion, be conceded that there were two or three of these transactions, which, if taken by themselves, unexplained, without reference to other undisputed facts, might tend to support appellant's views. But it is our duty to take all the facts, the circumstances, conditions, and surroundings of the parties, their financial condition, and methods of drawing checks and depositing money, etc. If it was the firm's understanding that such indebtedness had been assumed, is it likely that Middleton, as a sane man, would have agreed to give his notes to McIntire for one-half of the inventoried stock of goods? The articles of copartnership stated "that the common stock of the partnership consists of money and merchandise of the full value of $30,000"; that "the shares of the said partners in the profits or loss of the business are and shall be equal." The half interest in this property would be worth say $15,000. For this Middleton had agreed to give his notes. Would he have agreed to do this if it was the understanding that the firm was to assume the individual indebtedness of McIntire?

The testimony shows that, when the partnership was talked about between them, McIntire told Middleton that his indebtedness was only about $10,000, and that he would be able to arrange that before July 1, 1900. The testimony also shows that McIntire's indebtedness was at that time, and at the time the partnership was entered into, over $30,000. Middleton was not aware of this indebtedness. The First National Bank, appellant herein, knew of this indebtedness of McIntire, because the greater part of it was then owing to the bank, and it knew of the formation and existence of the partnership between McIntire and Middleton; and it never made any inquiry whatever of Middleton as to whether the partnership had assumed the indebtedness of McIntire, but relied and acted solely upon the statement made to it by McIntire.

W. B. Jordan, the president of the First National Bank, testified that he was acquainted with both McIntire and Middleton, and was in-

formed of the transaction of their going into business together as partners; that about the time of the formation of the partnership he had a talk with McIntire about his business, as he was largely indebted to the bank. Among other things, he said:

"I advised Mr. McIntire to enter into this partnership, and that we would take them for the indebtedness of H. W. McIntire and McIntire Mercantile Company to the bank. His assurances to me were that, if the firm of McIntire & Middleton was formed, that they would pay $10,000 to the First National Bank very soon, and reduce their indebtedness right along. I left here in a few days, and when I came back the firm of McIntire & Middleton was in operation."

Upon his cross-examination:

"Q. Mr. Jordan, with what member of the firm of McIntire & Middleton was this conversation relative to the new firm of McIntire & Middleton assuming the debts of the McIntire Mercantile Company? A. With Mr. McIntire. Q. You never at any time talked with Mr. Middleton about that? A. No, sir. * * * Q. Mr. Jordan, can you tell why that account was continued in the bank under the name of the McIntire Mercantile Company after the new firm was formed? A. I cannot. It was simply allowed to run along that way, and I asked the cashier if there had been any change, and there had not been any. It was just going along the same as before."

McIntire corroborated the statements made by Jordan. Upon McIntire's cross-examination:

"Q. Now, I will ask you, Mr. McIntire, why you kept the account with the First National Bank of McIntire & Middleton in the name of McIntire Mercantile Company? A. I do not know that I had any particular reason for doing that. The necessity of changing it did not occur to me at all. Q. Wasn't it mentioned to you by Mr. Middleton once or twice? A. Not that I remember. Q. Didn't he call your attention to it, and ask you to change it, or to change the account to the State National Bank? A. I do not remember any such conversation. By the way, I do remember having— Mr. Middleton understood that the account was to go to the State National Bank, but, so far as my recollection serves me, there was no discussion of this account between Mr. Middleton and myself. Q. You can give no good reason why you kept this account in the way you did? A. No; I cannot."

Middleton testified that he never consented, authorized, or agreed in any manner to assume the indebtedness of McIntire to the National Bank, and that the partnership never assumed the indebtedness. With reference to the two notes here in controversy, there is no evidence tending to show that Middleton ever knew of their existence until about the time of the filing of the firm's petition in bankruptcy. There is no sufficient evidence in the record to sustain the contention of appellant that the firm of McIntire & Middleton ever assumed the indebtedness of McIntire, or the McIntire Mercantile Company, in its entirety, to appellant. The weight of the testimony clearly shows that the partnership never assumed the payment of the two notes which are involved in these proceedings, and never authorized the giving of the notes. Surely McIntire alone had no authority to make the contract of renewal. Appellant, having notice of the facts, was put upon inquiry, and is not in a position in the bankruptcy proceedings, as against a creditor or creditors of the bankrupt firm, to maintain its claim for the allowance of the two notes—one for $2,500, and the other for $4,000.

It is a well-settled rule of law that it is the duty of all the members of a copartnership to observe the utmost good faith toward each other

in all their partnership transactions. This rule becomes essential because the members of the partnership stand in a fiduciary relation to each other. 22 Am. & Eng. Ency. L. (2d Ed.) 114, and numerous authorities there cited. The doctrine thus announced bears upon the conduct of the appellant bank. Did it have the right to assume that the conduct and statement made by McIntire, as testified to by its president, were authorized by the members of the firm of McIntire & Middleton? Was it not then and there put upon notice that it was doubtful, to say the least, if McIntire was authorized to make such a statement? It had no knowledge that Middleton knew the amount of McIntire's indebtedness to the bank. The amount was so large as to cast suspicion upon the part of the bank and its officers, and put them on inquiry as to the truth of McIntire's statement.

In 1 Lind. on Part. p. 413, § 171, the author says:

"A person who knows that a partner is using the name or assets of the firm for a private purpose of his own knows that he is prima facie committing a fraud on his copartners. Therefore, notwithstanding the implied power of a member of an ordinary trading firm to accept bills or make notes, if one partner accepts a bill or makes a note in the name of the firm, and gives the bill or note in payment of a private debt of his own, the creditor who takes the bill or note, knowing the circumstances under which it has been accepted or made, will not be able to enforce it against the firm, unless it was in fact given with the authority of the other partners, which it is for the creditor to prove."

In McNair v. Platt, 46 Ill. 211, 213, the court said:

"As a general rule, one partner is not bound by the unauthorized acts of his copartner; but, from the very nature of a partnership, each member of the firm is presumed to have and has authority to bind the firm within the scope of the business of the copartnership. Beyond the scope of its business, authority to act must be shown, precisely as if any other person had performed the act, or the firm will not be bound. The application of partnership funds or property to the payment of a debt of one member of the partnership is outside of and beyond the scope of its business, and assent to such application must be shown, or a subsequent ratification proved, or the firm will not be bound."

It is unnecessary to multiply authorities upon this point. The books are full of cases where this principle is announced. There are none to the contrary. It was this principle that authorized the allowance of many of the accounts by the court that were included by the bank in the McIntire Mercantile Company. The fact is that the court allowed all the accounts that were proven in good faith to belong to the partnership of McIntire & Middleton; otherwise all the accounts should have been disallowed on the general principle that they were charged to McIntire alone, and the appellant bank did not upon its books appear to be a creditor of McIntire & Middleton. The court took an equitable view of this matter in order to reach the ends of justice, and recognized the appellant bank as a creditor of the firm, and entitled to share with other creditors to the extent that it had proven it was in fact a creditor of the firm. This equitable view, however, could not be extended to the transaction of the renewal of the two notes unless the firm had agreed to assume the indebtedness of the McIntire Mercantile Company, because the bank knew that the renewal notes were given for the private debt of McIntire. The law is well settled that one partner

cannot bind the firm by giving a note to pay his individual debt unless authorized so to do by his partner. Such a transaction is treated as a fraud upon the partnership. 1 Bates on Part. §§ 347, 509, and authorities there cited; Elkin v. Green, 13 Bush, 612; Lanier v. McCabe, 2 Fla. 32, 48 Am. Dec. 173; Thomas v. Stetson, 62 Ill. 537; Howell v. Sewing Machine Co., 12 Neb. 177, 10 N. W. 700; Bank of Scott City v. Sandusky, 51 Mo. App. 398, 401; Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350.

In Shirreff v. Wilks, 1 East, 48, decided in 1800, Lord Kenyon, C. J., said:

"This is an action brought against three persons, Wilks, Bishop, and Robson, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by Bishop alone in the name of the firm. The consideration for this bill was some porter which had been sold by the plaintiffs to Wilks and Bishop only, at a time when Robson had no concern with the house. Then the plaintiffs, knowing this, draw the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, Robson, had no concern with the matter, and was no debtor of theirs; no assent of his being found, and nothing stated to show that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent, but it would be carrying the liability of partners for each other's acts to a most unjust extent if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs therefore ought not, in justice, to have taken this security, by which they were to bind one who was not their debtor. The transaction is fraudulent upon the face of it."

There is nothing in the course of dealing of the firm of McIntire & Middleton, irregular as it was, that could have misled the appellant bank, and induced it to accept the renewal notes under the belief that the firm had assumed the payment of McIntire's debt to the appellant bank.

In People's Savings Bank v. Smith & Co., 114 Ga. 185, 188, 39 S. E. 920, the court held that a partnership may frequently have drawn checks against its funds in bank for the purpose of discharging the individual debts of its members would not constitute such a course of dealing as would justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its promissory note in satisfaction of a debt due by one of the partners to the bank.

In order to ratify the act of McIntire in giving the notes in question, it must at least have been shown that Middleton had knowledge thereof. The foundation upon which the principle of ratification is based is wanting in this case. In the very nature of the facts, as disclosed by the testimony, there could not have been any ratification upon the part of Middleton, for he never heard of the $2,500 note until a very short time before the proceedings in bankruptcy were instituted, and there is no pretense that he then consented to it. His first knowledge of the $4,000 note was at the first meeting of the creditors before the referee in the bankruptcy proceedings. In Reubin v. Cohen, 48 Cal. 545, the court held that the mere fact that a partner, upon being informed that his copartner had given a firm note for his individual debt, does not deny his liability thereon, does not per se amount, in point of law, to a ratification or adoption of the note.

Some reliance seems to be placed upon the point that it is the duty of the court to assume in this case that Middleton had access to the firm books, and obtained knowledge therefrom. Middleton testified that he could have had access to the books of the firm, but that he had never examined them. There was no evidence upon this point except the testimony of Middleton. No inference could therefore be drawn as to his knowledge of what the books contained. The books introduced in evidence in this case did not contain any entries with reference to the notes in question, and Middleton could not have obtained any knowledge in regard to them if he had examined the books. The ordinary presumption undoubtedly is that all the partners have access to the partnership books, and know of the entries therein; but this is a mere presumption from the ordinary course of business, and may be repelled by any circumstances which lead to a contrary presumption. United States Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791.

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

FIRST NAT. BANK OF MILES CITY v. STATE NAT. BANK OF MILES CITY.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1904.)

No. 1,016.

1. BANKRUPTCY—EFFECT OF APPEAL ON JURISDICTION OF DISTRICT COURT.

Where an appeal has been duly taken and perfected under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], from a judgment allowing or rejecting a debt, the district court is thereby deprived of jurisdiction to further consider matters involved in the appeal, and cannot entertain a motion for a rehearing so long as the appeal is pending.

Appeal from the District Court of the United States for the District trict of Montana.

In Bankruptcy. On motion to dismiss appeal.

T. J. Porter and Davis, Kellogg & Severance, for appellant.

O. F. Goddard, for appellee.

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

HAWLEY, District Judge. This is an independent appeal in the case just disposed of. 131 Fed. 422. The facts are that on August 17, 1903, the District Court rendered its judgment in the case upon its merits; that on August 25, 1903, the First National Bank, appellant herein, took and perfected an appeal from that judgment to this court; that on September 12, 1903—18 days after said appeal was perfected—it filed a petition, with affidavits in its support, and thereon moved the court for a rehearing upon the ground of alleged newly discovered evi-

¶ 1. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

dence cumulative in its character. The court denied the rehearing, and from that order the present appeal is taken.

Appellee moves to dismiss the appeal on the grounds (1) that it is not an appealable order; (2) that it was made and entered after the appeal in the case was taken; (3) that by reason of the appeal the District Court had no jurisdiction to act upon the petition for rehearing during the pendency of said appeal to this court.

It is proper to state that the record herein shows that counter petitions and affidavits were filed by the appellee in the court below, that the cause was regularly submitted to the court, and that after consideration the court made the following order:

"Wherefore it is ordered and decreed that said petition for rehearing be, and the same hereby is, denied. And thereupon exception was allowed to the court's ruling, and the First National Bank of Miles City allowed fifteen days within which to prepare, serve, and file bill of exceptions."

So far as the record shows, it appears that the court disposed of the motion for rehearing upon its merits, and it does not affirmatively appear that it erred in so doing. It was certainly largely within the sound discretion of the court, and depended upon the views that might be taken of the facts contained in the case as originally tried and as presented in the petition. But, independent of these matters, the question of practice, as adopted in this case and raised by the motion to dismiss, is one that ought to be disposed of. The overwhelming weight of authority of the state courts is that an appeal, properly perfected, absolutely removes the case from the trial court, and places it in the appellate tribunal. The case must, of necessity, either be in the appellate or lower court. It cannot very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction. After the cause leaves the lower court, it is deprived of taking any action upon any question involved in the appeal. Many of the authorities in the state courts upon this point are collected and cited in Elliott's App. Pro. § 541. The federal authorities are substantially to the same effect.

The precise point here raised has not been discussed in the national courts, because the practice adopted by appellant in this case is virtually unknown; but it has been incidentally referred to in several decisions to the effect that the decree in the District or Circuit Courts, when an appeal has been taken therefrom, is suspended until the appeal is disposed of. This rule is frequently stated in admiralty and other causes. The Collector, Wilmot, Claimant, 6 Wheat. 194, 203, 5 L. Ed. 239; Bronson v. Railroad Co., 1 Wall. 405, 409, 17 L. Ed. 616; The Lottawanna, 20 Wall. 201, 225, 22 L. Ed. 259; The S. S. Osborne, 105 U. S. 447, 450, 26 L. Ed. 1065; Ensminger v. Powers, 108 U. S. 292, 302, 2 Sup. Ct. 643, 27 L. Ed. 732; Hovey v. McDonald, 109 U. S. 150, 157, 3 Sup. Ct. 136, 27 L. Ed. 888.

In Bronson v. Railroad Co., supra, the court said:

"They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree."

In Ensminger v. Powers, supra, the court said:

"While the appeal was pending here, although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, because such relief was beyond its control."

The decisions in the District and Circuit Courts are to the same effect. Morgan's Louisiana R. R. Co. v. R. R. Co. (C. C.) 32 Fed. 525, 530; Kimberly v. Arms (C. C.) 40 Fed. 548, 550; Citizens' Bank v. Farwell, 56 Fed. 539, 6 C. C. A. 30; Western W. S. Co. v. Drinnen (C. C.) 79 Fed. 820; Morrin v. Lawler (C. C.) 91 Fed. 693.

In Citizens' Bank v. Farwell, supra, the Court of Appeals said:

"After the cause had been thus removed into this court, the plaintiff in error appeared at a subsequent term of the Circuit Court, and filed a motion in that court to 'vacate, set aside, and annul the said judgment' on various grounds. This motion the court overruled, and thereupon the plaintiff in error sued out this second writ of error in the same cause, and assigned for error the overruling of said motion. The removal of the case into this court under the first writ of error transferred the jurisdiction of the suit to this court, and the jurisdiction of the lower court over the case was at an end."

In Morrin v. Lawler, supra, Thomas, J., said:

"When all the steps necessary to perfect an appeal to an appellate court have been properly taken, the action is within the control of that court, and the trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained."

The appeal here taken is not authorized or sanctioned by any of the provisions of the bankrupt act, or by any rule or practice adopted by the courts in bankruptcy proceedings.

Section 25a, Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432] provides:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States * * * (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered."

It was by virtue of these provisions that the first appeal was taken. In the petition for a rehearing it was stated that the matters upon which a rehearing was asked were discovered "since the suing out an appeal in this court, and that, if a rehearing of this cause is granted by the court, petitioner will dismiss such appeal, and diligently prosecute its said claim before this court upon such rehearing." This was not sufficient. If appellant desired its petition for rehearing to be passed upon by the court below, it should have dismissed the appeal it had previously taken to this court. The authorities cited by appellant are to the effect that by so doing it would not have lost its right to take an appeal after the final action of the court below upon the petition for rehearing. In re Wright (D. C.) 96 Fed. 820; Stickney v. Wilt, 23 Wall. 150, 23 L. Ed. 50. Appellant cites Devries v. Shanahan, 122 Fed. 629, 58 C. C. A. 482, but that case only decides that the Court of Appeals, where the record is imperfect, may return the same to the District Court for correction. In re Abraham, 93 Fed. 767, 782, 784, 35 C. C. A. 592, is based on facts entirely dissimilar to the case at bar. The appeal was there taken from an order that was not appealable, and the Court of Appeals, in the exercise of its discretion, permitted the appellant, in lieu

of his appeal, to file a petition for revision of the proceedings in the District Court. The only cases we have found where the appellate courts have considered or reviewed any question presented by a petition for a rehearing or review in bankruptcy cases is where the matter was presented under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]). In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356; In re Eggert, 102 Fed. 735, 43 C. C. A. 1; In re Derby, 102 Fed. 808, 814, 42 C. C. A. 637; In re Fisher, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292. But in these cases it was held that no such rehearing or review could be had where the appeal is taken under the provisions of section 25a. The general consensus of opinion is that, section 25a having provided a means to review by appeal three kinds of judgments, every other means is excluded. Coll. on Bk. (4th Ed.) p. 267; Brand. on Bk. §§ 604, 605; In re Good, 3 Am. Bankr. R. 605, 99 Fed. 389, 39 C. C. A. 581. The taking of an appeal deprives the court of bankruptcy of jurisdiction to further consider matters involved in the appeal.

Appeal dismissed.

THE ADMIRAL SCHLEY.

THE CHARLES F. MAYER.

(Circuit Court of Appeals, First Circuit. July 6, 1904.)

Nos. 513, 514.

1. COLLISION—TUG WITH LONG TOW—DUTY TO EXERCISE EXTRAORDINARY CARE.

   The rule reaffirmed that a tug with a long tow navigating the New England coast will be held to the exercise of extraordinary care, in the interest of common safety.

2. SAME—DANGEROUS SITUATION CREATED WITHOUT NECESSITY.

   A vessel may be in fault for a collision in a fog which would not have occurred but for her being in the usual track of vessels leaving a port, where she was there without necessity, although, if it had been in the line of her voyage, she might have been within her right, and not chargeable with fault.

3. SAME—CONTRIBUTORY FAULT—PRESUMPTION.

   The rule that where one vessel is shown to have been clearly in fault, without which a collision would not have occurred, the other vessel is to be presumed not in fault, is artificial and misleading unless very carefully applied. The rule may operate in reverse directions according to which vessel's faults are first considered.

4. SAME—RIGHT TO ASSUME OBEDIENCE TO RULES BY OTHER VESSEL.

   Also what is sometimes stated as a rule to the effect that a vessel which has come into collision had a right to proceed on the assumption that the other vessel would perform her duty has a limited effect, and is likewise misleading, unless very carefully applied, and it does not reach the circumstances of this case.

5. SAME—MANEUVERING WITH TOW IN FOG—UNNECESSARILY DANGEROUS POSITION.

   A steamer, with two coal barges in tow on a line, the whole 2,300 feet in length, deeming it unsafe to enter Boston Harbor because of a dense fog, continued to move slowly about with her tow between the lightship and the harbor entrance, crossing a number of times the usual path of steamers leaving the port, which was known to her master. While mov-

ing away from the harbor on a course nearly parallel to such path, and just as she had changed her course across it, she heard the signals of a vessel coming out, but did not change her course, and a collision between the two steamers resulted. The outgoing vessel was clearly in fault for excessive speed, but was misled by the course of the tows which she passed, which were still on a course practically parallel with her own. *Held*, that the towing vessel was also in fault for loitering with a tow of such dangerous length in the known way of outgoing vessels without necessity, it not being shown that she could not as well have kept her steerageway by maneuvering further out to sea, or to one side, which fault was aggravated by her failure to change her course back on hearing the other vessel, whose course she had reason to believe she was crossing; the rule prohibiting such change of course in a fog not being applicable under the circumstances.

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

For opinion below, see 115 Fed. 378.

Edward S. Dodge and J. Walter Lord (Frederic Dodge, on the brief), for appellant.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellee.

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

PUTNAM, Circuit Judge. These appeals arose out of a collision between the steamers Admiral Schley and Charles F. Mayer. The Admiral Schley was a packet steamer bound from Boston to Jamaica. The Charles F. Mayer was a powerful tug, bound into Boston, with two barges in tow, with a total length of tug and tow of about 2,300 feet. The collision was off Boston Harbor, in a thick fog. The District Court held both in fault. There is now no question that the Admiral Schley should be regarded as in fault, which fault, on account of her extreme speed and lack of proper lookout, was grievous. Neither is there any question that her fault contributed to the collision. Indeed, it was the prime cause. The only issue before us is whether the Charles F. Mayer was also in fault.

With reference to tugs with long tows on our New England coast, we have in several instances laid down the positive rule which applies here. In The Berkshire (decided June 23, 1896) 74 Fed. 906, 910, 21 C. C. A. 169, we said that we did not know that we would be authorized to deem as unsafe the use of a narrow channel by a tug, with its tow on a hawser of customary length, more than by a large propeller of considerable draft and speed; but in The Gladiator, 79 Fed. 445, 446, and 447, 25 C. C. A. 32, we also said that we must hold tugs which navigate the New England coast, with long and peculiarly hazardous tows, to the use of the extremest care, in the interest of common safety. We reaffirmed this proposition in the Mt. Hope, 84 Fed. 910, 912, 29 C. C. A. 365, The Samuel Dillaway, 98 Fed. 138, 141, 38 C. C. A. 675, and The Gertrude, 118 Fed. 130, 131, 55 C. C. A. 80. The same rule is held by the Circuit Court of Appeals for the Second Circuit in The H. M. Whitney, 86 Fed. 697, 700, 30 C. C. A. 343.

In disposing of these appeals, we rely on nothing except what is admitted by the Charles F. Mayer, or is shown by official publications

of the United States, including their charts, and list of lights and fog signals, or by facts commonly known. When we use the word "mile," we mean a nautical mile. Boston Light, Thieves' Ledge Buoy, and Boston Lightship are very nearly in line. The Lightship bears E. ½ S., 5 15/16 miles, from the Boston Light; Thieves' Ledge Buoy is about two miles easterly from the Light, and about four miles westerly from the Lightship; and Minot's Ledge Lighthouse bears from the latter 4⅛ miles S. by W. ¼ W. There is an abundance of water in the easterly part of the triangle made by the Boston Light, Boston Lightship, and Minot's Ledge, and, of course, an abundance of water seaward thereof.

The Charles F. Mayer admits that the fog, at all the times necessary to consider, was thick. One expression used is: "The fog being still very thick." Another is: "The fog shut down thick again." It is also natural that a steamer coming out of Boston, as the Schley was, in a fog, would endeavor to pick up the Lightship. Consequently, Capt. McLeod, master of the Charles F. Mayer, admits that such a steamer would usually go near, or head towards, Boston Lightship, if she could hear its whistle, whenever bound for Cape Cod, the West Indies, Europe, New York, Baltimore, Philadelphia, or any ports to the south, or, in fact, going through Vineyard Sound. He testifies, however, that a vessel going to Gloucester, Portsmouth, Portland, Halifax, or other ports easterly, would pick up Thieves' Ledge Buoy, if she could, and take her course northerly from that. It is a matter of common knowledge that the navigation which would pick up Boston Lightship, as stated by Capt. McLeod, is by far the larger portion of that sailing from Boston, and is very large at all portions of the year. Consequently, a vessel crossing the line from Boston Light to Boston Lightship of E. ½ S., would directly across the more largely traveled path.

The collision occurred between Boston Lightship and Thieves' Ledge Buoy; Capt. McLeod placing it about a mile to the west of the Lightship, and the master of the Schley about a mile and a half to the east of Thieves' Ledge Buoy. The admitted point of collision demonstrates that the course of the Schley, coming out of Boston, must have been as described by Capt. McLeod for vessels bound southerly; that is, picking up the Lightship. At the same time, the position of the Mayer, as worked out by ourselves, was as follows: Capt. McLeod thus describes his movements, so far as we need notice them: He was running a course S. S. E. about half past 11, when, the fog having begun to lift, and thinking it would have cleared up by the time he reached the entrance to the harbor, he turned on a course N. W. by W. ½ W., and passed the Lightship close on his starboard hand. Thus he ran northerly of the bearing from the Lightship to the Boston Light, and therefore across, and northerly of, the course that would be taken by a vessel outward bound for Jamaica. In other words, he brought himself so that he and his tow, in all, as we have said, covering about 2,300 feet, was crossing the path of all the navigation bound as we have described. At half past 12, however, the fog shut down thick again, and he turned back on a course E. by S., which, about 10 minutes afterwards, he changed to E. by N. to pass a schooner on his starboard

bow. During these maneuvers, and to the time the Schley was heard, about 15 minutes after turning on the course E. by N., the speed of the tug was maintained at about one knot and one-half per hour. After turning on the E. by N. course, she prepared to shorten hawsers, and commenced to swing her head to port on a course N. N. E. When she had swung three or four points on the last turn, Capt McLeod heard a sound abaft his port beam, which he could not clearly identify as a whistle. A minute later, a fog signal of a steamer was heard, still abaft the port beam, which was reported by the lookout. Shortly after, the Schley loomed up about 500 or 600 feet away, heading for the Mayer's pilot house, and on her port. What followed related to vessels in extremis, and we need not pursue it.

We have stated these facts for the purpose of showing with detail how the Charles F. Mayer, with her long tow, was moving slowly across the course of navigation out of Boston, bound to Europe or southerly, as Capt. McLeod explained it and understood it. This course, as we have shown, was substantially E. by S. The course of the Charles F. Mayer, before she made her turn in order to shorten hawsers, was, as we have said, E. by N.; and she was, therefore, crossing the path of navigation at an acute angle. After she began her last turn, to come on the course of N. N. E., she was running across the path of navigation out of Boston at an angle nearing seven points, and therefore practically at a right angle to it. Of course, she was properly proceeding very slowly, and was required to do so; but, unfortunately, her care in this respect endangered the particular position she was in, so that, in this sense, we may say she was loitering. It needs nothing in addition to the mere statement of these facts to demonstrate that for this tug and her long tow to be in the position in which she was at the time of the collision was presumptively not only a fault, but a gross fault; and this is especially so, in view of our rule already referred to, and last stated in The Gertrude. That this presumptive fault contributed to the collision cannot be denied, because the collision could not have occurred if the Charles F. Mayer had not been crossing this path of navigation, and perhaps not if she had not been loitering thereon. Under these circumstances, the burden rests on her to clearly justify her locality, if she can do so.

The Charles F. Mayer claims that it was necessary for her to keep on steerage way during the thick fog, because, on account of the heavy weather, it was impracticable for her to anchor in that neighborhood; and it may be that the well-known facts of the locality, supplemented by her evidence, sustain this proposition, but this in only a general way. It would not justify her keeping under way in an improper locality. She also asks whether she would have been in fault if she had been crossing, as she was crossing, but in the direct line of her voyage, assuming that she had been bound for some Northern port; and whether the circumstance that, instead of being in the line of her voyage, she was maneuvering as she was maneuvering, constitutes any essential distinction. The distinction is that, if in the line of her voyage, she would ordinarily have been within her right, although on a hypothetical question no one can answer positively. If within her

right, it would follow that ordinarily she would have been entitled to avail herself of it, though it involved danger to others.

It has not been specially pressed upon us that the Charles F. Mayer found it prudent to keep her bearings and thus retain knowledge of her position; but we may reasonably suppose that such was the fact. Nevertheless, even on this supposition, it was her duty to show us clearly that she could not have accomplished this by making use of some other lights or signals within reasonable range. Indeed, she has offered no specific proof on this topic, not even to show that it was needful for her to keep her bearings, as we have suggested, or that she might not prudently have run out to sea. In the absence of anything of this nature, the common knowledge of that part of our coast, and especially the presumption that the Mayer might have sufficiently preserved her bearings while remaining southerly of the path of navigation, and in the easterly part of the triangle of which we have already spoken, made by Boston Light, Boston Lightship, and Minot's Ledge Lighthouse, leave the case resting heavily against her with reference to this class of suggestions.

The Mayer relies on The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, in which case she claims it was decided that, as the Umbria was running under an excessive speed of about 20 knots, the alleged fault on the part of the Iberia, with which steamer she collided, could not be taken into account. But the fact is that a majority of the court held the Iberia was not in fault, while the other justices were of the opinion that, if she had been in fault, the fault did not contribute to the collision. Therefore the decision is not effectual here. We have sufficiently expressed our views of The Umbria in The Columbian, 100 Fed. 991, 994, 41 C. C. A. 150, and in The Gertrude, 118 Fed. 130, 132, 55 C. C. A. 80, where we said that the Iberia was in extremis from the moment she heard the signals of the Umbria. However, it is impossible to concede that there is any analogy between a tug like the Charles F. Mayer, "loitering" with her tow, and a steamer like the Iberia, which, at least, was endeavoring to escape by some action on her own part.

We are not prepared to condemn the Charles F. Mayer for not giving special signals, because it is settled law that, unless in extreme cases, to give signals not called for by the international rules may be a fault; and especially, under circumstances like those at bar, of a thick fog, with numerous vessels in the neighborhood, such signals may produce confusion. The Oregon, 158 U. S. 186, 200, 201, 202, 203, 15 Sup. Ct. 804, 39 L. Ed. 943. We appreciate the fact that, under the circumstances, the master of the Mayer came suddenly into a thick fog off Boston Harbor, and thus was brought unexpectedly into a difficult position; and we do not overlook the fact that, in a condition of maritime difficulty, the question is not necessarily whether the commanding officer made an error, but merely one of good seamanship. We have expressed this with reference to very peculiar circumstances in The Carbonero, 122 Fed. 753, 755, 58 C. C. A. 553. However, the error of the Mayer was so glaring that no claim of good seamanship can save her. Indeed, Capt. McLeod seems not to have relied so much on his own judgment as on what he regarded as a custom, in accordance with which it was the practice of tows to maneuver as he did in that locality

in a fog. Therefore these appeals do not raise so much a question of seamanship as they press upon us anew for our consideration one of the various practices of vessels in thick weather, both steamers and sailing vessels, some of them in violation of the international rules, which the courts are so frequently compelled to condemn.

We have shown that, just before the Charles F. Mayer heard the Schley coming out from Boston, she starboarded her helm, coming on the N. N. E. course, and continued to keep a starboard wheel, notwithstanding her master, Capt. McLeod, knew, or at any rate supposed, that the Schley was running towards her. The Schley, in her libel, distinctly charged this as a fault; also, in her answer to the libel in behalf of the Mayer, it is alleged that the Schley first saw one barge heading in the same direction as herself, and again a second barge still proceeding on the same parallel course, and that then, suddenly, she saw the Mayer crossing her path from starboard to port. The course of the barges would tend to mislead the Schley as to the supposed course of the tug, unless she was very attentive to lookout and signals. The testimony in behalf of the Mayer admits the substance of this. Nevertheless, Capt. McLeod continued to keep under his starboard wheel, and thus to complete a cul-de-sac in which the Schley was trapped; while, if he had ported his wheel when he first heard the Schley, and brought himself in line with his tow, he would have given the Schley more sea room, and the collision would have been avoided, as the Mayer merely caught the Schley's starboard quarter about 50 feet from her stern.

It is doubtful whether these steamers, under the circumstances, were in such a condition that the Mayer was bound by the international rules with reference to keeping her course; and it is still more difficult to determine what is the effect of these international rules when a vessel, being overtaken, is already under a port or starboard wheel. Indeed, so far as they are concerned, it is said in Marsden's Collisions at Sea (4th Ed.) 381, as follows:

"An alteration of the helm in a fog, when the other ship cannot be seen and only her whistle is heard, is not necessarily negligence, though it is made merely upon a guess as to the distance, course, speed, and direction of the other ship. As a general rule, in such circumstances, a ship should not alter her course; but each case must depend upon its own circumstances, and it cannot be laid down that every alteration of course, in ignorance of the position and course of the other ship, is in itself a fault."

The author in this particular is fully sustained by The Vindomera (1891) A. C. 1, where the syllabus, which correctly represents the decision, uses practically the same language as Mr. Marsden. Nevertheless, although the international rules do not literally apply, and although the fact that the Mayer kept her starboard wheel after she heard the whistle of the Schley was not her primary fault, yet it certainly aggravated it, and aids to expound and measure it as a serious one.

Two propositions have been brought to our attention incidentally, if not directly, namely: First, that as the case shows that the Schley was clearly guilty of a gross fault, the Mayer is presumed not to have been in fault; and, second, that the Mayer was proceeding slowly, with perfect discipline, as was the fact, while the Schley was moving rapidly in a thick fog, without discipline, and this to such an extent that she failed to hear the signals from the Mayer, all of which is

also true. It is said consequently that, if the Schley had had a proper lookout, or had been proceeding with the required care as to speed, the collision could not have occurred, which is also true. Therefore it is suggested that the Mayer was not bound to anticipate that a steamer would come out of Boston committing such gross faults as were exhibited by the Schley, so that the Mayer cannot be charged because she did not guard against the possibility of this occurring. The first proposition, which is often stated by the authorities, is artificial, and is misleading unless very carefully applied. In ordinary cases, it would operate in reverse directions, according to which vessel's faults are first considered in ascertaining the causes of the collision. So far as the second is concerned, the rule is also artificial, and also, unless applied very carefully, misleading. The Schley had as much right to assume that the Mayer would not be loitering on the path of navigation, and to govern herself accordingly, as the Mayer had to assume that the Schley would not violate the international rules. The authorities, however, which have used this proposition, have had a very limited effect. They may be illustrated by The Servia, 149 U. S. 144, 153, 13 Sup. Ct. 817, 37 L. Ed. 681, and the cases there cited, and by The Victory and the Plymothian, 168 U. S. 411, 426, 18 Sup. Ct. 149, 42 L. Ed. 519. The decisions named, and nearly all the cases cited by them, bear against the Mayer, instead of in her favor, because each turns on the assertion that one vessel was bound to anticipate that the other would take the course customarily taken by her. In each, the vessel expected to take the customary course failed to do so, so that the other vessel was exonerated. On the present appeals, however, the Mayer disregarded the presumption which the cases cited state, to the effect that vessels usually take known customary courses, which presumption, as applied to the present collision, charged the Mayer with the special duty of avoiding the Schley, and other vessels coming out of Boston, by the customary path. However, this topic is correctly disposed of by the statement which we have already made that the Schley was under no more obligation to assume that the Mayer would violate maritime rules than the Mayer was to assume that the Schley would do the same. If the second proposition were acceded to generally, there would hardly ever be a division of damages on account of the faults of both vessels involved in a collision, and it is only under extreme circumstances that it can possibly have any application. We must refuse to admit it here.

On the whole, these appeals seem to be within the practical rules applied by the Circuit Court of Appeals for the Second Circuit in The H. M. Whitney, 86 Fed. 697, 701, 30 C. C. A. 343.

In No. 513, The Admiral Schley, the decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

In No. 514, The Charles F. Mayer, the decree of the District Court is affirmed, with interest, and the appellee recovers its costs of appeal.

JABINE et al. v. SPARKS, Presiding Judge, et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1904.)

No. 1,301.

1. APPEAL AND ERROR—FINAL DETERMINATION.

The case coming on to be heard on plaintiffs' demurrer to defendant's return in a mandamus proceeding, the court made an order, and plaintiffs excepted to so much of it as ordered the appointment of a collector of taxes without first ordering the removal of the sheriff. Thereafter plaintiffs filed a reply to defendant's return, and the court required defendant to file a rejoinder in a certain time. *Held*, that the court had allowed further pleading, so that its order, which would have become final had plaintiffs stood by their demurrer, was not a final determination authorizing a writ of error.

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

D. M. Rodman, for all plaintiffs in error.
John A. Pitts, for plaintiff in error Frank C. Guthrie.
W. L. Reeves, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is a proceeding in mandamus instituted in the court below by the plaintiffs in error to enforce the payment of judgments obtained by them against Muhlenberg county, one by John N. Jabine on June 30, 1893, for $4,065.72, with interest and costs; and the other by Eva Murray on January 26, 1894, for $16,193.12, with interest and costs. These judgments were founded, respectively, upon bonds and interest coupons issued by the county on March 1,1869,in payment for its subscription for stock of the Elizabethtown & Paducah Railroad Company under the authority of an act of the Kentucky Legislature passed March 5, 1867 (2 Acts 1867, p. 253, c. 1689), which chartered the company, as amended by a further act passed February 24, 1868 (1 Acts 1867–68, p. 622, c. 548), enabling certain counties, of which Muhlenberg was one, lying along the route of the railroad, to purchase stock, and issue its bonds in payment therefor to the railroad company. It was provided in the act that it should be the duty of the county judge of each county in which the voters should elect to make such subscription, and which should issue its bonds therefor, to levy taxes upon all the assessable property in the county sufficient to pay the principal and interest on such bonds as they should become due. For several years the county paid the semiannual interest due on the bonds in due season, but in 1874, it repudiated the debt, and has ever since refused to pay the bonds, either the principal or the interest falling due thereon, notwithstanding the validity of the bonds and the obligation of the county to pay them has long since been judicially established.

Having obtained their judgments as aforesaid, the plaintiffs endeavored to secure the making of a levy of a tax by the county judge sufficient to pay their judgments. But all such applications were refused by the said county judge, and all legal proceedings taken for

the purpose of compelling him to perform this duty have been resisted. Without reciting further particulars than are necessary to the disposition of this writ of error, it must suffice to say that on January 27, 1897, the plaintiffs secured an order of the Circuit Court, which was affirmed by this court on a writ of error sued out by the county judge, for a peremptory writ of mandamus to the said county judge requiring him to make a levy of taxes on the county sufficient to pay their judgments, and deliver it to the sheriff of the county for collection. Eventually he made the levy. But the sheriff refused to give the bond required by law, and collectors were appointed, one after another, but they, too, refused to qualify. At length, on June 18, 1901, a motion was made based on an affidavit of the attorney for the plaintiffs stating the facts exhibited by the record and the changes which had occurred in the circumstances, for a further writ to order another levy upon the assessment of 1900 which was then current. This motion was denied upon the grounds that it should have been made upon petition, that it was not shown by the affidavit that any demand for such a levy had been made upon the county judge, and that the averments of the affidavit were vague and insufficient. Thereupon the plaintiffs at the November term, 1901, filed a petition, styled in the record "an amended and supplemental petition," and renewed their motion for an additional levy. The motion was again overruled. In May, 1902, the plaintiffs moved the court to require a return to the writ of mandamus which was entered in 1898 on the receipt of our mandate. This motion was overruled. Then, at the November term, 1902, the plaintiffs filed a further "amended and supplemental petition" charging that Sparks, the county judge, had not complied with the writ of mandamus of 1898; that he had continually refused to remove the sheriff and appoint a collector, and that the tax had not, therefore, been collected during any of the years which had elapsed; that Sparks, the county judge, had not made any return of his doings under the writ, and refused to take any steps whatever toward the fulfillment of the orders therein contained. They nominated one George S. Allison, a citizen of Kentucky, as collector, and prayed that the said county judge might be ordered to make return to said writ, that he be required to remove the sheriff from office and appoint Allison collector. The court sustained the motion so far as to require the county judge to make a report of "what he has done under the order entered herein on the 7th day of June, 1898." The county judge thereupon made a return setting up various grounds and reasons why the petition of the plaintiffs should not be granted, among them that it was not the duty of the sheriff to collect the taxes on the levy made in February, 1896, and that he (the county judge) was not authorized to require him to do so, or to remove him from office for a refusal to give bond for making such collection. Upon the coming in of this return the plaintiffs demurred thereto upon the ground that it did not present any defense to the petition, and was evasive and insufficient. The case came on to be heard upon the demurrer, and, as the record states, upon the plaintiffs' motion for a further writ of mandamus; whereupon the court, apparently basing its action upon all the petitions which had been filed in this behalf, filed its opinion upon the whole matter shown there-

by and by the return of the county judge, and entered the order following:

"The motion of the plaintiffs for a writ of mandamus requiring an additional levy is overruled, to which plaintiffs except. It is further considered and adjudged by the court that the defendant, Thos. J. Sparks, as county judge of said county, and sitting as such, shall within twenty days from the entry of this order give and allow to the sheriff of said county upon notice in writing an opportunity to qualify, if he will, by executing bond according to law for the collection of the levy made under the mandamus herein, and if within said twenty days said sheriff shall fail or refuse to do so the said county judge, sitting as the presiding judge of the county court of said county, shall enter an order declaring such failure or refusal, and shall thereupon appoint George S. Allison as collector of said taxes, but without otherwise removing said sheriff from office. When the said Allison, if appointed collector, shall have given a good and sufficient bond for the faithful discharge of his duties and containing such other stipulations as may be required by law, the county judge shall, at the expense of Muhlenberg county, furnish to said collector all proper tax books or lists showing all the particulars of said levy in due form of law, in order that the said Allison may proceed to collect the said taxes."

To this order the plaintiffs excepted as follows:

"To which the plaintiffs each except to so much of said order as orders the appointment of the collector without ordering the removal of the sheriff preceding the said appointment."

On the day following, which was November 24, 1903, the plaintiffs filed a reply to the beforementioned return of the county judge, in which they controverted many of the statements made therein; and the court ordered that the time for filing a rejoinder therein be extended until March 1, 1904. As the court had already rendered its decision upon the facts appearing upon the plaintiffs' petitions and the return of the county judge on the hearing of the demurrer, the filing of this reply, and the order of the court entered thereon, are explainable only upon the hypothesis that the plaintiffs regarded the order of the court upon the merits as one based upon the pleadings as they then stood, and claimed that they were entitled notwithstanding to take issue upon the return of the county judge, and that the court recognized that right, or, at all events, consented to reconsider the matter upon a further showing. Upon this state of facts it is contended for the defendants in error that the order of November 23, 1903, was not final, and that this writ of error is premature. We think there is no escape from this conclusion. If the plaintiffs had chosen to stand by their demurrer to the return of the county judge, the order would have become absolute and final. But instead of this they elected to plead further, and filed a reply. The court had required the respondent to rejoin thereto within a time fixed. In this condition of the case the plaintiffs sued out their writ of error. If the plaintiffs had first obtained leave of the court to withdraw their reply and to stand by their demurrer, it may be that the writ of error could then have been sued out. It is too plain to require the citation of authority that there had been no final determination of the suit or motions of the plaintiffs, and there is no alternative but to dismiss the writ of error.

An order must be entered accordingly.

GUTHRIE v. SPARKS, Presiding Judge, et al.

(Circuit Court of Appeals, Sixth Circuit. August 2, 1904.)

No. 1,307.

1. COUNTY RAILROAD BONDS—LEVY OF TAX FOR PAYMENT—KENTUCKY STATUTE.

Those provisions of Act Ky. Feb. 24, 1868 (Laws 1868, p. 622, c. 548), authorizing counties to issue bonds in payment for railroad stock, which made it the duty of the county judge to levy taxes for the payment of the principal and interest of such bonds, were not repealed by the new state Constitution of 1891, which continued the county courts, and also created fiscal courts in each county; nor by subsequent legislation thereunder embodied in the Kentucky Statutes of 1894, which devolved on the fiscal courts the duty of levying county taxes for general purposes, but expressly provided by section 1882 that the powers conferred should not extend to the levying of taxes to pay principal or interest of any railroad bond indebtedness. The effect of such provision was to leave the duty of levying such taxes, which is a purely ministerial one, resting upon the county judge.

2. SAME—REPEAL OF STATUTE BY IMPLICATION.

Ky. St. 1894, § 1882, which confers power on the fiscal court of each county to levy taxes for county purposes, but expressly excepts the power to levy a tax to pay any railroad bond indebtedness, or the interest thereon, is not repealed by implication as to such exception by section 1839 in the same chapter, which was originally enacted at a later date, and authorizes such courts to levy ad valorem taxes not exceeding a certain per cent. unless required to pay county indebtedness incurred prior to 1891, in which case they are authorized to make an additional levy therefor. Such provisions were not only brought together and re-enacted in the general statutes, but are capable of standing together, effect being given to the special exception created by section 1882.

3. MANDAMUS—PROCEEDING TO ENFORCE COLLECTION OF JUDGMENT—PARTIES.

Act Ky. Feb. 24, 1868 (Laws 1868, p. 622, c. 548), authorizing counties to issue bonds in aid of railroads, requires the county judge to levy taxes to meet the principal and interest of such bonds as they mature, and also requires the sheriff to collect such taxes, and to give a bond therefor, within 30 days after the levy shall have been made, providing that, if he fails to give such bond, he shall be removed from office by the judge, who shall appoint a collector. *Held*, that in a proceeding for a writ of mandamus to compel the levy of a tax to pay a judgment recovered on such bonds the sheriff was properly joined, although no duty would devolve on him until the levy had been made, where it was alleged that he had pledged himself not to give the bond or make the collection; and that, in case he should refuse to give the bond, the writ should require the judge to remove him, and appoint a collector to enforce the collection.

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

John A. Pitts and D. M. Rodman, for plaintiff in error.

W. L. Reeves, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case, like that of Jabine v. Sparks (No. 1,301) 131 Fed. 440, and heard together with that, is a

¶ 3. Mandamus to compel payment of judgment against municipality, see note to Holt County v. National Life Ins. Co., 25 C. C. A. 475.

proceeding to enforce by mandamus the levy and collection of a tax on the assessable property in the county to satisfy a judgment recovered by the plaintiff in error on June 1, 1895, against the county, in the court below, for the sum of $8,148.09, with interest and costs, upon bonds running for 20 years, with coupons for interest issued by the county March 1, 1869, under the authority of the Acts of the Kentucky Legislature of 1867–68. The act of February 24, 1868, made it the duty of the county judge to levy taxes upon the property in the county for the purpose of paying the bonds authorized by the act, and the interest thereon as they should become payable. After paying the interest until the year 1874, the county repudiated the bonds, and refused to make further payment thereon, either of principal or interest, and has ever since refused to pay them, or to pay the plaintiff's judgment, which was for some of said bonds. The county judge has refused to make any levy to pay the judgment. An execution issued on the judgment was returned nulla bona, and the plaintiff has no remedy except that of a writ of mandamus to compel the levy and collection of a sufficient tax. The issue of the bonds by the county was in payment for stock of the Elizabethtown & Paducah Railroad Company, subscribed for and taken by the county under the authority of said act of February 24, 1868 (Laws 1867–68, p. 622, c. 548), and the validity thereof and the obligation of the county to pay the bonds has been repeatedly declared by the state and federal courts, and, as above stated, the bonds of the plaintiff were merged in the judgment of June 1, 1895.

On March 21, 1903, the plaintiff in error here, Guthrie, filed in the court below his petition making the defendants in error, Sparks, the county judge, Blackwell, the sheriff, and the county of Muhlenberg respondents therein, and alleging the recovery of his judgment, the issue of an execution, and its return unsatisfied; that it was the duty of the county judge to levy a tax for the payment of the bonds on which his judgment rested, but that the county judge had refused to levy such tax, and had never levied any tax to pay the judgment; that at a session of the county court recently held at the county seat the plaintiff had made a demand upon the respondent Sparks, county judge, to make the levy of a tax to satisfy his judgment; and that said respondent refused to make any levy. The petition further set forth that it was the duty of the sheriff to collect all taxes levied under the authority of said act of February 24, 1868, and recited a Kentucky statute requiring the sheriff to give bond for the collection of taxes, and declaring that, if he failed to give the same within 30 days after levy of the tax, he should forfeit his office, and the court should have power to appoint a collector, who should have the powers of a sheriff in making such collection; and in reference to him (the said sheriff) the petition stated that he "announces and gives out in his speeches that he will not give bond and qualify to collect any tax levied under said act"; and that in a similar case pending in the same court the sheriff had refused to give bond for more than 30 days, but that the county judge nevertheless refuses to remove him. And, finally, the petition stated that the general tax bills would go into the sheriff's hands about July 1, 1903, and, if no one should qualify to collect the tax to pay the judgment before the end of the May term of the court, other state and

county creditors might acquire a preference over the plaintiff in the collection of their claims. The prayer of the plaintiff was that a mandamus issue whereby the respondent Sparks, as county judge, should be required to make the levy, and that this should be done in time for the levy to go in the current tax lists of 1902 (stating the particulars of the proposed directions), and "that the said county judge, sitting as the county court aforesaid, be commanded and directed in said writ to order that the present sheriff of said county, W. D. Blackwell, if he be then in office, give bond, qualify, and proceed to collect said levy; if the said Blackwell be not in office at the time said levy is ordered, that the officer or person acting in his place as sheriff be ordered to qualify, give bond, and proceed to collect said levy, and to pay over to the plaintiff the amount of his judgment and costs, and the balance, if any, to be held subject to the orders of said defendant county court; and, in the event that the said sheriff, Blackwell, or other officer taking or acting in his place, shall fail or refuse to give bond, qualify, and proceed to collect said levy, that the said defendant county court be ordered to forfeit the office of said sheriff or other officer, remove him from office, and to continue said orders and removal until a collector is found who will give bond, qualify, and collect; and, in the event that after the removal of said sheriff such other officer shall fail and refuse as aforesaid and be removed, that the said defendant county court be required to appoint some citizen of the state of Kentucky named by plaintiff, and otherwise qualified, and allow him to give bond, qualify, and collect said levy; that the said defendant county court be further commanded that in making the appointment of a collector in the event of the removal of the sheriff or other officer, that said collector need not be a resident of Muhlenberg county, but may be a resident of any part of the state of Kentucky, otherwise qualified; that the defendant county court be commanded to do and perform all the above duties without unnecessary delay, and that he be required to make his return to the said writ, and show what he has done thereunder, at some day during the coming May term of this honorable court, or at a called term thereof; and he prays for all such further orders and writs as he may be entitled to enforce the collection and payment of his said judgment." On May 4, 1903, Sparks and Blackwell appeared, and filed separate demurrers, each of which was stated to be for the reason that the petition did "not state facts sufficient to constitute a cause of action against him." The matter came on to be heard the same day, but the court, not being advised, took time. On November 23, 1903, the court delivered its opinion. The question which the court had been considering, and which was deemed the turning point in making its decision, was whether, in the then state of the statute law of Kentucky, the county judge, sitting as the county court, was authorized to levy the proposed tax, or whether that duty had been devolved upon the so-called "fiscal court" of the county, consisting of the county judge and the several justices of the peace of the county associated with him. The learned judge was of opinion that the authority to make the levy was vested in the fiscal court, and not in the county court represented by the county judge, and sustained the demurrers of the county judge and of the sheriff. The plaintiff then amended his petition by stat-

ing that the justices of the peace of the county were hostile to the levy of any tax, and could not be brought together to consider the matter; that the county judge had declared that he would not call them together; that the fiscal court is only required to have two sessions in each year; that it has power to change the time of meeting, and cannot be called together except by the county judge; and that by reason of the evasions of the members of the fiscal court he would be without any practical remedy. The county judge and the sheriff renewed their demurrers. The court sustained the demurrers and dismissed the petition upon the same ground as he had sustained the previous demurrers. Some other considerations were advanced, to which we may refer later. The writ of error brings the order dismissing the petition here for review.

In Meriwether v. Muhlenberg County Court, 120 U. S. 354, 7 Sup. Ct. 563, 30 L. Ed. 653, decided in 1887, it was held by the Supreme Court, following in that regard the decisions of the Kentucky Court of Appeals, that the duty of levying taxes under the provisions of the act of February 24, 1868, was a ministerial duty, which was devolved by the act upon the county court represented by the county judge, and not the county court called the "court of claims," consisting of the county judge and the justices of the peace of the county, and charged with the duty of laying the county levy, appropriating money, and transacting other financial business of the county. By the Constitution of Kentucky adopted in 1891 and the legislation of the assembly during the years following its adoption, certain changes were made in regard to the powers and duties of the county courts, and it is contended for defendants in error that these changes have resulted in transferring the duty of levying the taxes required by the act of 1868 from the county judge to the "fiscal court" of the county as it is now called. For the plaintiffs it is contended, first, that if it was intended to make this substitution, the new remedy is so uncertain and insecure that the change amounts to an impairment of the obligation of the contract of the county with the holders of its bonds; but, second, that in fact no such transfer of this particular duty was contemplated by the convention or by the Legislature in ordaining the provisions referred to. We pass by without deciding the first of the propositions of the plaintiffs thus stated, for the reason that we are of opinion that their second proposition is correct. By section 140 of the new Constitution it was ordained that there should be a county court in each county, and by section 141 that:

"The jurisdiction of the county court shall be uniform throughout the state, and shall be regulated by general law and until changed shall be the same as now vested in the county courts of this state by law."

Then section 144 provides that:

"Counties shall have a fiscal court, which may consist of the judge of the county court and justices of the peace, in which court the judge of the county court shall preside if present, or a county may have three commissioners to be elected by the county at large, who together with the judge of the county court shall constitute the fiscal court. A majority of the members of said court shall constitute a court for the transaction of business."

Inasmuch as the new Constitution was to take the place of the old one, these provisions simply continued the old courts, bestowing upon the

court of claims a title which would always have better described it. In regard to taxation, section 171 provided that "all taxes shall be levied and collected by general laws." Stress was laid upon this provision by the court below and by counsel in argument here, as if it established a new rule of taxation which had the effect to extinguish all inconsistent laws. But this is clearly a mistake. The convention did not intend to arrest the levy and collection of taxes under existing laws, but that the Legislature should enact general laws for the levy and collection of taxes, after which, and by consequence whereof, they would be levied, etc., by general laws. But with respect to this particular law it was impossible that the Constitution should have repealed it. It did not nullify this statute when it declared that statutes inconsistent with it should be void at that time or at some future time unless the Constitution should provide a certain equivalent; and this the Constitution did not do. It supplied no new remedy, and, if the old was not continued, there would have ensued a complete lapse of the obligation of the contract, with a prospect that perhaps some remedy would be supplied by future legislation. With respect to the obligation of a municipality, the substance of its value consists of the means provided for its enforcement; and it is no more possible for the people, by a provision of their Constitution, to impair the obligation of such a contract, than for a Legislature of a state. But we have no need to pursue this line of discussion further. We have referred to the established rule upon the subject as a reason for believing that the framers of the new Constitution did not intend to disturb this then existing law, and, if there were nothing more, we should have no hesitation in concluding that this was a law which was not presently repealed. But to guard against all misapprehensions, and to assure the preservation of existing rights, it was provided in a schedule which dominated this subject that "all rights, actions, prosecutions, claims and contracts of the state, counties, individuals or bodies corporate, not inconsistent therewith shall continue as valid as if this Constitution had not been adopted." The holders of these bonds had a right, and a remedy which was the essence of it, secured by a pre-existing law. We are not concerned now with the question whether it was permissible to supply an equivalent remedy, for we are seeking only to ascertain the meaning and intent of the Constitution. Section 59, under the title "Legislative Department," declared that the General Assembly shall not pass local or special acts to authorize or regulate the levy, the assessment, or collection of taxes. But this was a restriction upon future legislation, and in no wise impaired the validity of former laws, or the rights secured under them. This would be so even without the express declaration above quoted. For these reasons we think it entirely clear that the Constitution in no wise disturbed or affected the operation and effect of the act of February 24, 1868. But it is contended that, if the Constitution did not repeal that act, the subsequent enactments of the General Assembly did have that effect. We may say once for all that, so far as the subject of discussion is concerned, no subsequent legislation was had which would not have been equally valid if the new Constitution had not existed.

The Constitution directed that the Governor should appoint three commissioners to revise the statute laws and prepare amendments to

conform them to the Constitution, and that such revision and amendments should be laid before the next General Assembly for adoption or rejection in whole or in part. This was done. The General Assembly at its next session passed acts on different dates, and then finally assembled them with other statutes by revision in one whole, which was denominated the "Kentucky Statutes of 1894." On April 18, 1892, an act was passed containing the following provisions:

"The court of claims or levy or fiscal court of each county in this commonwealth is hereby authorized to levy and collect a poll and ad valorem tax to pay off the existing current indebtedness and to defray the current and necessary expenses of the respective counties of the commonwealth of Kentucky. But this act shall not be construed so as to authorize the court of claims or any fiscal court of any county to levy a tax to pay any railroad bond indebtedness of any interest on any such indebtedness. That the poll tax shall not exceed $1.50 on each male person of the age of twenty-one years or more residing in the county. The ad valorem tax shall not exceed fifty cents on the $100.00 worth of taxable property assessed in the county." Acts 1891–92, p. 40, c. 26, § 1.

And on October 17, 1892, another act of that Legislature was passed reading as follows:

"The fiscal courts shall hold their sessions at the county seats of their respective counties, and shall have jurisdiction to levy each year for county purposes a poll-tax on each male inhabitant of the county over twenty-one years of age not exceeding one dollar and fifty cents, and an ad valorem tax on all property subject to taxation within the county, whether belonging to natural persons or corporations, companies or associations, not to exceed fifty cents on each one hundred dollars in value thereof as assessed for state purposes, unless an additional tax be required to enable the county or taxing district thereof to pay the interest on and provide a sinking fund for the extinction of indebtedness of the county or district created prior to September twenty-eight, one thousand eight hundred and ninety-one, and for that purpose the fiscal court shall have jurisdiction to levy such additional tax as may be authorized by law in force prior to September twenty-eight, one thousand eight hundred and ninety-one, and shall superintend the collection of all such tax." Acts 1891–92, p. 270, c. 101, § 7.

Both these enactments were carried into the revision by the same Legislature, and are found in the same chapter 52 (Ky. St. 1894), under the title "Fiscal Courts." In the following order, in that chapter, section 1833 provides that the fiscal court in each county shall consist of the county judge and the justices of the peace. Section 1834 provides "that unless otherwise provided by law, the corporate powers of the several counties of the state shall be exercised by the fiscal court thereof, respectively." Then in section 1839 is the above-quoted provision of the act of October 17, 1892. Section 1840 confers similar, but no more specific, authority; and section 1882 is the foregoing quotation from the act of April 18, 1892. It is contended for the respondents that section 1839, having been originally passed at a later date than section 1882, repealed the same by implication, and upon this assumption that one is a later act than the other, the rule of construction which is supposed to be applicable to statutes holding that relation is invoked. We doubt, however, whether upon this assumption the later statute, which simply confers a jurisdiction in general terms, would repeal an act which so specifically denied jurisdiction in a particular class of cases. There is room for both statutes to have a field of operation, the special

statute in the particular cases and the general statute in the cases not thus eliminated; for it is not doubted that a county may have many other kinds of indebtedness than "railroad bonded indebtedness." But we do not think the rule sometimes applicable to a special act succeeded by a general one should be applied here. The general rule is that an act which relates to a particular subject is not repealed by a later one which is general in its terms, but would include the particular case if that were not already provided for. The exception to this rule is that, if it plainly appears that the later general statute was intended to cover the particular case, and hold sway in place of the former act, the latter must be regarded as repealed by implication. But, as repeals by implication are not favored, the intent to repeal must "plainly appear." And it is manifest that it cannot be said that the intention to repeal is clearly shown when the general statute by its own terms admits of exceptional cases where other provision is made. The above-stated rule has been applied in a great number of cases by the Supreme Court of the United States, and the exception in some. The cases most nearly in point here are State v. Stoll, 17 Wall. 425, 21 L. Ed. 650; Ex parte Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770. But the revision of 1894 was a single body of statutes, and all its parts were brought in and re-enacted. Each chapter and all related parts having reference to any given subject treated are deemed to be a fresh expression of the law. We think, therefore, that chapter 52 should be construed as if it were a single enactment. All parts of it are to be deemed to have been under the eye of the Legislature when that body put it together and enacted it, and we believe that in such case the authorities upon the subject of statutory construction are generally agreed that the special declaration will stand for the special matter, and the general provision will cover all other matters not thus set apart, or, if there be none such, then, of course, both cover the same territory, and that part of the statute last written will prevail. Sutherland on Statutory Construction, § 153; Commonwealth v. Huntly, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; Smith v. The People, 47 N. Y. 330; State v. Rotwitt, 17 Mont. 41, 41 Pac. 1004.

Then again it is to be borne in mind that section 1834 excludes from the powers of the fiscal court those cases where it is provided otherwise by law. If this means already provided by law, the present case would be excluded from this grant of power. If it does not mean that, but means (as we think most likely) such provision as might be made in that revision or by some subsequent enactment, this case would also be excluded. Again, the powers of the fiscal court are of a discretionary nature, requiring the exercise of judgment upon questions of expediency, and this is the reason why the justices of the peace of the county are brought in to aid the county judge by their counsel. And when it is said that that court shall have jurisdiction to levy taxes, more than the mere ministerial performance is intended. The amount of the taxes, and how much for the several purposes of the county, and in what year each tax should be raised—in short, the management of the fiscal affairs of the county—is delegated to it. But the levy of the tax required by the act of 1868 was a ministerial duty, for the discharge of

which there was no occasion for the exercise of the functions of the fiscal court. As was observed by Mr. Justice Harlan in Meriwether v. Muhlenberg County Court, supra:

"It is clear that the levy and collection of a tax to meet a county subscription to the stock of a railroad company is not a business connected with the laying of the county levy, or with appropriations of money out of said levy."

There was, therefore, no reason that we can see which should have moved the Legislature to transfer this duty from the county judge, to whom it then belonged, to the fiscal court, unless it was the merely fanciful one of creating uniformity; and that this was not a dominating purpose is shown by the exclusion from the powers of the fiscal court of such matters as were otherwise provided for by law. It was of no consequence to the county who should perform the duty. It was simple and absolute. The only consequence would be that the change might afford better means for embarrassing the creditors. Not only is it not permissible to attribute such a purpose, but we find, on the contrary, abundant evidence that the Legislature had no thought of disturbing vested rights or rendering them less secure. So by section 1057, chapter 35 of the same revision, the Legislature did not confine the power of the county court to the matters enumerated, but gave to it "such other jurisdiction as may be conferred upon it by law." And when, by section 1882, power was denied to the fiscal court "to levy a tax to pay any railroad bonded indebtedness," the law of 1868 conferring the power upon the county judge continued unrepealed, for there was no other law which furnished any remedy for enforcing payment of the bonds. Indeed, the distribution of the powers granted to these courts of the county, with the reservations contained in said grants, when construed and applied to the conditions then existing, as they should be, would, we think, retain the power here in question in the county judge.

Conceding that it would be in the power of the Legislature to change the system of levying and collecting taxes in the state, providing an equivalent substitute for the former method is supplied, and assuming that a grant of power to the fiscal court to make a levy and order the collection is the equivalent of a command to the county judge to do it, we are nevertheless of opinion that the Legislature did not intend to divest the power of the county judge to make the levy of taxes and order their collection granted by the act under which the bonds in suit were issued. We are not aware that the proposition now advanced by the respondents has the support of any adjudication of either the state or federal courts, but it is not wholly new. It was put forward by Fleming, the county judge who preceded the respondent Sparks, in his response to the alternative writ of mandamus issued by the court below in the case of Jabine et al. against him and the county, as a reason why he should not be required as county judge to make the levy. The response was held by Judge Barr to be insufficient, and was overruled. The opinion which he filed does not exhibit any discussion of the point, but the judgment necessarily determined that the legislation referred to did not take away the power to make the levy. The record of that case, brought into this court by writ of error, exhibited this defense, and it lay at the root of the whole proceeding. Notwithstanding this

the order of the Circuit Court was affirmed. No opinion was written, but the judgment here could not have been rendered if the respondent was not the proper person to be coerced by the writ. That judgment was between other parties, and so, of course, is not an estoppel. But it is in some sense a precedent.

The court below, in its opinion, expressed its view to be that:

"As to Blackwell, the sheriff, the petition is manifestly premature. No levy having been made, his refusal to qualify was 'in the air.' Certainly nothing has as yet arisen to make it his duty to give the bond required of him by the act, or to collect a levy which has not been made."

But it was distinctly decided otherwise by the Supreme Court in Labette County v. Moulton, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698, where it was held proper to join in the writ those officers who were charged by law with the performance of successive duties required in the levying and collection of the tax. As soon as the levy has been made and tendered to him for collection, the sheriff's duty at once becomes imperative to proceed to give the bond, to qualify himself, and to collect the tax. That was a duty he took upon himself when he assumed his office. If he will not do that, the act of February, 1868, declares he shall forfeit his office and the county judge is required to declare the forfeiture, and thereupon to appoint a collector, who, if he accepts the appointment, must give the bond, and thereupon has the powers and duties of the sheriff in making the collection. It is argued for the respondents that when the sheriff has, upon his entrance into office, given the bond required of him to qualify himself, that bond secures the performance of every duty cast upon him as sheriff, and the further bond required of him when he comes to collect a tax is a cumulative security, and that it is only the failure to give the original bond which justifies his removal from office; and Schuff v. Pflanz, 99 Ky. 97, 35 S. W. 132, is cited, which hardly sustains the proposition contended for. But, assuming the general law as it now exists to be as contended, that in no wise relieves the stress of the obligation of the fifteenth section of the act of 1868, which declares that, if the sheriff will not give the bond, he shall forfeit his office; and this law, as we have held, has not been repealed. It would seem that, if the machinery for collecting the tax has been changed to such an extent as the contention just noticed would indicate, the question whether an equivalent remedy has been provided might become serious; but we have proposed to pass that question.

It was held in Jabine et al. v. Sparks, supra, by Judge Barr, whose ruling was affirmed by this court, that, if the sheriff should refuse to give the bond required by the fifteenth section of said act of 1868, the county judge should remove him, and then proceed to appoint a collector. The course of proceeding there marked out should be followed here.

The order dismissing the plantiff's petition will be reversed, with costs, and the Circuit Court will be directed to overrule the respondents' demurrer, and to proceed in conformity with law, and not inconsistently with this opinion.

UNITED STATES v. GEDDES.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1904.)

No. 1,270.

1. SAFETY APPLIANCE ACT—NONCOMPLIANCE—INTERSTATE TRAFFIC—INTRASTATE RAILROADS.

Defendant, as receiver, operated a narrow gauge railroad wholly in Ohio, which connected at one of its termini with the B. & O. Railroad. Defendant refused to ship interstate traffic over his road, either received from or delivered to the B. & O. road, under a through bill of lading, or any other arrangement, except that, on the delivery of such freight shipped over defendant's road under a local bill of lading at its terminus, it should be received for transportation without the state by the B. & O. road under another bill of lading, the latter road assuming defendant's local freight charge, and defendant, on receiving such shipments from the B. & O. for transportation to points on his line, charged a local freight tariff from the receiving point to destination, also assuming payment of the B. & O.'s advance charges, settlement of freight between the parties being made weekly. *Held*, that defendant's railroad was not engaged in interstate commerce within the meaning of, and was, therefore, not liable for penalties for noncompliance with, the safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 532, as amended by Act Cong. April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]), requiring common carriers engaged in interstate commerce by railroad to equip their cars with automatic couplers, etc.

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

This was a suit on behalf of the United States for the recovery of penalties provided by Act Cong. March 2, 1893, c. 196, § 6, 27 Stat. 532, as amended by Act Cong. April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175], known as the "Safety Appliance Act." The sections of the act involved are:

"Section 1. That from and after the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

"Sec. 2. That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge," etc.

The petition contains four causes of action, alleging four violations of the law, based upon the movement of four cars used in moving interstate traffic, but not equipped with automatic couplers. A jury was waived and the court found in favor of the defendant on the ground that the railroad operated by

him was not engaged in interstate commerce and that the cars complained of were not used in moving interstate traffic.

The Ohio River & Western Railway Company (operated by the defendant as receiver) was, at the time of the acts complained of, a common carrier owning and operating a narrow gauge railroad about 100 miles long, wholly within the state of Ohio, from Bellaire, on the Ohio river, to Zanesville, a town in the interior. At Bellaire it connected with the Baltimore & Ohio road, in the sense that it received from the Baltimore & Ohio freight from other states marked for points on its line, and delivered to the Baltimore & Ohio freight from points on its line marked for other states, in the following manner: There was no interchange or common use of cars, the gauges of the two roads being different. The cars of the defendant road were used only on its own line. But a transfer track ran from the main line of the Baltimore & Ohio to the terminal station of the defendant road, so that the freight cars of the two roads could be placed alongside adjoining platforms and the transfer of freight made by the use of trucks handled by the Baltimore & Ohio men. No through bills of lading for such freight were issued by either road, no through rate was fixed by mutual arrangement, and no conventional division of a through freight charge was made. Each road charged and collected its local freight rate in this way: Freight transported to Bellaire by the defendant road and marked for a point in another state was delivered to the agents of the Baltimore & Ohio, with an expense or transfer bill, which stated the original point of shipment, the consignee and place of consignment, and the freight charges of the delivering road. Waybills also accompanied the traffic. On taking charge of the freight, the Baltimore & Ohio would assume the payment of the freight charges of the defendant road, collecting the entire charges on delivering the freight at its destination. The same method was pursued with respect to freight coming from outside Ohio, and destined for a point on the line of the defendant road within Ohio, except that the agents of the Baltimore & Ohio at Bellaire would bring the traffic to and put it in the cars of the defendant road. On receiving the freight, with the expense or transfer bill, the defendant road would assume the charges of the Baltimore & Ohio, collecting the entire freight charges at the destination. There were weekly settlements between the two roads of these collections, and the payment of any balance found to be due on such settlements; but each road became responsible for the freight charges of the other, whether they were ever collected from the consignee or not. Such transfers of traffic were made nearly every day. Each company's freight charges were in accordance with its own rates.

The acts upon which the suit was based were the hauling in a car not equipped with automatic couplers, from Summerfield, Ohio, to Bellaire, Ohio, of 37 cases of eggs destined for Pittsburg, Pa., and delivered at Bellaire to the Baltimore & Ohio road for shipment there; and the hauling in three separate cars not equipped with automatic couplers, from Bellaire, Ohio, to Woodsfield, Ohio, of certain coils of wire rope shipped from Philadelphia, consigned to Woodsfield, and transferred from the Baltimore & Ohio to the defendant road at Bellaire for shipment to Woodsfield. It does not appear that any through bills of lading were issued for this freight. The form of bill of lading used by the defendant company was produced. It had on it the following printed notice: "This blank must in no case be filled with the name of any station or place beyond the line of this company's road."

Sherman T. McPherson and L. A. Shaver, for the United States.
W. F. Hunter, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

In the cases of The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999 (decided in 1870), and Coe v. Errol, 116 U. S. 517, 528, 6 Sup. Ct. 475, 479, 29 L. Ed. 715 (decided in 1885), it was held that:

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

In the former case it is said:

"The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agent acts in that transportation, it is subject to the regulation of Congress." Page 565, 10 Wall., 19 L. Ed. 999.

And in the latter:

"But this movement [from state to state] does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence is no part of that journey. * * * Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain." Page 528, 116 U. S., page 479, 6 Sup. Ct., 29 L. Ed. 715.

The Daniel Ball Case involved the authority of the United States to license a vessel engaged in transportation on its navigable waters, and Mr. Justice Field, who delivered the opinion, took pains to say (page 566, 10 Wall., 19 L. Ed. 999):

"We are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."

In 1887, Congress passed what is known as the "Interstate Commerce Act" (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and, not content with the definition to be drawn from these cases, in the first section defined as follows, common carriers engaged in interstate or foreign commerce made subject to the act:

"The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

In Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, the Supreme Court, speaking by Mr. Justice Shiras, after quoting the above provisions, said (page 212, 162 U. S., page 672, 16 Sup. Ct., 40 L. Ed. 940):

"It would be difficult to use language more unmistably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between the states and territories as that going to or coming from foreign countries."

If this statement be accurate, if Congress, by this definition, did mean to include within its regulating power every carrier engaged in interstate or foreign commerce, then to be a "common carrier engaged in

interstate commerce by railroad," within the meaning of the Safety Appliance Act, a railroad must be "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for the continuous carriage or shipment" from one state to another. The court below, taking the view that the interstate commerce act and the safety appliance act are in pari materia, and referring to the above definition, reached the conclusion there was no arrangement between the two roads for a continuous carriage or shipment from one state to another, and therefore found in favor of the defendant, holding it was not engaged in interstate commerce.

It is vigorously insisted that the acts are not in pari materia, and that Congress, by the use of broader terms in the later act, intended a wider application of its provisions. In one sense, the two acts are in pari materia, in another, not. Both relate to the regulation of commerce among the states under the supervision of the Interstate Commerce Commission. The first deals largely with rates and fares—the cost of the commerce; the second with locomotives and cars—the instrumentalities used to carry it on. The first was intended, primarily, to protect shippers; the second, railroad employés; both, ultimately, to promote the best interests of the public. In each act, Congress seeks to regulate commerce. What commerce? Commerce among the several states. It was desirable, therefore, in the first act, to define that commerce. Having done this once, it was sufficient, in the second act, to apply its provisions to carriers "engaged in interstate commerce," adopting the definition of the first. This brings us to the question whether the defendant was "engaged in interstate commerce" within the meaning of the congressional definition.

In the case of Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935 (the Social Circle Case), it was held that the Central Railroad of Georgia was engaged in an act of interstate commerce in transporting from one point to another in Georgia freight which had been shipped from Cincinnati, Ohio, to Social Circle, Ga., under a through bill of lading, with a through charge and an arrangement for a conventional division of the entire charge among the railroads contributing to the movement of the traffic. Mr. Justice Shiras, speaking for the court, said (page 193, 162 U. S., page 704, 16 Sup. Ct., 40 L. Ed. 935):

"All we wish to be understood to hold is that when goods shipped under a through bill of lading, from a point in one state to a point in another, are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading, we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

"It may be true," said the same Justice (page 191, 162 U. S., page 703, 16 Sup. Ct., 40 L. Ed. 935), "that the Georgia Railroad Company, as a corporation of the state of Georgia, and whose entire road is within that state, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying between points in Georgia freight that has been brought from another state."

In the present case there was no through bill of lading, no through charge, no conventional division thereof among the carriers, and no arrangement for a continuous carriage or shipment, unless the method of transfer by which the receiving road assumed the payment of the charges of the delivering road constituted such an arrangement. If it did, then the only way a local road can escape participation in an arrangement for a continuous carriage or shipment of freight from one state to another is to refuse altogether to handle such freight; and it cannot do this, for, as a common carrier, it is bound to receive and transport from one point to another on its line, freight offered it for transportation, regardless of the origin or destination of the freight; so, notwithstanding the fact that, in the cases of Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586, Pullman Company v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877, and Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325, the Supreme Court apparently recognized the privilege of express, sleeping car, and railroad companies to limit the nature of their business, making it local or interstate or both, as they please, under this construction of the law, there could be no option or choice on the part of the local road as to whether it would or would not engage in interstate commerce, and thus subject itself to the acts of Congress regulating that business.

The defendant company did all it could to keep its business local. It limited its interest, so far as it could, to the transportation of the freight over its own line. It made no arrangement with the Baltimore & Ohio for through carriage either way. It was interested in none. It shared in none. It was interested only in its own local charge, and whatever arrangement it made was with a view simply of securing this. The fact that certain goods transported by it were marked for other states or received from other states did not make it a party to any arrangement for their interstate transportation in either direction. The part it performed was purely local. The interstate portion of the transportation was performed by the Baltimore & Ohio. When it delivered the goods to that road, they were still in Ohio. They might have stopped there for aught it cared. It had made no arrangement for their transportation any further. And so with the goods it received from the Baltimore & Ohio. They were offered to it in Ohio, and it was a matter of indifference to it where they came from. It had been no party to their transportation into Ohio. It received them virtually as Ohio goods, and carried them from one point to another in the state.

Taking the view that the defendant road, at the time of the acts complained of, was not engaged in interstate commerce, and that the cars which hauled the cases of eggs from Summerfield to Bellaire, and the coils of rope from Bellaire to Woodsfield, were not engaged in "moving interstate traffic," we affirm the judgment of the lower court.

ARROTT v. STANDARD SANITARY MFG. CO.

STANDARD SANITARY MFG. CO. v. ARROTT.

(Circuit Court, W. D. Pennsylvania. July 1, 1904.)

Nos. 16, 21.

1. PATENTS—PRIOR INVENTION—SUFFICIENCY OF EVIDENCE.
   Oral testimony of prior invention and use, not only unsupported by any writing or exhibits, but also contradicted upon the question of priority of date, and which, at best, shows only an unsuccessful and abandoned experiment, is insufficient to defeat a patent.
2. SAME—PRIORITY OF INVENTION.
   The Arrott patent, No. 633,941, for a dredger for pulverulent material, *held* not to have been anticipated by a device alleged to have been previously invented and put into use by another.
3. SAME—EQUITABLE ASSIGNMENT.
   Evidence considered, and *held* not to sustain the claim of a defendant to the equitable ownership of a patent as against the patentee, either on the ground of contract or estoppel.

In Equity. Suit for infringement of letters patent No. 633,941, for a dredger for pulverulent material, granted to James W. Arrott, Jr., September 26, 1899, and cross-suit for specific enforcement of an alleged contract for the assignment of such patent to defendant. On final hearing.

In No. 16:
Christy & Christy, for complainant.
Lyon, McKee & Mitchell and Connolly Bros., for respondent.
In No. 21:
Connolly Bros. and Lyon, McKee & Mitchell, for complainant.
Christy & Christy, for respondent.

ACHESON, Circuit Judge. There are before the court for decision cross-suits in equity which have been heard together upon the pleadings and proofs. The original suit was brought by James W. Arrott, Jr., against the Standard Sanitary Manufacturing Company, for the infringement of his letters patent No. 633,941, for an improvement in dredgers for pulverulent material, granted to him on September 26 1899. The invention has relation to the sifting and distributing of powdered enameling material on the heated surface of bath tubs and other vessels, accomplished by a pneumatic agitator attached to the dredger, and adapted to vibrate the sieve. The answer to the bill in the first case set up two defenses, namely, first, the prior invention and use of this improvement by Oscar Marschuetz at Louisville, Ky.; second, the ownership by the defendant corporation of the patented invention, and its equitable title to the patent acquired by the defendant through and from the patentee, Arrott. Subsequently the Standard Sanitary Manufacturing Company filed a bill against James W. Arrott, Jr., setting up its alleged equitable title to the patent, and praying specific performance of an alleged contract with Arrott for the conveyance by him

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 71, 73, 78.

to the defendant company of the patent. The patentability of the improvement is not denied, and the use by the Standard Sanitary Manufacturing Company of the patented dredger is admitted. We have then before us, and will consider in the order named, the two disputed questions involved in this litigation, to wit, the question of priority of the invention, and the question of the said company's alleged equitable title to the invention and patent.

1. At the time of the invention of the patented improvement, James W. Arrott, Jr., was superintendent of the enameling department of the old Standard Manufacturing Company, in Allegheny City, Pa. The evidence of Reed and Hunter, witnesses for the company, the Exhibit "bill for the First Arrott Hammer," and the testimony of Arrott himself, clearly show that Arrott's original conception dates back at least to February 14, 1898, and that from that date until June 30, 1898, when his device had been reduced to complete and operative form, he was diligently engaged in perfecting it. Marschuetz, who is alleged to have made and used a dredger similar to Arrott's, was superintendent of the Ahrens & Ott Company, of Louisville, Ky.—one of the concerns which afterwards was absorbed by the Standard Sanitary Manufacturing Company, a combination of a number of concerns formerly engaged in the manufacture of bath tubs and other sanitary articles and appliances. It is claimed by the company that Marschuetz made the invention about October, 1897, and used it at the plant of the Ahrens & Ott Company at Louisville for a very short period. Marschuetz himself, testifying for the company, states that, after it was used off and on for about three months, it was put aside and never again used. This dredger was not produced. It is said to have been lost in a fire which occurred in August, 1901. The alleged anticipating dates of the making and use of this Marschuetz dredger rest altogether upon the bare recollection of the witnesses for the Standard Sanitary Manufacturing Company, who testified in the fall of 1902. Not an anticipating date named by any of them is fixed by any exhibits, book entry, letter, or written memorandum whatever. These witnesses, who were mostly workmen at the Ahrens & Ott Company's establishment, do not agree among themselves. Their testimony is vague and unsatisfactory. I have no hesitation in saying that these witnesses leave the matter of the alleged anticipation by Marschuetz in such doubt that this defense would fail even if there was no opposing evidence on the subject. As the Supreme Court of the United States declared in Deering v. Winona Harvester Works, 155 U. S. 286, 300, 15 Sup. Ct. 118, 123, 39 L. Ed. 153: "Oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented, is, in the nature of the case, open to grave suspicion." Here, however, the witnesses who testify to the alleged prior device and use by Marschuetz are met by a number of opposing witnesses, whose testimony convincingly shows that the Marschuetz device was not made or used until October 11, 1898. In my judgment, upon the question of priority of invention, the decided preponderance of the evidence is with Arrott. Moreover, under the company's own proofs, whatever Marschuetz essayed to do ended in failure. His device belongs to the category of abandoned experiments.

In Parham v. Machine Company, 4 Fish. P. C. 468, 482, Fed. Cas. No. 10,713, Judge McKennan (speaking also for Judge Strong) said:

"The evidence must establish clearly the priority of a completed and useful machine over the complainant's, or it is unavailable. To doubt upon this point is to resolve it in the negative."

In the more recent case of the Barbed-Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 447, 36 L. Ed. 154, the Supreme Court said:

"We have now to deal with certain unpatented devices, claimed to be complete anticipation of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, the proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are usually not to be depended upon for accurate information."

Upon the proofs and under the authorities, I hold that the defense to the original bill based upon the alleged prior invention and use of this improvement by Marschuetz must be overruled.

2. In respect to the alleged equitable title of the Standard Sanitary Manufacturing Company to the said patent, the averments of that company contained in its answer to the original bill and in its cross-bill against James W. Arrott, Jr., are, in substance, these, namely: That Arrott was a stockholder and director of the Old Standard Manufacturing Company, and that while thus interested in that company, and employed as its superintendent at its Allegheny City factory, and, under his contract, was to use his best endeavors to advance the interests thereof, and improve and perfect appliances to be used in its business, the improvement constituting the subject-matter of letters patent No. 633,941 was made and reduced to practice, and afterwards used in the business of said company, and the expenses incurred in procuring the patent were paid by that company; that said patent was taken and held by James W. Arrott, Jr., in trust for said company, and was used by the said company until the beginning of the year 1900 with the consent of said Arrott, it being the equitable owner of the improvement and patent; that on December 30, 1899, certain property of the Standard Manufacturing Company, including its plant in Allegheny City, and all its patents, whether held in its own name or in the name of others, were sold to the Standard Sanitary Manufacturing Company; that on the 26th of January, 1900, James W. Arrott, Jr., entered into a contract with the Standard Sanitary Manufacturing Company, by which he was employed as general superintendent of the factory in Allegheny City at an increase in salary, and by which he confirmed to the Standard Sanitary Manufacturing Company the right to patent No. 633,941, and he thereby agreed to assign to that company the said letters patent; that Arrott continued from the date of this contract, January 26, 1900, until about May 19, 1901, as general superintendent of the Allegheny City factory, from which position he resigned on the date last mentioned; and that the right of the Standard Sanitary Manufacturing Company to said letters patent and the use of the improvement was

never denied by James W. Arrott, Jr., until after his resignation of said position.

In his answer to the cross-bill of the Standard Sanitary Manufacturing Company, James W. Arrott, Jr., denies that, under his contract with the old Standard Manufacturing Company, he was under any obligations to make inventions for that company, or to transfer to it, or hold for its use and benefit, any letters patent he might obtain, and denies that that company ever became or was the owner, in law or equity, of letters patent No. 633,941. He avers the fact to be that the use of said improvement was originally commenced by the Standard Manufacturing Company, with his knowledge and consent, in the expectation and contemplation of a satisfactory agreement between that company and himself with relation thereto, and that thereafter, to wit, on October 23, 1899, that company, through its board of directors, expressly recognized his title to said improvement and letters patent, and it was then and there agreed between himself and the company that the company should pay to him for the privilege of using the improvement at its factory a royalty or compensation which should be satisfactory to him, and that thereafter that company used the improvement under and subject to that agreement. He admits that on January 26, 1900, he entered into a contract with the Standard Sanitary Manufacturing Company under which he was employed as general superintendent at the Allegheny City factory, but not at an increased salary, but at the same salary he had formerly received from the Standard Manufacturing Company, and that he continued in the employ of the Standard Sanitary Manufacturing Company under that contract until about May 19, 1901, when he resigned his position and left the company's employ. He denies that by the contract of employment of January 26, 1900, he confirmed to the Standard Sanitary Manufacturing Company the right to patent No. 633,941, and denies that he thereby agreed to assign said letters patent to said company. He avers that at the time he entered the employ of the Standard Sanitary Manufacturing Company, and thereafter until he left its employ, he was ready and willing to grant to that company a license under his said letters patent to use the improvement, upon the payment to him of a satisfactory royalty or compensation therefor, and that he so advisied the managing officers of that company. He denies that he ever at any time consented to the use by that company of the said improvement otherwise than under the understanding that he should be duly compensated therefor. He further denies the averment in the bill of complaint that he did not prior to his resignation, on May 19, 1901, deny any alleged right of the Standard Sanitary Manufacturing Company to the said letters patent, or to the use of the improvement, and avers the fact to be that during his term of employment he gave to that company notice, through one or more of its proper officers, of the said letters patent, and his claims thereunder, and denied the right of the compnay to use the improvement without making due compensation to him; and he expressly denies that the Standard Sanitary Manufacturing Company, by the contract of employment of January 26, 1900, or otherwise, acquired any equitable title or interest in or to the said letters patent. The answer of James W. Arrott, Jr., is responsive to and traverses all

the allegations of the cross-bill upon which the right of the Standard Sanitary Manufacturing Company to equitable relief depends.

The proofs conclusively show that James W. Arrott, Jr., did not hold the letters patent No. 633,941 in trust for the Standard Manufacturing Company, and that that company had no right to use the patented improvement, except upon the basis of payment by the company to Arrott of a royalty satisfactory to him. The minute book of the company shows the following recited action in relation to said patent at a full meeting of the board of directors held on October 23, 1899:

"The matter of recognition of enameling appliances invented by James W. Arrott, Jr., and appliances for molding bath tubs invented by J. C. Reed was discussed, and it was agreed that such recognition be made on a royalty basis satisfactory to the said James W. Arrott, Jr., and J. C. Reed."

Thus the matter stood between Arrott and the Standard Manufacturing Company when the latter sold and transferred its property, including its patents, to the Standard Sanitary Manufacturing Company. The only right which passed from the Standard Manufacturing Company to the Standard Sanitary Manufacturing Company, as respects patent No. 633,941, was the right defined in the above-recited minute of October 23, 1899, namely, the right to use the invention on "a royalty basis satisfactory to the said J. W. Arrott, Jr." The Standard Sanitary Manufacturing Company, however, never sought to exercise such right, but repudiated an arrangement with Arrott on a royalty basis, and set up a title hostile to him. No question of license to use the invention is involved in this case. The company, in its answer to the original bill, and also in its cross-bill, puts its case upon its alleged equitable ownership of the patent. That is the issue, under the pleadings and proofs.

Now, as we have already seen, the Standard Manufacturing Company had no equitable ownership or title in or to the patent, and conveyed none to the Standard Sanitary Manufacturing Company. It remains, then, to inquire whether the company got an equitable title to the patent, or any interest therein, by virtue of a contract between it and Arrott, as alleged by the company in its answer and its bill.

The evidence shows that the negotiations which resulted in the consolidation of the Standard Manufacturing Company and other concerns into the new company, the Standard Sanitary Manufacturing Company, were conducted on the part of the Standard Maufacturing Company by James W. Arrott, the elder (the father of James W. Arrott, Jr.), and Francis J. Torrance. They held the bulk of the stock of that company. The interest of James W. Arrott, Jr., in the Company was only one-eightieth part of the capital stock. I find from the proofs that James W. Arrott, Jr., took no active part in the negotiations for the combination, and that he made no representations whatever to any of the persons conducting the negotiations for other concerns in respect to the ownership of the patent in controversy. The utmost that can be said is that he did not inform the gentlemen who were inspecting the Allegheny City plant that he was the owner of the patent. But he had no occasion to speak on that subject. He was not asked anything about it, and I cannot see that he was under any obligation to give that information. He had a right to suppose that the

gentlemen representing the other concerns who were negotiating with Mr. Arrott, Sr., and with Mr. Torrance, had knowledge that the use by the old company of the patented dredger was under the agreement with the old company spread out on the minute book. To hold that his mere silence under the circumstances operated as an estoppel against him, would be a cruel conclusion. Moreover, no matter of equitable estoppel has been set up by the Standard Sanitary Manufacturing Company in its answer or in its cross-bill. Under its averments in the pleadings, if it has any equitable title to or interest in the patent or the patented improvement, it is by express contract between the company and James W. Arrott, Jr.

In this connection it is proper to refer to a letter dated January 17, 1900, written by James W. Arrott, Jr., as superintendent of the new company, to Mr. E. L. Dawes, who was a member of the new company. Immediately after the new company commenced business, in January, 1900, Arrott was directed to send one of the patented dredgers to the Dawes-Myler plant, at New Brighton, Pa., that being one of the constituent concerns constituting the new company. Thus it was that Arrott came to write the letter. It contains the following clause:

"Yours of the 12th received, and am pleased to know that the dredger is satisfactory. I wish to state to you simply as a matter of record that the patent on the dredger belongs to me and that the Standard Manufacturing Company has given me credit for the invention and made satisfactory arrangement for its use here. I am not, of course, worrying about the action of the new company in regard to such matters, but do not wish the adoption of the dredger in your works to mean that I acknowledge the right of the Standard Sanitary Manufacturing Company to use the same without any consideration."

According to the testimony on behalf of the new company, the alleged contract between it and James W. Arrott, Jr., by which the company acquired the equitable title to patent No. 633,941, was entered into at a meeting of the executive committee of the company held on January 26, 1900. The witnesses on the part of the company to show the alleged contract are Messrs. Myler, Cribben, Dawes, and Ahrens. These gentlemen are all stockholders in the new company. It seems very clear from what these witnesses say that the employment of Arrott and its terms were agreed on before any question was raised in respect to his patent. His salary was to be the same as that he had previously received from the old company, with an undefined further contingent based on the future result of the business. Mr. Dawes states:

"After the salary was fixed up, he asked the question, what was going to be done with reference to his patent dredger? Different members of the committee stated that, as far as they were concerned, he had no patent dredger; that the dredger was a part and parcel of the plant, and had been turned over with the plant by the stockholders of the Standard Manufacturing Company."

And Mr. Dawes proceeds to state that a heated conversation followed. It can hardly be said that any of the witnesses on behalf of the company testify directly to the specific terms of an agreement between the company and Arrott in respect to the patent, but their testimony indicated a belief on their part that Arrott had consented to the claim of the company that it had acquired the patent by purchase from the old company.

Mr. Arrott himself testifies positively to the contrary, and states that in that interview, from first to last, he denied the claim set up by the new company, and refused to recognize it. It appears from the company's own testimony that a minute of the proceedings of that meeting was made at the time by Mr. Myler, the secretary of the company, and was entered upon the minute book. That minute is an exhibit in this case offered by each party. So far as it is important to this controversy, I quote the minute at length, to wit:

* * * * * * * * * *

"Mr. Charles F. Arrott and James W. Arrott, Jr., then came before the committee, and after quite a discussion as to plans, management, etc., of the Standard Manufacturing Company, Mr. C. F. Arrott signified his entire satisfaction, and the committee agreed to enter into a contract with him at an annual salary of $3,600 as manager of the Allegheny Works, and a further contingent based on the result of the business at the said Standard Mfg. Co.'s Works.

"It was then agreed to enter into a contract with Mr. James W. Arrott, Jr., as General Superintendent of the Allegheny Works, known as the Standard Mfg. Co. Works, on a salary of $3,600 per year with the same understanding as to contingent with Mr. C. F. Arrott.

"Further it was the general understanding of the members of the Executive Committee that the Standard Sanitary Mfg. Co., own and control, and that the same should be transferred to this Company, the patents obtained by James W. Arrott, Jr., and those in process or already applied for with reference to the dredging of enamel. The company's control of these patents it is understood is in the United States only, and Mr. James W. Arrott, Jr., was advised to this effect.

* * * * * * * * * *

"W. A. Myler, Secretary."

This minute, in my judgment, is decisive against the allegation of the company that Mr. Arrott entered into the agreement upon which the company relies. It contains in clear terms a memorandum of what was agreed on between Arrott and the company in respect to his employment. This is the only agreement with him recorded. If there had been any such agreement made in respect to his patent as the company alleges, undoubtedly it would have been stated in the minute, which Mr. Myler himself testifies contains a correct record of the facts as they occurred at that meeting. It will be perceived that the minute merely sets forth what was the "general understanding of the members of the Executive Committee" in respect to the patent, and that Mr. Arrott was so "advised."

The allegation made by the company in its cross-bill that its right to the letters patent and to the use of the improvement was never denied by Arrott until after his resignation of his position as an employé of the company is positively disproved. It appears that his father, James W. Arrott, Sr., who died pending these suits, and whose testimony therefore is not before us, was the treasurer, a director, and a member of the executive committee of the new company. On the 30th of January, 1900, four days after the company claims James W. Arrott, Jr., did agree to convey his patent to the new company, he wrote to his father a letter in which the following passage occurs:

"However, I was willing to accept the position offered, but I was not, nor will I give away that which I consider my own personal property, nor can I understand how the Standard Mfg. Co. could sell or give the impression that

it was selling something that did not belong to the company. I refer to the patents which I own and put into practical use. I feel that I have been ignored and that the results of my inventions have not been considered in proportion to the saving they have caused."

Mr. Arrott, Sr., immediately transmitted that letter to Mr. Ahrens, who was the president of the Standard Sanitary Manufacturing Company. On February 3, 1900, Mr. Ahrens wrote Mr. Arrott, Sr., acknowledging the receipt of the letter of Mr. Arrott, the younger. In the course of that letter, Mr. Ahrens states:

"Yours of January 31st, enclosing letter from J. W. Arrott, Jr., is received and has had my careful attention. At the last meeting of the Executive Committee, this matter came up and was fully discussed. All of the members of the committee recognized the value of the process introduced by your son, and all of us united in giving him due credit for it. We think he is entitled to recognition for what he has accomplished, and we supposed that this recognition would be or had already been given him by the Standard Mfg. Co."

We thus see from his letter of January 17, 1900, to Dawes, and his letter of January 30th to Mr. Arrott, Sr., that James W. Arrott, Jr., consistently asserted his right to the patent in controversy as against the Standard Sanitary Manufacturing Company. The minute that company made and recorded by its own secretary of the proceedings of January 26, 1900, convinces me that the testimony of Mr. Arrott as to what occurred on that occasion is correct. I do not mean to impute any intentional misstatement to any of the gentlemen who have testified on the other side, but I cannot avoid the conclusion that they are mistaken in thinking that Mr. Arrott assented on the occasion of the executive committee's meeting in January to the claim of the company.

Upon a consideration of the whole evidence, I am of opinion that the company has failed to substantiate its claim to equitable ownership of, or to any interest in, the patent in controversy. Let decrees be drawn, in accordance with the views expressed in the foregoing opinion, in favor of James W. Arrott, Jr.

KAHN v. STARRELLS.

(Circuit Court, E. D. Pennsylvania. July 15, 1904.)

No. 17.

1. PATENTS—NOVELTY—FLAT KNIT CAPS.

The Kahn patent, No. 669,011, claim 3, covering as an article of manufacture a flat knit cap formed from a single length of tubular fabric by distending and setting it on a block or former, is void for lack of novelty; the product, as distinguished from the process of making, differing not at all from other caps in extensive prior use.

2. SAME—PROCESS—INVENTION.

The Kahn patent, No. 669,011, claims 1 and 2, which cover a method or process of making flat knit caps, are void for lack of patentable invention, the process claimed and described differing from that previously used only in the degree of prominence given to certain of the steps employed, which are essentially alike in both; the desired shape being obtained in the older method more by fashioning in the knitting, and in that of the patent more by distending the knitted fabric by stretching. The patent *held*, also, not infringed, if conceded validity.

8. SAME—LESSENING COST OF MANUFACTURE.

An improvement in a mechanical process which results in increased rapidity of manufacture, and consequent cheapening in cost of the article, does not for that reason alone disclose invention, where the steps in the process remain the same; the only difference being in the relative extent to which certain of such steps are carried.

In Equity. Suit for infringement of letters patent No. 669,011 for a flat knit cap, and art of making same, granted to Nathan E. Kahn February 26, 1901. On final hearing.

Joseph C. Fraley, for complainant.
Lewis L. Smith, for defendant.

ARCHBALD, District Judge.[1] The patent in suit was issued to Nathan E. Kahn February 26, 1901, and has to do with the making of flat knit worsted caps, having a fuzzy or fleecy exterior, familiarly known as "tam-o'-shanters." If the case turned on whether Kahn or the defendant Starrells was the first to devise and use the particular method in controversy, there would be little difficulty in disposing of it. The application on which the patent is based was filed July 18, 1900, but the evidence shows that Kahn was at work on the idea as early as December, 1899, and had fully compassed it by the middle of March following; offering his goods to the trade and taking orders in May and June. This is substantiated by a number of disinterested witnesses, whose stories are circumstantial and convincing, and is also sustained by documentary proof in the way of letters. The evidence to meet this on the part of the defendant is far from satisfactory. So far as his own testimony is concerned, it consists of vague assertions, which do not stand analysis, that he was making similar efforts to imitate the imported "tams" about the same time that Kahn was, and that he had his goods ready for the market as early as May or June of that year. The complainant's salesman, however, experienced no competition until the fall; and there is evidence to show that the first that the defendant did in the way of turning out anything was in August, and that it was in imitation of caps which emanated from Kahn, and were then in the hands of the trade, of which he had procured a sample. Without going into further details, it is sufficient to say that Kahn is clearly entitled to whatever merit there is in the invention, and that the claim of the defendant to prior knowledge or use cannot be sustained.

There are three claims in the patent, as follows:

"(1) The method of forming flat knit caps, which consists in forming an elongated tubular body with a band-forming selvage at its lower open end, then flattening the tube by expanding it in a single, narrow plane, at a point between its ends, said plane being at right angles to the longitudinal axis of the tubular body and finally setting the article in its flat distended shape, substantially as described.

"(2) The method of forming flat knit caps, which consists in forming an open-ended tube of knit fabric with a band-forming selvage at one end, then raising a nap on the exterior of the tube, then closing the top of the tube by gathering the edge thereof together about its axis, then flattening the tube by expanding it or distending it at a point between its ends, the plane of such expansion being at a right angle to the longitudinal axis of the tubular body,

[1] Specially assigned.

and finally setting the article in its flat distended shape, substantially as described.

"(3) As a new article of manufacture, a flat knit cap, formed from a single length of tubular fabric, having a band-forming selvage at its lower end, its upper end gathered and secured in closed position, said tubular body being expanded to flatten the same, and then set in a narrow plane at right angles to its longitudinal axis, substantially as described."

The first two, as it will be observed, are for a special method or process of manufacture, and the third for the resultant product. In no event, as it seems to me, can the latter be sustained. In shape, character of fabric, and uses to which they are put, the caps manufactured by the process described in the patent differ not at all from other goods in extended prior use, of which they are intended to be closely imitative. The only distinction suggested is that each cap, instead of being knit into approximate shape, as heretofore, is produced out of a "single length of tubular fabric" by distending and setting it on a block or "former," in which, outside the economy of effort by which it is accomplished, there would seem to be no particular virtue, and which therefore presents as a product nothing that is new or patentable.

Of the two process claims, the first is the broader, omitting, as it does, the napping or brushing, and the closing or gathering in of the top. But the same considerations apply to both, and the question is whether they involve anything patentably novel. Confining our attention particularly to the second claim, as the more specific, five divisions or steps will be recognized: (a) Forming an open-ended tube of knit fabric, with a band-forming selvage at one end; (b) raising a nap on the exterior of the tube; (c) closing the top of the tube by gathering the edge together about its axis; (d) flattening the tube by expanding or distending it at a right angle to its longitudinal axis; and finally (e) setting it in its flat, distended shape. Taking it as it stands, all that is thus described is admittedly old in the art, but not, as it is contended, as an organized series of steps coacting toward a common end. The order in which the different steps are given is made material, each being introduced by the word "then," which makes it relate to the one preceding, and the intention to have them co-operate is undoubtedly implied. But the question is whether the putting together in this way of simple mechanical operations already in use in the art involves the exercise of that inventive effort which it is the object of the law to foster and protect. Except in the rapidity with which a cap can be made, and the consequent cheapening of the cost—ten dozen being possible where one dozen was before—nothing particular is accomplished by the process; and while the result which is attained is not to be despised, and in some instances may of itself make out a claim to invention, for reasons which will presently appear it is not sufficient to do so here. Something is sought to be made out of the idea that the brushing or napping of the fabric gives it a new quality, which enables it to be successfully distended; but, as this is only brought into the second claim, it would seem as though no great importance was attached to it by the inventor. The controlling thing against the patentability of this process is that not only does it represent what is old in the art, but in what is done, as well as in the way of doing it, it exactly duplicates the method already in vogue, differing from it only in the degree of prominence given to

certain of the steps employed. The accepted way for making these articles of headgear was to take a piece of fabric which had either been knit into approximate shape, or, having been knit flat, was put into form by having its sides and top gathered together and sewed; then to raise a nap on it by brushing; and finally to flatten or distend it by blocking it into the exact shape desired, setting it in that shape by ironing. But that is the process which is here patented, with hardly a shade of variance. There may be some slight difference in the order, but that is not material. The distinction relied upon is the approximate shaping or "fashioning" of the fabric in the original knitting, which, as it is claimed, is dispensed with. "To distend a tube is our patent," said counsel at the argument, which puts it tersely. But the tube which is thus spoken of is not necessarily confined to one that is strictly cylindrical, without being shaped or fashioned in any particular. On the contrary, both as described in the patent and as exemplified in practice, it is more nearly bag-shaped or globular. If the patent, indeed, is not broad enough to include this, all that would be necessary to get around it would be to put the fabric in its initial stage into some such form. Speaking of this part of the process in the specifications, the inventor declares that he knits the main body of the fabric which he has to use, of half cardigan or full cardigan loops, which make it loose, while the top and bottom edges are formed of selvage loops, by which the web is narrowed at these two points. This involves a certain amount of fashioning, and produces, not a cylindrical tube, but one, as already suggested, that is globular or balloon-shaped. Confirmatory also of the same idea, it is stated by Braithewaite, one of complainant's expert knitters, speaking of the caps manufactured by this process, "We shape them partly on the machine and partly on the shaper." But if this be so, the essential steps in the process on which the claim to novelty depends are matters of degree only. By that which was previously employed, the cap was knit to an approximate shape and then distended, while here the shaping is largely, but not wholly, dispensed with, the process itself in both instances being thus practically unchanged.

But while stress has been laid on the fact that the patent countenances and involves fashioning, the same result is reached even if the tube is strictly cylindrical, and none is employed. The difference is still merely one of degree, the steps in the process, as well as the effect obtained from each, being the same. All that the inventor discovered was that the fabric was capable of being subjected to a little more distending than was supposed possible before, the previous brushing or napping contributing to that end. It is true that, if the initial fashioning can be dispensed with, there is a gain in the knitting, and so in the manufacture. But passing by the fact that this advantage is not put forward in the patent, the material thing is that the mechanical operations which are made use of do not vary in kind or in order from those previously employed to bring about the same result. The fabric is shaped less and stretched harder, and that is all, which can hardly be said to display invention.

In view of the conclusion which is so reached with regard to the invalidity of the patent, the question of infringement is not important, but it will not be out of the way to express an opinion upon it. It must

be conceded that the attempted distinction between the process made use of by the defendant and that described in the patent fails, except in one particular. The knit loops on the outside of the defendant's fabric are of no materiality on this question, whatever advantage may result from not having to brush the interior and draw upon the body of the material for the nap. The patent says nothing of the character of the fabric, except that it shall be knit, and everything which falls within this description is therefore covered. It also calls for an exterior, and not an interior, brushing, so that nothing can be made out of that. Neither is there anything in the difference in the manner of blocking. The inventor suggests in the specifications the use of his own patent "former" for this purpose, but he by no means confines himself to it, and it is not mentioned in the claims. Whatever means of blocking or distending is employed, as a matter of process, it is the same. But in the use of a separately knit band with selvage edge, we have what, in my judgment, is a variance. The patent evidently contemplates that there shall be a single, integral piece of fabric, and not one made up of two or more parts. Referring to the initial step in the process, already in part quoted, the inventor declares:

"I first knit (preferably upon a flat-knitting machine of the ordinary Lamb type) a piece of fabric, * * * of which the main portion or body may be formed of half-cardigan or full-cardigan loops, * * * while the top and bottom edges are formed of selvage loops; * * * the web being consequently narrower at those regions. The piece of fabric thus obtained is then formed into a tube * * * by stitching the two longer sides together. The deep selvage edge, * * * which is intended to form the rim or band of the cap, fitting upon the head of the wearer, is then turned in and stitched around its inner edge so as to make a double selvage."

There is thus formed what is spoken of in the first claim as "an elongated tubular body, with a band-forming selvage at its lower open end"; and in the second claim, as "an open-ended tube of knit fabric, with a band-forming selvage at one end"; while in the third it is described as "a single length of tubular fabric." In either case it must be regarded as fulfilled only when body and selvage band are knit as one web, and not simply sewed together. Where a union is to be effected by stitching the inventor is careful to say so; and where, on the other hand, it may be entirely dispensed with, as where the fabric is knit in a tubular form at the outstart, he does not forget to point that out as an alternative. It may be that the claims, disregarding the specifications, could be made to include a band-forming selvage that was sewed on, as well as one that was knit integral with the body. But the natural reading is otherwise, and the inventor having explained in the appropriate place in the specifications what was intended, it is to be followed. The complainant certainly cannot expect any broad construction of the patent to be given. That there are advantages where the selvage band is integral with the body, as well as where it is not, sufficient to make a distinction, is shown by the evidence. In the former case the band is simply turned over and stitched to the body, saving work, as well as making a much less prominent and objectionable seam. But where, on the other hand, the band is made separate, it is not so liable to be stretched and made ill fitting; and the body, as it is claimed,

can be knit and handled more effectively both with respect to the design and characer of the fabric.

It is said, however, that infringement is confessed by the defendant in his answer to the interrogatories. But however much it may so appear, it is manifest that this was not intended; nor are we, by reason of any such concession, to put a construction on the patent in this case which it will not bear in every other. Notwithstanding what is so answered, the distinction which has been pointed out exists with regard to the integral character of the fabric described in the patent, and it is by this that the question of infringement must be determined.

It is also said that the defendant, in his examination, recognized that there was no material difference between a selvage band which is knit and one which is sewed to the body; speaking of them interchangeably in his testimony. But this occurred in answer to questions put by his counsel in which the identity of the two was assumed, and there is little significance to be given to his answering them, as they were framed, without stopping to mark the distinction. Further than this, it is possible that a separate band which is sewed to the body may, under certain circumstances, be properly spoken of as a selvage band. But that is not controlling. The question is whether the patent, as it stands, calls for the band and the body to be of one integral piece or web, which it plainly does, for reasons already given. Both on the ground, therefore, of the noninfringement of the patent, as well as its invalidity, the suit cannot be maintained.

Let a decree be drawn dismissing the bill, with costs.

DANIEL v. RESTEIN & CO.

(Circuit Court, E. D. Pennsylvania. July 1, 1904.)

No. 2.

1. PATENTS—ANTICIPATION—PACKING.

The Miller patent, No. 524,178, for a packing consisting of two wedge-shaped sections, intended to slide upon each other, with a yielding cushion back of one of said sections, by means of which the steam pressure transmitted to the sliding sections causes that side of the strip to widen, forming a tight joint, describes an effective and useful device; but the claims are not limited as to the materials to be used, and, the form of construction having been in use in a prior unpatented packing, the patent is void for anticipation.

2. SAME.

Anticipation is not avoided because the anticipating structure, while mechanically the same, is not so efficient as that of the patent, owing to the use in the latter of different and better materials, which are not, however, claimed as a feature of the invention.

3. SAME—UNPATENTED DEVICE—EXTENT OF PRIOR USE.

To constitute an anticipation by an unpatented device, it is not necessary that it should have come into general use, but it is sufficient if it was in actual and practical use by a number of persons.

In Equity. Suit for infringement of letters patent No. 524,178, for a packing, granted to N. B. Miller August 7, 1894. On final hearing.

¶ 3. See Patents, vol. 38, Cent. Dig. § 74.

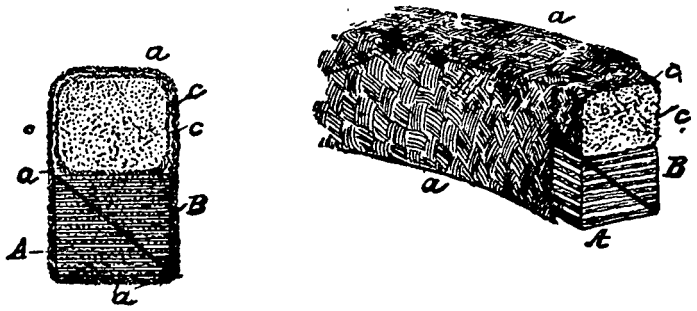
Charles Howson, for complainant.
A. B. Stoughton, for defendants.

ARCHBALD, District Judge.[1] There can be little doubt as to the high efficiency of the fibrous packing manufactured by the complainant, by reason of its self-sealing properties, by which the steam pressure operates to make it tight, without depending on the gland or follower yielding again when the pressure is lessened, and thus relieving friction. This is due, however, under the evidence, to two things: (1) The material of which the different parts of the packing are composed; and (2) the form in which they are put together, the one being as important as the other—if the elaborate experiments which have been put in evidence are to be accepted—a similar combination of different materials in the same form not giving the same satisfactory results. The packing is manufactured under a patent issued to N. B. Miller, August 7, 1894, the two claims of which are as follows:

"(1) The combination in a packing strip, of the wedge-shaped sections A and B, the inclined surfaces of said sections adjoining, with a yielding cushion back of one of said sections, the whole confined within a casing, substantially as described.

"(2) The combination in a packing, of the wedge-shaped sections, A and B, the inclined surfaces of each section adjoining, with an absorbent cushion confined in a braided casing and situated back of one of said sections, the whole combined in an outer casing, substantially as described."

The following is a perspective and a sectional view of the packing; A and B being the wedge-shaped parts, and C the cushion:



It will be noted that nothing is said in the claims with regard to the material of which these parts are to be respectively composed, except as in the one the cushion is required to be yielding, and in the other absorbent. The specifications, however, disclose that the wedge-shaped sections are intended to slide upon each other, so that the packing may widen out or extend itself laterally under pressure, from which it is argued that a material which will produce that result is necessarily implied. But all that is in fact stated on the subject is that the sections shall be made of flexible material—preferably of alternate layers of duck and rubber—which shall at the same time be comparatively stiff, and yet sufficiently yielding to effect their purpose, the use of a lubri-

[1] Specially assigned.

cant such as powdered graphite between the sections to facilitate sliding being also suggested; and that the cushion shall be preferably made of twisted cotton, because of its absorbent qualities, and its ability to transmit lateral pressure through the various layers of the packing. In these suggestions the inventor does not commit or confine himself to any specific material, nor base his invention upon it, and it would unwarrantably restrict its scope to so hold. The patent which covers it is therefore to be taken as essentially one for a mechanical combination or structure, and whatever is fashioned after it in this respect falls within its terms, whatever the material, and constitutes an infringement, or, conversely, if preceding it in time, amounts to an anticipation.

It must be conceded that, confining ourselves to what is disclosed in previous patents, there is nothing to be found which affects the novelty of the invention. It is true that, in several of these, wedge-shaped or diagonal sections are employed, the manifest purpose of which, the same as here, is to effect a spreading or widening out of the packing to make a more perfect fit around the piston, with a corresponding yielding—as we may fairly assume—by which the friction is lessened when the pressure is relieved. Thus, in the Furse (1878), a series of conical or obliquely cut rings, reversely arranged upon each other, is found, with flat rings or washers interposed between each set, in much the same way as the cushion in the complainant's packing, the object of which is declared to be in order that the moving parts—piston, ram, or whatever it be—may work with minimum friction. So, in the Law (1887), one form which is given consists of triangular or wedge-shaped rings put together in the same way as they are here; the purpose being, as it is stated, to force the inner surface of one segment inwardly against the rod, and the outer surface of the other outwardly against the stuffing box. Here, also, the material specifically designated to be used is one made up of alternate layers of duck and rubber, the same as that which is given preference in the patent before us. Again, in the Turner (English, 1891), we have squares of packing made up of triangular pieces, in which form, it is said, the sections, being wedge-shaped and sliding on each other, are easily flattened, and, with very little pressure from the gland, will be molded into the stuffing box, and kept in close contact with the piston rod or other moving part. And finally, in the Walsh (1890), a cushion combined with a separate wearing section is shown; the one being of rubber, and the other of flexible metal; the whole, as well as each part, being inclosed in a braided envelope or cover of fibrous texture, adapted to absorb and retain the lubricants applied.

But notwithstanding the fact that practically every feature of the present device, in one form or another, appears in these references, a new and distinct combination of them has been made by the inventor, by which a packing of novel character and efficiency has been produced. In reaching this conclusion, however, the ground upon which this novelty rests, which has already been indicated, should be clearly recognized. It is not to be predicated upon the sliding of the wedge-shaped sections on each other to effect a self-sealing, on which so much stress is laid. Accepting this as a real and valuable property, and as

effectively developed in the packing under discussion, it must at the same time be regarded as present to a degree in every one of the references given in which wedge-shaped sections are employed; the necessary result as well as the declared purpose in each, as has been pointed out, being to widen out the packing so as to produce it. The idea is also common to the general packing art—metallic as well as fibrous—as appears by the Gerry (1878), where it is distinctly described and claimed. The legal claim to novelty, therefore, in the complainant's packing, lies simply in the special combination of cushion and wedge-shaped parts, by which the inventor has undertaken to bring this action about; the increased effectiveness, if any, however produced, outside of this, going merely to its general merit.

If this conclusion be correct, the packing manufactured by the complainant, while good as against the record references which have been brought forward, was unfortunately anticipated by a packing devised by one W. H. Miller, father of N. B. Miller, who took out the patent in suit. This earlier packing, which was put out in 1882, was identical in structure with that manufactured by the complainant under the patent, differing only from it in the materials used. It had a cushion of hemp, instead of twisted cotton, and wedge-shaped sections, of which one was of solid rubber, and the other of cotton webbing, instead of each being made up, as in the complainant's packing, of alternate layers of the two; the whole being confined in a braided covering or casing. How any two devices could be closer, it is difficult to see; and, that the one fulfills the terms of the patent equally with the other, there can be no doubt. As we have already seen, all that is there required with regard to the cushion in either specifications or claims is that it shall be yielding and absorbent, which is just as true of hemp as of cotton; and, with regard to the diagonal sections, that the material shall be flexible, a quality which can be no more denied to rubber and cotton when used separately than when they are combined together. If now for the first time introduced, this packing would unquestionably constitute an infringement of the patent; and, having preceded it in time, it is, by the same consideration, an anticipation.

It is contended, however, that the two packings are distinguished by the results; the one being highly efficient, and the other not at all so; reliance for this being had upon the experiments which have been referred to. But as already intimated, the difference so established is one of degree, and not of mechanical structure, which alone is patentable; nor of function, which was common in the art and could not be so monopolized. It arises, undoubtedly, as pointed out above, from a wise selection of materials for the triangular sections, as well as the use of a lubricant between them to facilitate lateral sliding. The latter is suggested in the specifications, but does not enter into the claims any more than the material to be used, and is too obvious an expedient on which to base a pretension to novelty. As neither of the things, therefore, on which the superiority of the complainant's packing depends, enters into the invention as defined in the patent, they cannot be relied upon as final steps which sometimes distinguish success from failure, and make patentable that which otherwise would not be.

But it is said that the earlier packing was not successful commer-

cially—only twelve or fifteen hundred pounds being disposed of in all the years that it was upon the market—and that it never advanced beyond the experimental stage. This does not fairly represent the evidence, however, with regard to it. This was no incomplete or half-finished device, which was merely the subject of experiment. It was put into actual, if not extended, use, and not by one person, but by several. Bickerton & Co., by arrangement with Miller, who devised it, filled a number of different orders which the latter solicited and procured, collecting the bills for him, and taking out their commission. While some 50 pounds of the packing was finally left on their hands, where it remained until disposed of to the complainant shortly before this suit, this was not because of any dissatisfaction on the part of those who returned it, but because the order which they gave had not been filled in time, compelling them to secure other packing in its place. It was so well received, moreover, by Cartwright, McCurdy & Co., of Youngstown, Ohio, where it had been at first put on trial by Miller, that, when after receiving several intermediate orders he did not come around again, a sample was given to W. C. Henderson, of Pittsburg, to make some like it; and he, in turn, after obtaining the proper cores, put up about 200 pounds, which he sold to various parties under the name of Milling Combination Packing. That he went no further with it is due to the fact that he developed a packing of his own, which gave satisfaction, and was able to be sold at a less price. Prior knowledge and use by a single person has been held to be sufficient to negative novelty. Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821. And there is far more than that here. It was not necessary that it should go into general use or become a commercial factor, as suggested; and that it did not may well be ascribed, under the evidence, to the fact that it was not a cheap packing, and was not "pushed." I see no way for escaping the conclusion that it clearly anticipated that which is covered by the patent in suit, which it therefore deprives of its novelty.

Let a decree be drawn dismissing the bill, with costs.

ALBRIGHT v. LANGFELD et al.

(Circuit Court, E. D. Pennsylvania. August 1, 1904.)

No. 7

1. PATENTS—INVENTION—SIMPLE BUT USEFUL IMPROVEMENTS.

   Where a patent has been granted to an inventor for an improvement on a familiar article of simple mechanism, and such improvement, although it afterwards seems simple and unimportant, overcomes difficulties and objections, however slight, that have been endured by the public for a long time, and that others have made numerous efforts to overcome, without complete success, while the patented article has gone into immediate use, the patent will, as a rule, be upheld by the courts as disclosing invention.

2. SAME—INFRINGEMENT—MODIFICATION IN FORM.

   A patentee having described his invention and shown its principle, and claimed it in that form which perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless they are disclaimed.

3. SAME—PRIOR USE—SUFFICIENCY OF EVIDENCE.
Under the rule that the defense of prior use must be established beyond a reasonable doubt it will not be sustained when it rests upon the recollection of a single witness, especially when his knowledge depends in large part on information received from others who are not called.

4. SAME—INFRINGEMENT—COIN PURSE.
The Albright patent, No. 439,086, for a coin purse, held not anticipated, and to disclose invention; also infringed as to claims 1 and 6.

In Equity. Suit for infringement of letters patent No. 439,086, for a coin purse, granted to Chester E. Albright October 28, 1890. On final hearing.

Alexander & Magill, Andrew A. Leiser, and Walter F. Rogers, for complainant.

Ernest Howard Hunter, for respondents.

HOLLAND, District Judge. This suit is brought for an injunction and accounting for infringement by defendants of claims 1 and 6 of the patent No. 439,086, granted October 28, 1890, to complainant, for a coin purse. The bill further avers the complainant has invested large sums of money in the invention and business, and that a large number of purses were made according to the said invention and sold by complainant to the public at a great advantage. Defendants' answer denies that the purse they make and sell infringes the complainant's claims, and alleges the invalidity of the complainant's patent for want of invention in view of the prior state of the art. The patent covers a coin purse, in which there is a closed receptacle on one side, and an open receptacle or "till" on the opposite side, the two parts being each surrounded by a projecting stiff frame and connected by hinges. As set forth in the specifications, the inventor says:

"The object of my invention is to provide a convenient receptacle for specie, which may be both securely closed to prevent the escape of coin, and also readily opened to display the contents and make them easily accessible, so that any one piece of coin can be picked out from among the others with the greatest facility, and without handling any other than the piece wanted, as from off the bottom of a till."

The purse may be held in the hand, and the coin readily slipped from the closed receptacle to the open receptacle, and readily accessible without danger of the coin sliding off the purse. All prior coin purses not embodying the feature of the complainant's purse were objectionable for the reason that either the denomination of the coin could not be readily ascertained, because of the fact that it likely stood on its edge, and not easily accessible, or the denomination seen; or, if arranged as in the Rundlett patent, so that the coin could be slid out of the closed receptacle so as to readily reveal the denomination, there was danger of it sliding off from the purse and becoming lost. While the change made by the complainant is not very complicated, or apparently difficult, after it has been discovered, yet it overcame the objections and disadvantages experienced by all who use coin purses, and entered into extensive use; so that I am convinced, from an inspection

¶ 3. See Patents, vol. 38, Cent. Dig. §§ 78, 104.

of the various kinds of purses offered in evidence, that the complainant has made an improvement to which he is entitled to a patent. When the Patent Office has granted a patent to an inventor, the court should not be ready to adopt a narrow or astute construction fatal to the grant, and in cases where there is any doubt the test of practical success is always persuasive evidence of novelty, and has great weight in solving the question favorable to the invention. Keystone Mfg. Co. v. Adams, 151 U. S. 145, 14 Sup. Ct. 295, 38 L. Ed. 103. It is always possible, where an inventor has made an improvement upon the familiar article of simple mechanism, and the improvement only involves changes and additions, which afterwards seem simple and unimportant, to allege want of invention, or the result only that which the ordinary mechanic skilled in that particular art could have seen; yet where the difficulties and objections overcome by this improvement, however slight, have been endured by the public for a long time, and numerous efforts have been made to overcome them, without complete success, when a patent is granted for an improvement in that particular article which does overcome such former difficulties and objections, and it has immediately gone into use, the courts have, as a rule, found in favor of the inventor, and sustained the patent. Examples of patented inventions which have been upheld by the courts, although they differed very little in form, mechanism, or operation from other appliances, are numerous. Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; Loom v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; Magowan v. Packing Co., 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781; The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; Gandy v. Belting Co., 143 U. S. 587, 594, 12 Sup. Ct. 598, 36 L. Ed. 272; Topliff v. Topliff, 145 U. S. 156, 163, 12 Sup. Ct. 825, 36 L. Ed. 658. An examination of the patents stated as anticipating the complainant's improvements does not show that any of them embody the idea contained in the Albright purse. The first, or Osborne purse, is neither furnished with a stiff frame nor provided with a till, as found in the purse in question. The Enger patent has no application whatever, so far as I can see. It is a purse hinged together, but has no till feature whatever, nor can the coins be arranged so as to easily ascertain their denomination. It has only one apartment similar to the ordinary deep, clasped, bag-like purse. The Scherer patent is for a portfolio for receiving and containing writing paper, envelopes, blotting paper, pencils, erasers, etc., and it is difficult to see, from an examination of this structure, how the idea of the Albright purse could have been suggested. The Rundlett patent has one feature of the Albright patent, to wit, that by very skillful and careful manipulation the coins can be slid from a closed receptacle into a small open space between that closed receptacle and another receptacle at the other end of the purse, by which the denominations can be recognized; but there is no till-shaped arrangement to retain the coin, and it is plain that a nervous person, or one with little skill in its manipulation, could not successfully handle this purse without the coins sliding off of the purse. It is the well-known purse made of flexible materials, and so arranged with

hinged covers, one of which has a deep pocket, which normally holds the coins, while the other has a shallow pocket into which the closed end of the coin-receiving pocket is tucked when the purse is closed up, this being feasible on account of the flexibility of the entire purse. True, it can be said the difference between this and the purse in suit is not very great, as viewed after the successful improvement has been made; but, simple as the change is, it marks the difference between a purse containing the serious objections and one which is recognized by the public as desirable, embodying such features as to make its use easy and convenient.

The purse made and sold by the defendants is an infringement upon the first and sixth claims as alleged. The fact that there are no metal hinges connected by pintles or pins in the defendants' purse does not distinguish it from that of complainant's. The defendants' purse has the exact features of the complainant's in that there is a flange surrounding the till portion of the purse hinged together to the closed receptacle by leather. In other words, instead of hinging the flange to the flange of the closed portion of the purse, they have omitted that, and simply depend upon the back of the purse for its connection, making a hinge of leather as effectually as the hinges mentioned in the complainant's purse. The familiar case of Winans v. Denmead, 15 How. 330, 14 L. Ed. 717, lays down the rule that:

"When a patentee described a machine, and then claims it as described, * * * he is understood to intend to claim, and does by law actually cover, not only the precise form he has described, but all other forms which embody his invention; it being a familiar rule that to copy the principle or mode of operation described is an infringement, although such copy should be totally unlike the original in form and proportion."

The cases to the effect that, the patentee having described his invention, and shown its principle, and claimed it in that form which perfectly embodies it, is in contemplation of law deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of these forms, are numerous; and I shall simply state the following, which were decided in this district: Doyle et al. v. Perfect Cigar Shaper Co., 104 Fed. 997, 44 C. C. A. 301; National Folding Box & Paper Company v. Brown et al. (C. C.) 106 Fed. 189; Powell et al. v. Liecester Mills Co. et al., 108 Fed. 386, 47 C. C. A. 416; Daylight Prism Co. v. Marcus Prism Co. (C. C.) 110 Fed. 980; Lepper et al. v. Randall, 113 Fed. 627, 51 C. C. A. 337; Hutter v. Broome (C. C.) 114 Fed. 655; Smeeth v. Perkins & Co., Ltd., et al., 125 Fed. 285, 60 C. C. A. 199.

It is claimed, however, by the defendants, that the purse they make has been sold for a long time in foreign countries, and that it was imported and sold here prior to the time that the complainant received his patent. They call, however, only one witness to establish this fact, whose testimony does not convince me of the prior use as alleged. He gives the names of two firms, one in Philadelphia and the other in New York, who it is said imported defendants' style of purse; but they were not called as witnesses, nor does the witness say he saw them sold abroad. It is the rule that the defense of prior use must be proven beyond a reasonable doubt, and under this rule the courts have rejected

that defense when it rests upon the recollection of a single witness, especially when his knowledge must have depended upon information obtained from such importers, not called, as to the sale abroad and importation. Durfee v. Bawo et al. (C. C.) 118 Fed. 853; Brown v. Zaubitz (C. C.) 105 Fed. 242; Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017.

Let a decree be drawn in favor of the complainant.

WEISGERBER v. CLOWNEY.

(Circuit Court, D. New Jersey. July 20, 1904.)

1. PATENTS—INFRINGEMENT—ROLLING CHAIRS.
   The Weisgerber patent, No. 675,693, for "a rolling chair provided with an arm-rest, and a wheel-screen continuing downwardly from said rest, and extending from side to side of the frame below said rest, and swelled outwardly over the wheel," if not void for lack of patentable invention, is of narrow scope, and is not infringed by a chair in which the sides are extended downward in the same plane, and the wheels are placed inside of such extensions.

2. SAME—DESIGNS—MECHANICAL FUNCTION—NOVELTY.
   A design patent is addressed to the eye, and is to be judged by its ability to please, and, while there is no objection to the article to which it relates being useful as well as ornamental, such a patent cannot be made to cover a mechanical function or construction. A design patent also, the same as any other, must be possessed of novelty.

3. SAME—INFRINGEMENT—DESIGN FOR ROLLING CHAIR.
   The Weisgerber design patent, No. 35,043, for a design for a rolling chair *held* not infringed, on evidence which showed that defendant's chairs, if they would otherwise infringe, were constructed and in use by defendant prior to complainant's application for the patent.

In Equity. Suit for infringement of letters patent No. 675,693, for a rolling chair, granted June 4, 1901, and No. 35,043, for a design for such chair, granted September 3, 1901—both to Harry E. Weisgerber. On final hearing.

E. Hayward Fairbanks and H. C. Kennedy, for complainant.
Horace Pettit, for defendant.

ARCHBALD, District Judge.[1] There are two patents in controversy in this case—one mechanical and the other for a design; the subject of each being a rolling chair such as is in vogue on the board walk at Atlantic City, where both the parties to this litigation are engaged as competitors in furnishing these vehicles for public use. The mechanical or functional patent was applied for December 7, 1900, and obtained June 4th following; and the improvement which it covers consists in providing such chairs with screens or guards for the

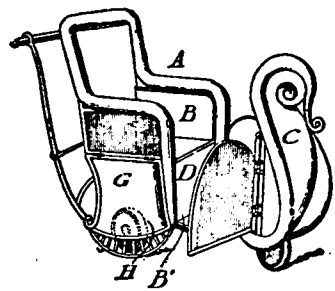
¶ 3. See Patents, vol. 38, Cent. Dig. § 66.

[1] Specially assigned.

wheels and the adjacent running gear, to prevent the contact of skirts and garments. In wheeling these chairs through the crowds which throng the thoroughfares where they are used, and also in getting in and out of them, there is danger that the dresses of ladies will be blown against the axles and be marred with grease, and even the trousers of men are not entirely exempt. It was definite public complaint on the subject that led to the present device. Notwithstanding this useful purpose, however, it is a question how far the simple providing of a screen or guard for the wheels of such a conveyance involves the exercise of invention. There is nothing new in the idea, even with regard to rolling chairs; the only difference being that heretofore the wheels have not been so completely screened or covered. But as a mere matter of extension or enlargement, this would not seem to be an inventive advance, nor to involve anything more than adaptive mechanical skill. It is not necessary, however, to definitely decide the question of invention, because it is clear that, whatever be the legal value of the patent, the defendants do not infringe its terms. The first claim, which is the one relied on, is as follows:

"(1) A rolling chair provided with an arm-rest, and a wheel-screen continuing downwardly from said rest, and extending from side to side of the frame below said rest, and swelled outwardly over the wheel."

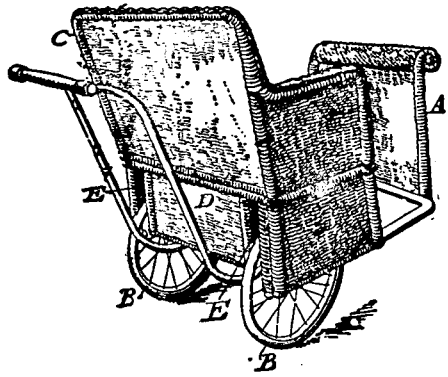
It is a mere repetition of the words of the claim to say that the guard or screen which is so provided must, as an essential characteristic, "swell outwardly over the wheel"; and this calls, if not for a strictly convex surface, at least for one that bulges or bellies outwardly, and is not satisfied by one that is flat. A reference to the specifications, as well as to the diagrams which accompany the patent, confirms this view:



Says the inventor in describing this part of the device in the specifications:

"G designates hangers constituting screens on the sides of the frame of the body below the arm-rest portions; the same approaching the ground or road; the lower portions of said hangers being swelled outwardly, forming fenders or inclosures, H, as guards for the wheels; said hangers preventing the passers-by from contacting with the wheels, while the fenders, owing to the swelled or segmental form, deflect the garment of the rider from the wheels; it being noticed that the widest portions of said fenders are over what may be termed the 'middle' of the wheels, while said fenders taper toward the floor of the chair."

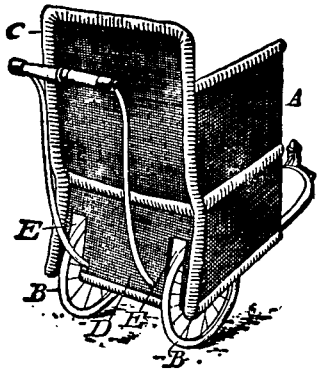
Both screen and dependent fenders, as thus described, are required to be of a swelled or segmental—that is to say, a bulging—form, and this is all that was patented. The inventor tried for more in his application, endeavoring to cover the general idea of a screen for the wheels of such chairs, but he was cut down in the course through the Patent Office to one of the particular fashion set forth in the claim, and to this he must be confined. But on this the defendants do not infringe, as a reference to the following diagram, which represents the chairs they use, will plainly show:



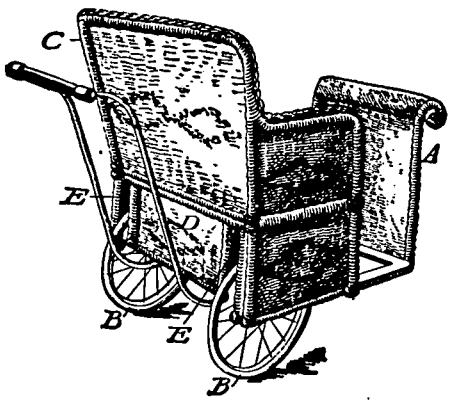
The wheels here are, no doubt, screened or covered, but it is accomplished by placing them under the body of the chair, which is extended squarely over them; the sides being projected downwards below the axles in order to do so. It is contended that they thereby "swell outwardly" over the wheels, within the meaning of the patent, but this is a forced view. The fact is that the screens, like the sides of the chair of which they are the prolongations, are perfectly flat, and lie in exactly the same plane. All the similarity resides in the circumstance that they have the same general function as the screens devised by the complainant, which is not sufficient, however, to make out an infringement.

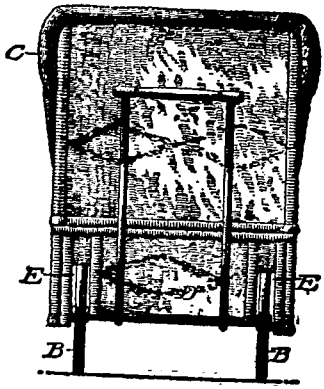
To properly understand the scope of the design patent, it will have to be quoted entire. "Be it known," says the patentee, "that I, Harry E. Weisgerber, * * * have invented and produced a new and original design for a rolling chair, of which the following is a specification; reference being had to the accompanying drawing forming part thereof: The leading feature of my design * * * is first a body having a depending wall on the back thereof, and next vertical passages in said wall. In the accompanying drawing, which represents a perspective view * * * embodying my design, A designates the body; * * * B, the wheels; C, * * * the back; * * * and D, * * * a depending wall on said back. In said wall are vertical passages, E, through which the wheels partly protrude. * * * What I claim as new, and desire to secure by letters patent, is the design for a rolling chair substantially as shown and described."

The drawing accompanying the patent which illustrates the design intended to be covered by it is as follows:



While the following represents the chairs of the defendants:





The question of infringement is to be determined by the comparative appearance of the two.

A design patent is addressed to the eye, and is to be judged by its ability to please. Rowe v. Blodgett & Clapp Co. (C. C.) 103 Fed. 873. There may be no objection to the article to which it relates being useful as well as ornamental, but the attempt to patent a mechanical function, under cover of a design, is a perversion of the privilege given by the statute. Rowe v. Blodgett & Clapp Co., 112 Fed. 61, 50 C. C. A. 120; Marvel Co. v. Pearl (C. C.) 114 Fed. 946; Eaton v. Lewis (C. C.) 115 Fed. 635. A design patent, also, the same as any other, must be possessed of novelty. Smith v. Saddle Co., 148 U. S. 679, 13 Sup. Ct. 768, 37 L. Ed. 606; Paine v. Snowden, 50 Fed. 776, 1 C. C. A. 661. Subjected to these tests, it is a question whether the present patent is of any validity. The extension of the back and sides of the chair, by which

screens for the wheels are formed, is functional rather than ornamental, whatever view to the contrary may have been expressed by the defendant Mrs. Clowney; neither would it seem to involve anything inventive to modify to that extent existing forms. Paine v. Snowden, 50 Fed. 776, 1 C. C. A. 661. But without stopping to enlarge on this idea, it is clear upon other grounds that the complainant as to this patent also has no case.

From the design standpoint, in which the guide is the eye, it requires hardly more than the most casual observation to perceive that there are several material points of difference between the defendants' chair and that which is portrayed in the patent. With regard, for instance, to what is declared to be the leading feature of the design; the depending wall in the back, as represented in the drawing, extends down even with the side screens; while in the defendants' chair it stops somewhat short of this, making a break in the lines, and producing a less pleasing effect. The vertical passages also in the one are cleaner cut, extending only partway up to the body of the chair, and are supplemented by two smaller auxiliary slots, through which the handle bars protrude; while in the other, these openings go entirely up to the body, the wicker work of either side being strengthened with dowel posts; and there are no auxiliary slots. In general configuration, also, the two chairs are different. That of the complainant has a stiff, square back, with square sides, the roll on the top being carried down the edges of the back to the bottom of the screens, and not extended out over the arms, which are given distinct and separate rolls of their own, terminating abruptly at the end; while in that of the defendants the back slightly inclines, and has decidedly rounded corners, and the roll or braid on top of the back continues out over the arms, and is carried down the front of the chair to the floor. The complainant's also has no dasher, while the defendants' has a very prominent one; and the wickerwork of the two chairs differs; that of the defendants being a basket pattern ornamented on back, sides, and depending walls, with diamond-shaped figures, while that of the complainant is a plain crosshatch. There are other slight distinctions, but these are enough. Whether taken singly or in general effect, the features of the defendants' chair constitute material variations from the design as set forth in the patent, and relieve the defendants from the charge of infringement upon it.

But assuming, for the sake of argument, that there are no such differences, after all, as we have found, the complainant is met by the fact that he was not the first to put out a rolling chair of this particular description. The patent was applied for August 2, 1901, but it is in evidence that on June 5th, two months before that, Mrs. Clowney, the principal defendant, purchased and had in use one of the chairs of which complaint is now made. This chair did not originate with her, but was manufactured by the Philadelphia Baby Carriage Company, from whom she ordered it May 14th; and it was followed by some 20 others from the same place in the next two months. These dates are not made to depend on the uncertain memory of witnesses, but are substantiated by documentary evidence in the way of bills and shipping receipts. The complainant himself also proves that on June 24th one of these

chairs was rented by him of the defendants, and taken to a photographer for the purpose of obtaining a picture to be used as evidence of infringement in this case. Further, if Harry Bellis, who is connected with another rolling chair establishment at Atlantic City, is to be believed, he saw chairs of this pattern at the Philadelphia Baby Carriage Works in March, 1901, where they were being shipped to the Pan American Exhibition at Buffalo, which occurred that year; and he ordered some for his own use, which were delivered about the same time as those to Mrs. Clowney. Nor is this by any means all the evidence there is upon the subject. It is testified by Mr. Bloch, the proprietor of the factory referred to, that the first chair delivered to Mrs. Clowney was designed and put together as a sample in the summer of 1900; this date being fixed by reference to the removal of the office and salesroom, which occurred in July or August of that year, and which it preceded. Levi, a salesman and clerk, corroborates this with convincing details, as do Semisch, the foreman of the reed department, and Heinel, who constructed the frame. The latter remembers the circumstance that in August, 1901, the frame, which originally had a roll on top of the back and arms, was returned to have a braid put on, just as it now appears. Semisch also produces a so-called invoice book, in which at the close of that year he entered an inventory of some 10 of these chairs, which by that time they had constructed and had on hand. The reason why this style was not sooner put on the market is explained by Bloch, who says that they are always working a season ahead, and that it not infrequently happens that they have new styles which are not made use of for six or eight months. It is said that the company with which these witnesses are associated is interested in establishing a prior use, in order to defeat any suit which may hereafter be brought against it for infringement; but their testimony is too circumstantial and convincing to be put aside in any such way. It is also said that Bloch was to produce his books in order to substantiate his statements, which he never did. But a fire occurred while the testimony was being taken, which prevented it; and, while this leaves his testimony without the promised support, corroborated as it is by the others referred to, to say nothing of its own inherent value, it cannot be disregarded.

In view of the conclusion which is thus reached, it is not necessary to go into any extended discussion of the evidence produced by the complainant with regard to the use of this style of chair in the first part of 1901 by the rolling chair establishment where he was employed. There is quite a little to throw doubt upon this, and it is a question whether, standing by itself, the evidence would be sufficient to meet the burden cast upon the complainant of carrying back the date of his invention to a point where it would clearly anticipate the use by Mrs. Clowney indisputably shown in June. But without going into the matter, and conceding for this evidence all that could be claimed for it, it only goes back to February, 1901, and thus fails to meet the evidence of the defendants by which chairs of this pattern are shown to have originated in the factory of the Philadelphia Baby Carriage Works fully six months before.

While the case is fully disposed of by what has thus been said, it will not be inappropriate to observe that the evidence with regard to the

origin of the chairs of which complaint is made has a bearing upon the mechanical as well as the design patent. For if it is contended that the screens on these chairs swell outwardly, within the meaning of that patent, in construction and function infringing upon it, then, being earlier in time, they anticipate it; the complainants' mechanical invention not being carried further back than December 7, 1900, the date of his application.

It being clear, therefore, that the bill cannot be maintained, a decree is directed to be drawn in favor of the defendants, with costs.

HEMOLIN CO. v. HARWAY DYEWOOD & EXTRACT MFG. CO. et al.

(Circuit Court, S. D. New York. July 19, 1904.)

1. PATENTS—INFRINGEMENT—PROCESS OF MAKING LOGWOOD EXTRACT.
   The Austen patent, No. 491,972, for an improvement in the art of making coloring matter from logwood, which covers a process and the resulting product, the process consisting of adding to logwood extract an alkaline nitrite in the presence of water, causing a reaction between them, and evaporating the product to dryness, when it is commonly ground and put up in the form of a dry powder, *held* not anticipated, valid, and infringed.

2. SAME.
   Where a defendant charged with infringement of a process patent admits that his product is the same, and that in making it the same materials are used and steps taken as called for by the patent, a mere denial that the process followed is the same, without disclosing the one claimed to be used, is insufficient to negative infringement.

In Equity. On final hearing.

Harold Binney and S. L. Moody, for complainant.
W. P. Preble, Jr., and John J. Gleason, for defendants.

COXE, Circuit Judge. This is an action in equity for the infringement of letters patent No. 491,972, granted to Peter T. Austen, February 14, 1893, for improvements in the art of making coloring matter from logwood. The specification says that prior to the patent the coloring matter extracted from logwood was made in the form of a paste, a liquid, or of the consistency of thick pitch. Each of these forms is open to many practical objections which are enumerated. The specification then proceeds as follows:

"My invention meets and overcomes all these objections, giving a stronger and purer color. It consists of a process for making a solid coloring matter from logwood which is not affected by the extremes of atmospheric temperature, and which can be made and will continue and can be used in the form of a dry powder similar to a coal tar dye, and which has the same advantages of stability, rapid solubility in water, which are possessed by many coal tar dyes, and which allow of the same facility and accuracy in determining the proper proportions required. Being much freer from tannin and resinous matters it affords a practical substitute for chip logwood, and avoids the labor, time and expense required in the use of logwood in the form of chips. To carry out my invention I heat ordinary liquid extract of logwood and mix with it sodium or potassium nitrites in the proportion of about five pounds of solid nitrite to each one hundred pounds of liquid extract of 51° Twaddle. The mixture is then stirred and evaporated to a point at which it becomes solid

and brittle on cooling. The method I have employed with most satisfaction is the following: I heat ordinary liquid extract of logwood of 51° Twaddle to about 140° of Fahrenheit, and add to it in successive portions an aqueous solution of potassium, or sodium nitrite, in the proportion given above, thoroughly mixing them and maintaining the temperature. A copious evolution of gas takes place, which is facilitated by stirring, or agitation. The heating is continued with frequent or continuous stirring until the evolution of gas has ceased, and the mixture is sufficiently evaporated to form a solid mass on cooling, which is sufficiently brittle to be ground into a powder, if so desired. A coloring matter is thus obtained in the form of a powder which appears black in shadow and purplish black in strong sunlight and is practically soluble in cold water and rapidly soluble in hot water, having the characteristics heretofore described. It may be dyed on wool by the same method as logwood, by mordanting the material in the usual manner with potassium bichromate and potassium bitartrate, but adding to the dyebath about twenty-five per cent. of the weight of the coloring matter of acetic acid. The color thus produced is much stronger and deeper than that produced by dyeing with equal quantities of logwood extract of 51° Twaddle.

"The above method of procedure is the best to me at present known. But, as heat and time are frequently convertible conditions in chemical reactions, I do not limit myself to the temperature, nor to the exact proportions above set forth; the essence of my discovery and invention being, that when logwood extracts are treated with nitrite of soda or potash under such conditions as to bring about a reaction between them, a new product may be produced having the characteristics hereinbefore set forth."

The patent contains three claims, two covering the process and one the product. They are as follows:

"(1) In the art of making logwood extract, the improvement which consists in adding to logwood extract an alkaline nitrite in the presence of water and causing a reaction between the nitrite and the extract, substantially as described.

"(2) In the art of making logwood extract, the improvement which consists in adding to logwood extract an alkaline nitrite in the presence of water, causing a reaction between the nitrite and the extract and evaporating the product to dryness, substantially as described.

"(3) As a new article of manufacture, a coloring matter derived from logwood extract by the incorporation therewith of an alkaline nitrite, and characterized by the fact of its being a friable solid, soluble in cold and rapidly soluble in hot water, substantially as described."

The defenses are lack of novelty and invention and noninfringement.

It should be remembered that the essence of the invention is that when logwood extracts are treated with nitrite of soda or potash, under such conditions as to bring about a reaction between them, a new product, consisting of a permanent dry powder, soluble in cold water and rapidly soluble in hot water, is produced in which the gummy matters are expelled or rendered nonhydroscopic. The objections to the coloring matter extracted from logwood, which was in use previous to the patent, are set out at length in the description and, so far as the proof shows, are stated with substantial accuracy. The court is unable to find from the present record that any one before Austen made the new coloring matter covered by the third claim or used the method of producing it covered by the first and second claims.

The principal witness to the so-called Oakes prior use is George Stiff, but his testimony is too indefinite and uncertain to overthrow the presumption arising from the patent. When he entered the employment of the Oakes Manufacturing Company he was only about 15 years of age. He had no previous knowledge of chemistry, having

entered the factory from a Canadian farm. It is quite improbable that an ignorant lad would be able to appreciate and recollect the details of a chemical experiment made 18 years before, and the court cannot resist the conclusion that his description of what took place in 1884 or 1885 has been colored, innocently no doubt, by expert knowledge since acquired. The other witnesses called in corroboration disagree with Stiff in many important details. Mr. Oakes, the president of the company, never heard of the particular experiment described by Stiff and as it was a costly one, involving the expenditure of at least $700, it is exceedingly improbable that it occurred without the knowledge of the president. Mr. Oakes testified that he made and sold a dry powder chemically produced from liquid logwood extract, but he declined to state the method employed, regarding it a secret of his business. He says that he has used nitrite of soda since 1884, but refuses to give any further information on the subject. No sample of the powder is produced and the witness is unable to give the name of any customer who purchased it from his company. If the patented process were ever produced in the Oakes factory it was by accident and when the investigation in hand was proceeding along different lines. Certainly the importance of the discovery was not understood or appreciated, assuming that it was made. But was it made? The most favorable answer the defendants can expect to this question is that it may have been, and the answer is fatal to their contention. Instead of proof they offer inference and presumption.

The foregoing remarks apply with even greater force to the experiments of Beach, which fall far short of establishing anticipation beyond a reasonable doubt. Beach is neither a chemist nor a manufacturer of logwood extract. His work was experimental and resulted in no lasting benefit. No sample is produced. The dye extracts with logwood as the base manufactured by Mucklow & Company, of Bury, England, of which samples were submitted to Beach & Company, were not made pursuant to the process of the patent; at least there is no proof that they were. In fact, so far as the foreign extract can be judged from these samples "it contained a highly concentrated and oxidized form of hæmatein," costing twice as much as the patented product and was not in competition therewith. The name given it by the English manufacturers was "powdered hæmatein."

The testimony regarding the powder imported by Sykes is even less satisfactory. A sample, imported in 1893 for exhibition at the Chicago Fair, was introduced in evidence and the defendants' expert is unable to say that it embodies the invention of the patent.

The record contains a number of prior patents and publications, most of them having only a very remote application to the present controversy. The defendants' expert witness was asked to point out in any of these documents a suggestion of the use of nitrite of soda in the presence of water for modifying the resinous and other attractive matters in a logwood extract, in addition to such effect as may occur upon the hæmatoxylin, and he answered as follows:

"I cannot point out where it is especially mentioned that the use of nitrite of soda in the presence of water will modify the resinous and other attractive matters in the logwood. * * * I may mention in this respect the Avery

patent, and this is absolutely the only piece of literature I can point out in this connection."

It will not be necessary, therefore, to examine the other patents and publications. The Avery patent, No. 320,526, was granted June 23, 1885, for "improvements in the preparation of liquors or extracts of logwood." The specification contains this statement: "The chlorates in this operation appear to be reduced to chlorides and the nitrates to nitrites." The expert understands from this that the organic matter in the extract and the acid naturally present in the extract reduce the nitrates to nitrites, but he made no careful examination of the extract after treatment with nitrate and cannot state definitely what nitrite is formed. The patent is not for a dry extract, but for a liquor used directly in the dyeing bath, the effect of the nitrites on the extract is not claimed and there is nothing to indicate that Avery knew of their action in destroying or modifying the extracted matters. If Avery knew of the Austen invention and was endeavoring to impart that information to the public his use of language was most unfortunate. It is thought that no chemist, however skillful, would be able to practice the Austen invention after reading the Avery patent. The defendants are charged with infringement in the manufacture and sale of powders, samples of which are marked in evidence as Exhibits N and P. The defendants' brief admits that "defendants' powder agrees with claim 3 of the patent * * * and many of the powders described in the prior art, in the well-known characteristics of being a friable solid, soluble in cold and rapidly soluble in hot water, and that it is derived from logwood extract. It is not, however, derived by the incorporation with the extract of an alkaline nitrite, although the nitrite of soda was used at one stage of the process." The defendants' contention seems to be that they escape infringement because the extract treated by them with nitrite is not ordinary but clarified, not a liquid but a paste, and because it is cured or fermented and by the previous addition of other ingredients its character has been substantially changed. In other words, they use the patented process, but add to and improve upon it. This is, in fact, admitted by the president of the defendant company, who was called as a witness by the complainant. He says:

"Q. Do you deny that you make logwood extract in making these powders? A. No. Q. Do you deny that you use a process which consists, among other things, in adding to the logwood extract an alkaline nitrite in the presence of water? A. I have answered that question that we did. Q. Do you deny that the addition of the alkaline nitrite causes a reaction between the nitrite and the extract? A. No. Q. Then what is there in the first claim, in any sense that you can give to it, which enables you to deny that you use the process therein mentioned, since you have just admitted that you do each one of the three phrases of that claim? A. That is not our process. Q. In your process you do other things in addition, do you not? A. Yes. Q. I ask you if you did what is mentioned in this claim without regard to additions? A. I have answered that, I think, in the affirmative. Q. Then the secret process which you are unwilling to disclose and which you say has differences does not lack any of the steps described in this patent but employs others which you refuse to tell about? A. Yes. Q. Do you deny that the process by which these powders 'P' and 'N' are made by your company employs a process which includes adding to logwood extract an alkaline nitrite, to wit, sodium nitrite in the presence of water, causing a reaction between the nitrite and the extract and evaporating

the product to dryness? A. We partly use it. Q. By the word 'partly' you mean you use it with additions which you refuse to disclose? A. Yes."

Further discussion is unnecessary. If there be any essential differences between the complainant's and the defendants' process the exact situation should be presented in order that the court may be able to form an intelligent judgment. All doubt would be removed if the secret process of the defendants were disclosed. Infringement seems clear and if the defendants can prove to the contrary they should do so. The mere assertion that their process is not that of the patent, without stating what their process is, does not meet the issue.

The complainant is entitled to the usual decree.

OEHRLE et al. v. WILLIAM H. HORSTMANN CO.

(Circuit Court, E. D. Pennsylvania. August 1, 1904.)

No. 40.

1. PATENTS—DESCRIPTIONS—FORMS—EXTENT.
   Where an inventor has placed his invention before the public in a form best fitted for practical use, and disclosed his conception of his invention, both in his description and in his claim, so as to accurately express his idea, he is entitled to the exclusive privilege of all other forms that can be embraced in the one claim, unless such other forms are disclaimed.

2. SAME—ORNAMENTAL ROPES—INFRINGEMENT.
   Patent No. 599,191, for an improvement in ornamental ropes or cords, issued to Franklin W. Oehrle, *held* not infringed.

In Equity.

Wm. C. Strawbridge, for complainants.
Henry N. Paul, Jr., and Joseph C. Fraley, for defendant.

HOLLAND, District Judge. Complainants' bill for a preliminary injunction alleges that the defendant has infringed both claims in letters patent granted to Franklin W. Oehrle for a certain new and useful improvement in ornamental ropes or cords, No. 599,191. Defendant admits manufacturing and selling two kinds of ornamental rope cords, slightly different from each other, which will hereafter be considered, of a construction, however, it claims identical with such ornamental cords as the specifications in the patent in question states to be old, excepting that, instead of one rope, two ropes are twisted together. The defense is (1) that the claims in suit are invalid and void by reason of being old, having both been previously patented and sold upon the market without patents, and consequently anticipated by the prior art; (2) that the defendant's two ornamental cords sold upon the market do not infringe any claim of the patent in suit.

The complainants claim that their improvement is "of great utility," and, "if protected against infringers, the said letters patent will be of great value to them, and that great profits will accrue to them therefrom." There is no allegation that these cords have been manufac-

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 241, 371.

tured by the complainants or any one else, and placed upon the market under the letters patent. There was, however, an ornamental cord offered in evidence by the complainants, which was before the court, which they claimed was made in accordance with their letters patent. This fact, however, was denied by the defendant.

In passing upon the controlling issue in this case, it will not be necessary to consider the question of anticipation, as, in the view I take of it, the defendant's ornamental cords offered in evidence do not infringe the claims of the complainants; and, in order that it may plainly appear what the complainants claim to have patented, we will take the description of their invention given by Mr. Livermore, an expert witness called by the complainants, together with the specifications, wherein a complete understanding of the objections and defects in the prior constructions are fully set forth, and the improvement claimed by the complainants accurately described:

"The invention of the patent in suit relates, as is stated in the specification, 'to a class of ornamental cords or ropes formed, as to their exteriors, of colored silk or other ornamental thread, and largely employed in the construction of portières and in the construction of curtains'; the object of the invention being 'to produce an ornamental rope or cord, of simple and inexpensive construction, but more ornamental in appearance than such devices as heretofore manufactured.' Referring first to what is, perhaps, the simplest form of this material, namely, that shown in Fig. 1, it comprises two strands or lengths of comparatively strong, flexible material, such as wire or twine, marked A and B in Fig. 1, which lie in the axis of the finished material, and constitute a core therefor, which is the part that affords the tensile strength of the completed material, as well as being the part that supports the ornamental exterior threads. The said ornamental thread is coiled in a close spiral around one of the core strands, B, as shown in Fig. 1, while the other of the core strands, A, lies along the exterior of the coil of ornamental threads, and the two core strands, being twisted one upon the other, hold the coils of the ornamental thread between them at one point in the periphery of each coil or turn, and at the same time give the entire coil of the ornamental thread a spiral or helical position around the core. There is thus formed an ornamental cord, the external diameter of which is approximately double the diameter of the coil of the ornamental thread, which ornamental thread does not contribute to the strength of the cord to resist longitudinal strain; that being only the strength that is afforded by the core strands. The modified form of this material shown in Fig. 3 is made by reducing the size of the coils of ornamental thread from point to point along the core, thus giving the resulting ornamental cord the appearance of being formed of portions of successively larger and smaller diameters. In the construction shown in Fig. 5, the ornamental thread, instead of being coiled around one of the core strands so that its successive coils or turns are secured in place between an external and internal core strand, is made into relatively larger coils, pinched together to give each coil substantially the form of a figure 8; both of the core strands being external to the coils of ornamental thread, and holding the middle or waist of each of the coils or turns of ornamental thread between them. In this construction the core strands are twisted together, and thus clamp the coils of ornamental thread between them, and at the same time give the said projecting coils the helical arrangement around the core; there being in this case two helices, one comprising the half coils of the ornamental thread projecting from one side of the core strands, and the other comprising the half coils projecting from the other side of the core strands. There is thus formed by any of these constructions an ornamental cord, comprising a central core, making a practically solid axis for the cord, which is surrounded by a helix made of loops or turns of ornamental thread. Such chenille cord constitutes, of itself, an ornamental cord, and has been used as such for decorative purposes, but is defective in certain respects, as set forth in the specification of the patent in suit, as fol-

lows: 'The structure thus formed, however, is less ornamental than it would otherwise be, by reason of the exposure to view of one of the strands, A, B, throughout the length of the rope, and further because said continuous spiral appears as a hollow or coreless spiral, or one not formed on a substantial core, and lacks the appearance of strength or durability.' The structure or article forming the subject of the patent, while comprising, as an essential component thereof, a cord of the construction above indicated, is characterized by having an additional strand of ornamental materials, called a 'filling strand,' arranged spirally or helically around the core in the space or spaces between the successive turns of the helix of ornamental thread connected to said core, as above described; the said filling strand thus covering the exposed core strand as it appears in the space or channel between the convolutions of the helically arranged ornamental thread, and at the same time wholly or partially filling the said channel, so as to give the finished article the appearance of greater solidity and strength. This is explained in the specification of the patent as follows, immediately after the matter above quoted, which points out the defects of the simple chenille cord made as shown in Fig. 1: 'I overcome both of these defects by providing an ornamental cord or group of cords or threads or tape, D, which I wind about the structure shown in Fig. 1, said threads or cords, which I term the 'filling strand,' passing spirally about the core of said rope, and between the spirals formed or described by the loop strand, C, with the result, as shown in Fig. 2, that the core is filled out, whereby the symmetry and the apparent strength of the completed cord is increased, and the core strands completely concealed. The helically arranged coils of ornamental threads are called in the patent the 'loop strand,' as each turn of the coil of ornamental thread forms a loop projecting laterally from the core, or, in the construction shown in Fig. 5, forms two loops, projecting laterally from opposite sides of the core, and the specification states that it 'will be understood that any desired number of strands, A, B, may be employed to form the core, and that any desired number and character of threads may be employed in the formation of the loop strand and filling strand, without departing from the spirit of my invention.' The various kinds of filling strands that may be employed are more fully set forth in the specification as follows: 'The ornamental filling strand, D, may, of course, be formed as a single body, or of a series of threads, or of a chenille cord, or in fact of any desired ornamental textile material.' Claim 1 of the patent is as follows: '(1) As an article of manufacture, an ornamental rope or cord composed of a core, consisting of a plurality of strands twisted together, and a series of loops of ornamental thread, engaged with the strands of the core, and spirally disposed with reference to the same, and an ornamental filling strand wound upon said core in the spiral space or spaces left between the projecting loops, substantially as set forth.' Claim 2 is as follows: 'As an article of manufacture, an ornamental rope or cord, composed of a core consisting of a plurality of strands twisted together, a tubular coil of ornamental threads passing spirally about and bound to said core by the engagement of one of the core strands within its hollow interior, and an ornamental filling strand wound upon said core in the space not occupied by the tubular coil, substantially as set forth.'"

It is clear from a consideration of the foregoing testimony of Mr. Livermore, and also from a consideration of the specifications of the patent itself, that the inventor did not intend to limit himself to the precise and exact form and construction of the filling strand illustrated in the drawings in the patent in suit. He states, "I describe two forms of convenient embodiment of my invention," indicating that other forms not illustrated might also embody it, and, further, "that the ornamental filling strand, D, may, of course, be formed as a single body, or of a series of threads, or of a chenille cord, or in fact of any desired ornamental textile material." Indeed, it was unnecessary for him to indicate his intention to claim all other forms of embodiment possible, as an inventor who places his invention before the public in a form best fitted for practical use, and both in his description and his

claim discloses his conception through that concrete instrument which most accurately expresses his idea, is entitled to the exclusive privilege of all other forms that can be embraced in the one claimed, unless they are disclaimed. In contemplation of law, after he has fully described his invention, and shown its principles, and claimed it in a form which perfectly embodies it, unless he disclaims other forms, he is deemed to claim every form in which his invention may be copied. Murphy v. Eastham, 5 Fish. Pat. Cas. 306, 17 Fed. Cas. 1034, No. 9,949; Winans v. Denmead, 15 How. 330, 14 L. Ed. 717; Grier v. Castle (C. C.) 17 Fed. 523. All equivalents are covered, whether the inventor thought of them or not. Burden v. Corning, 2 Fish. Pat. Cas. 477, 4 Fed. Cas. 701, No. 2,143. These rules have been observed by the courts in the construction of claims, but they do not warrant us in broadening such claims beyond what the inventor is entitled to, considering the prior art; and, in the case of patents for improvements, it is necessary to consider the state of the art. What is old, the public is entitled to use, and a claim couched in general terms must be restricted to such other forms and equivalents. The forms used in the prior art must be protected from inclusion. Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.

It will be observed that each of the claims refers broadly to an ornamental filling strand, without defining any particular form or construction of the strand. Upon referring to the specifications, we discover that the defect in the old ornamental cord is lack of substantial appearance and of strength and durability of core, and it is less ornamental. To overcome both these defects, the defendant conceived the idea of filling up the spaces between the ornamental loops with an "ornamental filling strand," which added to the apparent strength, durability, and substantiality of the core, and at the same time made the finished product more ornamental. Any kind of ornamental filling strand that can be used is fairly within the contemplation of complainants' claims, but it must be a "filling strand," and it may be made of a single thread, or a series of threads. One is the equivalent of the other. Or it may be a "chenille cord," but chenille cords are of various construction, and may be used so long as they are so constructed as to make a filling strand. Chenilles are frequently made in the shape of a soft, velvety cord, or of silk or worsted, and, no doubt, in this form it could be used as a filling strand; but I take it that it is essential that this filling strand should, when used, fill up the spaces between the ornamental groups of cords, as shown in figures 2, 4, and 5. The manufacture and sale of the article shown in figure 1, either as there represented, or in connection with a similar cord twisted together, is justified by the prior state of the art. The fact that one of such cords of the old ornamental rope is twisted with the other is not a duplication of the complainants' improvement, as it does not result in giving an appearance of additional strength, durability, and substantiality to the core of the finished product. The defendant's product is precisely the rope shown in figure 1, except that, in order to produce two-colored effects and to increase the compactness of the ornamental loops, two of these old constructions, represented in figure 1, are twisted together. This does not, however, increase the apparent strength and substantiality of the core,

because, where it can be seen between the loops, its lack of strength is apparent; the only difference being that there are four core strands in the defendant's product, instead of two, as in the old, represented by figure 1. And the difficulty with which we are met, and which was not removed even by a suggestion from the complainants in their contention that their patent is infringed by the structure of the defendant, is that they are unable to point out which of the two cords twisted together is the offending member of the defendant's product, or the one that takes the place of the "ornamental filling strand" in the complainants' patent. From the claims we learn there are three important members of complainants' improved ornamental cord, to wit, "plurality of strands twisted together" (or the core), "a series of loops of ornamental threads" (or the ornamental lateral loops), and "an ornamental filling strand."

Complainants' expert, Mr. Livermore, admits his inability to state which of the cords twisted together by the defendant is the "filling strand," and which the "plurality of strands twisted together," forming the core; but says that either of the constituent parts of the defendant's product can be regarded as the equivalent of either the "plurality of strands twisted together," or the "ornamental filling strand" of the complainants' product. In other words, their expert being unable to decide and point out and positively identify the element of the defendant's product which infringes upon the claim of the complainants, the court is left to guess as to which is the old and which the new, which is to take the place and act as an equivalent for the ornamental filling thread of the complainants.

In addition to the reasons already given, without entering into an elaborate consideration of the prior art, we will add that the testimony and exhibits show that the defendant was clearly within its rights to manufacture and sell this kind of ornamental cord, as it is old and long known to the trade, and this appears from previous patents and exhibits offered by the defendant.

Let a decree be drawn dismissing the bill, with costs.

INTERNATIONAL WIRELESS TELEGRAPH CO v. FESSENDEN. (No. 1.)

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

1. PATENTS—SUIT FOR INFRINGEMENT—JURISDICTION.
A court is without jurisdiction of a suit for infringement of a patent where the bill shows that defendant is a nonresident of the district, and it is not alleged that any act of infringement was committed within the district, or that defendant has an office or place of business within the district, with an agent in charge on whom service could properly be made.

In Equity. Suit for infringement of patent. On motion to dismiss for want of jurisdiction, and motion for costs to defendant on dismissal.

T. J. Johnston, for the motion.
E. B. Leaming and W. S. Darnell, for plaintiff.

¶ 1. See Patents, vol. 38, Cent. Dig. § 466.

KIRKPATRICK, District Judge. This bill is filed by the complainant, who states it is a citizen of New Jersey, against the defendant, who is described as a citizen of Virginia, for an alleged infringement of a patent of the United States. The Revised Statutes (U. S. Comp. St. 1901, pp. 588, 589) make provision for the service of process in such cases as follows:

"That in suits brought for the infringement of letters patent the Circuit Court shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established business, service of process, summons or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

The object of the law, doubtless, is to afford a forum in which injuries sustained by the infringement of letters patent may be redressed not only at the place at which the infringer may reside, but where he has a place of business and commits the infringing acts complained of. The defendant's place of business in the district must be a regular and a substantial one, actually conducted by an agent in charge. Service upon such agent is sufficient to compel the defendant's appearance in court to answer the complaint; but the agent in charge of such business must be one who stands in a representative capacity to the defendant, so that he may be properly held, in law, an agent to receive such process in the defendant's behalf. There are many cases sustaining this principle, the latest being Connecticut Mutual Insurance Company v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. The return of the marshal in this case is as follows:

"The within subpœna ad respondendum served on the defendant, Reginald A. Fessenden, at Bayonne, in the District of New Jersey, on the 5th day of October, 1903, by delivery to and leaving with William Cole, who is in charge of defendant's plant, personally a copy thereof, and at the same time informing him of its contents."

It does not appear that the defendant had a regular and established place of business in the district, or that Cole, upon whom the process was served, was in any sense the agent of the defendant conducting such business. The return says he (Cole) was in charge of the defendant's plant, but fails to state whether in the "plant" any kind of business was being conducted. The service of the writ not being in conformity with the statute, the return should be quashed.

The bill is defective in that, after showing that the defendant is a nonresident of the district, it fails to state any jurisdictional facts. It does not allege the commission of any act of infringement within the district, or that the defendant has an office or place of business within the district, with an agent in charge, engaged in conducting such business, upon whom service could properly be made. The jurisdiction of the court must appear in the pleadings, "and the presumption is that a cause is without the jurisdiction of the court unless the contrary affirmatively appears." Grace v. American Central Insurance Co., 109 U. S. 283, 3 Sup. Ct. 207, 27 L. Ed. 932. The defendant has entered a special appearance for the purpose of raising the question of the

jurisdiction of the court in accordance with the practice approved in United States v. American Bell Telephone Company (C. C.) 29 Fed. 17.

In accordance with the views expressed in the above case, and for the reasons above given, I am of opinion that the bill should be dismissed.

INTERNATIONAL WIRELESS TELEGRAPH CO. v. FESSENDEN. (No. 2.)

(Circuit Court, D. New Jersey. August 16, 1904.)

1. PATENTS—DISMISSAL FOR WANT OF JURISDICTION—COSTS.
Where a bill for infringement is dismissed for want of jurisdiction, costs cannot be awarded to defendant.

On Motion for Costs to Defendant on Dismissal of Bill.

T. J. Johnston, for the motion.
E. B. Leaming and W. S. Darnell, opposed.

ARCHBALD, District Judge.[1] The opinion of Judge Kirkpatrick (now deceased) discloses that the bill was directed to be dismissed not so much on the ground that the subpœna had not been properly served —which possibly could be cured, and as to which the conclusion simply was that the return of the marshal should be quashed—but on the ground that, although brought against one who, on the face of the pleadings, was admittedly a nonresident of the district, it failed to state the necessary facts to give jurisdiction in such cases. Act March 3, 1897, c. 395, 29 Stat. 695 [U. S. Comp. St. 1901, p. 589]. It was not alleged, for instance, that any act of infringement had been committed within the district, nor that the defendant had a regular and established place of business there, with an agent in charge upon whom service could properly be made. In other words, the case, as stated in the bill, was one over which the court had no jurisdiction; and, if so, it is not one in which costs can be awarded. Citizens' Bank of Louisiana v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451.

The motion for costs to the defendant is refused.

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

1 Specially assigned.

WESTON ELECTRICAL INSTRUMENT CO. v. EMPIRE ELECTRICAL INSTRUMENT CO.

(Circuit Court, S. D. New York. July 12, 1904.)

1. PATENTS—INFRINGEMENT—ELECTRICAL MEASURING APPARATUS.

Infringement of the Weston patent, No. 392,387, for an apparatus for measuring electrical currents of any size—as well those in multiple-arc, in amperes, as full currents, in volts—is not prevented by the fact that such apparatus is described in patent No. 392,386, issued at the same time to the same patentee, for means for dividing a current in definite parts, and measuring one part in amperes by such apparatus, although the alleged infringing instrument is one for measuring in amperes in multiple-arc; the two patents being for different things. Such patent *held* infringed on motion for preliminary injunction.

In Equity. Suit for infringement of letters patent No. 392,387, for an electrical measuring apparatus, granted to Edward Weston November 6, 1888. On motion for preliminary injunction.

William Houston Kenyon, for plaintiff.

C. A. L. Massie and Philip Mauro, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 392,387, dated November 6, 1888, and granted to Edward Weston, for an electrical measuring apparatus, which has been sustained by a decree of this court on final hearing in Weston Electrical Instrument Co. v. Jewell Electrical Instrument Co. (March, 1904) 128 Fed. 939. It has been heard on a motion for a preliminary injunction.

The differences between the defendant's instruments and those of the patent are formal, and not functional. The parts are different in shape, but they measure currents of electricity by the same means, in the same arrangement, and in the same way. That they infringe is not, and cannot well be, much disputed. But at the same time the inventor took out patent No. 392,386, for means by electrical resistance in multiple-arc circuit of dividing the current into definite parts, and measuring one of them in amperes by the apparatus of this patent, which is described in that; and the existence of that patent outstanding and not sued upon is claimed, as is understood, to shield everything covered by it from liability in a suit upon this patent, and that, as no infringement but by instruments for measuring by amperes in multiple-arc circuit before this suit is shown, no basis for an injunction is made out. The apparatus of this patent will, when properly adjusted, measure currents of any size—as well those in multiple-arc, in amperes, as full currents, in volts; and, although measurement in volts is mentioned in the specification and in some of the claims, the patent is not, except as to those claims, limited to measurement of a current in main circuit by volts. The other patent has four claims, each of which is for, in some form, the combination of the electrical resistance in multiple-arc circuit with other parts of the apparatus. One patent seems, therefore, to be for the means for dividing a current into definite parts, to be measured by measuring one part, and the other patent to be for the measuring any current, whether whole or fractional. The former would be infringed only by the fractional

means, but the latter would be by the means of either whole or fractional measurement. As the patents were simultaneous, there was no abandonment of what was covered in either by description in the other, and no priority in either to prevent a grant by the other, if both in any parts covered the same thing, but they do not appear to. Each patent is for a separate invention, and was necessary to secure to the inventor what it covered, and neither affords any excuse for infringing the other.

Motion granted.

AMERICAN ELECTRICAL NOVELTY & MFG. CO. v. HOWARD ELECTRICAL NOVELTY CO.

SAME v. STEIN & LANGLOS ELECTRIC MFG. CO.

(Circuit Court, S. D. New York. June 25, 1904.)

1. PATENTS—INVENTION—ELECTRIC HAND LAMP.
   The Misell patent, No. 617,592, for an electrical hand lamp, claims 1, 2, and 4, *held* void for lack of invention.

2. SAME—ELECTRIC BATTERY.
   The Hoggson patent, No. 520,429, for an electric battery, *held* void for lack of patentable invention.

In Equity. Suit for infringement of letters patent No. 520,429, for an electric battery, granted to S. H. Hoggson May 29, 1894, and No. 617,592, for an electrical hand lamp, granted to David Misell January 10, 1899. On final hearing.

Briesen & Knauth (Arthur v. Briesen and Hans v. Briesen, of counsel), for complainant.

John T. Booth (N. L. Frothingham and Edward S. Beach, of counsel), for defendants.

HOLT, District Judge. In my opinion, the decisions of Judge Coxe in the American Electrical Novelty & Manufacturing Co. v. Newgold (C. C.) 108 Fed. 957, and of the Circuit Court of Appeals in the same case on appeal (113 Fed. 877, 51 C. C. A. 501), are decisive of this case. It was held in the Newgold Case that claim 3 of the Misell patent was void for lack of patentable invention, in view of the prior art. I cannot see that anything is included in claims 1, 2, and 4 of the Misell patent which is not included in claim 3, and I think that the Hoggson patent is void for the same reason as the Misell patent. It is stated in Judge Coxe's opinion in the Newgold Case that the complainant was licensed under the Hoggson patent, and its batteries constructed in accordance with its terms. Page 960, 108 Fed. The electric batteries described in the Hoggson patent seem to me to be merely the result of a combination of previous electrical devices, fully disclosed by the state of the prior art, as shown in the patents of Roovers, Levi, and Van Horvath, the combination of which by Hoggson in the manner described in his patent did not amount to a patentable invention.

My conclusion is that the bill should be dismissed, with costs.

Ex parte FOLSOM et al.

FOLSOM v. NINETY-SIX TP. et al.

(Circuit Court, D. South Carolina. July 28, 1904.)

1. RAILROAD—ISSUANCE OF BONDS—STATE STATUTES—CONSTITUTIONALITY—OBLIGATION OF CONTRACTS—IMPAIRMENT.

Act S. C. 1882 (18 St. at Large, p. 216), chartering the G. & P. R. R. Co., authorized townships interested in such construction to subscribe for stock and issue bonds in payment therefor, and section 9 (page 217) thereof provided for the payment of interest on such bonds by authorizing the county auditor to assess and the county treasurer to collect such tax on the property of the township as should be necessary to pay such interest. By Act S. C. 1885 (19 St. at Large, p. 240) the former act was amended so as to provide that all counties and the townships in such counties along the line of such railroad or interested in its construction were created bodies politic and corporate, with necessary powers to carry out the provisions of the act, and subject to all liabilities growing out of the same, and the county commissioners of the respective counties were declared the corporate agents of the counties and townships so incorporated and situated within the limits of such counties. By constitutional amendment (23 St. at Large S. C. p. 1227), the state Constitution of 1895, art. 7, § 11, providing that the several townships of the state should constitute a body politic and corporate, etc., was amended so as to provide that such section should not apply to certain townships which had issued bonds in payment of stock in the railroad under the acts of 1882 and 1885, and that "the corporate existence of such townships be and the same is hereby destroyed and all officers of such townships are abolished and all corporate agents removed." *Held*, that such constitutional amendment was intended to impair the means provided by law for the payment of the bonds so issued, and to that extent was obnoxious to Const. U. S. art. 1, § 10, as impairing the obligation of contracts.

2. SAME—CONSTRUCTION.

Since the county auditor and treasurer, authorized by Act S. C. 1882 (18 St. at Large, p. 216) to levy and collect the tax for the payment of such bonds, were not officers or agents of the townships issuing the bonds in any sense, and the acts they were empowered to perform could be legally done independent of the corporate existence of the township, the abolition of the corporate existence of a township which had been organized as a corporation only for the purposes of the act did not deprive such officers of authority to levy the tax to pay such bonds issued by it.

3. SAME—BOUNDARIES OF TOWNSHIP—ALTERATION—EFFECT.

The fact that after the issuance of bonds under such acts the township issuing the same became a part of another county by means of a change in the boundaries of certain counties was immaterial, since the township's obligation to pay the bonds attached to the territory included in the township which issued the bonds, and passed with such territory into the county to which it was added.

At Law.

Shields, Cates & Montcastle and H. J. Haynsworth, for petitioners.
J. B. Pork and F. B. Grier, for respondents.

PRITCHARD, Circuit Judge. This is an application for a writ of mandamus to compel the auditor and treasurer of the county of Greenwood to assess and collect a judgment recovered against the township of Nintey-Six for certain bonds issued by it in aid of a railroad company. By an act of 1882 the Legislature of South Carolina chartered

the Greenville & Port Royal Railroad Company. Sections 6 and 8 of this act authorized cities, towns, townships, and counties interested in the construction of railroads to subscribe to the capital stock of said railroad company, and to issue bonds in payment thereof. 18 St. at Large S. C. pp. 216, 217. Section 9, as a means of paying the bonds, provided as follows:

"That for the payment of interest on such bonds as may be issued by the said counties, cities, towns or townships, the county auditor or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of such city, town, county or township such per centum as may be necessary to pay said interest of said sum of money subscribed, which shall be known and styled in the tax book as said railroad tax, which shall be collected by the treasurer under the same regulations as are provided by law for the collection of taxes in any counties, cities, towns or townships so subscribing and which shall be paid over by the said treasurer to the holders of said bonds as the said interest shall become due, on presentation of the coupons, which said coupons shall be reported to the county commissioners by the said treasurer, or to the council of any city or town where there are coupons from bonds of such city, or town, and all said coupons shall be cancelled by the county treasurer as soon as they are paid by them." Page 217.

In 1885, an amendatory act was passed in which the name of the railroad company was changed, and other alterations and changes were made, which do not concern the question at issue in this case. This act also amended the act of 1882 by adding the following provision to section 9:

"That for the purpose of this act, all the counties and the townships in said counties, along the line of the said railroad, or which are interested in the construction as herein provided for, shall be, and they are hereby declared to be bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this act, and shall have all the rights and be subject to all the liabilities in respect to any rights or causes of action growing out of the provisions of this act, the county commissioners of the respective counties are declared to be the corporate agents of the counties or townships so incorporated and situate within the limits of the said counties." 19 St. at Large S. C. p. 240.

This provision designates the county commissioners of the respective counties as the corporate agents of the counties and townships so incorporated, and clothes them with power to issue bonds in such amounts as may be authorized by the voters of the respective territories in the manner therein prescribed. In accordance with the provisions of this section, the people of the township, at an election held for that purpose, declared in favor of the issue of bonds in aid of the construction of the railroad, and the county commissioners of Abbeville county, in the spring of 1886, under the authority conferred upon them by the Legislature, issued the bonds of the township in the amounts stated in the petition. These bonds were sold to innocent purchasers for value, and for two years the taxes were regularly assessed and collected, and the interest upon the bonds was promptly paid. In November, 1888, the Supreme Court of South Carolina, in the case of Floyd v. Perrin, reported in 30 S. C., at page 1, 8 S. E. 14, 2 L. R. A. 242, held that under the statutes of 1882 and 1885 the township of Ninety-Six was created a corporation, but without any corporate purpose, and that the section of the act which undertook to authorize the issue of bonds was uncon-

stitutional, and the township bonds were invalid. For 10 years prior to this decision a number of similar acts had been passed by the Legislature of the state in pursuance of which township bonds were issued in aid of railroads, and placed upon the market, and until the decision in the case supra there had been no question or doubt as to the validity of these bonds. At the next session of the Legislature an act was passed declaring that, when the railroad had been completed through the township, the township bonds issued in aid thereof should be paid by taxation as provided in the original act. 20 St. at Large S. C. p. 12. This statute was held to be constitutional, and that a mandamus could be issued by that court to compel the collection of this tax. State v. Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; State v. Harper, 30 S. C. 586, 9 S. E. 664; State v. Neely, 30 S. C. 587, 9 S. E. 664, 3 L. R. A. 672. The decisions in these cases practically settled the question in so far as the townships were concerned through which the railroad had been completed, and the interest was paid without further contest. On the other hand, the bonds of the townships through which the railroad had not been completed were not paid. On the 10th day of February, 1893, George W. Folsom brought suit against township Ninety-Six upon certain coupons clipped from its bonds. A demurrer was filed in behalf of the township, and Judge Simonton, in an opinion dated December 27, 1893, sustained the demurrer and dismissed the complaint. This case was carried to the Circuit Court of Appeals, and that court certified certain questions of law to the Supreme Court of the United States. The Supreme Court, in the fall of 1885, rendered a decision, which is reported in 159 U. S., at page 611, 16 Sup. Ct. 174, 40 L. Ed. 278, in which it is held that the decision in Floyd v. Perrin, having been rendered subsequently to the issue of the bonds in question, was not binding on the federal courts, and, considering the question upon its merits, the court held the statute was constitutional, and the bonds were valid, unless there was some other defense. The demurrer was overruled, and the defendant was allowed to file an answer. When the case came on for trial in the Circuit Court it resulted in a verdict for the plaintiff. The case was carried to the Circuit Court of Appeals, and the judgment below was affirmed. Ninety-Six Township v. Folsom, 30 C. C. A. 657, 87 Fed. 304. In the meantime other cases had been instituted against various townships, and judgment was obtained against the township in each case. A writ of error was sued out in one of them, and the judgment below was affirmed. Dunklin Township v. Wells, 31 C. C. A. 593, 87 Fed. 1004. These decisions terminated the litigation of this class of cases on the merits. In 1897 and 1899 acts were passed by the Legislature forbidding township commissioners, county commissioners, and all other officers from assessing any tax to pay these bonds, and forbidding the county treasurer and all other officers from collecting such tax. 22 St. at Large S. C. p. 534; 23 St. at Large S. C. p. 78. After these statutes were enacted, the auditor and treasurer declined to levy and collect the taxes as required by the statutes of 1882 and 1885, and the plaintiff in one of the cases filed a petition for a writ of mandamus. Judge Simonton, who delivered the opinion in Hicks v. Cleveland, 45 C. C. A. 429, 106 Fed. 459, among other things, said:

"The purpose of the General Assembly in passing the act to amend the charter of the Greenville & Port Royal Railroad Company, approved December 24, 1885 (19 St. at Large S. C. p. 237), was to promote the construction of that road. To accomplish this, it authorized and encouraged townships along the proposed line of road to subscribe bonds towards this construction. In order to give character and credit to these bonds, and to induce the public to invest in them, the ninth section of the act provides a careful, full, and sure mode of providing for the interest. And an amendment to the same charter, made in 1887, provided (19 St. at Large S. C. p. 921) in the same way for the payment of the principal by taxation. These provisions of the act went into and formed a part of the contract moving to the bondholders, who invested their money trusting to the provisions. The contract could not be impaired by any subsequent act on the part of the state of South Carolina."

In this opinion Judge Simonton held that the acts of the Legislature which undertook to prevent the collection of the taxes in accordance with the provisions of section 9 of the acts of 1882 and 1885 were unconstitutional, and the judgment of the lower court directing the issuance of the writ of mandamus was affirmed. In the fall of 1891 an application was filed in the Supreme Court of South Carolina in behalf of certain taxpayers in the township of Dunklin, in which that court was asked to enjoin the county auditor and treasurer from levying and collecting the tax to pay the judgment which had been rendered. That court, on the 16th day of April, 1892, rendered its decision, in which it was held that a mandamus was in the nature of an execution to enforce a judgment of the federal court, and, among other things, it declared this "was an end of the argument, as it cannot be contended that a state court can enjoin any process of a federal court." McCullough v. Hicks, 63 S. C. 542, 41 S. E. 761.

Section 11 of article 7 of the Constitution of 1895 provided:

"Each of the several townships of this state, with names and boundaries as now established by law, shall constitute a body politic and corporate, but this act shall not prevent the General Assembly from organizing other townships or changing the boundaries of those already established; and the General Assembly may provide such system of township government as it shall think proper in any and all the counties, and may make special provision for municipal government and for the protection of chartered rights and powers of municipalities."

The following amendment to this section was proposed by a concurrent resolution of the Legislature of February 28, 1902:

"That this section shall not apply to the following townships in the following counties: Dunklin and Oaklawn in the county of Greenville; the townships of Cokesbury, Ninety Six and Cooper in the county of Greenwood; Sullivan in the county of Laurens; Huitt and Pine Grove in the county of Saluda. The corporate existence of the said townships be, and the same is hereby destroyed, and all officers in said townships are abolished and all corporate agents removed." 23 St. at Large S. C. p. 1227.

This amendment was voted upon favorably at a general election held in November, 1902, and in February, 1903, was adopted by the General Assembly by a concurrent resolution. Thus it became a part of the Constitution of South Carolina.

The petition upon which the writ of mandamus is based is as follows:

"That George W. Folsom, the plaintiff in the above-entitled cause, was a citizen and resident of the state of Tennessee, and the defendant a territorial division of the state of South Carolina, situate formerly in the county of Ab-

beville, but now included within the county of Greenwood under and by virtue of the laws of said state, and was incorporated under an act of the General Assembly entitled 'An act to charter the Greenville & Port Royal Railroad Company,' approved December 23, 1882, amended on December 24, 1885, by an act entitled 'An act to amend an act entitled "An act to charter the Greenville & Port Royal Railroad Company." '

"That on February 10, 1893, the said George W. Folsom brought his action in this honorable court, entitled 'George W. Folsom v. Township of Ninety-Six in the County of Abbeville, S. C.,' alleging, among other things, that the defendant, through its corporate agents, had, on March 25, 1886, duly executed and issued bonds of said township aggregating twenty-eight thousand dollars, with attached interest coupons at the rate of seven per cent. per annum, and of the denominations specified in said bonds, and that said George W. Folsom had purchased certain of said past-due coupons clipped therefrom, amounting in the aggregate to the sum of five thousand one hundred and ten dollars, being specifically set forth in said complaint, and alleging that no part of said coupons had been paid, and that defendant and its agents had refused and neglected to collect said taxes for the payment of said coupons and interest, and demanding judgment to the amount of said coupons, together with interest thereon, and for the cost of said action, and for the issue of a writ of mandamus directed to the proper officers to levy and collect taxes to pay said coupons.

"That, said action being pending, a verdict was rendered in favor of the plaintiff for the sum of seven thousand one hundred and eighteen and $^{78}/_{100}$ dollars and for one hundred ninety-three and $^{15}/_{100}$ dollars on August 14, 1896. The judgment was duly entered thereon and execution issued on August 28, 1896, and the same was lodged in the office of the marshal for said district, but said execution has been returned wholly unsatisfied, and no part of the said judgment has been paid, and the full amount is now due and payable.

"That by the act of the Legislature under which said bonds were issued it was provided: 'Sec. 9. That for the payment of the interest on such bonds as may be issued by said counties, cities, towns, or townships, the county auditor or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of the said county, city, town or township, such per centum as may be necessary to pay the said interest of said sum of money subscribed, which shall be known and styled in the tax books as said railroad tax, which shall be collected by the treasurer under the same regulations as are provided by law for the collection of taxes in any of the counties, cities, towns or townships so subscribing, and which shall be paid over by the treasurer to the holders of said bonds as the said interest shall become due on presentation of the coupons,' etc. 19 St. at Large S. C. p. 240.

"That at the time of the execution of the said bonds said township was situate in Abbeville county, but that thereafter, to wit, in the year 1896, the county of Greenwood was organized, in pursuance of the laws of said state, out of portions of Abbeville and Edgefield counties, and the township of Ninety-Six was included in the county of Greenwood.

"That demand has been made upon the proper officers of Greenwood county to assess and collect taxes for the payment of said judgment, but said officers have neglected and failed to make such assessment.

"That since said bonds have been executed the Legislature of said state has passed several acts forbidding under heavy penalty the levy and collection of taxes for the payment of said township bonds.

"That said acts are in violation of section 10 of article 1 of the Constitution of the United States of America, but the officers charged with the duty of levying and collecting taxes to pay said bonds have obeyed the mandate in said acts, and have failed to assess or collect taxes. That petitioner is advised and believes that any further effort to procure voluntary action on the part of said officers would be idle, and without effect. That the auditor for Greenwood county is T. A. Graham, and the treasurer of said county is J. A. Marshall.

"That petitioners are now the owners of said judgment, and all moneys due thereon are payable to them.

"Wherefore your petitioners pray:

"(1) That a writ of mandamus be issued directed to said auditor and said treasurer directing and demanding the said auditor to assess upon all property

of said township a sufficient per centum to pay said judgment, with costs, and commanding the treasurer of said county to collect the taxes so assessed, and pay over the same upon the said judgment until the same be wholly satisfied.

"(2) For the costs of this proceeding, and for such other and further relief as in the premises may be just."

The auditor and treasurer of Greenwood county, for their return to the rule to show cause, submit the following answer:

"T. A. Graham, as auditor of the county of Greenwood, and J. A. Marshall, as treasurer for the same county, for return to the rule to show cause why the writ of mandamus should not issue requiring these respondents respectively to assess and collect a tax as prayed for by the petition in the cause why such a writ should not issue before this court, respectfully show:

"(1) That the respondents admit the allegations of paragraph one except the allegations thereof which allege that Ninety-Six township is a subdivision of the state of South Carolina, and is now included in Greenwood county, which allegation is denied.

"(2) That respondents deny any knowledge or information sufficient to form a belief as to the matters contained in paragraph two of the said petition.

"(3) That neither of said respondents have knowledge or information to form a belief as to the allegations of paragraph three of the said petition, and deny any knowledge or information sufficient to form a belief as to the allegations of said paragraph three, and require strict proof of the same.

"(4) Respondents admit the allegations of paragraph four of the petition.

"(5) Respondents admit the allegations of paragraph five, except that they allege that Greenwood was formed in 1897 under the provisions of the Constitution of 1895.

"(6) Respondent T. A. Graham admits demand upon him to assess said tax, and that he refused to do so, and alleges that he had no power so to do.

"(7) Respondents admit the allegations of paragraph seven of the petition.

"(8) Respondents admit the allegations of paragraph eight of the petition, except the allegations that allege that said acts are in violation of the Constitution of the United States of America, which allegation is denied.

"(9) That these respondents further show and submit that neither of them is an officer of the county of Greenwood, nor the agent, under the law of the state of South Carolina, of either the holders of township bonds or the townships themselves. They are officers of the state of South Carolina, appointed by the Governor of the said state under the provisions of law, and, although termed county officers, are so styled because assigned to duty in that county; and they therefore submit they cannot exercise any function of these respective officers except as authorized by the laws of the said state.

"(10) That the General Assembly of the said state, by its act approved on ——— day of ———, 190–, and now of force, has forbidden the respondents and all other like officers to assess or collect a tax for the payment of subscriptions by townships to the building of railroads which have not been built.

"(11) That the railroad, for the building and construction of which the bonds alleged in the said petition to have been issued, has not been built.

"(12) That the township of Ninety-Six, described in the said petition, does not exist as a corporation, because by an amendment of the Constitution of the state of South Carolina voted by the people in the year 1902, and adopted by the General Assembly of the said state in the year 1903, the corporate existence of the said township was destroyed, and all officers in said township abolished, and all corporate agents removed long prior to the petition herein.

"(13) That the said township of Ninety-Six never owned any property whatever; that it never had any officers or agents of its affairs with the single exception that the county commissioners of the county of Abbeville were authorized to hold an election for the subscription of bonds described in the petition, and to issue bonds for the amount to be subscribed.

"(14) That respondents are officers under and by virtue of the provisions of the Constitution of 1895 and the law pursuant thereto, which fixes and determines their duties and power, and under the terms and provisions of the said Constitution and the acts of the Legislature pursuant thereto these respondents are without power to levy or collect any tax for the purpose set out

in the said petition, and are forbidden by the express terms of the said Constitution from so doing, under which said Constitution they hold their appointment as officers of the state of South Carolina; that these respondents are required to give a heavy bond conditioned to faithfully discharge and perform the duties of their office in accordance with the requirements of the law of their appointment, which prohibits and forbids doing the acts mentioned in the petition herein.

"(15) The respondents further submit that section 9 of the act incorporating Ninety-Six township does not make it the duty of the county auditor and county treasurer to assess and collect any tax whatever. It provides in plain terms that the said auditor and treasurer shall be authorized and required to assess and collect a certain tax mentioned therein on the property owned by the township, and it makes no provision whatever for an assessment of the property or fixing the valuation for taxation of any property within the said territory and could not so provide, this matter being regulated and fixed by the Constitution of 1868, which makes it incumbent on the Legislature to provide a regular way applicable alike to all counties for said purpose.

"(16) That at the time the bonds and coupons mentioned in the petition herein are alleged to have been issued the township of Ninety-Six was a territorial subdivision of the county of Abbeville, and whatever duty was imposed on the county auditor and treasurer had reference entirely to those officers acting for Abbeville county, and Abbeville county is still in existence, and still has a county auditor and county treasurer; that the respondents are the county auditor and county treasurer, respectively, for Greenwood county, which was formed under the provisions of the Constitution of 1895 and acts of the Legislature of 1897, and they are not officers or agents of Ninety-Six township for any purpose whatever, and are not officers or agents of the holders of the said bonds or judgment mentioned in the petition, and have no desire to act as such officers or agents; that they can and do exercise the duties of county auditor and county treasurer, respectively, in compliance with the law of the state under which they were appointed and commissioned, without reference to any duty or obligation of what was known as Ninety-Six township as a township, and in accepting the office of county auditor and county treasurer they did so under the laws then in existence and of force and afterwards to be enacted, fixing their duties and defining their power, and not as officers or agents of the said township, which position each of them declines to accept and exercise.

"Wherefore, because it is doubtful that the petitioner ever obtained the alleged judgment, and because it is impossible for the respondents to determine what property is subject to taxation on account of the demand alleged to be in judgment, and because the respondents do not possess or control any property ever belonging to the said township, and because the said county of Greenwood never succeeded to any right of property of the said township, and because the collection of the taxes prayed for is beyond the scope of authority and duty of the respondents, and because the said respondents cannot, under the law of their appointment, comply with the writ without violating their oath of office and the law appointing them, and because the township of Ninety-Six has no corporate existence, agents, or officers, and for the other good and sufficient reasons shown herein, they pray that the said rule be discharged."

From an examination of the record it will be seen that every question in this litigation from its inception has been settled by former adjudications, except such questions as may have arisen by virtue of the constitutional amendment which was adopted in 1903. Such being the case, we are to consider, first, the question whether the legal entity of the township of Ninety-Six has been abolished; second, and, if it shall appear that the corporate existence of the township has been abolished, what is the effect of the acts of 1882 and 1885, which provide the means for the assessment and collection of the taxes to pay the interest and principal of the bonds? The language of the statute of 1885 is so plain and direct that there can be no question as to its meaning. It provides in plain and unmistakable terms the means as well as the mode of pro-

cedure by which the taxes in question are to be assessed and collected. The county auditor and treasurer are designated by the Legislature as the instrumentalities by which the bondholders are to be afforded a remedy. Its provisions which relate to the assessment and collection of the tax are a part of the conditions of the contract which induced the bondholders to invest their money, and cannot be destroyed by any legislative acts passed subsequent to the issue of the bonds in pursuance of former acts of the Legislature. "By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement." Nelson v. Police Jury of St. Martin's Parish, 111 U. S. 720, 4 Sup. Ct. 648, 28 L. Ed. 574. "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it." Louisiana v. New Orleans, 102 U. S. 206, 26 L. Ed. 132. It cannot be doubted that the constitutional amendment of 1903 was intended to impair the means provided by law for the payment of these bonds. To this extent it is obnoxious to article 1, § 10, of the Constitution of the United States.

Mr. Justice Swayne, in delivering the opinion of the court in Walker v. Whitehead, 16 Wall. 317, 21 L. Ed. 357, said:

"The Constitution of the United States declares that no state shall pass any 'law impairing the obligations of contracts.' These propositions may be considered consequent axioms in our jurisprudence: The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the Constitution against impairment. The obligation of a contract 'is the law which binds the parties to perform their agreement.' Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution. The states may change the remedy, provided that no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guaranty of the Constitution gives it protection to that extent. The effect of these propositions upon the judgment before us requires but a single remark. A clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur."

The attempt to abolish the township and destroy the machinery for taxation, and to transfer the territory to another county, is a direct attack upon the remedy which is given the petitioner by the acts which authorized the issuance of the bonds, and the fact that the attempt is made by constitutional enactment does not give it any additional force.

The provisions of the acts of 1882 and 1885 which relate to the assessment and collection of taxes are a part of the conditions of the contract which induced the bondholders to invest their money, and this contract cannot be impaired. The authority for an annual tax for the payment of the bonds being granted by the Legislature at the time of the issuance of the same, cannot be revoked by the Legislature, unless

some other remedy equally as efficacious is provided as a substitute. In the case of Hicks v. Cleveland, 45 C. C. A. 429, 106 Fed. 459, Judge Simonton, in discussing this phase of the question, said:

"The Supreme Court of the United States deals with the provisions of statutes like this as creating a trust which the state, the donor, cannot annul, and which the officers to whom the power is given are bound to execute. So neither the state nor the corporation can any more impair the obligation of the contract by repeal of the act than they can in any other way."

Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; Von Hoffman v. Quincy, 4 Wall. 553, 18 L. Ed. 403; Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699.

If the payment of debts could be defeated by the means employed in this case, then there would be no security as to any contracts which the individual might enter into in cases wherein the power to contract is derived from legislative authority. The law does not contemplate that any one shall be permitted, directly or indirectly, to repudiate an honest obligation. The act of 1885, which vested the township with corporate functions, was passed solely for the purpose of this contract, and as such was intended to afford the bondholders a safe and sure remedy. It did not undertake to incorporate the township as a general municipal corporation. It simply gave the township certain functions to be exercised solely and exclusively for the purpose of making and discharging the contract, and the provisions of the same thereby became a part of the essential elements of the contract, and do not in any wise partake of the character of the powers ordinarily conferred upon a township or other territory in order to enable such township or territory to exercise the functions of a municipal corporation. Therefore the constitutional enactment in question is not aimed at a municipal corporation, but is in the nature of a direct attack upon legislation which has for its object the enforcement of a contract.

No one questions the power of the Legislature at any time to abolish a municipal corporation, provided that in doing so it does not impair the obligation of a contract. But in this instance the acts in question do not have the effect of abolishing a municipal corporation as such, the constitutional and legislative enactments being directed against the means by which the holders of the bonds are to be paid the amounts due them.

In the case of Von Hoffman v. Quincy, 4 Wall. 553, 18 L. Ed. 403, among other things, Mr. Justice Swayne, who delivered the opinion of the court, said:

"It is competent for the states to change the form of the remedy or to modify it otherwise, as they may see fit, provided that no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those under the form of modifying the remedy impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition, and to that extent void."

We now come to consider the question as to whether the means provided as a remedy are in any way connected with that part of the act which confers corporate powers upon the township. If the contention that the Legislature had the right to destroy the corporate existence

of the township be true, we are nevertheless confronted with the fact that the instrumentalities and means employed by the Legislature in this instance for the purpose of enforcing the collection of a tax are still unimpaired. The duties of the officers designated for the assessment and collection of taxes are not affected in any manner by the acts which undertook to abolish the township. In other words, even though it should be held that the township as a corporate entity no longer exists, however, the remedy which is provided for the collection of taxes remains unimpaired. Therefore, if the contention of respondents that the township is abolished be correct, then we have the act which makes the levy and authorizes the assessment and collection of taxes in a certain territory for the payment of an indebtedness evidenced by bonds upon which judgment has been obtained in a regular manner; the instrumentality for its collection remains the same as when the act in question was passed. The county auditor and treasurer are not officers or agents of the township in any sense of the word. Inasmuch as the acts of 1882 and 1885 constitute the county commissioners the corporate agents of the township, and at the same time authorized the county auditor and treasurer to perform duties incident to the assessment and collection of taxes that are separate and distinct from those assigned to the county commissioners, it cannot be contended that the Legislature intended to authorize the auditor and treasurer to act as agents of the township. The act provides that the county commissioners shall be the agents of the township, and clothes them with discretionary power, to wit, the power to issue bonds when certain conditions have been complied with. The power which was conferred upon them has been exercised by the issuance of the bonds, and, since they have performed the duties incumbent on them as agents of the township, they are powerless to do anything further in the premises. It is different when we come to consider the authority which was conferred on the county treasurer and auditor by the Legislature. While the duties of the county commissioners were simply to issue the bonds and deliver the same, the county auditor and treasurer are authorized and empowered to do that which may be lawfully done independent of the corporate existence of the township.

In this case a judgment has been obtained, and the liability of the township for the payment of these bonds judicially determined. The court is now called upon to enforce the laws of the state existing at the time of the execution of the bonds, the provisions of which enter into and constitute an essential element thereof. Conceding that the constitutional enactment is valid, and that it has had the effect to abolish the corporate existence of the township, we cannot escape the conclusion that the means and procedure provided for the enforcement of the contract remain unaltered. The officials chosen by the Legislature as instrumentalities for the assessment and collection of the tax are in existence, and it is the duty of the court to compel the enforcement of the same, irrespective of the result of any attempt which may have been made to abolish the township. It is contended by the respondents that the territory of township Ninety-Six as a subdivision of the county of Abbeville no longer exists as such, and that the same has been trans-

ferred and embraced as a part of one of the territorial subdivisions of the county of Greenwood, and therefore the court is without authority to compel the auditor and treasurer of the new county to enforce the assessment and collection of the tax in the territory which formerly was included in the county of Abbeville. This position is untenable, and cannot be sustained. The creation of the new county of Greenwood and the transfer of the territory of township Ninety-Six to said county as a part of its territory do not alter the status of the territory thus transferred in so far as it is affected by the acts of 1882 and 1885, which provide that the county auditor and treasurer shall assess and collect annually a tax upon the property included in said territory. It has been repeatedly held that, where a subdivision of the state has contracted a debt, such debt follows the people of the newly acquired territory. In cases where an indebted municipality is divided among other municipalities, the debt follows the territory, and the duty of assessing and collecting taxes applies to the new officers in whose jurisdiction it comes. Broadfoot v. Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620.

Counsel for respondent insist that it will work a hardship upon the property owners of the township to compel them to pay taxes to meet the obligations of the contract from which they can never realize any benefit. The unfortunate condition which the property owners now occupy is due in a large measure to the failure on the part of the Legislature at the time of the passage of the act to provide that the bonds should not be issued until the railroad had been completed through the territory in question. While the contention of the respondent as to the lamentable condition of the township is true, it is equally true that a failure on the part of the inhabitants of the township to comply with the obligations which they entered into at the time the bonds were issued will work a hardship on the owners of the bonds, who are innocent purchasers, and who are in no wise responsible for the issuance of the bonds in the first instance, nor for the failure of the railroad company to complete its road through the territory in question.

In view of the foregoing, it is ordered that a writ of mandamus issue directed to the said auditor and treasurer of the county of Greenwood, commanding the said auditor to assess upon the property in said township a sufficient per centum to pay said judgment and costs, and to continue to assess from year to year, and commanding said treasurer of said county to collect such tax so assessed, and pay over the same upon said judgment until the same is wholly satisfied.

In re MERTENS et al.

(District Court, N. D. New York. August 6, 1904.)

No. 1,527.

1. FEDERAL COURTS—BANKRUPTCY JURISDICTION—CLAIMS TO PROPERTY.
Under Bankr. Act July 1, 1898, c. 541, subc. 2, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], as amended by Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409], providing that courts of bankruptcy shall have such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, a court of bankruptcy has jurisdiction to try and determine the title to property found in the possession of the bankrupt, which had been purchased by and delivered to him, the sale not having been rescinded for fraud until after the bankruptcy proceedings had been instituted and the bankruptcy court had taken possession of the property.

2. SAME — BANKRUPTCY PROCEEDINGS — PARTIES—CLAIMS—PROSECUTION—FORUM.
Where the seller of goods, which had been delivered to the buyers prior to the institution of bankruptcy proceedings against them, rescinded the sale for fraud after the bankruptcy proceedings had been instituted, and applied to the court in which such proceedings were pending for leave to commence a replevin action for the goods in the state court against the receiver in bankruptcy, and after such petition was denied again applied for an order directing the receiver to set aside and hold the goods in question for petitioners which was also denied, such seller thereby became a party to the bankruptcy proceedings, and was bound to prosecute its claim to the goods in the court where such proceedings were pending.

3. SAME—INJUNCTION.
Such goods having been taken possession of by the bankrupt's receiver, and having been thereafter sold by such receiver as the bankrupt's trustee under order of court, such court had jurisdiction to grant an injunction restraining the claimant from prosecuting a suit against the trustee in a state court for conversion of the proceeds, under Rev. St. U. S. § 720, providing that an injunction shall not be granted by a court of the United States to stay proceedings in a state court except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

4. SAME—BANKRUPTCY PETITION—FILING.
The filing of a bankruptcy petition is notice to the world of the pendency of the proceedings, and operates as an attachment of the bankrupt's property, and as an injunction restraining all persons from intermeddling therewith.

5. SAME—ACTS OF TRUSTEE.
Where a bankrupt's receiver and trustee took possession of property in the hands of the bankrupt at the time the petition was filed, and the seller of the property to the bankrupt did not elect to rescind for fraud until after such proceedings had been instituted, the bankrupt's trustee was not liable to the seller for the conversion of the property or its proceeds by selling the same under order of the court of bankruptcy.

In Bankruptcy.

This is a motion by Albert K. Hiscock, as receiver and as trustee of the estate in bankruptcy of J. M. Mertens & Co., to restrain the American Woolen Company of New York from further prosecuting an action brought by said company against said Albert K. Hiscock as such receiver and as such trustee to recover damages for the alleged conver-

sion by said Hiscock as such receiver and as such trustee of certain woolen goods in the piece, sold by said American Woolen Company to said J. M. Mertens & Co., and which goods formed a part of the stock in trade of said J. M. Mertens & Co., and were in the possession of said company, commingled with other goods, at the time of the filing of the petition herein, and at the time of the appointment of such receiver by this court, and at the time he took possession of same as such receiver under and pursuant to the order of this court, and which possession was taken before notice was given any one that the sale thereof by the said American Woolen Company to the said firm of J. M. Mertens & Co. was rescinded. Said goods were sold by said trustee, it is alleged, with the consent of said American Woolen Company, and the proceeds are now in his hands, subject to the order of this court.

Lewis & Crowley, for receiver and trustee.
McGowan & Stolz, for American Woolen Co.

RAY, District Judge (after stating the facts). At some time prior to the commencement of the bankruptcy proceedings herein the American Woolen Company of New York, city of New York, sold on credit and delivered to J. M. Mertens & Co., a firm doing business in the city of Syracuse, N. Y., certain woolen goods in the piece, of the value of several thousand dollars. Said American Woolen Company had been selling goods to said firm for a considerable length of time, and there was an open running account between them, with a balance of several thousand dollars due the woolen company. The petition in involuntary bankruptcy herein was filed on the 20th day of August, 1903, and on the same day Albert K. Hiscock, of Syracuse, N. Y., was, by this court, duly appointed receiver of the alleged bankrupts' estate. Such receiver gave the bond required, and entered on the discharge of his duties by taking possession of all the property of the firm of J. M. Mertens & Co., and by proceeding to complete the manufacture of certain goods previously ordered by customers, and fill such orders; all pursuant to the order and direction of this court. The schedules required by law were duly made and filed. Thereafter, and on the 31st day of August, 1903, McGowan & Stolz, the attorneys for said American Woolen Company of New York, which is a corporation duly incorporated under and pursuant to the laws of the state of New York, served on said receiver a notice and demand, of which the following is a copy (omitting the schedule of goods):

"Take notice that the pretended sales of certain pieces of cloth, more particularly described in the schedule hereto annexed and marked 'A,' made by us to J. M. Mertens & Co., are rescinded on the ground of fraud perpetrated upon us by said J. M. Mertens & Co. in the purchase thereof, and we hereby demand the possession of such articles from you and of any and all suits, overcoats, and other articles of clothing into which the same may have been manufactured, or are in process of manufacture. And you will also take further notice, that we hereby demand that in case you shall have disposed of, or shall at any time hereafter dispose of, said pieces of cloth or any of them, or any of the suits, overcoats or other garments which may have been manufactured from the same, the proceeds thereof are our property and belong to us, and that you pay the same over to us, and that the said goods were obtained from us by fraud and

deceit, and that to the said property and the proceeds thereof neither you nor the said J. M. Mertens & Co. have any right or color of right.

"Dated, August 31, 1903.

"Yours &c., American Woolen Company of New York.

"To Albert K. Hiscock, Esq.,

"As Receiver of J. M. Mertens & Co.

"To J. M. Mertens & Co."

The receiver did not comply with the demand, acting on the information and belief that such goods were not obtained by fraud, and that the title was in the bankrupt, and also on the theory that in reclamation proceedings the title to such property could and should be determined in this court, the same being in the possession of this court. Thereafter said American Woolen Company of New York applied to this court for leave to commence a replevin action for these goods in the state court. The application was denied. September 16, 1903, said J. M. Mertens & Co., and each of the individuals composing said firm, were duly adjudicated bankrupts by this court. On the 21st day of September, 1903, this court made an order, which was duly served on said McGowan & Stolz, attorneys for said American Woolen Company, restraining all persons, and particularly said company and its attorneys, from bringing any suit in the state court for said stock of goods, or any suit against said receiver regarding said property or estate. Said order was not appealed from, set aside, or vacated. The writ of injunction issued pursuant to such order was not served until after the action now sought to be restrained was commenced. October 6, 1903, said American Woolen Company applied to this court for an order directing the receiver to set aside and hold and not sell these goods in question. That application was denied, and no appeal was taken. Such proceedings were duly had that on the 14th day of October, 1903, said Albert K. Hiscock, then acting as receiver, was duly appointed the trustee in bankruptcy of the estates of said bankrupts. On qualifying as trustee, said Hiscock, as receiver, actually passed over to himself as trustee the said stock of goods, including those in question, which remained unsold and undisposed of, except so far as the bankrupts themselves had disposed of them prior to the filing of the petition in bankruptcy.

On the 4th day of November, 1903, the trustee received a very advantageous offer for the stock of goods—$67,500—and an order was made by Chas. L. Stone, the referee in bankruptcy, to whom this bankruptcy matter had been duly referred, directing a sale of such stock of goods, and same were sold accordingly. McGowan & Stolz, appearing as attorneys for said American Woolen Company, consented to such sale. By these proceedings the goods in question have been converted into cash by the trustee pursuant to the order of the court, and the proceeds are now in the custody of the court in bankruptcy. This order of the court to sell the goods at the price offered—substantially the price at which same were inventoried—was made and entered November 6, 1903, and the goods were immediately delivered to the purchaser. On the very next day, and November 7, 1903, a summons in an action in the Supreme Court of the state of New York was served

on the said Albert K. Hiscock as such receiver and as such trustee, of which the following is a copy:

"State of New York, Supreme Court, County of New York.

"American Woolen Company of New York v. Albert K. Hiscock as Receiver in Bankruptcy of J. M. Mertens & Co., and Albert K. Hiscock as Trustee in Bankruptcy of J. M. Mertens & Co.

"To the Above-Named Defendants: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this Summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

"Trial to be held in the County of New York.

"Dated this seventh day of November, 1903,

"McGowan & Stolz, Plaintiff's Attorneys,

"Office & P. O. Address, 339 Onondaga County Savings Bank Building, Syracuse, N. Y."

The plaintiff in such action is the same American Woolen Company of New York, before referred to, and the action is brought by the same attorneys hereinbefore named as appearing for such company in such prior proceedings, and who are under a restraining order, as stated. The bankrupts resided and had their place of business at Syracuse, in the Northern District of New York, in which district all of the proceedings in bankruptcy have been had, and where the said trustee resides, and where such property was situated and the proceeds are deposited. The plaintiff resides and has its place of business in the city of New York, in the Southern District of New York, and in said Southern District the venue of said action in the state court is laid.

Immediately after being appointed trustee, said Hiscock duly accounted as receiver, and his accounts were duly passed and settled, and he was directed to pay over all moneys and deliver all property held by himself as receiver to himself as trustee. No objection was made to this order, said American Woolen Company of New York being represented in that proceeding by said McGowan & Stolz as its attorneys. Such order has not been vacated, set aside, or appealed from, and its mandates were fully complied with. Owing to necessary delays, such order was not actually made and entered until after the commencement of such suit in the state court.

On this motion it is denied by the American Woolen Company of New York that McGowan & Stolz represented it when the order to sell the goods was made; but however that fact may be, the court is of opinion that the result is the same. It is conceded by said McGowan & Stolz, who represent the American Woolen Company on this motion, that this action in the state court is brought to recover damages for the alleged conversion by said receiver or trustee, as such, of the goods in question. Before considering the legal aspects of the case, it may be well to summarize the facts.

(1) Prior to the filing of the petition in bankruptcy herein, the American Woolen Company of New York sold and delivered the goods in question to J. M. Mertens & Co. on credit.

(2) On the 20th day of August, 1903, a petition in involuntary bankruptcy was filed in this court against said firm or copartnership of J. M. Mertens & Co.

(3) August 20, 1903, Albert K. Hiscock was duly appointed by this court in bankruptcy and in such pending proceeding the receiver of all the property and estate of said J. M. Mertens & Co., and directed to take possession of and hold the same which he did.

(4) The goods in question were then in the possession of said J. M. Mertens & Co. in their store, commingled with their other goods, and the sale to said company had not been rescinded, and such goods passed into the possession of said officer of this court, duly appointed, and were thenceforth, until sold, in the custody of this court.

(5) On the 31st day of August, 1903, said American Woolen Company of New York gave written notice that it then rescinded the sale of said goods to said J. M. Mertens & Co. on the ground that the contract of sale and the delivery of the goods were procured by fraud, and also demanded the goods, and the proceeds of such as had been sold, and the proceeds of the sale of any thereof thereafter sold by said receiver.

(6) The said receiver did not comply with such demand, or acquiesce in the claims of the woolen company.

(7) The said woolen company then applied to this court in bankruptcy for leave to prosecute an action of replevin for said goods, which motion was denied. Said company also applied to the court for an order directing the said receiver to set apart and hold said goods in question, and not sell same. This application was denied. No appeal was taken from said orders.

(8) Thereafter said Albert K. Hiscock, who was acting as such receiver, was duly appointed trustee in bankruptcy of all the property, etc., of said J. M. Mertens & Co. and of the individual members of said firm, they having been duly adjudicated bankrupts on the 16th day of September, 1903. The possession of said property then passed to the trustee. Subsequently a formal order was made by this court directing the transfer of the possession of such property, including the proceeds of the sale of the property in question.

(9) The said trustee, having received an advantageous offer for the entire stock of goods of said J. M. Mertens & Co., including the goods in question, was authorized and directed by this court to sell such goods. Said order was complied with, and the goods were paid for, and the purchase money deposited in one of the designated depositories to the credit of said trustee, where it now remains.

(10) Said American Woolen Company has not taken any proceeding in this court to determine the title to the goods in question or the title to the proceeds thereof.

(11) The day after such sale was consummated said American Woolen Company commenced an action in the Supreme Court of the state of New York against said Albert K. Hiscock as such receiver and as such trustee to recover damages for the alleged conversion of such goods claimed by said woolen company, the claim being that the sale to J. M. Mertens & Co. was induced and procured by fraud, that same was voidable, and was rescinded, and that title did not pass to J. M. Mertens & Co. and hence did not pass to the receiver or to the trustee, and that by selling such goods even under and pursuant to the order of this court said officer was guilty of a conversion thereof.

In this summary of the facts all reference to the injunction order and the alleged consent of said woolen company to the sale is purposely omitted. The said Albert K. Hiscock has done no act in reference to the property in question or its proceeds not sanctioned, approved, and directed by the bankruptcy court. He took possession of, held, and sold same under and pursuant to the orders and directions of the court having the custody of the property and the control of said Hiscock, its duly appointed officer. Said American Woolen Company, the claimant, and also the plaintiff in said action for conversion, had the right to appeal to this court in reclamation proceedings for the surrender and delivery to it of said property, and still has the right to appeal to this court for the surrender and delivery of the proceeds thereof. Said company takes no such action, or any action, in this court, but sues the officer of this court in the state court and in the Southern District of New York, charging that he was guilty of a conversion of its property when he followed the instructions and obeyed the orders of this court. If the action is maintainable, and cannot be restrained and enjoined by this court, its action in the premises heretofore taken is, in effect, to be reviewed, and, it may be, pronounced null and void, or at least illegal, by one of the courts of the state of New York. These goods had been sold and delivered to J. M. Mertens & Co., and mingled with their stock in their general store in Syracuse. Apparently they were the property of said J. M. Mertens & Co. The sale had not been rescinded when proceedings in bankruptcy were instituted, when the receiver was appointed by this court, and when possession of the property was taken by this court. This court has at all times asserted its jurisdiction over the property, and its power and right to determine the title thereto and the validity of all adverse claims. It has not granted any order permitting its officer to be sued in any other court, but has steadily denied all such applications. It went further, and made an order restraining and enjoining all actions in the state court that would interfere with this property or its proceeds. Having come into this court on at least two occasions—once with a motion for leave to prosecute a replevin action in the state court for this property, and again for an order to have the property in question set aside, and not sold—the American Woolen Company is not in a position to assert that it has not made itself a party to these bankruptcy proceedings. It has twice submitted itself and its claim to this property to the jurisdiction of this court. The Revised Statutes of the United States expressly provide that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581].

The Constitution in express terms confers upon Congress the power to enact uniform laws on the subject of bankruptcies, and in the exercise of this power Congress has conferred on the courts in bankruptcy the power to grant injunctions and appoint receivers and trustees of the estates of bankrupts. The laws of the United States passed pursuant to the Constitution are paramount, and suspend the operation of all

state laws on the same subject or in conflict with the national laws when invoked. When property sold to the bankrupt prior to proceedings in bankruptcy is found in his possession, mingled with his stock in trade or other property, it is presumably his, and when the bankruptcy court has taken possession of it and assumed control through its duly appointed receiver before a rescission of the sale, the vendor who assumes thereafter to rescind the sale on the ground of fraud practiced by the vendee (now the bankrupt), and who seeks to recover the property or its proceeds, or damages from such officer of the court who has held and sold it pursuant to the order of the court, should be compelled to come into the court having the possession and control of the property, and try the question of title thereto there, unless that court is without jurisdiction to try the question, or the law of the United States has expressly placed concurrent jurisdiction elsewhere. If the court should find that the sale was procured by fraud, then the rescission would be valid, and the title would be in the vendor, and he would be entitled to the property, or its value, from the estate of the bankrupt, and this court would so award; but, should the court find that such sale was not procured by fraud, then the rescission would be of no avail, and the title would be in the trustee in bankruptcy when appointed. Is not the bankruptcy court, in possession of the property, possessed of power and jurisdiction to try and determine this question? Or must it await the trial and determination of a suit for conversion against its officer in the state court before proceeding to administer the trust and wind up the bankruptcy proceedings? It is conceded that in such a case as this the bankruptcy court may enjoin an action in replevin in the state court against the receiver or trustee to recover the property. Why may it not enjoin an action in trespass, or for conversion brought against the receiver or trustee in bankruptcy in the state court to recover the proceeds of a sale of the property or its value as damages for a conversion, based on the claim that the title was in the vendor? Does the one action interfere with the property or the proceedings in the court of bankruptcy any more or any less than the other? If so, wherein? Section 720, Rev. St. U. S., above quoted, recognizes the paramount authority of the bankruptcy laws in such a case, and does not attempt to forbid the enjoining of suits in a state court by the federal court as against a provision of the federal laws permitting such action. This property in question here was included in the trust committed to the receiver, and then to the trustee. It was a part of the trust estate. The American Woolen Company attempts to take it out of the trust and from the jurisdiction of the court in bankruptcy by rescinding the sale after such jurisdiction was obtained and asserted by this court. If the sale by the woolen company was procured by fraud, then this court should order the trustee to pay to it the value of the property; otherwise it should not. Must this receiver and trustee litigate this question of fraud in the state court and in another judicial district of the United States? Clearly, it seems to this court the question may be fully determined by the bankruptcy court.

Section 2 of subchapter 2 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], as amended Feb-

ruary 5, 1903, c. 487, § 1, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409]) defines the jurisdiction of courts of bankruptcy, viz.:

"That the courts of bankruptcy as hereinbefore defined, * * * are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms as they are now or may be hereafter held, to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Here clearly is jurisdiction to try and determine the title to property found in the possession of the bankrupt purchased by and delivered to him, and which sale is sought to be rescinded for fraud after the bankruptcy proceedings have been instituted and after the bankruptcy court has taken possession of the property. Clearly, this is a controversy in relation to the estate of the bankrupt. In vain we search the act for a provision that deprives the bankruptcy court of power to determine such a controversy regarding the title to the property.

It would seem equally clear that the action of the American Woolen Company in rescinding the sale after the petition in bankruptcy was filed is an attempt to divest the title of the trustee in bankruptcy. Section 70 of the Bankruptcy Act, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], provides:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him."

This property in question the bankrupt could have sold and transferred, giving good title, at any time before the petition was filed. It is, of course, true that if the property was obtained by fraud the woolen company had the right to rescind the sale, and recover the property, or its proceeds, or damages for its conversion, if converted. In such case the title of the trustee would be subordinate to that of the woolen company. But the question of the right to the property, its possession and disposition, and also the disposition of its proceeds, depends on this question of fact, which the courts of the United States are as competent to try and determine as are those of the state; and, having the custody of the property and its proceeds, and jurisdiction to determine the title thereto, this court will not permit the state court to intermeddle either with the property, its proceeds, or with the officer who has disposed of it by order of the federal court. Freeman v. Howe, 24 How. 450, 16 L. Ed. 749. And this court has no hesitation in holding that in this case neither the receiver nor the trustee has been guilty of a conversion or wrongful disposition of the property in question. The conversion, if any, or wrongful disposition of the property, if any, has been committed by this court in bankruptcy, for it has ordered and directed and approved these acts of its officers complained of, and alleged to constitute a conversion of the property, in proceed-

ings duly had in this court, with the American Woolen Company present in court by counsel, and also by petition made by it, asking other disposition of the property than that made by the court. The defendants in the suit in the action in the state court, sought to be restrained, have done no act not directed by the court. If the authority and jurisdiction of this court in bankruptcy is paramount and superior to that of the state court, and it has jurisdiction to determine conflicting claims to property forming a part of the estate of the bankrupt at the time the petition in bankruptcy is filed (and this property concededly was a part of the property of the bankrupt at that time, for the sale had not been rescinded), then this action in the state court should not be permitted to proceed further, for a judgment that either the receiver or trustee has converted this property would be an adjudication by the state court that this court in bankruptcy had no authority or jurisdiction to direct its officers to take possession of and sell the property. The sale to the bankrupt was not void; only voidable. 14 Am. & Eng. Enc. Law (2d Ed.) 156; Foreman v. Bigelow, 4 Cliff. 508, Fed. Cas. No. 4,334; Cobb v. Hatfield, 46 N. Y. 533; Gould v. C. C. N. Bank, 86 N. Y. 75; Baird v. New York, 96 N. Y. 567.

This court cannot assent to the doctrine that its trustee in bankruptcy is liable to an action in the state court as for trespass, trover, or conversion, when he follows the order of the court in disposing of property in its possession. This is not a case where the receiver or trustee has taken and held and disposed of property which was outside of the possession and control and apparent ownership of the bankrupt at the time of the filing of the petition in bankruptcy, in which case this court should not and would not interfere. In such case the officer of this court would act on his own responsibility, and take his chances.

In Re Gutman & Wenk, 8 Am. Bankr. R. 255, 114 Fed. 1009, Adams, District Judge, said:

"Ordinarily, where the receiver of the court has merely general directions to take into his possession the property of the bankrupt, and there is a claim that he has taken the property of a third person, the court, in conformity with general principles, would leave him to answer in any proper forum for his individual acts (Buck v. Colbath, 3 Wall. 334 [18 L. Ed. 257]; Covell v. Heyman, 111 U. S. 176 [4 Sup. Ct. 355, 28 L. Ed. 390]; McNulta v. Lochridge, 141 U. S. 327 [12 Sup. Ct. 11, 35 L. Ed. 796]; Central Trust Co. v. East Tenn., V. & G. Ry. Co. [C. C.] 59 Fed. 523; High. Inj. § 298; Hale v. Bugg [C. C.] 82 Fed. 33); but where it appears without dispute, as it does here, that the third party cannot possibly have any legal rights to be established by the litigation in the state court, and the result of permitting it to be continued would not only suffer an injustice to the receiver, but indirectly tend to embarrass this court in administering the estate, the equitable powers of the court should be exercised both for the prevention of the injustice and to protect the court's full jurisdiction. Dietzsch v. Huidekoper, 103 U. S. 494 [26 L. Ed. 497]; Chapman v. Brewer, 114 U. S. 158 [5 Sup. Ct. 799, 29 L. Ed. 83]; Garner v. Second Nat. Bank of Providence, 67 Fed. 833 [16 C. C. A. 86]; James v. Central Trust Co., 98 Fed. 489 [39 C. C. A. 126]; Mueller v. Nugent [184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405], 7 Am. Bankr. R. 224."

In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. R. 234, it was decided:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and, in effect, an attachment and injunction (Bank v. Sherman, 101 U. S. 407 [25 L. Ed. 866]); and on adjudication title

to the bankrupt's property became vested in the trustee (sections 70, 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court."

So here the filing of the petition in bankruptcy was notice to all the world of the pendency of the proceeding, and, in effect, an attachment of this property, and an injunction against all persons prohibiting them from intermeddling with it. This court took immediate custody of the property through its receiver.

In Mueller v. Nugent, supra, the bankrupt had delivered, shortly before the petition was filed, property to a third person, who had no adverse claim to it; and he refused to deliver it to the trustee. In the summary application to compel this third person to deliver the property the Supreme Court said, referring to the necessity of a suit in the circuit or state court:

"If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and in many respects rendered practically inefficient. The bankruptcy court would be helpless, indeed, if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

Here we find not only a direct affirmance of the power of the bankruptcy court to determine conflicting claims to property in the possession of the court, actually or constructively, but a condemnation of the theory that in case of dispute as to title the bankruptcy court should be subjected to the expense, delay, and embarrassment incident to the settlement of that question in some other tribunal—as the state court. It is well known that this action brought in the state court against this receiver and trustee cannot be reached for trial in New York county in less than two or three years, and to permit it to proceed would delay the settlement of this bankrupt estate for years. The whole question may be determined in this court, even allowing for an appeal to the Circuit Court of Appeals, in a few months.

The case last cited is direct authority, in effect, for the proposition that adverse claimants to property in the hands of the bankrupt at the time of the filing of the petition, and claimed by him, and apparently his, should try the question of title in the bankruptcy court. The federal court should not permit an evasion of this rule by allowing the adverse claimant to lie still until the property is disposed of by the trustee, and then prosecute an action of trespass or trover in the state court. It is the duty of the federal court to protect its officers in such a case as this from the annoyance and expense of such suits in the state court, as well as the possible injury both to the officer and the creditors of the bankrupt. No warrant for permitting the prosecution of such suits in the state courts, under such circumstances as exist here, is found in any well-considered case.

The motion is granted, and an order will be entered restraining the plaintiff and its attorneys by name from taking further proceedings in the action referred to.

In re L. B. WEISENBERG & CO.

(District Court, E. D. Kentucky. February 25, 1904.)

No. 340.

1. BANKRUPTCY—PARTNERSHIP—JOINT DEBTS OF PARTNERS.
Under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], joint debts of partners composing a bankrupt partnership cannot be proved against the partnership estate, to share on an equality with firm creditors.

2. SAME—JOINT NOTES OF PARTNERS—EVIDENCE TO SHOW LIABILITY OF FIRM.
Parol evidence is admissible to show that joint notes signed by the members of a bankrupt partnership are in fact firm debts.

3. SAME—EVIDENCE CONSIDERED.
A bank made a loan of money to each of the two members of a partnership, taking in each case a note signed by both partners. The proceeds were passed to the individual accounts of the partners, respectively, and were by them checked to the partnership account and used in the firm business. *Held*, that the notes did not constitute debts of the firm provable against its estate in bankruptcy; it having received the money from the partners, and not from the bank.

4. SAME—EVIDENCE—MATERIALITY.
The testimony of the cashier of a bank that loans made by the bank on notes signed by members of a bankrupt partnership were made to the firm, and not to the partners, is not admissible to establish such fact, which must be determined from the facts of the transaction, and not from the intention of the witness.

In Bankruptcy. On review of decision of referee.

Frank Chinn, for Deposit Bank of Frankfort.
T. N. Lindsey, for appellees.

COCHRAN, District Judge. The bankrupt L. B. Weisenberg & Co. was a firm engaged in the business of buying and selling wheat at Frankfort, Ky., composed of the bankrupts L. B. Weisenberg and A. Dudley Blanton. January 24, 1903, the Deposit Bank of Frankfort, a corporation engaged in the banking business at said place, discounted two joint notes of said Weisenberg and Blanton—one for $15,000 and the other for $10,000, both due 60 days after date, and negotiable and payable at said bank, which discounting placed them on the footing of a bill of exchange. The only difference between the two notes, other than as to the amount, was that the largest one was signed by Weisenberg first, and the smallest by Blanton. The bank presented these two notes to the referee for allowance as claims against the estate of said firm, asserting in the affidavit that they were firm debts. This application was resisted by firm creditors, and, after hearing evidence in relation to the matter, the referee denied the application, and refused to allow said notes as firm debts. In his opinion the referee gave two reasons for his action. One was that said notes, on their face, were the joint debts of the members of the firm, and parol evidence was inadmissible to prove that they were firm debts. The other was that they were in

¶ 2. See Evidence, vol. 20, Cent. Dig. § 1909.

fact joint, and not firm, debts. The matter has been brought before me for review.

It is certain that if, for either reason, the notes in question must be treated as joint debts, they cannot be allowed as valid claims against the firm assets, on a par with firm creditors. In re Webb, Fed. Cas. No. 17,313, vol. 29, p. 493; In re Roddin, Fed. Cas. No. 11,989, vol. 20, p. 1084; In re Nims, Fed. Cas. No. 10,268, vol. 18, p. 254; In re Nims, Fed. Cas. No. 10,269, vol. 18, p. 255.

In the case of Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207, Mr. Justice Strong said:

"It is not certain that a promise by a partnership and a promise by the individual partners collectively have the same effect. If a firm be composed of two persons associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of two partners, made in their individual names, respectively, on a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that the debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively in the first instance for the payment of its debts may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm, as such, even though all the persons who compose the firm may be the parties to the contract."

The Nims Case arose under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). There certain individuals had carried on a certain business as partners under a certain name, and failed. Afterwards they carried on another business as partners under another firm name. The members of the two firms then went into bankruptcy. The last firm had assets. The first had none. The question was whether the creditors of the first firm were entitled to share in the assets of the last firm, pari passu with its creditors. Judge Wallace, in the District Court, held that they were. He placed his decision on the broad ground that joint creditors were entitled to share equally in firm assets with firm creditors. He said:

"Neither section 5121 of the Revised Statutes, nor the rule of equitable distribution which that section is intended to adopt, precludes the creditors of the bankrupts jointly from resorting to any firm assets of the bankrupts which may exist."

As to section 5121 of the Revised Statutes, he said:

"The language of section 5121 does not in terms prescribe the rule of distribution when debts are proven against the bankrupts jointly which are not partnership debts, but it deals only with the mode of distribution as between partnership creditors and creditors of the partners separately."

As to the rule of equitable distribution, he argued that it did not preclude such resort, because it was not within the purview of the reason which led to the adoption of that rule. He claimed that it did not originate in the presumption that a partnership debt was incurred for the benefit of the partnership, and that the property consists, in whole or in part, of what has been obtained from creditors, and is therefore considered as a primary fund for the payment of such debts, and said that, "after a very careful reading of the books," he had been "unable to

find any case in this country or in England" that had advanced the view that it did so originate, "except the dictum in Forsyth v. Woods, 11 Wall. 486, 20 L. Ed. 207," above quoted. He gave as a reason for so claiming the fact that partners might during the continuance of the partnership, by agreement, convert the partnership estate into separate estate, and thereby determine its character for the purpose of distribution. He said:

"Accordingly, when one partner without fraud sells out to the other, the property becomes separate property, and the creditors of the firm are postponed to the separate creditors of the purchasing partner. If the rule of distribution is founded on the theory that the fund which is derived from the creditors is primarily the fund for their payment, and the law therefore appropriates it to them, it could not be permitted that the debtors themselves, by agreement, should defeat that result."

As to the reason for the rule, and the effect thereof on its scope, he said:

"The principles of distribution in equity have their origin in the rights of creditors at law. At law the creditors of the firm may resort in the first instance to the separate as well as to the joint property of the partners, while the separate creditors of a partner cannot resort effectually to the joint property, because upon an execution they can reach only the interest of the partner, and are thus obliged to invoke the aid of a court of equity to ascertain it through an accounting, in which case the creditors of the firm must first be satisfied, and thus obtain a priority as to the joint assets. But suppose an execution to be levied in favor of a creditor against all the members of the firm upon the joint debt, but not a partnership debt. Here the sale would carry the title of all the partners, and the creditors would not be under the necessity of having an accounting or invoking the assistance of a court of equity. There would thus appear to be a solid distinction between the rights of a creditor of all the partners and those of one or more partners in the joint property, as respects the partnership creditors, and the case would arise for the application of the equitable rule which postpones the separate creditor to the partnership creditor in the joint assets."

The order of the District Court was carried to the Circuit Court for review, and there reversed. Judge Blatchford conceded that the rule of equitable distribution was as held by Judge Wallace. He said that it was—

"A general equitable idea that creditors of joint debtors who were in fact partners should be allowed to share in the assets of the partnership, although not creditors of the partnership, or in respect to any matter growing out of or connected with the partnership."

And further:

"Hence the decisions in England, of which the case of Hoare v. Oriental Bank Corp., 2 App. Cas. 589, is a recent instance, holding that a joint debt not shown to have been incurred as a partnership transaction could be proved against the partnership estate where the partners were the joint debtors. In this last case it was suggested as a ground for allowing the proof that the creditors could, before the insolvency, have sued the debtors composing the partnership jointly upon the obligation held by him, and, upon recovering judgment, have taken out execution against the partnership assets."

But he held that the relevant provision of the bankruptcy statutes (section 5121, Rev. St.) prohibited the application of this rule of equitable distribution to bankruptcy cases. It not only dealt with the mode of distribution as between partnership creditors and creditors of the partners, separately, but, in prescribing that the "net proceeds of the

joint stock shall be appropriated to pay the creditors of the copartnership," impliedly negatived that joint creditors should participate in partnership assets along with firm creditors. He said:

"The rule of distribution prescribed by this section is very distinct. It is arbitrary, like many other provisions of the bankruptcy statute, but it must be followed, and cannot be made to yield to any supposed equities in favor of any other rule of distribution."

And again:

"This rule of distribution is a statutory one, and applies only to partnership assets, which remain such, to be administered in bankruptcy. There never was any statute in England in terms like our statute during the time the English decisions referred to were made."

And again:

"The provisions of our bankruptcy statute on the matter in hand are like those of the Massachusetts insolvency law of 1838, p. 97, c. 163, § 21. Under that law it was held in Ex parte Weston, 12 Metc. 1, that only partnership debts could come against partnership assets."

As to the alleged dictum in Forsyth v. Woods, he said:

"The remarks of Mr. Justice Strong in Forsyth v. Woods are not understood to go any further than to say that, under the bankruptcy statute, if there are partnership debts and partnership assets, it will be presumed that such assets were obtained from the partnership creditors, so that, if such assets remain to be administered in bankruptcy, they shall be applied first to pay debts of the partnership."

The relevant provision of the present bankruptcy act is substantially the same as that of the act of 1867, and, of course, the same rule as to distribution must prevail under it as prevailed under that.

It is therefore essential, in order for the Deposit Bank of Frankfort to be entitled to share in the firm assets herein, that it had a right to show that the joint notes held by it were firm debts, and that it has shown that in fact they were firm debts. And first is the rule that parol evidence is inadmissible to add to, vary, or contradict the terms of a written contract in the way of the bank having that right, as the referee held. There is a rule in relation to negotiable instruments that may be confused with this rule against parol evidence, and, owing to a misapprehension as to its scope, be thought to preclude the bank from having such right. That rule is that none but parties to a bill or note can be a party to an action on it. It is laid down by Judge Metcalf in the case of Fuller v. Hooper, 3 Gray, 341, in the following language:

"The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue on a negotiable instrument, can be shown by parol evidence. When an agent signs such an instrument without disclosing his agency on its face, the holder must look to him alone. And when such an instrument, which is intended for the benefit of the principal, is given to the agent only, he only, or his indorsee, can sue on it. In other simple contracts the rule is different."

And by Judge Prentiss in the case of United States Bank v. Lyman, 20 Vt. 666, Fed. Cas. No. 924, in the following language:

"Upon the whole, it appears to me that the true rule of law, as deducible from the adjudged cases—American as well as English—is that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note unless he appears upon its face to be a party to it. A promissory note, according to the expressions of very great judges, partakes in some

measure of the nature of a specialty, importing a consideration and creating a debt or duty by its own proper force. Being assignable and passing by mere indorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing, for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities, and on these considerations, that it is distinguished from written simple contracts in general, and made subject to a different rule."

And by Lord Justice James in the case of In re Adansonia Co., L. R. 9 Ch. 635, in the following language:

"Now, it is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name, or the name of some partnership or body of persons of which he is one, appears either on the face or the back of the bill."

This rule has been applied to a case where one partner of a firm duly executed a negotiable instrument on behalf of the firm. In the case of Siffkin v. Walker, 2 Camp. 550, a firm composed of two members was indebted to another. One partner gave his note to the creditors for the debt. The latter sued both partners on the note. It was held that this could not be done, and plaintiff was nonsuited. Lord Ellenborough said:

"The import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and I must treat this note as a separate security for a joint debt."

This rule, however, is not the same as the rule against parol evidence, nor is it a specialization of that rule. For it is settled that in the case of other simple contracts in writing—assuming for the time being that bills and notes are simple contracts, as is assumed in certain of the foregoing quotations and in that about to be made—persons other than the parties to them can sue or be sued on them, notwithstanding the rule against parol evidence. In the case of Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527, Mr. Justice Clifford said:

"Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name; and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another, and that principle has been fully adopted by this court. N. J. Steam Nav. Co. v. Merch. Bk., 6 How. 381, 12 L. Ed. 465; Ford v. Williams, 21 How. 289, 16 L. Ed. 36; Oelricks v. Ford, 23 How. 63, 16 L. Ed. 534. Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal; and, in that state of the case, he may have his remedy against either at his election. Thomas v. Davenport, 9 Barn. & C. 78. Evidence to that effect will be admitted to charge the principal, or to enable him to sue in his own name; but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal. 1 Pars. Cont. (5th Ed.) 64; Jones v. Luttledale, 6 Ad. & E. 486; Titus v. Kyle, 10 Ohio St. 444; 2 Sm. Lead. Cas. (6th Am. Ed.) 421."

If this is true as to simple contracts in writing, other than bills and notes, no good reason can be given why the rule against parol evidence should prevent its being true as to bills and notes, on the basis that they are simple contracts. The rule in question therefore must be accounted for on some other ground than that it is identical with, or an out-

growth of, the rule against parol evidence. The rule is due to the fact that bills and notes are not simple contracts at all, as has been assumed, but specialties, and one of the characteristics of a specialty is that none but parties thereto can be parties to an action thereon. That such is the true nature of bills and notes is laid down in 2 Ames, Bills & Notes, p. 872. It is there said:

"There are two classes of specialty contracts in the English law—common-law specialties and mercantile specialties. The first class includes bonds and covenants, i. e., instruments under seal; the second class includes bills and notes and policies of insurance, and possibly other mercantile instruments. There is a prevalent notion, traceable to an opinion given in the House of Lords in 1778, in the case of Rann v. Hughs, 7 T. R. 350, that only contracts under seal can be specialties; all other contracts, whether written or oral, being merely simple contracts. The fallacy of this notion is easily demonstrable by an examination of the resemblances between bills and notes and instruments under seal, on the one hand, and the differences between bills and notes and simple contracts, on the other hand, in those points in which specialties and simple contracts most strikingly differ."

Of the eight points of resemblance on the one hand, and difference on the other hand, stated, the first one is that none but parties to a bill or note can be a party to an action thereon. This rule, however, did not preclude the bank from the right of showing that the two notes in question were firm debts, and having them allowed against firm assets. If this were an action at law on these notes, none other than the parties thereto would be parties to the action. The question whether they were firm notes or not would cut no figure therein. An execution upon a judgment recovered would be leviable upon the firm assets. And had they been firm notes executed in the firm name, the course of procedure would not have been different. Hence no occasion would have arisen therein calling for the application of the rule, or even for the consideration of the question as to its application. It certainly can have no bearing in this proceeding. In the case of Ex parte First National Bank, 70 Me. 369, Judge Peters said:

"It is said that an objection to this doctrine is the rule of law that oral evidence is not admissible in cases of commercial paper to prove any person a party to a bill or note who does not appear to be such upon the face of the paper itself. But equity looks more to the fact than to the form, and the rule of distribution incorporated into our insolvent law is one incorporated from the principles and practice of courts of equity. * * * The cases in which the strict legal view has been upheld will be found to be mostly actions at law, where the effort has been by the holders of a bill or note to fix the liability upon some defendant whose name was in no manner written or indicated on the instrument itself, or where the facts differ in some other essential respects from the facts of the present case. Here the names of both partners are upon the note. Both are holden thereon."

Having thus distinguished this rule from that against parol evidence, and shown that it did not affect the bank's right in question, it is in order to recur to the question whether the rule against parol evidence affected it. It has been pointed out that it is not a violation of that rule to add a party to a contract in writing, either as obligee or obligor, to the extent laid down in the case of Nash v. Towne. If this is so, it is hardly a violation thereof to show in this proceeding that the joint liability of the two members of the firm of L. B. Weisenberg & Co. was in fact the liability of the firm. Again, it is well settled that one partner

has an implied authority to sign the firm name to negotiable paper for partnership purposes. This authority goes no further than to sign the firm name thereto. He cannot execute such paper upon behalf of the firm, even though for partnership purposes, in any other name. Hence it was held in the case of Kirk v. Blurton, 9 M. & W. 284, that, where John Blurton and Charles Habershon were partners doing business under the firm name of John Blurton, Blurton was not liable upon a negotiable instrument executed by Habershon on behalf of the firm, for partnership purposes, in the name of John Blurton & Co. Yet it is held that a partner may execute such paper under such circumstances, and sign the individual names of all the partners thereto, and they will be bound thereby. Galaway v. Mathew, 1 Camp. 403. This could hardly be the case if parol evidence was inadmissible to show that a written contract so executed was a firm contract. Besides, I know of no authority making such an application of the parol evidence rule.

My conclusion, therefore, is that the bank had a right to show, if it could, that the joint notes held by it were the firm debts of the bankrupt firm of L. B. Weisenberg & Co. Did it show that said notes were in fact firm debts? There is a difference in the authorities as to whether the joint notes of the members of a firm executed in the strict partnership business for a consideration passing to the firm, nothing else appearing, are to be treated as debts of the individuals, or of the firm. In the following cases they were held to be debts of the individuals, to wit: In re Bucyrus Machine Co., Fed. Cas. No. 2,100; In re Holbrook, Fed. Cas. No. 6,588; In re Herrick, Fed. Cas. No. 6,420; Strause v. Hooper, 5 Am. Bankr. Rep. 225, 105 Fed. 590; In re Jones, 8 Am. Bankr. Rep. 626, 116 Fed. 431. The doctrine of these cases is approved in Collier on Bankruptcy (4th Ed.) 72, and in a note to the case of Strause v. Hooper by the author of that work—possibly, also, by Bump & Loveland in their works on Bankruptcy. Possibly the Holbrook Case is to be distinguished by the fact that the note in that case was signed also by other individuals, not members of the firm, as sureties, and it was the joint and several note of all, and not the joint note of less than all. Possibly, also, the Herrick Case is to be distinguished by same consideration. In the following cases the joint notes were held to be firm debts, on the ground that they were executed in the partnership business, and for a consideration passing to the firm, to wit: In re Warren, Fed. Cas. No. 17,191; In re Thomas, Fed. Cas. No. 13,886; Davis v. Turner, 9 Am. Bankr. Rep. 704, 120 Fed. 605, 56 C. C. A. 669. The same thing has been held in quite a number of state decisions, most of which have been cited by the counsel for the bank. And I think that it may be correctly said that the decided weight of authority is to that effect.

But I do not find it necessary in this case to choose between these contending authorities. There are facts in it which differentiate it from those authorities, and which, in my opinion, require that it should be held that these notes were in fact the debts of the bankrupts Weisenberg and Blanton, and not of the bankrupt Weisenberg & Co. It started out to be a single partnership transaction, but turned out to be two individual transactions. The bankrupt firm applied to the bank for a loan of $25,000. This application the bank, however, declined

to grant. It did so because it considered that, under the laws of this state, it had no right to make the loan. The amount was in excess of what it could loan the said firm, according to its understanding of its powers. It proposed, however, to loan $15,000 to Weisenberg, with Blanton as surety, and $10,000 to Blanton, with Weisenberg as surety, which it considered it had a right to do. This proposal was accepted, and in pursuance thereto the notes in question were executed and discounted. The proceeds of one note was placed to Weisenberg's credit, and that of the other to Blanton's. It is true that thereupon, perhaps immediately, each partner checked the amount to his credit to the firm. But the firm got the money, not from the bank, but from the members of the firm to whom the bank loaned it. No such condition of things as this existed in any of the authorities cited by counsel for the bank. They were all cases where the loan was made to the firm, and the consideration passed directly to it from the lender. The only case which comes any way near to it is the case of Kendrick v. Tarbell, 26 Vt. 416, where the note in question was executed in the names of the individuals composing the firm at the request of the payee. But the loan was made to the firm, and passed to it directly from the payee. Here the notes were not only executed in the names of Weisenberg and Blanton, but the loan, as to one note, was made to Weisenberg, and as to the other to Blanton, and not to the firm, and the proceeds passed from the bank to said members of the firm, and not to the firm. Suppose the individual assets had been greater than the firm assets, instead of the reverse, so as to have made it to the bank's interest to prove the notes against the individuals, and not against the firm. Would it not have proved them against the former assets, and would not the facts above referred to have entitled it so to do? I think so. Besides, there does not seem to be any equity in the bank's position herein, on the ground that its money went towards swelling the firm's assets on hand for distribution. It is shown by the evidence, and seems to be conceded, that nearly the whole of the proceeds were lost in futures. I feel constrained, therefore, to hold that the ruling of the referee as to said notes not being firm liabilities is correct.

Then, as to his refusal to permit Mr. Nicol, the cashier of the bank, to answer the questions as to whom he gave credit for the $25,000, and to whom he looked for payment thereof, which is complained of. I do not think that the referee erred in this particular. The question as to whom credit was given, and from whom payment was expected, could be determined only from the facts of the transaction; i. e., what was said and done before and at the time the notes were executed and discounted. It would not be affected by any testimony of Mr. Nicol as to what his notions in regard to the matter were. The probability is that the main, if not sole, reliance, was placed on the warehouse receipt which was pledged as collateral security, and which is conceded to be void.

The decision of the referee is affirmed

In re MOODY.

(District Court, N. D. Iowa, E. D. August 15, 1904.)

No. 394.

1. BANKRUPTCY—JURISDICTION OF COURT—PROPERTY IN POSSESSION OF ADVERSE CLAIMANT.

A court of bankruptcy has jurisdiction under Bankr. Act July 1, 1898, c. 541, § 2, cl. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], to take possession by its marshal or receiver of property in the possession of an adverse claimant, but which is charged in a petition in bankruptcy to have been fraudulently transferred by the alleged bankrupt, where the court finds such action necessary to the preservation of the estate, and, having taken such possession, it has jurisdiction, on reasonable notice to the claimant, to determine the right of ownership, which in such case is one arising in a proceeding in bankruptcy, as distinguished from a controversy at law or in equity, within the meaning of section 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].

In Bankruptcy. On motion of petitioning creditors for temporary injunction against the Hawkeye Land Company and Myrtle Moody, and motion of said land company for release of property in the custody of the receiver.

May 24, 1904, Charles Kaufman & Bros. and others filed a creditors' petition in bankruptcy against Edward J. Moody, of Hawkeye, Fayette county, alleging that said Moody had committed acts of bankruptcy, for that he had on May 14, 1904, while insolvent, transferred to the Hawkeye Land Company, of said Fayette county, a large part of his personal property, to wit, a stock of merchandise of the value of $7,000, with intent to hinder, delay, and defraud his creditors, and that on the same day, while insolvent, he transferred to his wife, Myrtle Moody, property of the value of more than $5,000, with intent to hinder, delay, and defraud his creditors, and to give her, as one of his creditors, a preference over the others; and they asked that he be adjudged a bankrupt. May 25, 1904, said Charles Kaufman & Bros. filed an ancillary petition in said proceedings, in which they alleged the filing of said creditors' petition, and, further, that on May 14, 1904, said Edward J. Moody, with intent to hinder, delay, and defraud his creditors, without consideration, and while insolvent, attempted to convey to the Hawkeye Land Company, of Fayette county, a large part of his property, consisting of his entire stock of merchandise, all located in his store at Hawkeye, but that after said alleged transfer said Edward J. Moody remained in the open and visible possession of said property, in the same manner that he had been before; that he is now in possession thereof, where he had been and is now doing business; that he is neglecting the business aforesaid, to the great loss of the petitioner and creditors of like class; that it is for the best interest of said estate that some responsible person be appointed to take charge of the property and assets of said Moody until the hearing of the petition, and continue the business of said bankrupt. An injunction against the Hawkeye Land Company is asked, restraining it from transferring or in any manner disposing of or interfering with said stock of goods; also that a receiver be appointed to take possession of the property and assets of said Edward J. Moody pending the hearing of the petition. A certificate of the clerk of this court, stating that the judge was absent from the division of the district in which such petitions were filed, was presented to and filed with the referee in bankruptcy for Fayette county May 26, 1904, together with said ancillary petition, and on that date said referee made an order appointing a receiver to take possession of said stock of goods, which order commanded the receiver to take charge of and hold said estate (being the stock of goods referred to herein), and to continue the business of said bankrupt at Hawkeye until the further order of the court. The receiver duly qualified, took possession of said stock of merchandise on May 26th pursuant to said order,

and has since continued the business of the bankrupt thereunder, and has sold a part of said goods. June 4th an injunction was also asked against Myrtle Moody, wife of Edward J. Moody, restraining her from removing or disposing of the property alleged to have been transferred to her by said Edward J. Moody. Notice of the applications for these injunctions was given to the Hawkeye Land Company and Myrtle Moody, and a time fixed for the hearings thereon, and a temporary restraining order was issued against each, as prayed, pending such hearings. The Hawkeye Land Company has appeared and filed affidavits in opposition to the issuance of an injunction against it, and has also filed a motion to vacate the restraining order, and that the stock of merchandise so taken possession of by the receiver be turned over to it.

Lacy & Brown and Hugh J. Kearns, for petitioning creditors.
Hurd, Lenehan & Kiesel, for Hawkeye Land Co.

REED, District Judge (after stating the facts). The Hawkeye Land Company claims to be a good-faith purchaser of this stock of merchandise from Edward J. Moody, that it was in actual possession thereof as such prior to the filing of the petition in bankruptcy, and that the court of bankruptcy therefore had no jurisdiction to summarily take possession of such property from it. The affidavits filed by the land company tend to show that on May 14, 1904, it purchased this stock of merchandise in good faith from the alleged bankrupt, without notice of his insolvency, paid therefor $400 in cash, paid a note of Moody's to the First State Bank of Hawkeye for $400, gave its own note for $1,000 and a quarter section of land in Fayette county, took actual possession of said goods on that day, and a written bill of sale of the same, which it duly recorded, and was in the open and exclusive possession of said property at the time the receiver was appointed; that Moody was employed by it as a clerk after it purchased the stock of goods, and that he was acting in that capacity only when the receiver was appointed; that the petitioning creditors and the receiver all knew of such purchase by and possession of the land company when the receiver was appointed, but he took the same from its custody, against its protest, and without its consent.

The examination by the petitioning creditors of some of the affiants whose affidavits were so presented by the land company tends to show that the land so conveyed by that company in part payment for the stock of goods was subject to a mortgage for $6,000, and was deeded to Myrtle Moody, wife of Edward J. Moody; that the $1,000 note was made payable to her, or delivered to her at the time of the transaction; that one of the members of the land company is an officer of the First State Bank of Hawkeye; that Moody remained in the store after the sale of the goods to the land company, carried the keys thereto, and continued to sell the goods as he had been selling them before said sale; that he was to have a percentage of the daily sales of goods for his salary, and that the proceeds of such sales above this were to be applied upon the note for $1,000 which the land company gave as part payment for the stock of merchandise; and the petitioning creditors claim that the transaction between Moody and the land company was intended by both of said parties as a fraud upon the creditors of Moody, and that the land company is not, therefore, a good-faith purchaser of said property. Counsel for the land company cite and rely upon In

re Rockwood (D. C.) 91 Fed. 363; Bernheimer v. Bryan, 93 Fed. 767, 35 C. C. A. 592; Beach v. Macon Grocery Co., 116 Fed. 143, 53 C. C. A. 463, and other similar cases. In the first of these it was ruled by Judge Shiras that the marshal or a receiver should not be appointed, under section 69 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], to take possession of property from a third person who was in actual possession thereof under claim of right prior to the institution of bankruptcy proceedings. In general, the rule so announced should be followed, and should be observed by referees acting under authority of section 38 (3), 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], in appointing receivers. In Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, in speaking of the powers conferred upon courts of bankruptcy by sections 2 (3) and 69 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545, 565 [U. S. Comp. St. 1901, pp. 3421, 3450], it is said, "These provisions can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant." These rulings, however, were made prior to the decision of the Supreme Court in Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, hereinafter referred to, and they must yield to that decision; and whether or not the marshal or a receiver should be directed to take possession of property in the hands of third parties will depend upon the circumstances of the particular case. Bernheimer v. Bryan and Beach v. Macon Grocery Company are authority for the contention of the land company that, if it was in fact in possession of the property at the time the receiver took possession thereof, the court of bankruptcy would be without jurisdiction to summarily take the property from it, and it should be returned to the land company, and the right to the property determined in an action therefor by the trustee in the event that Moody should be adjudged bankrupt. But these decisions upon this point are overruled by the Supreme Court in Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. In this case the Supreme Court held that a court of bankruptcy has authority under section 2 (3) of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], after the adjudication of bankruptcy, to order the marshal or receiver to take possession of the property of the bankrupt from a third party who acquired such possession and the alleged right thereto from the bankrupt, or one holding his title and right only, after the filing of the petition, and before the adjudication of bankruptcy. It is contended by the land company that this should only be done after the adjudication, for until that time it cannot be known that the court of bankruptcy will have authority to make distribution of the property. In Re Rochford, 124 Fed. 182 (C. C. A., Eighth Circuit), the property appears to have been in the possession of one who claimed to own and to have acquired it from the bankrupt a month before the petition in bankruptcy was filed; and it is there held that the bankruptcy court had authority to order the receiver to take possession thereof after the filing of such petition, and before the adjudication. Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372 (Eighth Circuit), is to the same effect.

Section 2 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], provides that courts of bankruptcy are invested with jurisdiction to "* * * (3) appoint receivers or marshals upon the application of parties in interest * * * to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified. * * *" It is the filing of the petition, therefore, and not the adjudication, that authorizes this action by the court of bankruptcy. Such filing is the commencement of the proceedings, and in effect is an attachment or sequestration from that time of all the property of the bankrupt not exempt to him for the benefit of his creditors. Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405. The court from that time may draw to its actual custody the property of the bankrupt within its territorial jurisdiction. If an adjudication follows, such property will be distributed by the court. If it does not, it will be restored to the bankrupt, or the person from whose custody it was taken. In most of these cases the distinction is observed between proceedings in bankruptcy, as such, and controversies at law or in equity under section 23, Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]. But in Bryan v. Bernheimer the Supreme Court is careful to state that the powers of the bankruptcy court under section 2, cl. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], are not limited by section 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], and that what is said in Bardes v. Bank that might be so construed was inadvertently said upon a question not arising in that case. This question is carefully considered by the Court of Appeals in Re Rochford, above, and the distinction between proceedings in bankruptcy, as such, and a controversy at law or in equity, within the meaning of section 23, is clearly pointed out, and the rules deducible from the decisions of the Supreme Court in Bryan v. Bernheimer and Bardes v. Bank are summarized by Sanborn, Circuit Judge, as follows:

"(1) The District Court, sitting in bankruptcy, has no jurisdiction over a controversy between trustees in bankruptcy and an adverse claimant over the title or possession of property in the custody of the latter in the absence of his consent. But such an issue is a controversy at law or in equity, as distinguished from a proceeding in bankruptcy, within the meaning of section 23 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].

"(2) The District Court, sitting in bankruptcy, has jurisdiction of such a controversy in cases in which it finds it absolutely necessary for the preservation of the estate to take possession of the property from the adverse claimant by means of its receiver or the marshal, under clause 3 of section 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]; and such a seizure, and the subsequent determination of the issue thus raised between the trustee and the adverse claimant, is a proceeding in bankruptcy, as distinguished from a controversy at law or in equity, within the true construction of section 23.

"(3) The District Court, sitting in bankruptcy, has jurisdiction to determine, after reasonable notice to the claimants to present their claims to it, the claims of all parties to property, and to the proceeds of property, which its officers have lawfully reduced to their actual possession in the course of the administration of the estate of the bankrupt; and controversies between trustees in bankruptcy and adverse claimants to property which has in this way reached the custody of the District Court are not controversies at law or in equity, as

distinguished from proceedings in bankruptcy, within the proper interpretation of section 23."

This was prior to the amendment of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409]. That amendment in no way restricts the power of the court under section 2 (3), but does enlarge the jurisdictions in which suits or actions by the trustee against third parties may be brought.

The conclusion, therefore, is that the bankruptcy court had jurisdiction to summarily take possession of this stock of merchandise from the Hawkeye Land Company, under clause 3 of section 2 of the bankruptcy act, in case it was necessary to do so to preserve it to the estate of the bankrupt; that the allegations of the ancillary petition, in effect, are that such property in fact belonged to Edward J. Moody, and are sufficient upon which to base a finding that it was necessary for the court to take possession of it in order to preserve it to his estate in bankruptcy in case he was such owner, and should be adjudged bankrupt; that the order appointing the receiver, and directing him to take possession of such property, is, in effect, a finding that it was necessary to do so. The result is that by that finding and order, and the action of the receiver thereunder, the court of bankruptcy has reduced this property to its actual custody. This, however, does not determine the actual ownership of the same.

Since this matter was submitted, Edward J. Moody has been adjudged a bankrupt, and the matter has been referred generally to the referee for Fayette county, and a trustee has been, or in due time will be, appointed. The right of the land company to the property or its proceeds depends upon whether or not it is a bona fide purchaser of it from the bankrupt prior to the filing of the petition in bankruptcy. The petitioning creditors contend that it is not. This is a question which the parties have the right to contest. It can only be done, however, in a proceeding where the evidence upon both sides can be taken in the usual way. In Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, above, it is said that proceedings in bankruptcy for the distribution of property in the custody of the bankruptcy court are in the nature of proceedings in equity. They are therefore a branch of equity jurisdiction. It is a familiar principle of equity jurisprudence that property in the custody of a court of equity is always held by it in trust for those to whom it rightly belongs; and the jurisdiction to inquire into and determine to whom it so belongs, and to that end to require all claimants thereto to present their claims within a stated time, or be barred of any interest in or right to the property, is inherent in every court of equity. In re Rochford (C. C. A.) 124 Fed. 187, above. And this though the property may have been wrongfully seized, and so brought into the custody of the court. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145. See, also, Freeman v. Howe, 24 How. 450, 16 L. Ed. 749, and Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257. Bryan v. Bernheimer and In re Rochford, above, establish the rule by which the right to this stock of merchandise or its proceeds so in the custody of the court may be fully determined; and that is to require the land company to propound its claims to such property to the bankruptcy court within a stated time. The motion of the Hawk-

eye Land Company for the release of the property will therefore be overruled, and it will be required to propound its claim to this property before the referee by September 1, 1904. The referee will so notify it at least 10 days before such date,, and, if it fails to do so within such time, it will be barred of all right to or interest in said property. If it shall so propound its claim, the referee will then fix the time within which the trustee, as soon as appointed, shall plead thereto, and will make all requisite and necessary orders for speeding the matter to a final hearing, and determine the questions so presented. Upon the appointment of the trustee, the receiver will turn over to him all property seized under the order of his appointment, or the proceeds of such as he may have sold, and render to the referee a full and true account of all thereof. The referee will fix the amount of the receiver's compensation. The trustee, however, will not be entitled to the property or the proceeds thereof paid by the Hawkeye Land Company as consideration for the stock of merchandise, and such merchandise also. He must either affirm or disaffirm as a whole the transaction between the Hawkeye Land Company and Edward J. Moody, and, if it be finally adjudged that the trustee is entitled to the stock of merchandise, the consideration paid by the Hawkeye Land Company therefor, if received or recovered by him, must be returned to it. It is not necessary that an injunction should issue against the land company, as the stock of merchandise is now in the actual custody of the bankruptcy court, through its receiver; and any interference with it, or any attempt to do so, while in his possession or that of the trustee, would be an interference with and obstruction of the exercise of the jurisdiction of that court, and there is no reason to apprehend that this will be done.

Mrs. Myrtle Moody has not appeared in response to the notice to show cause why an injunction should not be granted against her. An injunction will therefore be issued against her as prayed, upon the petitioning creditors filing a bond in the sum of $1,000, with sureties to be approved by the clerk of this court.

It is ordered accordingly.

BOBBS-MERRILL CO. v. SNELLENBURG et al.

(Circuit Court, E. D. Pennsylvania. August 1, 1904.)

No. 29.

1. COPYRIGHTS—RETAIL PRICE—CONTROL—NOTICE.

Where publishers of a copyrighted book printed on the page immediately following the title page of each copy, underneath the notice of copyright, a notice that the price of the book at retail was $1 net, and that no dealer was licensed to sell it at a less price, and that such a sale would be treated as an infringement of the copyright, such notice did not entitle the publishers to control the retail price of the book, so as to render a sale of the book at a reduced price an infringement of their copyright.

In Equity.

Samuel Dickson, for complainant.
Ira J. Williams and Alexander Simpson, Jr., for respondents.

HOLLAND, District Judge. The Bobbs-Merrill Company is the publisher of a book or novel known as "The Castaway," which was written by Hallie Erminie Rives, from whom it was purchased, together with a copyright for the same. The defendants purchased a large quantity of these books from a third party, without any notice of the fact that the plaintiffs were attempting to limit the retail price thereof, at the time they purchased them, other than the notice contained in the book upon the page immediately following the title page. There was no contract or agreement made by the defendants with the plaintiffs or any other parties as to the sale of the copies owned by defendants. That upon the page immediately following the title page of each copy of this book appear the following words:

Copyright 1904

The Bobbs-Merrill Company

May

The price of this book at retail is One Dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright. The Bobbs-Merrill Company.

The defendants have been selling this book at 98 cents per copy, and this bill is for a preliminary injunction to restrain them from selling any copies of the novel at retail at a less price than $1 net, and for an accounting for the profits accruing to the plaintiffs by reason of these unlawful sales.

It is contended on the part of the plaintiffs that a sale by the defendants of a copy of this novel at a less price than $1, under the circumstances, is an infringement of their copyright, and that they are entitled to a restraining order, and an accounting for such violation. After a very careful consideration of this question and the cases reported wherein the law applicable thereto has been considered, we fail to find any decision covering all the features of this case. The closest case to the one at bar is Harrison v. Maynard, Merrill & Co., 61 Fed. 689, 10 C. C. A. 17, which was decided in 1894 by the Circuit Court of Appeals for the Southern District of New York by Circuit Judge Shipman; and, while that case may not be controlling in this district, yet the deliberate judgment of a Circuit Court of another district should be regarded as decisive of the question involved until otherwise determined by the Supreme Court. In that case Maynard & Co., the owners of a copyright of a book, had sent a number of unbound volumes to one Alexander, a bookbinder in the city of New York, for the purpose of having them bound for sale. While in the latter's store, a destructive fire occurred in the bindery, as a result of which these unbound volumes were partially damaged. They were sold to one Fitzgerald, who after-

ward sold them to be utilized as paper stock only, and not to be placed on the market as anything else. Harrison, a dealer in secondhand books, obtained possession of some of these unbound damaged volumes, bound them, and placed them upon the market for sale, without any knowledge of the agreement made by his vendor not to sell the same as newly bound books. A bill was filed against Harrison to restrain him from disposing of the same in violation of Maynard's right under the copyright statutes of the United States. It was contended there that the owner of a copyright was entitled to an order to restrain the sale of a copyrighted book, the title to which he had transferred, but which was being sold in violation of an agreement entered into between himself and his vendee; but it was held that the owner of a copyright, who has transferred the title to copyrighted books under an agreement restricting their use, cannot restrain, by virtue of the copyright statutes, sales of said books in violation of the agreement. He was confined to his remedy for the breach of contract.

In an elaborate opinion by Judge Hammond in the case of Publishing Company v. Smythe (C. C.) 27 Fed. 914, it was decided that, so long as the owner of a copyright retains the title to the copies of the book which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and upon the person to whom the copies can be sold. Having the exclusive right to vend, he has the right to appoint to whom the book shall be sold. If his agents, to whom he has intrusted the possession of his books, violate his instructions, and fraudulently sell to a person with knowledge or notice of the fraud, or to one who, under all the circumstances, should have made inquiry as to his vendor's rights to sell, such fraud will be an infringement of the copyright, with which the original owner has never parted, and can be restrained by virtue of the statutes of the United States. This right to enjoy the benefits of the copyright statutes results from the fact that the owner has never parted with the title to the book or the copyright, although he parted with the possession of the book. But the right to restrain the sale of a particular copy of the book by virtue of the copyright statute has gone when the owner of the copyright and of that particular copy has parted with all his title to it, and has conferred an absolute title to the copy upon the purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes. Harrison v. Maynard & Co., supra.

It will be noted, however, that in the case of Harrison v. Maynard, supra, there was no notice printed in each copy of the book, such as is found on the page immediately following the title page to the book in this suit. Though the result of all the decisions in cases of this kind is to the effect that, when the owner of a copyright transfers title to a copyrighted book, although under an agreement restricting its use, or price at which it can be sold at retail, and the book is sold in violation of this agreement, his only remedy is for breach of contract and cannot be restrained by virtue of the copyright statutes, yet the question in this case arises as to whether this notice inserted by the plaintiffs in this case in the book in question amounts to the retention by them of such an

ownership in the copies transferred as would entitle them to protection under the copyright law. If it does not, it would not protect them under the copyright law, even if the defendants had notice of this agreement that the book should not be sold for less than a dollar, as the plaintiffs in that case would be required to seek their remedy at law, either for a breach of contract, or such other remedy as the circumstances might warrant. Purchasers of the book are informed by the notice that the price of this book at retail is $1 net, and no dealer is licensed to sell it for a less price, and a sale at a less price will be treated as an infringement of the copyright.

It is evident that the object of the plaintiffs is to control the retail price of this book in their vending of the same by their vendees and subsequent purchasers by means of the copyright statutes of the United States, by the notice therein contained, but it can amount to no more, at most, than a notice to all who may come into possession of a copy or copies that the plaintiffs are attempting to control the price in the retail trade. The copyright statutes cannot be invoked to control the retail trade of books the title to which the copyright owner has transferred. Where would such a right end? If purchasers of these books can be regarded as violators of the law in case any of them should sell at less than $1, it is putting a construction on the right of a copyright owner to have the "sole liberty * * * of vending" so broad that, so long as the copyright continues, this plaintiff holds control as to price and mode of selling books over every volume owned and held throughout this whole United States, by men, women, and children, as well as those now held by defendants and other retail dealers; and the owner of a volume, however anxious he might be to sell, as a result, perchance, of necessity, could not dispose of his secondhand copy for less than $1 without placing himself in the humiliating attitude of being a violator of the law. When the plaintiffs transfer their title to a copy of this book, either to a reader, subscriber, or a retailer, they have exercised their "sole liberty * * * of vending" that particular copy, and have determined as to the price, the mode of sale, and to whom it shall be sold. This is the only right the exercise of which is protected by the copyright law, and, if they desire to further control the matter of sale in retail in the possession of their vendees, it is a matter of agreement with them and their vendees, and the fact that a notice in the book that a sale for less than $1 shall be regarded as an infringement of the copyright law cannot make it such an infringement. It is simply a violation of the contract with their vendee, and they must look to their remedy upon their contract.

Petition for preliminary injunction refused.

HAMPTON ROADS RY. & ELECTRIC CO. v. NEWPORT NEWS & O. P. RY. & ELECTRIC CO.

(Circuit Court, E. D. Virginia. June 8, 1904.)

1. FEDERAL COURTS—ANCILLARY JURISDICTION—RECEIVERS.
Where a federal court had acquired jurisdiction of the assets of a street railway company operating the same through a receiver for the benefit of creditors, it had ancillary jurisdiction of a petition by the receiver to restrain a competing street railway company from maintaining gates across a certain highway, the effect of which would be to practically destroy the value of the property in the hands of the receiver, without regard to the citizenship of the parties.

2. HIGHWAYS—DEDICATION—PRELIMINARY INJUNCTION.
Where two competing street railroads, one of which was being operated by a receiver appointed by a federal court, terminated at a street leading to a bathing beach at a summer resort, and it appeared that under a prior agreement between the owners of land comprising the beach, to which defendant street railway's predecessor was a party, a certain triangle of land was conveyed and dedicated to the public as an extension to the street and an approach to the beach, the receiver was entitled to a preliminary injunction restraining defendant street railway company from closing such street and grounds, by reason of which passengers over the receiver's line were prevented from obtaining direct access to the beach, and were landed in a cul-de-sac.

In Equity.

These causes are now before the court upon the petition of Robert I. Mason, receiver, filed herein on the 2d day of March, 1904, and upon the supplemental and ancillary bill subsequently filed on the 26th of March, 1904, the demurrer and plea of the Newport News & Old Point Railway and Electric Company to the said first-named petition, and sundry affidavits filed by the parties in support of their respective contentions arising on said petition and ancillary bill: it being understood that said plea and demurrer and affidavits are to be read and considered as well upon the questions raised by the said bill, as also the said petition; the question at issue between the parties being as to the right of the Newport News & Old Point Railway Company to erect and maintain a certain fence and gates on and extending along Bay View avenue to and across Chesapeake Boulevard, at its intersection with said Bay View avenue at Buckroe Beach, in the county of Elizabeth City, and extending therefrom to and into the waters of the Chesapeake Bay. It is charged that the said fence and gates were erected by the said Newport News Company in the nighttime. The Newport News Company and the Hampton Roads Company, the affairs of the last named of which are being administered through receivers appointed by the court, are the owners and operators of competing lines of electric railway extending from Newport News, Va., to and through the town of Hampton, to Buckroe Beach, a summer watering place and resort for excursionists, on Chesapeake Bay, in said Elizabeth City county. Each of said companies are Virginia corporations, chartered and organized under the laws of the state of Virginia, and have their separate tracks down what is known as "Bay View Avenue," to a point near to where said avenue intersects with Chesapeake Boulevard, and along the western line of the public grounds and water front at said place. The Newport News Company is the owner of a 10-acre tract of land lying at the intersection of the said two avenues, fronting immediately to the western line of said Chesapeake Boulevard, the tracks of the Newport News Company being on the southern side of said Bay View avenue, and next to its 10-acre tract of land, which fronts also on said avenue; and upon its

¶ 1. Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

property so situated at the intersection of these two avenues the Newport News Company now and for some years past has maintained a pleasure resort, consisting of hotel, pavilion, and places of amusement and entertainment. In the summer of 1903 the said Hampton Roads Company had secured its right of way from the Buckroe Beach Land Company and the Woodfin heirs, along Bay View avenue and Bay View avenue extended, to the westerly line of Chesapeake Boulevard, and effected its terminus there, making considerable expenditures to that end. Some weeks after this the Newport News Company secured a lease of all their interest in a certain triangular piece of land from the heirs of the late P. T. Woodfin, extending across the intersection of Bay View avenue extended and Chesapeake Boulevard, which land lay between the terminus of the Hampton Roads Company, on the west line of Chesapeake Boulevard, and that portion of Chesapeake Boulevard which lies in front of the property owned by the Newport News Company, and between said terminus of the Hampton Roads Company and the bathing beach or water front in the bill mentioned. After securing the lease referred to, the Newport News Company proceeded in the nighttime to erect the fence and gates aforesaid along said triangle, and extending in and along and intruding upon Bay View avenue. The building of this fence shortly preceded the appointment of the receiver herein, and this proceeding was taken in these causes after the appointment of the receiver herein, with the view of preventing the maintenance of the fence and closing of the gates which, it is claimed, will in effect destroy the property operated by the receivers, since the maintenance of such fence and gates will result in cutting off the passengers by the Hampton Roads Company from reaching the public grounds and bathing beach, and land them, in effect, in a cul-de-sac. The receivers insist that the fence was constructed without authority; that the Newport News Company acquired the pretended right so to do solely for the purpose of destroying the property in their hands; and that the lessors from whom they claim to have leased the same had no title to the land leased, their ancestor, P. T. Woodfin, having heretofore conveyed and dedicated the property sought to be leased to the public as a highway; and that both they and the company leasing from them were fully aware of this fact at the time of the execution of the said lease, and the same was recognized in the deed of lease or quitclaim deed made to the Newport News Company. The Newport News Company, on the other hand, contend that the lease of said property is valid; that they leased said land and erected the fence in question because it was necessary for the orderly conduct of their business at the pleasure resort aforesaid.

R. G. Bickford and W. G. Nelms, for plaintiffs.

S. Gordon Cumming, for defendant.

WADDILL, District Judge (after stating the facts). Two questions are presented for the consideration of the court in these causes: First, as to the jurisdiction of the court in this proceeding; second, if jurisdiction exists, whether upon the facts in the case it appears there was a dedication to the public of the land upon which the fence and gates in question are erected.

1. On the question of jurisdiction, it is manifest that as an original proposition this court would be without jurisdiction to determine the question at issue between the parties in interest, they, one and all, being citizens of the state of Virginia, and that jurisdiction can only be maintained as ancillary and auxiliary to the receivership of the Hampton Roads Railway & Electric Company. That such jurisdiction does exist in this case is quite apparent. It arises upon a proceeding ancillary and auxiliary to the original suit, of which the court clearly had jurisdiction, and made necessary in order that the receiver of the court might protect his possession of the property intrusted to his care and custody, and save the same from threatened injury and

destruction. The property in the custody of the receiver was built at considerable cost, down to its present terminus of Bay View avenue, a public highway near to its intersection with Chesapeake Boulevard. The Newport News & Old Point Railway & Electric Company are the owners of the land immediately to the south of Bay View avenue, and near to their tracks, and passengers transported by the last-named road are admitted through their own private gates direct into their pleasure resort, and thence across Chesapeake Boulevard to the public grounds and water front of Buckroe Beach, on Chesapeake Bay, whereas passengers transported by the former road operated by the receivers have only access to these public grounds and the bathing beach on Chesapeake Bay by means of Chesapeake Boulevard.

To erect gates and a fence across Chesapeake Boulevard is in effect to close up the line operated by the receivers, and make it impracticable to do business at that resort at all; and to permit the same, if Chesapeake Boulevard exists as a public highway, would be virtually for this court to allow the opposition company, by means of closing a public highway lying immediately at the terminus of the two roads, and which is necessary for the use of the company in the hands of the court, to make its business a total loss. The absence of power in the court to prevent this wrong would be to visit upon litigants the loss of their estate, by seeking the aid of a court of equity to administer their affairs when insolvent; and no court having general equity jurisdiction, and the power to administer estates of persons insolvent and incapacitated to protect themselves, should be dependent upon or required to seek the aid of any other tribunal to prevent such injustice to litigants before it. The authorities are ample to maintain this position, and to show that the jurisdiction of the court in this class of cases in no manner depends upon the citizenship of the parties to the cause. 1 Foster, Fed. Pro. § 249; Davis v. Gray, 16 Wall. 218, 219, 21 L. Ed. 447; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Pacific R. R. Co. v. Mo. Pac. R. R. Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 785, 37 L. Ed. 689; Root v. Woolworth, 150 U. S. 413, 14 Sup. Ct. 136, 37 L. Ed. 1123; White v. Ewing, 159 U. S. 39, 15 Sup. Ct. 1018, 40 L. Ed. 67; Carpenter v. Northern Pacific R. R. Co. (C. C.) 75 Fed. 851.

Counsel for the Newport News & Old Point Railway & Electric Company have referred the court to the case of Wood v. N. Y. & N. E. R. R. (C. C.) 61 Fed. 236—a decision by Judge Colt, of the First Circuit. This is an interesting case, and bears incidentally with the one under consideration. It was there sought by the receivers of a railroad company to enjoin in the receivership proceedings another railroad from making an alleged discrimination in rates against the road operated by the receivers. In a word, it was an intent to control the administration of the affairs of an independent railroad in the receivership suit. There was no charge of actual or constructive interference with the property under the control of the receivers, or that they did not have an equal right with the company sought to be restrained; that is to say, to the equal use of the public highway.

2. Coming to the question of the dedication of the property at the

intersection of Bay View avenue and Chesapeake Boulevard, it seems that prior to the building of either of the street car lines, and at the time of the proposed extension of the Newport News & Old Point Railway & Electric Company to Buckroe Beach, down Bay View avenue, the desirability of laying off streets and avenues was duly considered and agreed on between the owners of the property, including P. T. Woodfin, on one hand, and the owners of the predecessor company, the said Newport News & Old Point Railway & Electric Company, and certain land companies, on the other, and that in extension of said Bay View avenue, as it now exists, certain triangles on either side of the avenue were left, whereby, on the one hand, deeds had to be made to the said Woodfin of land not theretofore owned by him, but thrown with his land by the opening of said avenue, and he was required to convey certain triangles of his own land, by reason of the cutting off of the same, in the extension of said avenue. Proper deeds were regularly made to the said T. P. Woodfin for the triangles to be conveyed to him by the land companies, and he regularly conveyed one of the triangles for which he was to make deeds, which deed is duly recorded; but as to the triangle now in question, extending from the water front across Chesapeake Boulevard to the westerly line thereof, and to and across Bay View avenue extended, there was considerable delay in making the deed, by reason of certain reservations that said Woodfin desired to make in connection with the extension of the line from the water front to Chesapeake Boulevard, and to and along Bay View avenue and Bay View avenue extended, and the manner of the maintenance of the street car line down said avenue, as affecting his other property. As to the execution of this last-mentioned deed, voluminous affidavits have been filed by the parties, respectively; and the conclusion reached by the court is that this later deed was executed by Col. Woodfin, and delivered in his lifetime to the counsel for the predecessor of the said Newport News & Old Point Railway & Electric Company, and that, so far as the property at the intersection of Chesapeake Boulevard and Bay View avenue is concerned, the same, as well as all the property included in triangle forming part of said Bay View avenue and Chesapeake Boulevard, was by said deed dedicated to the public, and, as a consequence thereof, and because of the dedication of Bay View avenue by the land company, which formerly owned the same, said Bay View avenue to the southward of Woodfin's triangle has been used as a public thoroughfare by the public and by the Newport News & Old Point Railway & Electric Company for some years past, as well as the Hampton Roads Railway & Electric Company, since the extension of its lines, and that said triangle, as it affects the said two streets to the eastward to the west line of Chesapeake Boulevard, has been regularly conveyed and dedicated to and accepted by the public. The heirs of Col. Woodfin have no right or interest whatever therein, and no lease made by them, or attempted to be made by them, of said streets, or either of them, or of any of the property formerly belonging to P. T. Woodfin, and lying to the southward of the north line of Bay View avenue extended into Chesapeake Bay, is in any respect valid or binding upon the public, or upon any person entitled to the use of said streets. Certain it is,

the receivers on this question have made out a prima facie case, entitling them to an injunction preventing the closing of said Chesapeake Boulevard and the obstruction of said Bay View avenue; and the case can hereafter be heard and determined upon the merits, as to the making of said deed, and setting up the same in this cause, all parties in interest being before the court.

The relief here sought is necessary as well for the Newport News & Old Point Company as the Hampton Roads Company, since both are without title to the right of way for their tracks for a considerable distance upon and over Bay View avenue, if the deed from Woodfin has never been executed. Indeed, whether the deed was ever executed or not by Col. Woodfin, if he received, upon the faith of making the same, a conveyance of the triangles exchanged for his, any party in interest could require the specific performance of the undertaking to convey on his part; the Hampton Roads Company being an occupant of part of Bay View avenue as a public highway, and by permit of the land companies, as well as that of the Woodfin heirs precedent to said lease, would itself be entitled to seek this relief, as would also any of the land companies affected by the failure to make the conveyance.

It follows from what has been said that an injunction should be awarded, enjoining and commanding the removal of the fence in the bill and proceedings mentioned, and, pending such removal, restraining defendants from closing said gates.

On the question of jurisdiction, see, also, Texas & Pacific Railway Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; Porter v. Labin, 149 U. S. 479, 13 Sup. Ct. 1008, 37 L. Ed. 815; Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; Price v. Abbott (C. C.) 17 Fed. 506; Armstrong v. Trautman (C. C.) 36 Fed. 275; Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616.

McALARNEY v. SUPREME COUNCIL A. L. H.

(Circuit Court, E. D. Pennsylvania. August 1, 1904.)

No. 17.

1. MUTUAL BENEFIT INSURANCE—CONTRACTS—BREACH—RESCISSION—BY-LAWS.
Where an incorporated mutual benefit association, without legal right so to do, renounced liability on certain of its insurance contracts by the adoption of a by-law reducing the amount payable on such contracts below that which it had contracted to pay, and by making assessments on the new basis and notifying members of the reduction, a member who had performed the contract on his part, and who had not consented to such reduction, might, at his election, treat the contract as rescinded, and sue to recover the amount paid.

2. SAME—LACHES—CHANGE OF POSITION.
Where defendant mutual benefit association renounced its liability to pay the amount specified in plaintiff's contract of insurance, the fact that during three years which elapsed between such breach of contract and the date plaintiff elected to rescind the same, more than 3,000 members of the association had died or withdrawn, and that 325 new members had joined the association without knowledge of plaintiff's claim to recover the

amount paid on his contract so broken, did not constitute such a change of position by defendant as to preclude plaintiff from recovering because of laches.

Joseph H. Brinton, for plaintiff.
Murdoch Kendrick, J. F. B. Atkin, and Frank P. Prichard, for defendant.

HOLLAND, District Judge. This is a suit for an anticipatory breach of contract on a policy of insurance, for the assessments paid by the plaintiff to defendant during the life of the policy. The plaintiff became a member of the defendant's subordinate lodge, known as "Anthracite Lodge No. 49," located in Philadelphia, on April 24, 1883, and received from the defendant a death benefit certificate in the sum of $5,000. Plaintiff continued to pay his insurance on the certificate for this amount until October 1, 1900, when the defendant reduced the amount of the certificate from $5,000 to $2,000, and levied an assessment, payable October 1, 1900, which the defendant did not pay, and on November 1, 1900, he was suspended by the lodge and his certificate forfeited. Discovering the illegality of the by-law reducing these certificates, the defendant, at its sessions in August, 1903, amended its by-law making this reduction so as to read as follows:

"Two thousand dollars shall be the highest amount paid by the order on the death of a member. This sum shall be paid on the death of every member holding a certificate of two thousand dollars. * * * Provided, however, that nothing herein contained shall be construed to in any way impair the obligation of any benefit certificate heretofore issued for a larger or smaller amount than that authorized by the provisions of this by-law."

A number of similar suits have been brought, two of which were passed upon in this jurisdiction. These two suits arose out of the same circumstances, to wit, an enactment by the defendant of a by-law reducing certificates from $5,000 to $2,000. Both suits were appealed and passed upon by the Circuit Court. An examination of these cases establishes the following:

"Where an incorporated fraternal benefit association, which has entered into insurance contracts with its members, without legal right renounces such contracts by the adoption of a by-law reducing the amount payable on the same below that which it contracted to pay, and putting such law into effect by making assessments on the new basis and notifying members of the reduction, a member who has performed the contract on his part and who has not consented to such reduction may, at his election, treat the contract as rescinded, and sue at once to recover the amount he has paid thereon (Supreme Council v. Black, 123 Fed. 650, 59 C. C. A. 414; Black v. Supreme Council A. L. H. [C. C.] 120 Fed. 580), and it is immaterial in such an action what use the association has made of the money so paid; nor is it any defense against its legal liability for breach of the contract that its charter and laws made no provisions for receiving funds to discharge such obligations, when it had power to make the contracts (Black v. Supreme Council A. L. H., supra), and that such contracts are made by it as a legal entity, and in an action for breach of such a contract the internal affairs of the corporation and the equities of its members inter sese are matters which are immaterial and which cannot affect its liability (Black v. Supreme Council A. L. H., supra), and, further, that in a suit such as this in question, an affidavit of defense stating generally that by reason of plaintiff's delay in electing to rescind the association has altered its position to its prejudice, without setting out in detail any facts to

support such statement, and where the association has always denied and still denies plaintiff's right to rescind, is insufficient to state a defense (Daix v. Supreme Council A. L. H. [C. C.] 127 Fed. 374)."

In the last case, Daix did not notify the defendant that he intended to treat the contract as rescinded and bring suit for the recovery of the amount paid until two years and three months thereafter. The Circuit Court of Appeals affirmed this case (130 Fed. 101), and held that the right of a member to elect to treat the contract as rescinded and recover the payments made by him was not lost by delay so long as he has not recognized the illegal action by the payment of other assessments, or done anything to mislead the association to its prejudice. The rights of the plaintiff upon his certificate of insurance are nearly all settled.

The defendant, in the affidavit of defense, however, contends that in this case it has shown a state of facts sufficiently set forth to prevent the recovery of the plaintiff, in consequence of his delay and the position of the association having altered to its injury, in that, between November 1, 1903, and May 10, 1904, when suit was brought, 3,000 members had died or withdrawn, upon whom assessments should have been made for this liability, and that 325 members have come in during that time without knowledge of this claim of the plaintiff, and, as there was no fund provided by which such claims could be paid, these new members would be required to pay their share of a sum to meet this obligation in addition to the regular and ordinary dues on the certificates; and the further defense is made that on May 24th, upon receiving notice of the suit, the defendant notified the plaintiff that it would put his benefit certificate in force, and tender to him all rights and privileges of membership, including the rights under his benefit certificate, provided that he would pay to the order the amount of the assessments, which would have been paid by him had he remained a member to date of this notice, and it claims that that offer was made at that time, because, prior to the bringing of suit by the plaintiff, defendant claims to have had no knowledge that plaintiff claimed a breach of contract because of the amendment passed in August, 1900. The delay of the plaintiff does not relieve the defendant, unless, as was said in Daix v. Supreme Council (C. C.) 127 Fed. 374, in consequence of such delay the position of the association has been altered to its injury.

The defendant alleges that the position of the association has been altered to its injury, and in support of this proposition sets forth the fact that 3,000 members had either died or withdrawn between November 1, 1900, and May 10, 1904, and that 325 new members, who were not aware of this claim, came in. Admitting the full force of this statement, and that, in consequence, the defendant is less able to pay, and that it may entail additional expense upon the new members, who were not connected with the organization at the time of the plaintiff's suspension, we cannot see how this can be admitted as a defense. In Black v. Supreme Council, supra, Judge Dallas held that:

"Such contracts are made by the defendant as a legal entity, and in an action for breach of such a contract the internal affairs of the corporation and the equities of its members inter sese are matters which are immaterial and which cannot affect its liability."

The very nature of the business in which a mutual life insurance company is engaged involves the process of dropping out of old and taking in new members, and the latter connect themselves therewith for the benefits of the insurance guarantied by their certificates, in consideration for which they pay certain stipulated sums, and impliedly assume their respective shares of all lawful liabilities of the association not excluded by their contract. If this had been a contract on the part of the defendant at a certain time in the future to convey to the plaintiff a certain piece of real estate owned by the defendant at the time of the execution of the contract, upon the plaintiff paying to it a certain stipulated sum at certain stipulated times, and the defendant, by some action of itself, or notice to the plaintiff, informed him of an anticipatory breach of this contract, and the plaintiff ceased the payment of the stipulated installments, and remained silent for three years and six months, and in the meantime the defendant, in the regular order of its business, disposed of this real estate, thereby placing itself in the disadvantageous position of being unable to deliver the property, it might be held that, in consequence of the plaintiff's silence, the defendant's position had been altered to its injury. But it does not appear that, even if the plaintiff had notified the defendant of his election to treat the contract as rescinded, there would have been any difference in the result as to the death and decrease of membership, or that any less new members would have joined; and, even if the knowledge of this obligation had deterred new members from connecting themselves with the association, these incidents were mere matters of internal management, and would result from the nature of the business in which they were engaged.

The case of Susquehanna Mutual Fire Insurance Company v. Oberholtzer, 172 Pa. 223, 32 Atl. 1105, 1108, cited by defendant, is not in point. In that case Oberholtzer was endeavoring to relieve himself of his share of the liabilities of this mutual fire insurance company, which occurred during the life of his policy, upon the ground of fraud at the execution thereof. He had, however, acquiesced in the conditions of his policy, and paid assessments on the same for a year, and enjoyed the protection afforded under the provisions of the policy. During that time these liabilities had attached, and it was held by the court that his silence during that time and his acquiescence in the conditions of the policy was a waiver of his claim to have the contract declared void because of fraud which induced it, and it was the duty of the officers to insist on the equities of the members as against any one of them. It was manifestly unjust to permit Oberholtzer to escape his share of the liabilities, which occurred during the existence of his policy, during which times he enjoyed the same benefits as other members, and to shift those liabilities upon his fellow members, who enjoyed no greater protection than he. The court was considering the equities existing among members in full standing, and the reasoning does not apply to a case such as the one at bar, where the organization itself, through its authorized officers, had rescinded a contract of insurance with one of its policy holders, who had performed his part of the agreement up to the time of such arbitrary renunciation, and who did not consent to it. He has enjoyed no benefits for which he is under obliga-

tion to the association, or any of its individual members; nor were there any liabilities thrust upon him between the time of his expulsion and the time of bringing suit, which will be shifted from his shoulders to those of other members, who would have no just right to bear them more than himself. It was the wrongful act of the association, through its officers, that brought about the liability to the plaintiff, and his right to reimbursement for the injury resulting therefrom cannot be defeated because of a change of membership in the organization between the time of their wrongful act and the assertion of plaintiff's right, so long as he has done nothing by act or delay to mislead the association to its injury.

Nor does the notice sent the plaintiff May 24, 1904, notifying him of defendant's willingness to reinstate his benefit certificate and extend to him all rights and privileges of membership upon his payment to the order of the amount of the assessments, which would have been paid by him had he remained a member, relieve them of this liability. The defendant in this case, by enactment of its by-law reducing the amount of a plaintiff's benefit certificate, in effect renounced its contract with him, and as he, in his refusal to pay the assessments, accepted this situation and treated the contract as at an end, and elected to rescind the same by bringing his suit for a recovery of the installments previously paid, the defendant cannot afterward change its mind, and require the plaintiff to abandon his election and accept performance of the contract, or agree to a reinstatement of its provisions. New Brunswick & Canada Railway Co. v. E. S. Wheeler & Co. (C. C.) 12 Fed. 377.

The plaintiff is entitled to judgment for want of a sufficient affidavit of defense, and the only other question involved is as to whether or not judgment shall be entered for the sum of $2,009.20, together with interest from May 10, 1904, or the amount of $1,931.40, which the defendant acknowledges to have been paid by the plaintiff during his membership. The plaintiff alleges the former sum to have been paid. The affidavit of defense agrees that the latter amount has been paid, but does not deny specifically the payment of the difference. In the absence of a denial of payment of this amount, we think the plaintiff is entitled to recover.

Judgment will therefore be entered for the sum of $2,009.20, with interest from the date of the commencement of suit, to wit, May 10, 1904.

H. B. CHAFFEE MFG. CO. v. SELCHOW et al.

(Circuit Court, S. D. New York. June 24, 1904.)

1. TRADE-MARKS—NAMES OF GAMES.
The inventor of a game, by giving it a distinct name, and selling it under such name, may obtain a trade-mark in the name, though he never copyrighted or patented the game.

2. SAME—GENERIC NAMES.
The generic name of a thing is not the subject of a trade-mark.

3. SAME—OWNERSHIP.
Defendants' assignor invented a game to which he applied the name "Flinch," after which, under an arrangement with various assignors of complainant, the game was put up in boxes, and sold with indifferent success; and, on the failure of one of the firms owning the business, to which the complainant succeeded, its assets, including its trade-marks, were sold to complainant under a judicial sale. The original inventor of the game, however, continued to manufacture and sell the same; and thereafter he and his executrix transferred all his rights and ownership, including the trade-mark in the name of "Flinch," to defendant. *Held*, that complainant and its assignors, by simply making and selling the game, could not acquire a trade-mark in the name as against defendants.

In Equity.

A. Bell Malcolmson, for complainant.
Frederick C. McLaughlin and Fred. L. Chappell, for defendants.

HOLT, District Judge. This is an action to restrain the infringement of a trade-mark. The complainant alleges that it owns a trade-mark in the word "Flinch," the name of a game of cards. About the year 1893, Eugene H. Munger, a clerk in a dry goods house in New York, invented a game, to which he gave the name of "Flinch," to be played with cards on which were printed various numbers. The rules of the game prescribe that, if a player makes a certain play, his adversary can call, "Flinched," and thereby gain an advantage, which I presume is the origin of the name. Munger arranged with a friend named Myers to print the cards. He originally had a few put up in boxes covered with plaid colored paper, without any name upon the boxes. About 1894 Munger entered into negotiations with Elisha G. Selchow, a member of the firm of Selchow & Righter, of New York, dealers in games, with a view to having them take up and market the game of Flinch for him. Elisha G. Selchow's son, Frederick M. Selchow, was then engaged in the business of manufacturing toys and games in New York, and his father, Elisha Selchow, arranged to have Frederick Selchow make some boxes in which to put up and sell the cards. Frederick Selchow got up a black box on which the word "Flinch" was printed. Elisha Selchow obtained the printed cards from Munger, and delivered them to his son Frederick Selchow, who made the boxes and arranged the cards in them for sale. The firm of Selchow & Righter attempted to sell them for Munger, but did not meet

¶ 2. See Trade-Marks and Trade-Names, vol. 46, Cent. Dig. § 11.
Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.

with much success. On September 25, 1895, Elisha Selchow wrote Munger a letter, stating:

"Your game of Flinch, I am sorry to say, has not been a success. We have not sold what we bought of you last year, and we made a cheaper edition, and even that does not sell. If I can see any way in which to dispose of the lot which you now have on hand at a lower price, I will communicate with you later."

In 1896 Herbert B. Chaffee entered into partnership with Frederick M. Selchow. Chaffee was to contribute cash capital, and Selchow was to put in the assets of his business. An inventory was prepared. The inventory has been lost, and is not in evidence; but I am satisfied that the inventory contained, among a statement of other assets, a list of games, in which was included the name Flinch. The firm of Chaffee & Selchow was succeeded in 1901 by a corporation which took over the firm's assets, called the Chaffee & Selchow Company. This company got into financial difficulties; and all its assets, including its trade-marks, were sold out by the sheriff, and were purchased by and transferred to the complainant, the H. B. Chaffee Manufacturing Company, which now claims to own the trade-mark by reason of this transfer. The complainant claims that Frederick M. Selchow, before the formation of the firm of Chaffee & Selchow, and that firm after its formation, sold a considerable quantity of the game, done up in the black boxes marked "Flinch," and thereby obtained a trade-mark in the name, and an exclusive right to make and sell the game under that name. It is admitted that Munger never formally transferred any rights in the game to either of the Selchows, or to the firm of Chaffee & Selchow, or to the Chaffee Manufacturing Company. Both the Selchows assert that Frederick M. Selchow never owned the game, or a trade-mark in the name; that he never transferred either to Chaffee & Selchow; that Munger had the cards printed by Myers; that Frederick M. Selchow simply manufactured the boxes, and put up the cards in them; that Selchow & Righter sold the game for Munger, but that the attempt to sell the game was substantially a failure; and that they stopped selling it in 1895. Frederick M. Selchow says that, at the time the firm of Chaffee & Selchow was formed, he had a number of uncut sheets of the cards, which Munger had furnished him; that they were the things described in the inventory as "Flinch"; and that they were afterwards cut up and used in the manufacture of another game called "Laughter." Munger, after 1895, always kept a stock of the games in a closet in his house, and sold a few from time to time, in boxes made by Frederick M. Selchow, or Chaffee & Selchow, but the evidence shows that after 1896 the sales by him were inconsiderable.

About 1901 a member of the firm of Beecher & Kymer, engaged in the book and stationery business in Kalamazoo, Mich., became acquainted with the game of Flinch, and tried unsuccessfully to find who had it for sale. Thereupon Beecher & Kymer began to manufacture and sell the game, and in 1902 registered the name "Flinch" as their trade-mark in the Patent Office at Washington. Munger, in 1902, hearing that they were manufacturing and selling the game, notified them that he was the owner of it, and objected to their manufacturing it or dealing in it without his consent. Thereupon they entered into negotiations

with him which resulted in his entering into a contract with them for the sale to them of his rights in the game. He died shortly after, and his executrix made a formal transfer of all his rights and ownership in the game, including the trade-mark in the name "Flinch," to Beecher & Kymer, who adopted the name of the Flinch Card Company for that portion of their business relating to this game. The Flinch Card Company, after it began to manufacture the game, advertised it extensively, and a demand thereupon arose for it in the trade. In February, 1903, the complainant sent out a circular to the trade as follows:

"We beg to inform you that we have in preparation and shortly to be issued the old game of 'Flinch,' the same which we formerly published under that title.

"We offer it to you at $36.00 per gross, and will guarantee that if prices go lower, we will, at our option, either meet the market price or take back the goods you have left."

The complainant accordingly brought out the game anew. Thereafter the Flinch Card Company continued to manufacture and sell the game, and the defendants Selchow & Righter purchased the game from them and sold it, and their sale constitutes the alleged infringement which this suit is brought to restrain. The Flinch Card Company is conducting the defense of this action on behalf of Selchow & Righter.

In considering the legal questions arising upon these facts, it is important at the outset to apprehend clearly what the complainant's claim is. It claims a trade-mark in the word "Flinch." It does not, as I understand it, claim an exclusive right to make and sell the game. Its claim is that no one else can sell it under the name Flinch. If it claimed an exclusive ownership in the game, its claim would be clearly invalid. Munger invented the game and named it. When he had completed his invention he owned it, and therefore had an exclusive right to it. But in order to retain an exclusive right to the game after selling it to the general public, he would have been obliged to copyright it or patent it. The invention of such a game, consisting of printed cards, can probably be protected by copyright or by registry in the Patent Office. For instance, playing cards of a certain style have been copyrighted as prints. Richardson v. Miller, 3 Law & Eq. Rep. 614, Fed. Cas. No. 11,791. And see, generally, Drone on Copyright, p. 178, and cases cited. The inventor, if he did not copyright it or patent it, by giving it a distinctive name and selling it under such name, could probably obtain a trade-mark in the name; but if the inventor of such a game gives it a distinctive name, and then makes it and sells it, or permits it to be sold, without copyrighting it or patenting it, I do not see how any other person, by simply making it and selling it, can obtain a trade-mark in its name. The general rule is that the generic name of a thing is not the subject of a trade-mark. Browne on Trade-Marks, §§ 87–91; Paul on Trade-Marks, § 35. If chess or golf or whist were now invented and named, could any manufacturer or vendor of the implements with which such games are played obtain a trade-mark in their names by selling such implements put up in boxes marked with the names of the games? He, of course, could adopt a trade-mark to distinguish the chessmen or the playing cards or the golf clubs which he made from those made by others, but I think he could not acquire

a trade-mark in the names of the games by simply selling the games after they had become known to the public under such names.

In view of these considerations, I cannot see anything in the evidence to show that the complainant has a trade-mark in the word "Flinch." Munger invented the game and named it, and, after he had done so he owned it, just as the author of a book owns it after he has written it. He never specifically transferred the ownership of it, or any trade-mark in its name, to either of the Selchows or the successors of either of them. I think, upon the evidence, that neither Frederick M. Selchow nor Chaffee & Selchow nor the complainant sold the game to any extent before 1903. If they did, there is no evidence that Munger consented to it. Selchow & Righter did sell the game about 1895 to some extent, but I think the evidence shows that they substantially abandoned the sale from that time until about 1903. Munger, however, continued to sell the game in a small way all the time until his death. If any one retained the exclusive ownership of the game and of the trade-mark in the name, Munger did, and the contracts which he and his executrix made with the Flinch Card Company transferred whatever ownership he had to them. Even if it should be considered that either of the Selchows or either of their firms ever had any rights in the game or the name before 1895, I think they abandoned them about 1895. The complainant's circular to the trade, issued in 1903, announces that they "have in preparation and shortly to be published the old game of 'Flinch,' the same which we formerly published." The circular offers the game at a certain price and guaranties that, "if prices go lower," they will either "meet the market price or take back the goods." Such a circular, in my opinion, is entirely inconsistent with the complainant's present claim that it and its predecessors have continuously sold the game, or have a trade-mark in the name "Flinch," which gives them an exclusive right to sell it under that name.

It is not necessary in this case to decide whether the Flinch Card Company owns the trade-mark. It is sufficient to say that, in my opinion, the complainant, the H. B. Chaffee Manufacturing Company, never owned it.

My conclusion is that the bill should be dismissed, with costs.

In re PRINCE & WALTER.

(District Court, M. D. Pennsylvania. July 28, 1904.)

No. 43.

1. BANKRUPTCY—MORTGAGES—LIEN—EXTINGUISHMENT.

Under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3451], providing that liens given or accepted in good faith, etc., which have been recorded according to law, shall not be affected by the act, where real estate of a bankrupt was ordered to be sold subject to a first mortgage, and the trustee, who was the holder of a second mortgage thereon, obtained special leave to bid as a lien creditor, and the referee's original order of sale expressly provided that the land should be sold subject only to the first mortgage, the lien of the second mortgage was divested by the sale.

2. SAME—TAXES—STATE STATUTES—CONSTRUCTION.
Act Pa. June 4, 1901, § 2 (P. L. 364), providing that all taxes that may thereafter be lawfully imposed or assessed on any property shall be a first lien thereon, etc., and that such lien shall have priority to, and be fully paid and satisfied out of the proceeds of, any judicial sales of the property, etc., is prospective only, and does not give priority to taxes over a mortgage which was a lien before its passage.

3. SAME—ORDER OF SALE—LIENS—VACATION.
Where real estate of a bankrupt was sold subject only to a first mortgage thereon, such sale operated to divest a tax lien on the property, as against a purchaser on the faith of the record, notwithstanding Act Pa. June 4, 1901, § 32 (P. L. 375), by which all taxes are made a continuing lien on property, notwithstanding a judicial sale, unless the proceeds of the sale are sufficient to pay them.

4. SAME—ASSETS—PAYMENT OF CLAIMS—PRIORITY—TAXES.
Under Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], providing the order of priority in which debts or charges against the estate of a bankrupt are to be paid, and declaring that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt in advance of the payment of the dividends to creditors, where state taxes assessed on the property of a bankrupt were not payable out of the proceeds of the bankrupt's real estate, they were entitled to payment as a preferred claim from the proceeds of a sale of the bankrupt's personalty, whether they were assessed prior to, or during the continuance of, the bankruptcy proceedings.

5. SAME—PROOF OF CLAIM.
Since taxes assessed against the property of a bankrupt during the administration of his estate are matters of public record, they need not be proved as a claim against the bankrupt's estate in order to be allowed.

6. SAME—PARTNERSHIP—EXEMPTIONS.
Where a partnership is adjudged a bankrupt, in Pennsylvania, the partners are not entitled to exemptions out of the partnership property.

7. SAME—SELECTION.
Where bankrupts failed to make their selection of specific articles for their exemptions at the time of the filing of their schedules, and to have the property set off to them by the trustee, to be reported by him, with their estimated value, to the court, for its approval, as required by Bankr. Act July 1, 1898, c. 541, § 7a (8), 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], and section 47a (11), 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], the trustee had no authority to pay the exemption to the bankrupts in cash out of the proceeds of a sale of bankrupt property, although unanimously assented to by certain creditors present at a meeting before the referee.

8. SAME—TAX COLLECTORS—ESTOPPEL.
Where claims for taxes had been filed against a bankrupt's estate, the tax collectors had no power to prejudice the municipalities which they represented by agreeing that the bankrupt's exemptions might be paid to them, and hence they were not estopped from subsequently repudiating such agreement.

9. SAME—OPERATION OF BUSINESS BY TRUSTEE—DEFICIT.
Where a bankrupt's hotel was operated during the pendency of bankruptcy proceedings, first under the direction of the court, through a receiver, and afterwards by the creditors through the bankrupt's trustee, a deficit made up of premiums paid for insurance on personal property and on the hotel, together with an amount paid for a liquor license necessary to maintain the good will and custom of the hotel, and the cost of advertising the sale of the property, constituted a preferred claim on the proceeds of the sale.

¶ 2. See Taxation, vol. 45, Cent. Dig. § 946.

10. SAME—COSTS.

Where a sale of a bankrupt's real estate was made subject only to a first mortgage thereon, the proceeds of the sale should be applied to the satisfaction of other liens on such real estate, undiminished by anything except the costs of the sale, etc., to the exclusion of the costs of administering the bankrupt's estate.

In Bankruptcy. On certificate of W. G. Thomas, referee.

James S. Biery and J. C. Loose, for exceptions.
W. G. Freyman and E. O. Nothstein, opposed.

ARCHBALD, District Judge. The trustee realized $1,150 from the sale of the bankrupts' personal property, and $1,450 from the real estate, and the question is how the money should be distributed. The principal controversy arises over the taxes. At the time the proceedings in bankruptcy were instituted, in August, 1901, the bankrupts were owing county, school, poor, and borough taxes to the extent of $478.50, which, with penalties for nonpayment subsequently accruing, ran the amount up to $502.43. While the estate was in the hands of the trustee, it was further assessed the same amount for like taxes for the year 1902, and claim is now made for both years. It is clear that, so far as the real estate fund is concerned, these taxes are not entitled to payment. The sale of the real estate was made subject to a first mortgage of $18,000, and the amount obtained, $1,450, is claimed by Mr. Nothstein, who holds a second mortgage of $12,500. It is expressly provided by section 67d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3451]) that:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

This requires that the money realized from the sale of property on which there are existing liens shall go to satisfy them according to their priority. There can be no question that the Nothstein mortgage was divested by the sale, and thereby remitted to the fund for payment. Not only is this implied by the order of the court, by which the sale was directed to be made subject to the first mortgage, but it was expressly provided in the original order of the referee, of which the subsequent order of court was a mere continuance, that this should be the case; and, in view of this, Mr. Nothstein, being the trustee, obtained special leave to bid as a lien creditor. The return of sale, also, is in line with this. It would not only fly in the face of the record, therefore, but would be contrary to what was the confessed understanding of all parties, to hold that the lien of this mortgage still remains.

But payment of the taxes out of the proceeds of the sale is sought to be maintained by virtue of the Pennsylvania act of Assembly of June 4, 1901 (P. L. 364), by section 2 of which it is provided that all taxes which may thereafter be lawfully imposed or assessed on any property shall be a first lien thereon, together with all charges, expenses, and fees for failure to pay promptly, and that "such lien shall have priority to, and be fully paid and satisfied out of the proceeds of, any judicial sale of said property, before any other obligation, judgment,

claim, lien, or estate with which the said property may become charged or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made."

It is to be noted that, if this act covers the taxes of 1901, it does those of 1902 also—assuming that the property is liable for the latter in the hands of the trustee—since both were assessed before the sale. But the truth is that it applies to neither. The act, by its terms, is prospective, and not retroactive; priority being given to taxes only as against any obligation, judgment lien, etc., with which the property "may become charged, or for which it may become liable." This plainly refers to the future. Lukens v. Katz, 12 Pa. Dist. R. 604. And the Nothstein mortgage, having been executed and recorded in December, 1900, six months before the act was passed, is not, therefore, affected by it. Whether it would be competent for the Legislature to postpone in favor of taxes a lien already duly acquired, it is not necessary to decide, for they have not undertaken to do so; nor, if the construction of the act was doubtful, would this be presumed.

But it is urged that by the thirty-second section (page 375) of the act the taxes are made a continuing lien on the property, notwithstanding a sale, unless the proceeds are sufficient to pay them, and that they should not fare any differently or better in the bankruptcy court than they would elsewhere, and should therefore be left to be worked out against the property in the hands of the purchaser; the municipalities to which they are due being abundantly secured thereby. In re Veitch, 4 Am. Bankr. Rep. 112, 101 Fed. 251. In re Brinker (D. C.) 128 Fed. 634; City of Waco v. Bryan (C. C. A.) 127 Fed. 79 (dissenting opinion of Shelby, J.). But it is not correct to assume that the lien of the taxes continues notwithstanding the sale which has been made. No doubt they would if the matter was regulated purely by the state law. But notwithstanding what has been said above about liens being unaffected by bankruptcy proceedings, it is in the power of the court to order a sale free and clear of them, regardless of how they would ordinarily stand. In re Keet, 11 Am. Bankr. Rep. 117, 128 Fed. 651. And the court having undertaken to administer upon the real estate in the present instance, and directed a sale subject to the lien of the first mortgage, all others were thereby divested; and any one who purchased upon the faith of this, as disclosed by the record, took a clear title, on which nothing further can be imposed.

But if nothing can be made for the taxes in question out of the real estate, it is clear that, so far as the personal fund is concerned, the taxes of 1901, at least, are entitled to be paid. The order of priority in which debts or charges against the estate of a bankrupt are to be met is established by section 64 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), by subsection "a" of which it is provided that "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof"; and by subsection "b" that the order of payment, except as so provided, shall be (1) the actual and necessary cost of preserving the estate subsequent

to filing the petition; (2) the filing fees paid in involuntary cases, and the reasonable expenses of creditors in recovering property transferred or concealed by the bankrupt; (3) the costs of administration; (4) wages due to workmen, clerks, or servants, earned within three months; and (5) debts owing to any person entitled by the laws of the states or the United States to priority. Taxes, as a class, are thus put at the head of everything—even above the expense of preserving the estate, or the cost of administering it. Brandenburg, § 1008; Collier (4th Ed.) 459. This is explicit and decisive, and, as the taxes of 1901 are unquestionably within the provisions of the act, they must be paid.

The taxes for 1902 stand somewhat differently. They were not due and owing by the bankrupts at the time of their bankruptcy, but have accrued since the proceedings were instituted, and do not, therefore, fall within the strict letter of the law. But the bankruptcy act does not withdraw the estates of bankrupts from the reach of the taxing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of trustees, the same as if they were not. Swarts v. Hammer, 120 Fed. 256, 56 C. C. A. 92, affirmed 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060; City of Waco v. Bryan (C. C. A.) 127 Fed. 79; In re Sims (D. C.) 118 Fed. 356; In re Conhaim, 4 Am. Bankr. Rep. 59, 100 Fed. 268; In re Keller, 6 Am. Bankr. Rep. 356, 109 Fed. 131. Even though accruing after bankruptcy, they must be regarded as within the meaning of the statute, and entitled to priority, the same as those which antedated it. They are equally important to the municipalities to which they are due, whenever assessed, and the obligation of the property to respond is logically no different or greater at the one time than at the other. The same reasons existing in both cases, it must be assumed that no distinction was intended to be made between them. The taxes of 1902 must consequently be paid, the same as those of 1901, out of the personal fund, in preference to every other charge; and this includes the penalties for nonpayment, which are a constituent part of them. City of Titusville's Appeal, 108 Pa. 600; 27 Am. & Eng. Enc. Law (2d Ed.) 778. The taxes of 1901 were duly and promptly proved within the year, but it is no objection to those of 1902 that they were not. Indeed, where taxes do not accrue until after the adjudication, it might not be possible in many cases to conform to this requirement. Moreover, they are matters of public record, of which every one is bound to take notice. In re Harvey, 10 Am. Bankr. Rep. 567, 122 Fed. 745. And the bankruptcy act evidently does not contemplate that they shall be proved like an ordinary debt; providing, as it does, that they shall be paid by the trustee on the order of the court, and that he shall have credit in his accounts upon filing the receipts of the proper officers therefor.

The taxes for the two years in question together amount to $1,004.85, and, as the personal property fund is only $1,150, there is but $145.15 left to meet other demands. This cuts out a large number of items which appear in the trustee's accounts, prominent among which is $300 paid in cash to the bankrupts as their state exemption. But there was unfortunately no authority for this payment, so far, at least, as any one now before the court is concerned, and it is difficult to see how the trustee was led into making it. As partners, the bankrupts had no right

to an exemption out of partnership property. Bonsall v. Comly, 44 Pa. 442; Clegg v. Houston, 1 Phila. 352. And even if this were not so, they were bound to designate specific articles, and were not entitled to come in on the proceeds after they had been sold. Hammer v. Freese, 19 Pa. 255. Moreover, it was their duty to make this designation at the time of filing their schedules, and to have the property set off to them by the trustee, who was required to report the items, with their estimated value, to the court for its approval. Bankr. Act, § 7a (8); Id. § 47a (11); In re Duffy, 9 Am. Bankr. Rep. 358, 118 Fed. 926; In re Le Vay, 11 Am. Bankr. Rep. 114, 125 Fed. 990. The assent of creditors, who are said to have unanimously agreed at one of the meetings before the referee that the bankrupts should receive their exemption in cash, could not dispense with these formalities, or give the bankrupts that to which they were not legally entitled. In re Grimes, 2 Am. Bankr. Rep. 730, 96 Fed. 529. And however much those who joined in this reported action may be estopped from repudiating it after the trustee has paid the money, nothing of that kind can be set up against the parties who are claiming here. Both are tax collectors, and neither could prejudice in any such way the municipalities which they represent. It is of no consequence, therefore, whether Culver, who has the taxes for 1901, was present at the meeting referred to; and Sitler, who has those for 1902, could not have been, for they were not then in his hands.

The other items which are displaced cover the deficiency resulting from the trustee's running the hotel, the filing fees, and the costs of administration, including the referee's fees and the expenses of making the sale. The bankrupts at the time the proceedings were instituted were engaged in the hotel business, and, in order to preserve the good will, for the benefit of all parties interested, until the property was brought to a sale, Mr. Nothstein was directed to carry on the business, first by the court, as receiver, and afterwards by the creditors, as trustee. This he did for some 15 months; making an attempt meanwhile to sell the property, which was ineffectual because of depressing local conditions. But the result was a deficit of $708.65, and the question is how it is to be disposed of. This deficit is made up of $125 paid to insure the personal property, $375 for insurance on the hotel, and $200 for a liquor license; the remaining $8.65 being odds and ends. The first of these falls naturally upon the personal fund, and the other three upon that derived from the realty. The disposition of the insurance is sufficiently obvious, but, with regard to the license, it is proper to say that until the hotel was sold it was important to maintain its good will or custom, and to this the license was essential. The delay in effecting a sale having necessitated these expenditures, they are to be paid out of the proceeds of the real estate in preference to liens which were benefited by them, on the same principle as the expenses of a managing receivership. So, also, are the costs of advertising, amounting to $50.75. Some of this, perhaps, may have been for the benefit of the personal property, but there is no way of separating it.

But what is to be done with the large amount of costs incurred in administering the estate, which still remains? The $20.15 which is left of the personal fund will take care, to that extent, of the filing fees,

which by the bankruptcy act are put next in order of preference. But in addition to the remnant of these fees, of $4.85, there are clerk's costs, of $15.41; the referee's bill, of $229.50; the appraisers' fees, of $93; $17.50 due the stenographer; and $1.50 of sundries. If the real estate fund could be appropriated, regardless of the displacement of liens, there would be no difficulty, and it is held by some that it can be. Brandenburg, §§ 1009, 1010; In re Tebo (D. C.) 101 Fed. 419. But the better opinion is otherwise. Collier (4th Ed.) 458; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816. It is expressly provided by the act, as we have seen, that liens which do not infringe upon its terms shall not be affected, and this is not observed if the security on which they depend is liable to be eaten into by the general costs of the proceedings. A sale of the property free of liens may undoubtedly be ordered, but, if this is done, the proceeds must be applied to their satisfaction, undiminished by anything except the costs of sale, or the expenses, if any, which have been undertaken for, and result to, their benefit. They are not concerned with the bankruptcy proceedings outside of this, and cannot, therefore, be charged with the cost of instituting them or carrying them on. Whether in such a case—there being no other way of providing for the costs—they may be put on the petitioning creditors, is a question I shall not attempt to decide. There is a possible lapse in the law as it stands, which ought to be provided for.

The exceptions are sustained, and the case is sent back to the referee with instructions to distribute the estate in the hands of the trustee in conformity with the views expressed in this opinion.

UNITED STATES v. BURTON.

(District Court, E. D. Missouri, E. D. February 16, 1904.)

1. POST OFFICE—FRAUD ORDERS—POSTMASTER GENERAL—JURISDICTION—PLEADINGS.

Rev. St. 3929 [U. S. Comp. St. 1901, p. 2686], provides that the Postmaster General, on evidence satisfactory to him that any person "is engaged" in conducting any scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, may instruct postmasters to return mail addressed to such persons, marked with the word "Fraudulent," and section 5480 [U. S. Comp. St. 1901, p. 3696] declares that if any person, having devised or intended to devise any scheme or artifice to defraud, etc., deposits any letter or paper in the post office for the furtherance of such scheme, he shall be guilty of an offense. *Held*, that an averment in the indictment that the matter pending before the Post-Office Department was whether a corporation *had* violated section 5480 did not show want of jurisdiction in the Postmaster General to hear and determine whether the corporation should be denied the use of the mail service, such averment being evidential only of the ultimate jurisdictional fact whether the corporation was *then* fraudulently using the mail. *Held*, further, that such averment, if faulty, was cured by the later averment that the inquiry was "to the end and for the purpose" of enabling the Postmaster General to ascertain, find, and determine whether he should exercise the power conferred upon him by section 3929, and forbid the use of the mails to the corporation.

2. CRIMINAL LAW—SENATORS—BRIBERY—INDICTMENT—SURPLUSAGE.

Where an indictment in a prosecution of a United States senator for receiving pay for services rendered to a client before the Post-Office De-

partment, in violation of Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212], charged that accused rendered services before such department; that he received compensation therefor; that the United States was interested in the matter in relation to which the services were rendered; and specifically described the services and compensation, and alleged the time it was received—it was sufficient, and all other averments tending more specifically to describe the nature of the matter in process of investigation was surplusage.

3. SAME—JURISDICTION OF POSTMASTER GENERAL.

Where the Postmaster General had jurisdiction, in the abstract, of a proceeding to determine whether a certain corporation should be longer permitted to use the mails, and whether a "fraud order" should be issued against it, such jurisdiction was sufficient for the purposes of a prosecution of a United States senator for taking compensation from such corporation for services rendered in representing it in endeavoring to induce the Postmaster General to render a decision favorable to the corporation in such proceeding, in violation of Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212].

4. SAME—STATUTES—CONSTRUCTION.

An inquiry authorized by Rev. St. § 3929 [U. S. Comp. St. 1901, p. 2686], to be prosecuted by the Post-Office Department for the purpose of determining whether a corporation is engaged in conducting a fraudulent scheme or device by means of the post-office establishment, is "a matter or thing" concerning which a senator of the United States is precluded from rendering services for a pecuniary compensation by Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212].

5. SAME—INTEREST.

An inquiry by the Post-Office Department for the purpose of determining whether a corporation has been guilty of a fraudulent use of the mails, and whether a fraud order shall be issued against it, is a proceeding in which the United States is "interested," within Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], prohibiting a United States senator from receiving compensation for services rendered by him to any person or any bureau of the United States in relation to a matter in which the United States is interested.

On Demurrer to Indictment.

D. P. Dyer, U. S. Atty.
Chester H. Krum and F. W. Lehman, for accused.

ADAMS, District Judge. The offense charged in the indictment is denounced by section 1782 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1212], and, stripped of verbiage, is that the accused, a senator of the United States, received a pecuniary compensation from the Rialto Grain & Securities Company for services rendered by him to that company in a matter pending before the Post-Office Department. The matter alleged to have been so pending is whether the securities company had so violated section 5480, Rev. St. [U. S. Comp. St. 1901, p. 3696], by devising a scheme to defraud, contemplating the use of the United States mails, as to require the Postmaster General to forbid the use of the mails to the securities company, and to direct the Postmaster at St. Louis to return all letters coming to that post office, addressed to the securities company, to the writers thereof with the word "Fraudulent" stamped thereon, and to make an order to that effect.

A demurrer has been interposed to the indictment on the grounds: First. That the Postmaster General had no authority, on the facts

stated in the indictment, to make the order forbidding the use of the mails to the securities company. Second. That the inquiry charged to have been pending before the Post-Office Department was not such an inquiry as falls within the comprehension of section 1782, and Third. No inquiry or "matter or thing" in which the United States was interested, within the purview of section 1782, was pending before the Post-Office Department.

Section 3929, Rev. St. [U. S. Comp. St. 1901, p. 2686], provides, in effect, that the Postmaster General may, upon evidence satisfactory to him that any person is engaged in conducting any scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, instruct postmasters at any post office at which letters may arrive directed to any such person to return all such letters to the postmaster at the offices at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside of such letters. The indictment charges that the matter pending before the Post-Office Department was whether the securities company had violated the provisions of section 5480, Rev. St., which denounces the use of the mails for executing schemes to defraud as a crime, when, according to the contention of counsel for the accused, it should have charged that it was then so violating those provisions. The argument is that the Postmaster General had no jurisdiction to issue the so-called "fraud order," or stop the mail of the securities company, except on evidence satisfactory to him that the company was then conducting a fraudulent scheme, and that the averment that the company had so conducted such a scheme is not enough. I am not impressed with the importance of this criticism. Section 5480, Rev. St., to which section 3929, Rev. St., manifestly refers, so far as the fraudulent scheme for obtaining money through the mails there referred to is concerned, contemplates an executed transaction. No indictment would lie unless the offense had been completed by the actual deposit of some letter in furtherance of the fraudulent scheme in the post office. Such offense actually committed once, and, a fortiori, many times, would be strong evidence that the offender was actually engaged in conducting business fraudulently, within the meaning of section 3929. But, waiving this view, it must be observed that the gist of the offense charged against the accused is that he unlawfully received compensation for services rendered by him before the Post-Office Department in relation to a matter in which the United States was interested.

The indictment accurately charges all the statutory elements of the offense, namely, that the accused rendered services before the department; that he received compensation therefor (naming the party to whom the services were rendered and from whom the compensation was received, the amount which he received, the time when he received it); and that the United States was interested in the matter in relation to which he rendered the services. For the purpose of informing the accused as to the nature and character of the matter in question, the pleader undertook to state what was pending before the Post-Office Department in relation to which the accused rendered the services. The sole purpose of this statement was to fairly and reasonably inform the accused of the general nature of the matter; and for this purpose,

as was conceded in argument, no such particularity of averment is required as would have been necessary if a criminal charge was being laid against the securities company. It is entirely sufficient if the averments fairly serve the purpose of informing the accused of the general nature of the matter which was pending before the department, in regard to which he is charged with having rendered service.

But a conclusive answer to this first criticism is that the indictment, after alleging that the inquiry before the department was whether the securities company had violated section 5480, Rev. St., charges that the matter so pending before the department was "to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find, and determine from evidence satisfactory to him whether he should order and direct the postmaster at St. Louis not to deliver to the said Rialto Grain & Securities Company, but to return with the word 'Fraudulent' plainly written or stamped upon the outside, * * * any and all letters addressed to said Rialto Grain & Securities Company, and sent to or through the post office at St. Louis, Missouri, by means of the post-office establishment of the United States." All other averments, in my opinion, might be treated as surplusage. Those just quoted would in and of themselves sufficiently apprise the accused of the matter pending before the department. It cannot be successfully claimed, I think, that the Postmaster General did not have jurisdiction and ample authority under section 3929, Rev. St., as amended, to forbid the use of the mails by the securities company, and to issue the so-called "fraud order," under some circumstances. If he had such jurisdiction in the abstract—that is, if he could have exercised the jurisdiction of forbidding the use of the mails to the securities company under any circumstances—such was jurisdiction enough for the purposes of this case. I know of no reasons why, in this incidental feature of the indictment, the pleader should be called upon to state accurately all the facts necessary to give jurisdiction to the Postmaster General. The law (section 3929) conferred the jurisdiction just referred to upon the Postmaster General, and of this law the courts take full cognizance. I think the pleader might properly enough have omitted all else in the indictment on the subject now discussed except that portion above quoted, and the necessary jurisdiction in the Postmaster General would have sufficiently appeared. Certainly, no injury can befall the accused by reason of the unnecessary detail of evidential facts. This tends to apprise him more fully than the law requires of the nature of the matter pending before the department.

The next question is whether the inquiry provided for by section 3929 of the Revised Statutes, namely, whether any person is engaged in conducting a fraudulent scheme or device by means of the post-office establishment is "a matter or thing" concerning which a senator of the United States is precluded from rendering services for a pecuniary compensation, within the true meaning of section 1782. The prohibition of the statute is against rendering any service to any person "in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest or other matter or thing in which the United States is a party or directly or indirectly interested before any depart-

ment, court-martial, bureau, officer, or any civil, military or naval commissioner whatever." It is first contended by counsel for the accused that the words "other matter or thing" found in the enumeration cannot enlarge the particular specification which precedes it. The rule "ejusdem generis" is invoked, to the effect that, when such general words follow particularly specified subjects in a statute, the general words must be construed as not enlarging the particulars enumerated, and as not creating any new subject differing from those specified. This, generally speaking, is a well-recognized rule of construction, but clearly does not go to the extent of altogether nullifying the general words. Its true meaning is that the general words must be construed as comprehending and embracing other subjects like those specified; that is, of the same general character, or so related to them as to be within the legislative intention. Effect must be given to all words of a statute, if possible. Congress, therefore, must be held to have intended something by the use of these general words. Now what is it?

Congress industriously specified the several subjects just mentioned, obviously intending to cover any and all matters or things that might be the subject of inquiry before a department in which the United States should be interested. The statute in the language employed embraces the actual "proceeding," "controversy," "charge," "accusation," or "arrest" in which the United States might in any technical sense be a party. It then adds the words "contract" and "claim," manifestly embracing the matters in which the United States might be interested pecuniarily. Congress then, doubtless realizing that in the several executive departments and bureaus of the government divers other matters might properly and necessarily be the subject of consideration and investigation, made use of the other general words "or other matter or thing." I think these words, within the true meaning of the rule of construction known as "ejusdem generis," were intended to cover kindred subjects, like preliminary examinations and inquiries necessary to enable the government acting through one of its departments, bureaus, officers, etc., to determine whether a proceeding should be instituted, a charge or accusation made, or an arrest ordered, or whether a contract or claim should be made. All of these things are obviously important in the conduct of the great executive departments and bureaus of the government, and it is with reference to these executive departments and bureaus that the provisions in question appear. The chief functions of these departments and bureaus are to investigate, determine, and act, and not to sit as courts in the matter of actual arrests, accusations, or controversies in the legal sense. I think, in the light of the foregoing considerations, that the general words "or other matter or thing" fairly embrace the inquiry or investigation alleged in the indictment to have been pending in the Post-Office Department. This conclusion, it seems to me, is eminently correct, so far as the particular charge laid in the present indictment goes. The Postmaster General is alleged to have been engaged in making an inquiry as to whether the securities company should be forbidden the use of the mails. This inquiry was quasi judicial in its character. It could be followed by an order depriving the securities company of the valuable privilege of using the mails. Such an inquiry involves many of the

essential characteristics of a "proceeding" or "accusation"; at least, in my opinion, enough to make it so akin to or so like the "proceeding" or "accusation" of the statute as to be fairly comprehended by the general words under consideration.

It is next argued that, even if the inquiry before the Postmaster General in question was within the contemplation of the statute, the United States is not directly or indirectly interested in it, and therefore that the accused is guilty of no offense within the meaning of section 1782, Rev. St. [U. S. Comp. St. 1901, p. 1212], even if he did receive compensation for services rendered to the securities company before the department in the matter under investigation. It is true, as argued by counsel, that the statute in question carries a limitation. The matter or thing involved must be one "in which the United States is a party, or directly or indirectly interested." It is not averred in the indictment that the United States was a party to the proceeding in question, but that it was directly, and in the second count indirectly, interested. Counsel have called attention to several cases in the United States Supreme Court and in state courts of last resort in which the words "interest" and "interested" are found in statutes relating to disqualification of parties, witnesses, and judges in legal proceedings—that is, suits pending in the courts—and to cases involving the right of appeal in suits in which the state is interested as a party or otherwise. In these cases it has been held generally that the "interest" referred to must be a pecuniary or property interest, and counsel for the accused contend that the interest of the United States contemplated by section 1782 is only that kind of an interest, namely, a pecuniary or property interest, and that the matter or thing pending before the department within the purview of that section must be one in the determination of which the United States may gain or lose something of value. These cases involve statutes relating generally to suits or actions at law wherein property or property rights are involved. The witnesses and judges whose "interest" in the matter was made a disqualification were such as had no other duty to discharge in the cases except, so far as the witnesses were concerned, to testify, and, so far as the judges were concerned, to render judgments and pass upon rights of property or other valuable rights, which afforded the subject of the particular litigation in hand. The Legislatures which enacted the statutes construed in those cases obviously had primarily in view the narrow sphere of the subject of litigation, which, of course, was property—the vindication of individual right, or the redress of individual wrong. The legislative vision need not and did not extend beyond the effect of the pecuniary interest of the witnesses or judges in the individual cases. Is this the measure of duty or obligation of the United States in the matter of inquiries or investigations pending before its executive departments or bureaus? I think not. The United States, in effect, agreed with the states, and with the people of the states, by the adoption of the Constitution, and the acceptance of the powers delegated to it by the states, that it would, among many other grave responsibilities represented by delegated powers, establish post offices and post roads, and it agreed that it would pass any and all laws requisite and necessary to make that grant of power effectual. Pursuant thereto, it, by its Congress, has

passed many laws regulating the mail service, prohibiting its use for fraudulent purposes and punishing offenders. The Constitution, and the laws of the United States made pursuant thereto, is the supreme law of the land. The President is the chief executive officer. The Constitution ordains that he "shall take care that the laws be faithfully executed," and requires that he shall take a solemn oath to faithfully discharge this obligation. Numerous departments, which are but an arm of the President for the performance of his executive duties, have been organized to aid him in the discharge of these duties. It follows from these considerations that in the performance of these duties the executive department is but fulfilling the high obligation imposed upon it by law. These duties, including that of executing the law, are duties which the government owes, not as a moral obligation resting alike upon all the citizens of the republic, but are duties imposed upon its executive officers and departments by law, and which, under the highest and most solemn obligations, they must perform. Madison, in one of his famous papers on the Constitution, says: "The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designed for different purposes." In my opinion, the government of the United States is interested in the matters of inquiry and investigation pending before its executive departments, looking towards the enforcement of its laws, in a higher measure of legal obligation than an ordinary agent is bound, by the contract between him and his principal, to perform his duties. No one would question for a moment that such an agent would be interested, even in a pecuniary sense, in the performance of his duty. For failure to do it legal liability might accrue against him.

I regret that industrious counsel have not been able to call my attention to any adjudication of any court on the direct question now under consideration. So far as I know, the particular feature of section 1782, now under consideration, has never been adjudicated by any court of the United States. In the absence of the aid of any prior adjudication, I have now given the statute in question such interpretation as its language, taken in connection with the obligations imposed by the Constitution and laws upon the executive department of the United States, seem to me to require.

It follows that, in my opinion, the United States can be and is interested as charged in the indictment in the matter alleged to have been pending before the Post-Office Department. I think the same conclusion would follow if heed should be given to the ordinary and natural meaning of the word "interested." Its primary meaning is "to be concerned in a cause or its consequences," and this meaning is the one which ordinarily should be given to legislative enactments.

The demurrer to the indictment must be overruled.

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

(Circuit Court, E. D. Pennsylvania. August 1, 1904.)

No. 9.

1. INSURANCE—ACTION ON POLICY—AFFIDAVIT OF DEFENSE—DOCUMENTS—COPIES.

Where, in an action on a policy of life insurance, the affidavit of defense charged false answers and representations in the application for the policy and in certain letters written between the parties, but failed to contain a copy of such application and letters, it was insufficient.

2. SAME—PROVISIONAL POLICY—REJECTION OF RISK—NOTICE.

Where a provisional certificate of insurance for 90 days provided that, if the officers of defendant company should not agree to continue the insurance during said 90 days, they might terminate it any time prior to the expiration of that term, and in such case the provisional policy should be null and void; but that, if the application for insurance was accepted by defendant's officers, a permanent policy should be made out and delivered to the insured as soon as may be, and the amount paid for the provisional policy credited on the first year's premium on the permanent policy, and defendant gave no notice to insured within the 90 days that it elected to terminate the insurance, and took no steps to return the premium paid for the provisional policy, at the end of that period insured was entitled to assume that his permanent policy took effect, and was in force at his death shortly thereafter.

Francis S. Laws, for plaintiff.
Charles P. Sherman and John G. Johnson, for defendant.

HOLLAND, District Judge. This is a motion for judgment for want of a sufficient affidavit of defense to a suit instituted by the plaintiff to recover the amount of a life insurance. The defendant, on the 4th day of November, 1902, issued a provisional policy of life insurance for the term of 90 days from date, to wit, until the 2d day of February, 1903, on the life of John E. Keen, the husband of the plaintiff, who at that time resided at Constantinople, Turkey. The plaintiff's statement shows that the insured died March 26, 1903, after the expiration of the 90 days for which the provisional policy was issued. The statement further avers that in the latter part of February, 1903, the insured, by his agent, made a demand upon the defendant at Constantinople, Turkey, for a permanent policy of insurance, to be issued in pursuance of said provisional policy, or a return of the premium, and that the defendant refused to return the premium, and advised the said insured that his application for permanent policy had been accepted by the home office of the defendant in New York, and that a permanent policy would be delivered in the due course of mail, and that the defendant never returned, or offered to return, the premium, and still retains the same.

The provisional policy, executed November 4, 1902, is "for the term of ninety days from date, to wit, until the 2d day of February, 1903, subject to the usual terms of said company's policies. It is expressly stipulated that if the officers of said company at New York shall not agree to continue the insurance during the said ninety days, they may

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1611.

terminate said insurance any time prior to the expiration of said ninety days by mailing a registered letter to the said Keen informing him of their decision, and said insurance shall thereupon become null and void. In such a case this provisional policy shall become null and void and shall be returned to the company at Paris, against reimbursement of the sum paid. If, on the other hand, the application for insurance is accepted by the officers of said company at New York, a permanent policy shall be made out and delivered to the insured as soon as may be, and the amount herein acknowledged to have been received by the company in exchange for this provisional policy shall be allowed in payment of first premium on said insurance."

The affidavit of defense denies that any insurance existed at the time of the death of the said Keen, as the provisional policy lapsed at the expiration of the 90 days, and that the company (defendant) offered to return said premium upon the return of the said provisional policy, but said offer was not accepted, and that the application for permanent insurance was not accepted by the officers of the company at New York; never agreed or authorized any one to express its agreement to the issuance of such permanent policy; and that no permanent policy was ever delivered to the said John E. Keen, and no contract of insurance other than the provisional policy was ever entered into by the defendant with the said Keen. It further denies that it refused to return said premiums, or that it advised the insured that his application for a permanent policy had been accepted by the home office in New York, or that a permanent policy would be delivered in due course of mail, and alleges that, on the contrary, before the death of the said John E. Keen the defendant, by its officers at New York, became satisfied that it had been deceived in certain material matters, and forthwith without delay, by cable and mail, notified its said director general for the Levant, in Paris, not to deliver any permanent policy to the said Keen, and to return to the said Keen the premiums which he had paid upon the provisional policy which had been issued. The affidavit then gives a meager and insufficient statement of the answers to questions in the application and in letters, without appending a copy of either; averring that the representations made by the insured that "he had not previously made application for insurance in other companies and been refused," that the "last physician he consulted was Dr. Patterson," and "has not been seriously ill," were false, without giving any other company to which he had applied and been refused, or any physician that he had consulted, and without appending a copy of any letters in which these alleged false answers were made, or the application which was executed at the time of executing the provisional policy containing his answers. It did, however, state that he had been operated upon in May, 1902, for tubercular orchitis by a physician other than the said Dr. Patterson, without giving the name of the physician, or where the operation took place. The affidavit of defense as to the false answers is clearly insufficient, as the law requires that, where a paper is an important factor in a case, and the defendant attempts to set up his interpretation of it as a defense to the action, or draws therefrom alleged facts as a defense, he must attach a copy of his affidavit. Hebb v. Kittanning Insurance Co., 138 Pa. 174, 20 Atl. 837; Erie City v. But-

ler, 120 Pa. 374, 14 Atl. 153; McCracken v. Ref. Con., 111 Pa. 106, 2 Atl. 94; Peck v. Jones, 70 Pa. 83.

It is further necessary to consider whether there is a valid defense set up other than the one of fraud and misrepresentation, and this involves a construction of the provisional certificate of insurance. This provisional certificate was for 90 days from November 4th "until the 2d day of February, 1903," with the provision that, "if the officers of said company at New York shall not agree to continue the insurance during the said ninety days, they may terminate said insurance any time prior to the expiration of said ninety days, * * * and in such case the provisional policy shall become null and void; * * * on the other hand, if the application for insurance is accepted by the officers of said company at New York, a permanent policy shall be made out and delivered to the insured as soon as may be." It is manifest that this provisional certificate was for 3 months, for the purpose of giving the officers at New York time and a chance to investigate the risk of insuring the applicant, and in case of an adverse finding they could nullify the whole contract at any time within the 90 days by informing the applicant. Then follows the provision that, if the "application for insurance" is accepted, a permanent policy shall be made out. The defendant does not claim that there was any notice of its intention to terminate this insurance any time prior to the expiration of the 90 days, and a fair construction of the contract entitled the insured to assume that his insurance was accepted. The provisional policy was issued for three months, which was to be merged in a permanent policy at the end thereof, unless the company found reasons during that time for terminating the insurance, when the provisional policy was to become null and void at the same time upon the receipt of notice. No notice was given, and we think, therefore, at the end of the expiration of the provisional policy the insured had a right to assume, from the language of his provisional policy, that his permanent policy took effect, unless otherwise notified. This view is strengthened by the fact that there is no requirement in the provisional policy that any notice of an acceptance during the 90 days to continue the permanent policy thereafter will be given, and no provision is made for the return of any portion of the money when the insurance is not nullified during the 90 days, which would indicate the understanding to be that, when no termination of the policy took place within the 90 days, the insurance was to be continued, and a "permanent policy would be made out and delivered to the insured as soon as may be," the amount paid to be applied to the first year's premium. We think, therefore, for these reasons, that the decedent was insured at the time of his death, whether defendant had actually executed and delivered the policy or not. He was entitled to the policy under the contract. No money had been returned, nor had the insurance been terminated, in accordance with the provisions in the agreement; and its failure to carry out its part of the contract by not executing the permanent policy of insurance does not relieve it from liability.

Judgment is therefore entered for the plaintiff for the sum of $4,850, with interest from May 26, 1903.

THE ELTON.

(District Court, E. D. Pennsylvania. August 2, 1904.)

No. 7.

1. SHIPPING—INJURIES TO STEVEDORES—NEGLIGENCE.

Plaintiff, an employé of the stevedore engaged in discharging a vessel, was injured by the sudden descent of a tub loaded with iron ore after it had been raised about 14 feet. The tub was raised by means of a steam winch in charge of a seaman who had knowledge that men were working below, and that a sudden lowering of the bucket for the entire distance would probably result in injury to them. He was in the habit, after raising the bucket part way, to lower it a few feet, to steady it, but in this instance it descended suddenly, as if it "had been dropped." The signalman testified that proper signals were given, but that the winchman disregarded the signals, and by mistake pulled the lever to lower the bucket. He, however, testified that he received the wrong signal. *Held*, that the injury was occasioned by the negligence of the winchman.

2. SAME—INCOMPETENT SERVANT.

Where a negligent person is placed by a master in a position requiring care and caution, such person is incompetent, and the master is liable therefor.

3. SAME—FELLOW SERVANTS.

A sailor placed at the winch by the officers of a vessel, in compliance with the charter party requiring the ship to furnish cranes and winches, with necessary steam power and hands for unloading, is not a fellow servant of the employés of a stevedore engaged in discharging the vessel.

In Admiralty.

Samuel M. Clement, Jr., and Allen C. Thomas, for libelant.
Convers & Kirlin and John Munro Woolsey, for respondent.

HOLLAND, District Judge. In accordance with the provisions of a charter party, the steamer Elton, on the 17th of July, 1902, was lying at pier No. 14 on the Delaware river, in Philadelphia, Pa., discharging a cargo of iron ore shipped from Antwerp. Peter Bellew was an employé of stevedore Boney, who at the time was discharging the cargo. Bellew, on the above-mentioned date, was working in the hold of the vessel, inshore side of hatch No. 3, filling ore into tubs, which were raised by means of a chain working on a pulley from a boom and propelled by a steam winch, managed by William Flinn, a sailor, placed at that work by the first mate of the vessel. About 10 o'clock on above date the libelant was injured by the rapid descent of one of the filled tubs. It had been raised about 14 feet, and of a sudden descended as if it "had been dropped," on the inshore side, where libelant was working. He was struck in the breast, and his legs and back were injured. He was taken to the hospital, where he regained consciousness about 12 o'clock. As a result he has not been able to work since that time, and has not yet fully recovered. At the date of the injury he was 41 years of age, of stalwart physique, able and was

¶ 3. Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Canadian Pac. Ry. Co. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

See Master and Servant, vol. 34, Cent. Dig. § 485.

earning $3 per day. The evidence shows that he will not hereafter be able to do work of the kind in which he was theretofore engaged, but will be required to seek employment requiring less physical exertion. A libel was filed in the sum of $5,000, and it is sought to hold the vessel responsible for this injury. It charges that "the master had knowledge that said gaft or boom was constructed in an unsafe manner, and the man in charge of lowering the buckets or tubs was an inexperienced and incompetent person. The libelant exercised due care and precaution, and in no manner contributed to the said injuries, but the same were solely caused by the negligence and carelessness of the respondents in improperly constructing the boom or gaft, and in allowing the same to be managed by an incompetent and inexperienced person." The answer denies negligence or carelessness on the part of the respondents, and denies that the boom or gaft was improperly constructed, or that the same was managed by an incompetent and inexperienced person.

Upon the pleadings it is contended the libelant is confined to the allegations of fault contained in the charge of negligence on the part of the respondents, due to the danger of having improperly constructed the boom or gaft, and in allowing the same to be managed by an incompetent and inexperienced person. In other words, he is required to prove that his injury resulted from the negligence of the shipowners and the inexperience and incompetency of the winchman; and, further, that if the question of the negligence of the winchman is an issue raised by the pleadings, and the injury resulted from that cause alone, the libelant cannot recover, as Flinn, the man managing the winch at the time, was a fellow servant, for whose negligence the respondents are not responsible. William Flinn was a seaman on board the Elton, and was placed at the winch by the first mate, in accordance with the requirements of the charter party under which the cargo was shipped and was being discharged requiring "the vessel to deliver the cargo to the consignee at Philadelphia, * * * paying for discharge thirty-five cents per ton, * * * and to furnish cranes and winches with necessary steam power and hands." One of the stevedore's men was placed at the opening of the hatch in a position to see in the hold, and to signal the winchman when to lower and raise the tubs. There is a conflict of evidence as to the cause of the accident. It was customary, in raising a filled tub, for the man to signal the winchman to go ahead. After raising the same some distance to stop the swing of the tub, he was signaled to lower a few feet, where the tub was steadied. He was then signaled to go ahead, when the tub was raised clear of the vessel. The signalman claims that the signals were properly given, but were disregarded by the winchman, who made a mistake, and carelessly pulled his lever to lower the bucket when he signaled him to go ahead. The winchman, however, denied this, and claims that he received the wrong signal. I find, however, from all the evidence and circumstances, that this injury resulted from the negligence of the winchman. It is clear to my mind that, if he had been attending carefully to his duties, he would not have allowed this bucket to descend the entire distance as if it "had dropped." He knew the men were working below, and in

lowering a few feet to steady the bucket he must have known required caution, and that a sudden lowering for the entire distance would in all probability injure some one below. It is evident that he negligently pulled his lever to lower the bucket, when he should have raised it; so that I find that the injury was the result of the negligence of the winchman. The winchman was the representative of the respondents, placed there by the first mate, in accordance with the provisions in the charter party, and the libel charges them with negligence and carelessness in placing an incompetent and inexperienced person at the winch. We are of opinion that a negligent person at a position requiring care and caution is incompetent. Incompetency includes want of qualification generally, and we hold that the question of the winchman's negligence is an issue fairly raised by the pleadings, and for which the respondents are responsible, if he is not a fellow servant.

The question as to whether he is a fellow servant has been passed upon so frequently and so recently that I shall only refer to the cases which I think settle that question against the claim of the respondents. McGough v. Ropner (D. C.) 87 Fed. 534, was a case decided in this district, in which the facts are almost the same as the facts in this case. Numerous cases are there cited to sustain the proposition that a sailor placed at the winch by the officers of a vessel is not a fellow servant of the employés of a stevedore. To the same effect are The Slingsby, 120 Fed. 748, 57 C. C. A. 52, and The Gladestry (C. C. A.) 128 Fed. 591, both of which cases are decisions of the Circuit Court of Appeals of the Second District.

The libel must, therefore, be sustained, and a decree may be entered accordingly.

GEORGE T. BISEL CO. v. WELSH et al.

(Circuit Court, E. D. Pennsylvania. August 1, 1904.)

No. 38.

1. COPYRIGHT—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where defendant published a digest of the laws of Pennsylvania for the years 1895–1903, inclusive, in one volume, edited and compiled by the same person who compiled complainant's copyrighted digest of the laws of Pennsylvania, with supplements for the years 1895–1897, and it appeared that the compiler made 11 errors, consisting of incorrect citations in complainant's work, which appeared verbatim in defendant's compilation, such errors justified an inference of infringement of complainant's copyright entitling complainant to a preliminary injunction; the only explanation offered therefor being that the similarity of mistake was accidental.

In Equity. Granting a preliminary injunction.

Frank P. Prichard and John G. Johnson, for complainant.
F. F. Brightly and A. S. L. Shields, for respondents.

HOLLAND, District Judge. The complainant is the owner of the copyright for the Twelfth Edition of Brightly's Purdon's Digest of the

¶ 1. See Copyrights, vol. 11, Cent. Dig. § 76.

Laws of Pennsylvania, issued 1894, and two supplements, of the same title, for the years 1895 and 1897 (hereinafter called "Supplements"). These three editions were digested and compiled by Frank F. Brightly, one of the defendants, under contract with Kay Bros., from whom complainant purchased the copyright in the spring of 1902. Subsequently, in the early part of 1903, the same Frank F. Brightly digested and compiled the Laws of Pennsylvania for the years 1895, 1897, 1899, 1901, and 1903 in one volume under the name, style, and title of "Brightly's Digest of Laws of Pennsylvania 1893 to 1903" (hereinafter called "Brightly"), adopting the same general plan as to type, arrangement of subject, cross-references, synopsis, and general appearance of that of the Supplements of 1895 and 1897, but with much more elaboration and detail as to titles, subtitles, cross-references, and notes.

Mr. Brightly, in compiling the Supplements of 1895 and 1897, as was usual, made a number of errors, 11 of which appear verbatim in his subsequent volume of Brightly. They consisted in citing a wrong page upon which an act or section of an act of assembly could be found. The nature and kind of all these errors appearing in both volumes is fully indicated by the following:

The Supplement of 1897, page 2710, in the list of acts under heading "Acts of Assembly," subheading "6 Repealed Acts," cites the act of 22d March, 1817, section 4, as "6 Sm. L., 48." Brightly's volume, page 13, in the list of acts under the head "Acts of Assembly," subheading, "6 Acts Repealed," cites the act of March 22, 1817, section 4, as "6 Sm. L., 48." This act occurs at page 438 of volume 6 of Smith's Laws.

In the list of amended, repealed, and partly repealed acts in the Supplement of 1897 three omissions occur, which were evidently an oversight of Mr. Brightly in digesting that Supplement. The same omissions occur in the same list in his volume of Brightly.

In the list of amended acts of assembly in the Supplement of 1897, giving first the act which is amended, and then on the same line with it the act which amends it, there is a list of 54 amended Acts, an arbitrary method of citing the page of the Pamphlet Laws where the amending act or section is adopted in the Supplement of 1897. In 15 instances, Mr. Brightly cited the page of the Pamphlet Laws on which the entire act commenced, and not the page on which was found the amended section, and in 39 cases the author cited the page of the Phamphlet Law of 1897 on which the amending clause occurred, and not the page of the Pamphlet Law on which the act commenced. No reason appears for the distinction adopted by the compiler, and none is offered in the answer or affidavits of the defendants. Brightly's edition has duplicated this paging exactly, adding to it the amendments subsequent to 1897. It is difficult to understand how this could be done five years afterward, except by copying.

The complainant contends that the defendants have infringed upon their copyright, in that they have made an unfair use of the Supplements of 1895 and 1897, and have copied therefrom, and that this is established by the same errors, same omissions, and similarity of statement appearing in the Supplements and Brightly.

Defendants deny the use of the Supplement to any extent whatever in the preparation of Brightly, and Mr. Brightly himself gives a de-

tailed account in his affidavit of the work and method pursued in the digesting and compiling the volume complained of, in which it is contended that Brightly's Digest, being a digest similar to the Supplements, for which the material was necessarily secured from the same original source, and the work having been done in both instances by the same person, the result would necessarily be similar—in fact almost the same; and then follows an explanation as to the errors, omissions, and sameness of arrangement, which amounts to saying it occurred accidentally.

At the hearing, some of the original work was produced, showing that in the preparation of Brightly the acts of assembly of 1895 and 1897 were used and cut up in the process of digesting and pasted upon cardboard. This was produced in court, and showed that there was undoubtedly original work done on the acts of assembly of 1895 and 1897 in compiling Brightly. In fact, the Brightly Digest was of such a different scope, taking in five sessions of the Pennsylvania State Legislature, which were to be digested into one volume in alphabetical order as to subject, and the Supplements being only for one year, that it was necessary to do original work on the acts of each session, although some of the material of the Supplements could have been used in Brightly; but as to the amount there is much uncertainty, as defendants deny having made any use at all.

Notwithstanding, however, the explanations offered in this preliminary motion, I am not satisfied that Mr. Brightly did not make an unfair use of the complainant's Supplements of 1895 and 1897. In a case like this, where the same kind of a digest is to be compiled from the same material, by the same man, similarly arranged, the existence of the same errors in the two digests offer one of the surest tests of copying. The improbability that the same mistakes would have been made, even by the same author, in both volumes, compiled five and six years apart, if in both instances he had done original work, suggests such a cogent presumption of copying from the former into the latter digest that it can only be overcome by clear evidence to the contrary. List v. Keller (C. C.) 30 Fed. 772. It may be that at the final hearing he can explain and satisfy the court that there was no copying of the Supplements in his Brightly. But as these errors, omissions, and similarity of language occurring in the Supplements are exactly reproduced in Brightly, and the explanation as to how it occurred being unsatisfactory, under the ruling of Callaghan v. Meyers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, List v. Keller (C. C.) 30 Fed. 772, Trow Directory Company v. U. S. Directory Co. (C. C.) 122 Fed. 191, the complainant is entitled to a preliminary injunction.

In re SWEETSER.

(District Court, D. Massachusetts. July 18, 1904.)

No. 7,811.

1. BANKRUPTCY—ASSIGNMENT OF CLAIMS—ACT OF 1867.

General order No. 34 of the general orders in bankruptcy (89 Fed. xiii, 32 C. C. A. xxxiii) adopted under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) which provided that the register should subrogate the assignee of a claim "upon the filing of satisfactory proof of the assignment," does not require any particular form of assignment, and the indorsement and delivery of notes which had been proved and allowed against an estate by the creditor to the assignee of the estate, with the intention that it should transfer the debt in payment of a personal obligation to the assignee, will be given effect as an assignment, as against a written assignment by the creditor several years afterward, made through a mistake, and in the belief that the claim had never been transferred; it being shown that the first transfer was given and received in good faith.

In Bankruptcy. On review of order of register.

Maynard E. S. Clemons, for Linscott.
Fred Joy, for Dowse.

LOWELL, District Judge. In 1878 the claim of Dolliver on certain notes was allowed against the bankrupt estate. About 1883 Dolliver handed over to Dowse, one of the assignees of the estate, the notes, indorsed in blank, in payment of a debt owed by Dolliver to Dowse. There was no other writing. The intention on both sides was to transfer the claim in bankruptcy. In 1901 Dolliver made a formal written transfer of the claim to Martha Whittredge; saying at the time that he was sure it had not been assigned before, but that, if he was mistaken, Mrs. Whittredge should have her money back. The facts are stated fully in the register's clear report. Linscott, the assignee of Mrs. Whittredge, has filed a petition to be subrogated to Dolliver's proof. Joy, assignee of Dowse, objects thereto.

The first question concerns the validity of an oral assignment of a claim in bankruptcy proved and allowed. Counsel for Linscott argued that such an assignment was invalidated by order 34 of the general orders in bankruptcy (see Bump on Bankruptcy [10th Ed.] 892), in this respect substantially like general order 21 under the act of 1898 (89 C. C. A. ix, 32 C. C. A. xxii). But a provision that the register shall subrogate the assignee "upon the filing of satisfactory proof of the assignment" does not indicate that any particular form of proof is required—rather, the reverse. Again, a provision that "the execution of any letter of attorney to represent a creditor of an assignment of claim after proof may be proved or acknowledged before" any one of several federal officers does not make totally invalid an assignment acknowledged in some other way. Can it be supposed that a statute which provided that "a bill of sale of personal property may be acknowledged before a justice of the peace" would of itself totally invalidate all other methods of transferring personal property? See In re Miner (D. C.) 114 Fed. 998; Id., 117 Fed. 953. It is to be

observed that here the notes themselves were handed over, and that no notice to the debtor of the transfer of a chose in action was needed, as Dowse, the assignee of the claim, as assignee in bankruptcy himself represented the debtor.

It was further objected that Dowse, as assignee in bankruptcy, was forbidden to purchase the claim. Pooley v. Quilter, 2 De Gex & J. 327; Ex parte Lacey, 6 Ves. 325. See Lowell on Bankruptcy, § 383. But where, as here, it appears that the transfer to the assignee was in good faith, and was not procured by his misrepresentation or fraud, and that it was challenged only as the result of a mistake, and because its existence had been forgotten, there is no sufficient reason to deny it effect. See Robson on Bankruptcy (6th Ed.) 634.

In view of the additional evidence taken before the register, his original order subrogating Linscott to Dolliver is reversed, but without costs.

GEORGE RIGGS & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 27, 1904.)

No. 3,412.

1. CUSTOMS DUTIES—CLASSIFICATION—FIGURED COTTON CLOTH.

In the main part of paragraphs 306, 307, Tariff Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 176 [U. S. Comp. St. 1901, pp. 1656, 1657], there is prescribed a scale of duties for cotton cloth, varying in rate according to certain physical conditions of the fabric, as whether bleached, dyed, colored, stained, painted, or printed, and whether of specified conditions of weight and thread count; and in a proviso to each of these paragraphs there is prescribed a different scale of duties, varying according to the same tests, except as to weight, but regulated by additional conditions as to the value of the cloth. Paragraph 313 of said act, c. 11, § 1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], provides that such cloth shall, if subjected to certain figuring processes, pay a duty "in addition to the duty herein provided for other cotton cloth of the same description, or condition, weight, and count of threads." *Held*, that the expression, "same description, or condition," as thus used, has no reference to the condition concerning value prescribed in the provisos to paragraphs 306, 307, and that, when cotton cloth is of such character as to become liable to the additional duty prescribed in paragraph 313, such duty should be additional only to that provided in the main part of paragraph 306 or 307, and not to that prescribed in said provisos to those paragraphs, conditioned on the value of the fabric.

On Application for Review of a Decision of the Board of General Appraisers.

These proceedings relate to a decision (In re Riggs, G. A. 5,374, T. D. 24,562) affirming the assessment of duty by the collector of customs at the port of New York on an importation of George Riggs & Co.

W. Wickham Smith, for importers.

D. Frank Lloyd, Asst. U. S. Atty. (Albert H. Washburn, Counsel for the Treasury Department, of counsel).

TOWNSEND, Circuit Judge. The merchandise in question consists of figured cotton cloth, which was assessed for duty under the provisions of paragraph 313 of the tariff act of July 24, 1897, c. 11, §

1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], which reads as follows:

"(313) Cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, and whether unbleached, bleached, dyed, colored, stained, painted, or printed, shall pay in addition to the duty herein provided for other cotton cloth of the same description or condition, weight, and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard, and two cents per square yard if valued at more than seven cents per square yard."

The collector made the assessment subject to the duties imposed by said paragraph, and also assessed duty at the rate of 35 per cent. ad valorem under the provisions of the countable cotton clauses, paragraphs 306 and 307 of said act, c. 11, § 1, Schedule I, 30 Stat. 176 [U. S. Comp. St. 1901, pp. 1656, 1657], which provides a rate of duty on cotton cloth, determined according to its conditions, as bleached, dyed, colored, etc.; the tests being, as referred to in said paragraph 313, description, condition, weight, and count of threads. Said paragraphs, however, contain a further proviso that on all cotton cloth exceeding a certain number of threads, etc., a further ad valorem duty shall be collected. Counsel for the importers insists that inasmuch as paragraph 313 provides for a duty additional to that provided "for other cotton cloth of the same description, or condition, weight and count of threads," under paragraphs 306 and 307, but does not refer to the ad valorem proviso, there was no justification for the action of the collector in assessing the ad valorem duty under paragraph 306 or 307. Counsel for the government contends that the words in paragraph 313, "of the same description, or condition," are broad enough to include "value." There would be considerable force in this contention, were it not for the fact that said words are followed by the words "weight and count of threads," while all reference to the ad valorem provision is omitted. The chief contention of counsel for the government is that, as the act of 1897 is intended as a protective tariff, the effect of the construction contended for by the importers would be to nullify the intent of the law, by permitting fancy goods to come in at a lower rate of duty than plain goods. The evidence on this point, however, is incomplete and unsatisfactory. It is practically conceded by counsel for the government that in this specific case the fancy goods would pay a slightly higher rate of duty than the plain goods. Certain illustrative samples were introduced to show that in certain other cases fancy goods would pay a lower rate of duty than plain goods, but it does not appear that this would be true as to fancy goods generally. The question is a doubtful one. If Congress intended that the ad valorem duty provided for in paragraphs 306 and 307 should be imposed upon these goods, it could have avoided all question by inserting the word "value." It has not done this, and, in these circumstances, it would seem to be the duty of the court to resolve the doubt raised by reason of such omission in favor of the importer.

The decision of the Board of General Appraisers is reversed.

HOENINGHAUS & CURTIS v. UNITED STATES.

(Circuit Court, S. D. New York. May 25, 1904.)

No. 3,362.

1. CUSTOMS DUTIES—COMPONENT MATERIAL OF CHIEF VALUE—RULE OF ASCERTAINMENT.

Held, that the provision in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], that "the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article," does not mean the value of the materials as they go into the hands of the manufacturer, but when in the condition that nothing remains to be done to them by the manufacturer, except to put them together to make the completed product.

2. SAME—WARPING NOT PART OF PROCESS OF WEAVING.

Held, that warping is not a part of the process of weaving, and that, in determining, under the provisions of Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], the component material of chief value in fabrics having a silk warp and a cotton weft, the cost of warping should be included wholly in the value of the silk component, and not distributed between the silk and the cotton.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

On application for review of a decision of the Board of General Appraisers. These proceedings were brought by Hoeninghaus & Curtis, and relate to merchandise imported by them at the port of New York. The assessment of duty by the collector of customs at that port was affirmed by the Board of General Appraisers. In re Hoeninghaus, G. A. 5,335, T. D. 24,423.

Howard T. Walden, for the importers.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question comprises woven fabrics of silk and cotton, assessed for duty under the provisions of paragraph 311 of the tariff act of 1897, c. 11, § 1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], as manufactures of silk and cotton, cotton chief value, and claimed by the importers to be properly dutiable under the provisions of paragraph 387 (Schedule L, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669]), of said act.

The sole question herein is whether silk or cotton is the component material of chief value. The determination of this question depends upon whether the expense of warping the silk is to be added in ascertaining its value. The opinion of the Board of General Appraisers contains a careful and accurate presentation of the facts, and a full discussion of the provisions of law applicable thereto. I am compelled, however, to dissent from their conclusion as to the interpretation of the law, in the light of the decided cases. Section 7 of said Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], provides that "the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article." The Supreme Court of the United States has held, in Seeberger v. Hardy, 150 U. S. 420, 14 Sup. Ct. 170, 37 L. Ed. 1129, that this pro-

vision is declaratory of the law, and that the value of the materials should be taken, not as they go into the hands of the manufacturer, but when they are in the condition that nothing remains to be done upon them by the manufacturer, except putting them together, to make the completed product. It appears from the opinion of the board, quoting Ure's Dictionary of Arts, Manufactures & Mines, that the process of warping must precede that of weaving, and that its object is to prepare the threads or yarns for the weaving process, and that such warping must be completed before the weaving process commences. It would seem, therefore, that the silk was not ready to be combined and put together with the cotton until the process of warping was finished, and that then only are the silk threads in a condition where nothing remains to be done except to put them and the cotton threads together. The expert witness for the government states that the cost of warping is a proper and necessary expense of preparing the material for the weaving process. The contention of the government that the value of the thread is not increased by the warping process, provided it should thereafter be decided not to use it for that purpose, is immaterial. The same might be said of the shells of the mother of pearl in the opera glasses of the Seeberger Case, supra. The question is as to the value of the material as it goes into the article for the purpose to which it is devoted. As Mr. Justice Brown says in Seeberger v. Hardy, supra:

"Thus, in appraising the value of a piece of furniture made of wood and silk plush, it would be obviously inequitable to take the value of the lumber as it comes from the tree, and the silk from the worm or the spinner. The true rule would seem to be to take each of them as they go into the furniture."

In this case the value of the silk, as actually computed, included its conversion into yarn. It is difficult to conceive upon what theory the line can be drawn between the process of converting the raw product into yarn, in order to prepare it for weaving, and the further process of warping which is equally necessary for said purpose.

The decision of the Board of General Appraisers is reversed.

UNITED STATES v. PEARSON & EMMOTT.

(Circuit Court, S. D. New York. May 23, 1904.)

No. 3,024.

1. CUSTOMS DUTIES—CLASSIFICATION—WOOLEN RAGS—WASTE.

Clippings of woolen material, produced in the process of making up garments, are "rags," within both the popular and the commercial signification of the term, and are more specifically provided for as "woolen rags," in paragraph 363, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1666], than in paragraph 362 of said act (30 Stat. 183 [U. S. Comp. St. 1901, p. 1666]), as "wastes composed wholly or in part of wool, not specially provided for."

On Application for Review of a Decision of the Board of General Appraisers.

These proceedings were brought by the United States in the matter of an importation by Pearson & Emmott, with regard to which the

assessment of duty by the collector of customs at the port of New York had been reversed by the Board of General Appraisers. Note G. A. 4,555, T. D. 21,595, and U. S. v. Cummings (C. C.) 65 Fed. 495.

D. Frank Lloyd, Asst. U. S. Atty.

William B. Coughtry and Walter K. Griffin, for the importers.

TOWNSEND, Circuit Judge. The articles in question comprise the portions of woolen material clipped from the piece in the course of making up garments. They are commercially designated by dealers in waste and by hosiery manufacturers, specifically, as "clippings" or "clips," and are included by them within the designation "waste," as a generic term. They are waste in the sense that they are refuse portions of the fabric, which cannot be used by the woolen mill. They are "rags" in the dictionary and popular signification, and are commercially designated and dealt in as rags by rag dealers. The evidence shows that the greater part of their business consists of dealings in this class of rags. The evidence fails to show that the term "rags" is confined, in trade and commerce, generally to pieces of old, worn-out garments. There is considerable evidence tending to show that this merchandise is known as "new rags," as distinguished from "old rags." Several of the witnesses for the government admit that these pieces are commercially known as "rags." It further appears that during the last 10 years such merchandise has always been passed by the customs authorities as rags.

It would seem, from the class of articles specifically designated as varieties of waste under the provisions of paragraphs 361 and 362 of the tariff act of 1897, and from the evidence herein, that the term "waste" is generally applied to threads or yarn either before they have been woven into a fabric, or to such threads or yarn reduced by the disintegration of the refuse fabric.

The merchandise was assessed for duty, under the provisions of paragraph 362, of said act of July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1666], as "waste, not specially provided for." The importers have protested on the ground that the articles are woolen rags, and dutiable as such under the provisions of paragraph 363 of said act (30 Stat. 183 [U. S. Comp. St. 1901, p. 1666]), which provision covers woolen rags, and is not qualified by the term "not specially provided for."

Inasmuch as the evidence fails to show any such extensive commercial designation of this merchandise as waste as would take it out of the general class of woolen rags, it must be held to be specially provided for under said paragraph 363, and therefore not dutiable as "waste, not specially provided for."

The decision of the Board of General Appraisers is affirmed.

DICKSON v. UNITED STATES.

(Circuit Court, S. D. New York. May 23, 1904.)

No. 3,456.

1. CUSTOMS DUTIES—LEGALITY OF PROTEST—RELIQUIDATION UNDER DECISION OF GENERAL APPRAISERS.

In reliquidating an entry under a decision of the Board of General Appraisers sustaining an importer's protest, the collector withheld a portion of the duty that had been improperly assessed, and within 10 days thereafter the importer filed a protest against the collector's action. *Held*, that the protest was within the requirements for protests as established by section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review overruled a protest made by George M. Dickson against the action of the collector of customs at the port of New York in reliquidating an entry under a decision of the Board of General Appraisers. The decision under which the collector proceeded had sustained a protest which the importer had filed at the time of the original liquidation of the entry, and which made the contention that the collector, in assessing duty on certain ginger ale in bottles, had erred in including the value of the bottles in that of the ale. As in this liquidation the bottles and their contents had been subjected to the same rate of duty, no question had arisen as to whether the amount of certain items in the invoice for corking, wiring, etc., should be treated as part of the value of the bottles, or of that of their contents. The importer did not raise that point in his protest, and the board made no reference to it when, in deciding the protest, it held that no duty should have been assessed on the bottles. The collector, in reliquidating the entry under the decision of the board, treated said items as pertaining wholly to the ale, and refused to include their value in the value of the bottles on which duty was refunded. Thereupon the importer, within 10 days after reliquidation, filed the protest which is the subject of these proceedings; contending that said items should have been treated as part of the value of the bottles, and have participated in the refund. It was insisted on the part of the collector that this contention should have been made at the time of the original liquidation, in the protest then made, and that a protest filed at the time of a reliquidation made in response to a decision of the Board of General Appraisers does not meet the requirements of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], where it is provided that protests shall be filed within 10 days after the collector's ascertainment and liquidation of duties. This contention was upheld by the board in an opinion reading as follows (Somerville, General Appraiser):

"This protest covers an importation of bottles containing ginger ale, and claims that the items of corking and wiring are not dutiable under paragraph 248 of the tariff act of August 27, 1894, c. 349, 28 Stat. 526. This claim is well founded, under previous decisions. In re King, G. A. 5,290, T. D. 24,262; West v. United States (C. C.) 119 Fed. 495. The collector, however, reports, and the importer has not sought to controvert the statement, that the present protest is filed against a liquidation made by him under a decision and order of this board on previous protests filed by the same importer. In short, it is shown that the present proceeding is an attempt to recover on claims not made in the preceding protests. Under the ruling of the courts and this board, the importers cannot be permitted to raise new questions by a second protest. Stern v. United States (C. C.) 77 Fed. 607; In re Duke, G. A. 3,823, T. D. 17,948. The present protest having been filed more than ten days after the liquidation of the entry and the collector's decision contemplated by section 14 of the act of June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], it comes

too late for consideration. It is overruled, and the decision of the collector affirmed."

Edward Hartley, for importer.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The appellant herein imported under the act of 1894 ginger ale in bottles, upon which the collector imposed a duty of 20 per cent. on the total value of bottles and contents. The board of general appraisers sustained a protest of the importer, holding the bottles to be free, on the authority of U. S. v. Dickson, 73 Fed. 195, 19 C. C. A. 428. The collector, in refunding the excess duty, on the order of the board, withheld the duty collected on the value of corking, wiring, etc., against which the appellant herein had protested. The board found that the claim was well founded, on the authority of West v. U. S. (C. C.) 119 Fed. 495, but held that, as the protest was filed against the liquidation by the collector under a decision of the board, the importer cannot now raise any new questions by a second protest.

This conclusion does not seem to be well founded. In the first place, this protest does not raise a new question, because the decision that no additional duty could be assessed covered the corks and wires as well as the bottles. Furthermore, upon a reliquidation the previous liquidation is abandoned, and the time to protest does not begin to run until such reliquidation. Robertson v. Downing, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269. The technical objections made to this claim seem to be contrary to the decisions of the courts, and are confessedly contrary to the decisions of the Board of General Appraisers. See G. A. 5,346, 5,406.

The decision of the Board of General Appraisers is reversed.

GARTNER & FRIEDENHEIT v. UNITED STATES.

(Circuit Court, S. D. New York. June 2, 1904.)

No. 3,439.

1. CUSTOMS DUTIES—CLASSIFICATION—SILK RIBBONS—TRIMMINGS.

Held, that certain silk ribbons, of which some were, and others were not, in the nature of trimmings, but which, whenever used for trimmings, are required to be further fashioned for such use, and which are not in fact or commercially within the class of goods known as "trimmings," are not dutiable as silk trimmings, under paragraph 390, Tariff Act 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], but as manufactures of silk, not specially provided for, under paragraph 391 of said act (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]).

On Application for Review of a Decision of the Board of General Appraisers.

These proceedings were brought by Gartner & Friedenheit to secure the reversal of an affirmance by the Board of General Appraisers (G. A. 5,460, T. D. 24,756) of the assessment of duty by the collector of customs at the port of New York.

C. A. Mountjoy (James M. Beck, of counsel), for the importers.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question is represented by 13 samples of ribbons, differing in quality and character, all of silk, or of which silk is the material of chief value. They were classified for duty as silk trimmings, under the provisions of paragraph 390 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]). The importers claim that they should be classified under paragraph 391 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]) of said act as "manufactures of silk or of which silk is the component material of chief value, not specially provided for."

The single question presented is whether these articles are in fact trimmings. The Board of Appraisers found that the ribbons were applied to a variety of uses, some of which were of the character of trimmings, while others—such as the use for tying bonbon boxes, and as drawing strings for underwear and in corsets, were not in the nature of trimmings. The board also found that, in most instances where used for trimming, they were cut, tied, and otherwise fashioned for their ultimate use. In these circumstances, I should feel inclined to follow the decision of Judge Wheeler in Robinson v. U. S. (C. C.) 121 Fed. 204, where it was held that such articles did not become trimmings until they were so fashioned as to be applied to the articles to be trimmed. The counsel for the United States contends, however, that Judge Wheeler's opinion is contrary to the decisions of the Supreme Court of the United States in the Hat Trimmings Cases, and in support of said contention cites the following: Hartranft v. Langfelt, 125 U. S. 128, 8 Sup. Ct. 732, 31 L. Ed. 672; Robertson v. Edelhoff, 132 U. S. 614, 10 Sup. Ct. 186, 33 L. Ed. 477; Cadwalader v. Wanamaker, 149 U. S. 532, 13 Sup. Ct. 979, 983, 37 L. Ed. 837; Walker v. Seeberger, 149 U. S. 541, 13 Sup. Ct. 981, 37 L. Ed. 839; Hartranft v. Meyer, 149 U. S. 544, 13 Sup. Ct. 982, 983, 37 L. Ed. 840. It appears, however, that in each of these cases the question as to whether the articles were or were not trimmings was not decided by the court as a matter of law, but was left as a question of fact to be determined by the jury, and that, the jury having determined this question of fact, the court applied the law to such finding. In the present case the testimony establishes that the chief uses of these articles are not for trimming hats or dresses, and that they are not in fact or commercially within the class of goods known as trimmings. It further appears by a comparison of paragraph 339 (Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]) and paragraph 320 (Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]) of said act that Congress has made a distinction in the case of cotton goods between trimmings and ribbons. It also appears from the rulings of the Treasury Department that ribbons of the kind in question here have been uniformly held to be dutiable as manufactures of silk.

The decision of the Board of General Appraisers is reversed.

UNITED STATES v. ROESSLER & HASSLACHER CHEMICAL CO.

(Circuit Court, S. D. New York. June 2, 1904.)

No. 3,416.

1. CUSTOMS DUTIES—CLASSIFICATION—FERROCHROME—FERROTUNGSTEN—FERROMOLYBDENUM — FERROVANADIUM — FERROMANGANESE — SIMILITUDE — UNWROUGHT METALS.

Held, that certain alloys of iron and mineral substances known as ferrochrome, ferrotungsten, ferromolybdenum, and ferrovanadium are not dutiable as "metals unwrought," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 183, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], but are dutiable at the rate applicable to the ferromanganese, enumerated in paragraph 122 of said act (30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]), which they resemble in quality and use, within the meaning of the so-called similitude clause in section 7 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1694]).

Application for Review of a Decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York.

Charles Duane Baker, Asst. U. S. Atty., and Charles Fuller, Special Asst. U. S. Atty.

Frederick W. Brooks, for importers.

TOWNSEND, Circuit Judge. The merchandise in question consisted of ferrochrome, ferrotungsten, ferromolybdenum, and ferrovenadium, and was assessed for duty at the rate of 20 per cent. ad valorem as a "metal unwrought," under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 183, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645]. The importers protested, claiming that said merchandise was properly dutiable at the rate of $4 per ton, the rate imposed by paragraph 122 of said act (30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]) on "ferromanganese," etc., by virtue of the similitude clause in section 7 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1694]). The Board of Appraisers sustained the protest. Counsel for the United States contends that upon the evidence herein these metals are not wrought, because they are now in the first state in which they appear after reduction from the ore; that is, the first stage in which they appear as pure metals. There is nothing to show that they have been subjected to any process different from that proved on the former hearings in this court. I shall therefore follow the decision of this court in Dana v. U. S. (C. C.) 116 Fed. 933, that they are not metals unwrought. This fact being proved, they fall within the decision in Dana v. U. S. (C. C.) 91 Fed. 522, affirmed in U. S. v. Dana, 99 Fed. 433, 39 C. C. A. 590, that they are similar in quality and use to ferromanganese.

The decision of the Board of General Appraisers is therefore affirmed.

THOMPSON et al. v. SCHENECTADY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. April 5, 1904.)

No. 167.

1. JUDGMENT—CONCLUSIVENESS—PARTIES.
Where whatever rights complainants acquired in the property of a street railway company were acquired after a foreclosure decree had been entered, but before the decree had been executed by a sale of the mortgaged property, under an agreement between complainants and the street railway company's receiver, and complainants were not parties to the foreclosure proceeding, they were not bound by the decree therein.

2. STREET RAILWAYS—FRANCHISE—SURRENDER—CONSENT OF STATE.
Where the consent of the state was not obtained to a contract between complainants and the receiver of a street railway company and a city, by which the railway company was permitted to permanently discontinue its railway on a certain street, such contract was void as against public policy, the right to operate the same being a franchise granted by the state on considerations of public welfare.

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

See 119 Fed. 634; 124 Fed. 274.

Marcus T. Hun, for railway company.

A. H. Van Brunt, for trust company.

Edward W. Paige, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree for the complainants, and presents the question whether, upon the conceded facts, as appearing by the bill of complaint, the complainant was entitled to relief. The bill is one in the nature of a bill of review to revise a decree of the United States Circuit Court for the Northern District of New York in an action brought by the Central Trust Company against the Schenectady Street Railway Company for the foreclosure of a mortgage made by the railway company. The decree was entered September 1, 1894. Included in the property covered by the mortgage was that part of the railroad of the mortgagor which had been constructed along Washington avenue, in the city of Schenectady, and this part of the railroad was included in the property decreed to be sold, and was sold under the decree January 12, 1895, to Kobbe and others. The sale was confirmed, and a conveyance made to the purchasers February 8, 1895. The complainants are property owners upon Washington avenue, who seek to restrain the Schenectady Railway Company, a corporation, which acquired the mortgaged premises February 17, 1895, from operating its road upon a portion of that street. They assert by their bill that during the pendency of the foreclosure action the receiver in the action, appointed by the court, was in possession of the mortgaged property, and joined with certain property owners upon Washington avenue, including some of the present complainants, in a petition to the common council of

the city of Schenectady asking that body to consent and authorize the mortgagor to discontinue permanently the running of its cars upon said street and to remove its track, and that October 2, 1894, the common council adopted a consenting resolution.

The specific relief prayed for by the bill is that the foreclosure decree be revised so as to omit the Washington avenue property from the property therein, and so as to provide that the agreement between the receiver and the Washington avenue property owners and the city of Schenectady be approved by the court, and be binding upon all the parties to the action; and that the defendants be permanently enjoined from doing any act in the construction or operation of any sort of a railroad upon any part of the street.

Whether the matters set forth in the bill make a case which, assuming it to be one entitling the complainants to relief in equity, can be appropriately presented by a bill or a supplemental bill in the nature of a bill of review, or which can be presented only by an original bill, we need not decide. The original suit decided nothing which could prejudice the complainants. They were not parties, and could not be affected by any decree. Whatever rights they acquired in the mortgaged premises were acquired after the decree had been entered, but before the decree had been executed by a sale of the mortgaged premises by an agreement made with the receiver. Doubtless they could have applied to the court for an approval of that agreement and a modification of the decree recognizing and giving effect to it. The requisite diversity of citizenship to maintain an original bill in this court does not exist between the parties. We think the facts did not afford any ground of relief, whether by a bill of review, or one in the nature of such a bill. The relief which they seek to obtain is the enforcement of an agreement which they assert was constituted by the action of the receiver, the property owners, and the common council of Schenectady, and by which they claim that the parties to the foreclosure action and their successors in title to the mortgaged premises are bound to an abandonment of the right to operate a railroad upon part of the street; and they urge that the court can now approve the action of the receiver and ratify the agreement with the same effect as though an application had been made and granted in the foreclosure suit. To do this would be, in effect, to decide that the court, whose officer the receiver was, would have approved the agreement if an application had been made to it, or ought to have approved it had an application been made. The approval of a receiver's contract rests in the sound discretion of the court. It will not be granted merely because the agreement is for the interests of the immediate parties to the suit, and is often determined upon consideration of the interests of those who are not parties, or of the public. It is apparent, from the facts disclosed by the bill, that the so-called agreement was made in the supposed interests of the receiver and the parties to the foreclosure action, and in order to lift the burden of maintaining an unprofitable part of the railroad. It does not appear by the bill that the receiver obtained the consent of the Railroad Commissioners or of the state to the agreement, and the argument for the complainants concedes that such consent was not

obtained. The right to construct and operate a street railway is a franchise granted by the state upon considerations of the public welfare; and any contract which disables the corporation from performing its functions without the consent of the state, and made to relieve the corporation of the burden which it has assumed, is void as against public policy. That consideration alone would have justified and compelled the court in the foreclosure suit to withhold its sanction to the agreement. It presents an insuperable objection to the making of any new decree which would now sanction the agreement. The very recent decision of the highest court of the state in actions between some of the present parties is authoritative to the effect that the attempted abandonment was a nullity because against public policy. Thompson v. Schenectady Railway Company (N. Y.) 70 N. E. 213. The court say:

"Within the principle of the cases cited, it is obvious that the public has an interest in that portion of the Schenectady Railway which was constructed in Washington avenue, which could not be destroyed or abandoned without the consent of the state."

The authorities cited in the opinion in that case abundantly prove the proposition decided, and no further reference to them is necessary. If the decision had been rendered before the decision in the present case, and brought to the attention of the learned judge of the court below, doubtless he would have dismissed the bill.

The decree is reversed, with costs, and with instructions to the court below to dismiss the bill.

LAST CHANCE MIN. CO. et al. v. BUNKER HILL & S. MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. May 31, 1904.)

No. 985.

1. MINING CLAIMS—SUIT TO ESTABLISH EXTRALATERAL RIGHTS—SUFFICIENCY OF BILL.

   A bill filed by the owner of a lode mining claim to establish extralateral rights and quiet its title need not allege the general course of the vein beyond the limits of the claim.

2. SAME—POSSESSION—EXTRALATERAL RIGHTS.

   The ownership and possession of the surface of a lode mining claim carries with it the ownership and possession of the lode which has its apex therein to the full extent of the extralateral right given by the statute to the owner of the claim.

3. SAME—RIGHTS ACQUIRED BY LOCATION—INTEGRAL CHARACTER.

   The right given by the location of a lode mining claim in that portion of the vein lying within its surface boundaries and that portion lying beyond them in which the statute gives the owner extralateral rights is integral, and no adverse right can be acquired by the locator of another claim in respect to the latter portion that could not in respect to the former.

4. SAME—PRIORITY OF EXTRALATERAL RIGHTS—FAILURE TO RECORD NOTICE.

   The fact that the locator of a lode claim failed to record his location notice within 15 days, as required by the Idaho statute, did not invalidate

the location, there being no such penalty affixed by the statute, and the locator of another claim on the same vein within the 15 days, with knowledge of the prior location, and that the owner was in possession and actually engaged in working the claim, acquired no rights to conflict with those of the older claim either in the surface or underground portion of the vein.

5. SAME—VALIDITY OF LOCATION—EFFECT OF ISSUANCE OF PATENT.
The issuance of a patent for a mining claim is conclusive evidence of the sufficiency of the steps taken by the locator as against one claiming adverse rights.

6. APPEAL—REVIEW—FINDINGS OF FACT.
Findings of fact made by a master in pursuance of the order of the court that depend upon conflicting testimony or upon the credibility of witnesses, especially where they have been approved by the trial court, will not be disturbed on appeal.

7. MINING CLAIMS—EXTRALATERAL RIGHTS.
The fact that a vein or lode is of such width on the surface as to extend beyond the side line of a claim located thereon does not affect the extralateral rights of such claim as against a junior location.

8. SAME—END LINES OF LODE CLAIM—MISTAKE IN DIRECTION OF LODE.
Where the apex of a vein crosses what were originally intended as the side lines of a lode claim, and they are parallel, they become, by operation of law, the end lines.

9. SAME—EXTRALATERAL RIGHTS—COURSE OF VEIN.
Where the end lines of a lode claim cross the surface outcropping of a vein, they determine the extralateral right of the claim, without regard to the angle at which they cross the general course of the vein; its course for that purpose being fixed by the course of the apex on the surface of the claim.

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

W. B. Heyburn, John P. Gray, and F. T. Post, for appellants.
Curtis H. Lindley, Henry Eickhoff, and M. A. Folsom, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. In the court below the appellee was complainant, and the appellants defendants. For convenience of reference, the complainant Bunker Hill & Sullivan Mining & Concentrating Company will be referred to as the "Bunker Hill Company," the defendant Last Chance Mining Company as the "Last Chance Company," the defendant Shoshone Mining Company as the "Shoshone Company," and the defendant Empire State-Idaho Mining & Developing Company as the "Empire Company."

The bill of complaint alleges the Bunker Hill Company to be the owner in fee in possession and entitled to the possession of that certain mine and lode mining claim situated in Yreka mining district, Shoshone county, Idaho, known as the "Bunker Hill Lode Mining Claim," and specifically described in the bill; that within that claim there is a vein or lode of rock in place carrying silver, lead, and other valuable minerals, the general course or strike of the top or apex of which at the surface within the claim is northerly and southerly, on which course the

¶ 9. See Mines and Minerals, vol. 34, Cent. Dig. §§ 75, 76

top or apex of the vein crosses the southerly end line thereof at a point 300 feet westerly from its corner No. 3, and, continuing on its northerly course, the top or apex of the vein passes through the claim and crosses the northerly end line thereof at a point about 700 feet westerly of corner No. 2 of the claim, and that the said vein or lode on its downward course westerly passes out of and extends indefinitely beyond a vertical plane drawn through the westerly boundary thereof; that this vein or lode is the only vein or lode having its top or apex within the limits of the Bunker Hill claim, and is the vein or lode originally discovered on the 10th day of September, 1885, by the grantors of the Bunker Hill Company. Attached to and made a part of the bill is a diagram, which shows that the claim was located across the top or apex of the vein, instead of along it. It is not shown or suggested that this was knowingly or purposely done; on the contrary, it appears in this and other records in this court that at the time the Bunker Hill claim, and others within the immediate vicinity, were located, it was supposed by the locators thereof that the vein or lode outcropping thereon ran in an easterly and westerly direction. That fact is referred to by counsel for the present appellants in his brief on behalf of the Empire Company in cause numbered 950, where, in speaking of a dispute between the owners of the Stemwinder and Emma claims in December, 1885, he said: "The Stemwinder at that time lay in an easterly and westerly direction. It was supposed that the ledges ran easterly and westerly, and that the ledges of the Stemwinder and Emma were separate and parallel ledges." What were intended as the side lines of the Bunker Hill claim, therefore, actually became its end lines, under the familiar doctrine hereinafter referred to.

The bill further alleges that the Bunker Hill Company is, and for many years has been, the owner in fee and in the actual and exclusive possession of the Bunker Hill claim, and of the apex of the Bunker Hill lode within the claim, and of such part of the said vein or lode throughout its entire depth as lies westerly from, outside of, and beyond a vertical plane drawn downward through the westerly side line of the claim, and between vertical planes drawn downward through the end lines thereof extended indefinitely in their own direction westwardly; that neither of the defendants to the suit is, or ever has been, in possession of any part of the Bunker Hill claim or of the Bunker Hill lode as thus described, and that each of them claims an estate or interest therein adverse to the Bunker Hill Company, which the latter alleges to be false and groundless, and without any right whatever, and a cloud upon its title; that the value of that part of the Bunker Hill lode situated westerly of its side line, and between vertical planes drawn downward through its end lines, exceeds the sum of $500,000, exclusive of interest and costs. The prayer of the bill is, among other things, that the defendants, and each of them, be required to set forth the nature of their respective claims, and for a decree adjudging the alleged title of the complainant to be good and valid, and that the defendants have no interest in or to the Bunker Hill claim or lode as described in the bill.

The defendants interposed a demurrer to the bill on the ground that it did not make or state such a case as doth or ought to entitle the

complainant to any such discovery or relief as is thereby sought or prayed for. The demurrer being overruled, each of the defendants filed a separate and similar answer, and also a cross-bill, differing only in that each alleged ownership in the respective defendants of separate and distinct mining claims. Each of the answers admits that the complainant owns the surface of the Bunker Hill claim, and the vein or lode within its boundaries, but denies that the course of the vein is northerly and southerly, or that it crosses the alleged side line thereof, or that in its downward course it passes westerly beyond a vertical plane drawn through the west side line of the Bunker Hill claim, or that the complainant company is the owner of any part of the lode situated west of its alleged west side line.

The cross-bills alleged ownership, respectively, in the Last Chance Company of the Last Chance mining claim; in the Shoshone Company of the Shoshone and Summit mining claims; and in the Empire Company of 16 other mining claims, specifically named and described—all of which, with the outcrop of the vein or lode therein, its course and dip, and its conflict with the extralateral right claimed by the Bunker Hill Company, are described in the respective cross-bills. They also allege that the vein or lode described in the Bunker Hill claim does not cross its end lines as now claimed, but crosses its original end lines, and that the Bunker Hill Company's right to follow its vein or lode downward is between the parallel vertical planes drawn through its located end lines; that the course of the vein or lode, instead of being northerly and southerly, is north, about 51° west, and that to follow it westerly, as complainant claims the right to do, would be following it more along its course or strike than upon its true dip. The prayer of the cross-bills was to the effect that the Bunker Hill Company be required to set forth any and every adverse interest, claim, or demand which it had to the claims, veins, or lodes described in the cross-bills, whether the same be claimed by the Bunker Hill Company by virtue of its ownership of the Bunker Hill claim and of the lode apexing therein or by virtue of its ownership of any other claim, vein, or lode, and that such adverse claim, interest, or demand be decreed null and void as against the cross-complainants, and that their respective titles thereto be quieted.

To each of the cross-bills the Bunker Hill Company demurred on the ground that it presented mere matter of defense, and that the mining claims therein described were not included in or embraced by the original bill of complaint. The demurrers to the cross-bills were sustained by the court below.

We think the ruling of the court below upon all of the demurrers was right. Two objections are made to the bill. One is that it contains no allegation concerning the general course of the vein beyond the limits of the Bunker Hill claim; and the other that the bill does not show that the complainant is the legal owner and in the exclusive possession of the ore bodies in controversy. In respect to the first objection, it is not perceived that there is any necessity for an averment in such a bill concerning the general course of the vein beyond the limits of the claim. The statute authorizes citizens of the United States and

those who have declared their intention to become such, who find a vein or lode upon the public land, carrying any valuable deposit, to locate and claim the same, not exceeding 1,500 feet along its length, and not exceeding 300 feet on each side of its middle at the surface, making the end lines of the claim parallel. Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424]. The right of location is in no respect made dependent upon the course of the vein beyond the limits so fixed. A location so made, and marked and claimed as further required by statute, or by the local rules and regulations of the particular mining district, when not inconsistent with statutory regulations, confers upon the locator and his assigns and successors the rights defined and specified by section 2322 of the Revised Statutes [U. S. Comp. St. 1901, p. 1425], to wit:

"The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

Whether the lines of the Bunker Hill claim were so laid with respect to the vein or lode outcropping within them as entitles the complainant to the extralateral right there defined and here claimed, depends upon the probative facts of the case.

In respect to the second objection urged to the bill, it is enough to say that it has heretofore been held by this court that the ownership and possession of a vein at the surface carries with it the ownership and possession of all that pertains to the location. "The mining right," as said by us in Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., 121 Fed. 977, 58 C. C. A. 315, "is an integral one. It is secured by a single location. The title to it is conveyed by one patent." It is a separate and distinct thing from any and every other claim. The fact that one individual, company, or corporation locates or acquires many such claims is wholly unimportant. Congress has never yet seen proper to put a limit on the number of such claims that one individual, company, or corporation may locate or acquire. Whether, in view of its well-known policy to encourage the development of the mineral wealth of the country, it shall ever deem it wise to do so, rests with Congress, and is a matter with which the courts have nothing to do. The rights which a valid location of such a claim secures to the locator and his grantees or successors are clearly defined by law, and are wholly unaffected by any subsequent conflicting location. In all such matters the first in time is the first in right. Therefore it being conceded by the defendants' answers in the present suit that there is a vein or lode outcropping within the surface boundaries of the Bunker Hill claim, and that the complainant is the owner of the surface of that claim and of the vein or lode within its boundaries, it follows, as matter of law, that, if the vein or lode so crosses the lines of the claim as to entitle its owner to extralateral rights at all, the complainant has, as against any and

every other claim not founded on a prior location, precisely the same right, by virtue of section 2322 of the Revised Statutes, to such parts of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of its surface lines, as lie between vertical planes drawn downward vertically through the end lines of the location extended indefinitely in their own direction.

A stipulation of the parties is to the effect that every one of the claims here in question, except the Last Chance, is subsequent in point of time to the Bunker Hill. Priority is asserted for the Last Chance only upon the fact that it was located, marked, and the notice of its location recorded, before the location notice of the Bunker Hill was recorded. A statute of the state in which the claims are situate requires such notice to be recorded within 15 days after the making of the location, in the office of the recorder of the county or with the recorder of the district designated by the resident miners, as provided by section 3103 of the Revised Statutes of Idaho of 1887. The statute, however, prescribes no penalty for a failure to record such notice.

The master found as facts that the Bunker Hill claim was located September 10, 1885, by one O'Rourke, who possessed the necessary qualifications, and who had theretofore discovered within its limits a vein of rock in place carrying silver and lead; that on the day named O'Rourke posted "a discovery notice of location," containing the name of the location and claim, the date of its location, a description of the claim by reference to such natural objects and permanent monuments as identified it, and reciting "such other matters as were then required by the laws of the United States and the territory of Idaho"; that at the same time O'Rourke marked the boundaries of the claim on the ground so that they could be readily traced, and then entered into the actual possession of the claim and commenced working it, which possession has been ever since maintained by him and his successors in interest; that on September 29, 1885, O'Rourke caused a notice of location of the claim, duly verified, to be recorded in the office of the recorder of the county in which it is situate; that prior to March 21, 1902, the complainant duly acquired, through mesne conveyances from O'Rourke, the title to the claim, and on the day last mentioned made application to the United States for a patent therefor, which application recited the facts just stated, and upon which application a patent was issued by the government to the complainant on the 17th day of November, 1903; that the Last Chance claim was duly located September 17, 1885, and the location notice thereof recorded on the 22d day of the same month; that prior to the discovery and location of the Last Chance its discoverers and locators "had actual knowledge of the discovery and location of the Bunker Hill claim; they had visited the discovery, read the notice posted thereon, saw the discovery stake, the east end stakes, and knew that the locator was in the actual possession of the claim, and was then engaged in development work thereon." The record shows that during the proceedings before the master the following stipulation was entered into by and between counsel for the respective parties:

"Mr. Heyburn: It is stipulated that the discovery of the Bunker Hill lode claim was on the 10th of September, 1885; that the acts of location, except

as to the recording, were performed at or prior to that time; and that the recording of the claim was on the 29th day of September.

"Mr. Lindley: In other words, it will be admitted by all the parties to this action that all the acts establishing a perfected location were completed prior to the acquisition of any rights asserted by respondents, or any of them, in this action; respondents reserving, however, such legal objection as they may hereafter desire to make with regard to the application of the doctrine of relation, for the failure to record the Bunker Hill location prior to the 29th day of September.

"Mr. Heyburn: No objection is raised to the sufficiency of the location of any of our claims.

"Mr. Lindley: I must make a reservation in there in reference to the Shoshone and Summit. That is the only reservation that I make.

"Mr. Heyburn: I think we will have to stipulate all or none, judge. As to the Shoshone and Summit, we will only be required to make proofs of the acts of location, and the admission goes to the effect that whatever title the locators got is vested in the Shoshone Mining Company.

"Mr. Lindley: If any title goes by that location, it is vested in you by mesne conveyances."

The record further shows that at a subsequent stage in the proceedings the following stipulation between the counsel was read in evidence:

"Mr. Heyburn: I offer in evidence a stipulation entered into this day, signed in open court by the counsel for the respective parties to this suit, as follows: 'It is hereby stipulated in the above-entitled cause that if Philip O'Rourke, the locator of the Bunker Hill lode claim, were present as a witness in this case, he would testify that the west end stakes of the Bunker Hill lode claim were not put up, nor was the west end of said claim marked upon the ground by the locators, until after the location and recording of the Last Chance and Emma lode claims.' That stipulation is signed by counsel for the respective parties in this suit. I offer it in evidence, in order that it may be here in the record.

"Mr. Lindley: We will reserve a formal objection to the materiality and admissibility of it.

"(Overruled. Exception.)"

We do not think it necessary to decide whether a stipulation to the effect that a certain witness would, if present, testify in contradiction of one or more of the facts already agreed to by counsel, could be properly held to modify such prior stipulation, for the reason that upon the facts expressly conceded, found, and in no wise contested the Last Chance was located after the Bunker Hill, and while the latter was a valid, subsisting claim. At the time of the location of the Last Chance claim the time prescribed by the Idaho statute within which the Bunker Hill location should be recorded had not expired. The Last Chance locators had actual notice of the Bunker Hill location, had read the description of it, and the locator of the Bunker Hill was in actual possession of that claim and actually engaged in working it. No part of the claim, therefore, whether above or underground, was then open to location by any other person. Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Book v. Justice Mining Co. (C. C.) 58 Fed. 106; Meydenbauer v. Stevens (D. C.) 78 Fed. 787; Jordan v. Duke (Ariz.) 53 Pac. 197.

It is conceded by the counsel for the appellants that the locators of the Last Chance could not then have entered upon the surface of the Bunker Hill claim and acquired any right as against it; but he insists that it is different in respect to such portions of its veins or lodes as lie outside of

the vertical boundaries of that claim. The mistake of the learned counsel is in supposing, as he does throughout his argument, that there is a radical difference in the nature of the right by which the locator of a valid lode claim holds the veins or lodes embraced by the surface lines extended vertically downward, and such of the veins or lodes belonging to the claim as extend in their downward course outside of its side lines; and that as to the latter adverse rights may be acquired which could not be acquired in respect to the former. As has been already said herein, there is no such distinction. The mining right is an integral one, and is precisely the same to all that belongs to the location—its surface, and all veins or lodes apexing within it, and all not apexing elsewhere, found within the surface lines extending vertically downward, as well as the extralateral right defined by section 2322 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1425]. The St. Louis Mining and Milling Company of Montana et al. v. Montana Mining Company, Limited (decided May 2, 1904) 24 Sup. Ct. 654, 48 L. Ed. 953. That the failure of the locator of the Bunker Hill claim to record his notice of location within the time prescribed by the Idaho statute did not work a forfeiture of the claim, there being no such penalty affixed by the statute, is well settled. Jupiter Mining Co. v. Bodie Con. Min. Co. (C. C.) 11 Fed. 666; Bell v. Bedrock T. & M. Co., 36 Cal. 214; McGarrity v. Byington, 12 Cal. 426; Johnson et al. v. McLaughlin et al. (Ariz.) 4 Pac. 130; Emerson v. McWhirter (Cal.) 65 Pac. 1036; Rush v. French (Ariz.) 25 Pac. 816. Besides, the issuance by the government of its patent for the claim is conclusive evidence of the sufficiency of the steps taken by the complainant. Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; United States v. Iron & S. M. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; Montana Cent. Ry. Co. v. Migeon (C. C.) 68 Fed. 811. Whether the surface lines of the Bunker Hill claim were so laid as to entitle its owner to any extralateral right at all; whether, if it exists, it should be bounded by vertical planes drawn downward through what were originally located as the end lines of the claim or through those originally located as its side lines; and whether the extralateral right claimed by the complainant and awarded it by the court below is to permit the complainant to follow the vein along its length, and not on its downward course, as prescribed by the statute—were matters of defense open to all of the defendants in the court below, and upon which much evidence was given by the respective parties.

The master, to whom the cause was referred to take the proofs and report to the court his findings of fact and conclusions of law, found, among other things, the following to be facts: That within the Bunker Hill claim there is a vein or lode of rock in place, carrying silver and lead, commonly known in the district as the "Bunker Hill Lode," the apex of which is indicated by the outcrop of the foot wall, which traverses the claim in a general northwesterly course from where it cuts the south boundary; that the foot wall is the well-defined and persistent feature of this vein, and enters the Bunker Hill claim at a point on its south line about 300 feet from the southeast corner, and, extending along its course at the surface northwesterly, passes out of the north line

of the claim about 726 feet from the northeast corner of the claim; that the Bunker Hill lode has no physical hanging wall, no marked line complement to the foot wall, in defining the limit of the fissure; that for its underlying boundary it has a well-defined, continuous bed of barren quartzite, but for its overlying boundary it has only an irregular and vague outline of the limit of mineralization, from which fact, and the peculiar geological formation of the lode, it is very difficult to define this limit with any degree of certainty, for which reason much confusion and some contradiction appears in the testimony upon this point; that the weight of the testimony shows, however, that the mineralization of this lode or ledge extending from the foot wall into the hanging wall country gradually fades in value until a point is reached 350 or 400 feet out, where the rock is practically barren; that the lode or vein, in passing through the Bunker Hill claim, takes a northwesterly and southeasterly direction, and so intersects the north and south lines of the claim, which lines, while originally located as side lines, are in fact its end lines, and the original end lines become its side lines; that there is within the surface boundaries of the Bunker Hill claim the entire apex of the vein for a length of 676 feet, measured on the line of the foot wall at the surface, and that a segment of part of that vein departs from the perpendicular in its downward course, and extends in a westerly direction under the outside of the westerly side of the claim, the same having been originally located as the westerly end line, and between vertical planes drawn downward through the end lines of the claim as above designated, so continued in their own westerly direction indefinitely; that the vein, or segment thereof, having its apex within the surface boundaries of the Bunker Hill claim on its downward course between the extended end line planes thereof, extended in their own direction, passes underneath respective portions of the surface of the following lode claims owned by the Empire State-Idaho Mining & Developing Company, namely, the Lily May, Butte, Good Luck, and Number 4, all of which are junior in point of time to the location of the Bunker Hill claim. And as conclusions of law, the master found:

"(1) That the surface lines of the Bunker Hill claim, originally located as side lines, are in law the end lines of the claim, and its extralateral right is defined by vertical planes drawn downward through these lines extended in their own direction westerly indefinitely.

"(2) That the complainant is the owner and entitled to the possession of the segment of said Bunker Hill lode and the ore-bodies thereof in controversy herein, as against the respondents Last Chance Mining Company, the Shoshone Mining Company, the Empire State-Idaho Mining & Developing Company; and that complainant is entitled to a decree against said respondents, and each of them, in accordance with these findings and conclusions, and agreeable to the practice of this court."

Certain exceptions were filed by the defendants to the master's report, but none calling in question any ruling of his in admitting or rejecting evidence. Findings of fact made without any evidence to support them may, and should, as a matter of course and of law, be disregarded; but findings made by a master in pursuance of an order to take the proofs and report the facts and conclusions of law to the court, that depend upon conflicting testimony, or upon the credibility of witnesses, especially where, as in the present case, they are approved by the trial

court, will not be disturbed. Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Warren v. Keep, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552; The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955 (May 2, 1904); The S. B. Wheeler, 20 Wall. 385, 22 L. Ed. 385; The Lady Pike, 21 Wall. 1, 8, 24 L. Ed. 672; The Richmond, 103 U. S. 540, 3 L. Ed. 670; Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597; Smith v. Burnett, 173 U. S. 430, 436, 19 Sup. Ct. 442, 43 L. Ed. 756; Singleton v. Felton, 101 Fed. 526, 42 C. C. A. 57; The Columbian, 100 Fed. 991, 41 C. C. A. 150; North American Exploration Co. v. Adams, 104 Fed. 404, 45 C. C. A. 185; Fidelity & Casualty Co. v. St. Mathews Sav. Bank, 104 Fed. 858, 44 C. C. A. 225; Western Union Tel. Co. v. American Bell Tel. Co. (C. C.) 105 Fed. 684; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, 45 C. C. A. 544; Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579; Thallman v. Thomas, 111 Fed. 277, 49 C. C. A. 317.

The appellants do not, and, in view of the record, could not, contend that there is no evidence to support the findings; but they urge that the weight of the evidence is to the effect that the true course of the vein or lode in question runs easterly and westerly, instead of northwesterly and southeasterly, through the Bunker Hill claim, and crosses the lines originally located as the end lines of that claim; and that, even if its course through the Bunker Hill claim be as found by the master, its width is far greater than found by him, and in fact extends outside of and beyond the westerly boundary of that claim, originally located as one of its end lines and now treated as its westerly side line. The conclusive answer to all of this is that above indicated, viz., that the findings by the master, made, in this instance, upon evidence that is decidedly conflicting, and approved by the court below, are against the appellants upon these points. But it may be added that, even if the vein or lode be as extensive in width upon the surface as contended by the appellants, the priority of the Bunker Hill claim over those here in controversy being established, the extralateral right of the appellee would remain as fixed and determined by the decree of the court below. Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 52 C. C. A. 219; St. Louis M. & M. Co. v. Montana Min. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725, and like cases there cited. The case showing that the lines originally located as the side lines of the claim are parallel, and it appearing from the findings that the apex of the vein or lode in question crosses those lines, they become in law the real end lines of the claim, under the well-settled doctrine upon that subject. Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Tyler Min. Co. v. Last Chance M. Co. (C. C.) 71 Fed. 849; Tyler v. Sweeney, 79 Fed. 277, 24 C. C. A. 578; Last Chance M. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Empire M. & M. Co. v. Tombstone M. & M. Co. (C. C.) 100 Fed. 910; Cosmopolitan M. Co. v. Foote (C. C.) 101 Fed. 518; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 48 C. C. A. 665.

It is further and strenuously urged on behalf of the appellants that the appellee, in following the vein underground between vertical planes drawn downward through its adjudicated end lines, does so more upon its strike than upon its dip; and this, it is insisted, is not permissible under the law. In respect to this matter the master made no findings, holding it immaterial, as did the court below, and confining his finding in that regard to the fact that the course of the vein was downward between the end line planes fixed by him. The extralateral right to a vein or lode outcropping at the surface, where it exists, is fixed by the course of the vein or lode at the surface, and not by its course on a level. "We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it," said the Supreme Court in Mining Co. v. Tarbet, 98 U. S. 469, 25 L. Ed. 253. "If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined." In the subsequent case of Iron Silver Mining Co. v. Elgin Mining Co., 118 U. S. 196, 206, 6 Sup. Ct. 1177, 30 L. Ed. 98, the same court, after quoting section 2322 of the Revised Statutes [U. S. Comp. St. 1901, p. 1426], said:

"This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The locators have the exclusive right of possession and enjoyment of 'all the surface included within the lines of their locations'; and the location, by another section, must be distinctly marked on the ground, so that its boundaries can be readily traced. Rev. St. § 2324. They have also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations.' The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface. The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein. This difficulty must often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location, and in

postponing the marking of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein. In Colorado the statute allows for this purpose sixty days after notice of the discovery of the lode. Then the location must be distinctly marked on the ground, and thirty days thereafter are given for the preparation of the proper certificate of location to be recorded. Erhardt v. Boaro, 113 U. S. 527, 533, 5 Sup. Ct. 560, 28 L. Ed. 1113. Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein. But, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location, than that they should be subject to perpetual readjustment according to subterranean developments made by mine workings. Such readjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims. The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty. * * * The provision of the statute that the locator is entitled throughout their entire depth to all the veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins if they are not identical."

While the statute requires parallelism of the end lines, and the courts have held that they may not be laid so divergent as to include more in length upon the dip of the vein than is allowed in length upon the surface, neither the statute nor any decision to which our attention has been called defines any particular angle at which the end lines shall cross the general course of the vein in order that the extralateral right given by the statute may exist. And as said by the Supreme Court in the case last cited, where more than one vein apexes within the surface lines, it would be a physical impossibility for the end lines to be drawn at a right angle to the courses of all such veins. And that the extralateral right conferred by the statute may and does exist without regard to the angle at which the end lines cross the general course of the vein has been held both by the Supreme Court and by this court. Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 52 C. C. A. 219, in which last-named case this court awarded the appellant Empire State-Idaho Mining & Developing Company the right to follow the vein outcropping within the surface boundaries of its San Carlos location between planes drawn down through its end lines at almost, if not quite, as much an angle to the general course of the outcrop of the vein within its surface boundaries as is the angle at which the appellee herein was permitted by the court below to pursue the segment of the vein here in question.

The judgment is affirmed.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1904.)

No. 950.

1. MINING CLAIMS—LOCATION—ESTABLISHING LINE ON OLDER CLAIM.
The locator of a lode mining claim has the legal right to lay an end line of his claim on the surface of a prior claim, in the absence of objection by the owner; and, as against the government and subsequent locators, such location carries precisely the same rights, both surface and extralateral, as it would if all its lines were laid on unappropriated ground.

2. SAME—EXTRALATERAL RIGHTS—AGREED BOUNDARY BETWEEN OVERLAPPING CLAIMS.
An oral agreement between the owners of two overlapping lode mining claims, located on the same day, in accordance with which a monument was built, which it was agreed should be a point on the line between the claims, cannot affect the extralateral rights appertaining to one of the claims which has passed into the hands of other owners, having no knowledge of such agreement, as against third parties owning junior claims, and having no interest in the other claim or privity with the agreement.

3. SAME—EFFECT OF AMENDED LOCATION.
An amended location of a lode mining claim, made because of an error as to the course of the vein when the original location was made, in consequence of which the original side lines became end lines, did not operate as an abandonment of all rights under the original location, where it is expressly stated in the new location notice that such was not the intention; and, where the end lines of the amended location do not entirely coincide with the side lines of the original claim, it was not error for the court, in determining collateral rights as against an intervening locator, to draw vertical planes through the side lines of the original claim, which became end lines by operation of law, owing to the course of the vein, and through the end lines of the amended claim, extending both in the direction of the dip of the vein, and to award to the claim extralateral rights in so much of the vein on its dip as lay within both of such extensions; treating as abandoned only so much of the original claim, with its planes so extended, as lay without the extended end-line planes of the amended claim.

4. SAME—WIDE APEX EXTENDING ACROSS SIDE LINE.
Where the apex of a vein is of such width as to extend beyond the side line of a claim onto a junior claim, the extralateral rights therein belong to the senior claim, within its extended end-line planes.

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

See 121 Fed. 973.

F. T. Post (W. B. Heyburn, of counsel), for appellant.

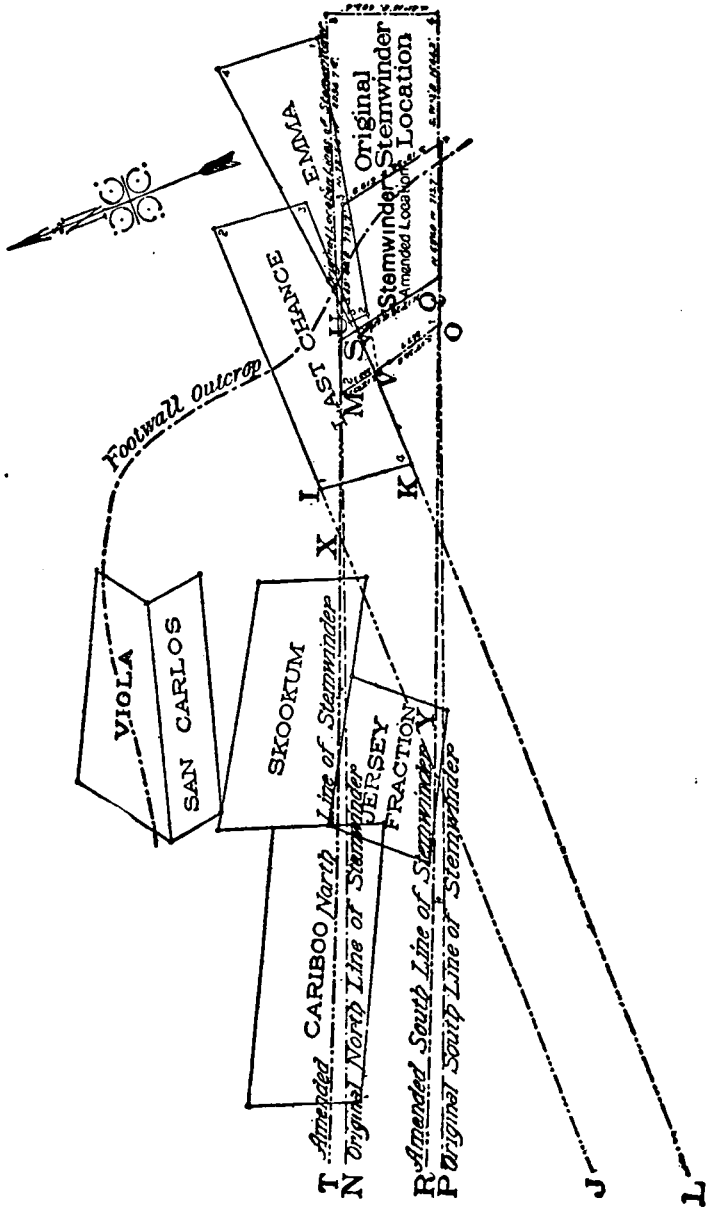
Curtis H. Lindley, Henry Eickhoff, John R. McBride, and M. A. Folsom, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This is an appeal from a decree quieting the appellee's title, as against the appellant, to the Stemwinder lode claim,

¶ 4. See Mines and Minerals, vol. 34, Cent. Dig. § 76.

and defining its extralateral right in and to the ledge apexing within the surface boundaries of the claim. Annexed to and made a part of the decree is the following diagram, indicating the location of the various claims mentioned in the record, and the course of the vein in question:



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 marked on the diagram "Stemwinder Amended Location," except such portions thereof as are included within the surface lines of the Emma and Last Chance claims, and excepting, also, such parts of the lode or vein having its apex within the Stemwinder boundaries as lie within the surface lines of the Emma and Last Chance, and as lie underground between planes drawn downward through the end lines of the Emma claim produced southwestwardly to their intersection, and between planes drawn downward through the end lines of the Last Chance claim extended indefinitely in their own direction. The bill alleges that the course of the apex of the vein 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 veins so apexing within the surface lines of the Stemwinder, throughout its entire depth, on its downward course between the end-line planes, as indicated on the diagram, except such parts thereof as are embraced by the end-line planes of the Emma and Last Chance claims. The bill avers that the appellant claims an estate or interest adverse to the appellee in the Stemwinder claim, and in such part of its vein as lies westerly of and beyond a vertical plane drawn downward through the westerly boundary of the Stemwinder claim, and northwesterly of and beyond a vertical plane drawn downward through the northwesterly boundary of the Last Chance claim, and between vertical planes drawn downward through the end lines of the Stemwinder claim, extended westwardly indefinitely in their own direction; that the claim of right so asserted by the appellant is false and groundless, and a cloud upon the appellant's title; that since September 1, 1899, the appellant, by means of underground workings, of which it has exclusive possession and control, has penetrated into that part of the underground vein so claimed to lie within the Stemwinder's extralateral boundaries, and beyond the end-line plane of the northern boundary of the Last Chance claim; and that the said underground vein, where so penetrated, contains large and valuable ore bodies, which appellant is extracting, and threatens to extract, unless enjoined from so doing.

The demurrer and the plea filed by the appellant to the bill in the court below were before this court, and were here considered and determined, on the appellant's appeal from the order of the trial court awarding the appellee an injunction. The decision here was that the bill was good and sufficient, and that the plea, in both of its branches, was bad. Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 58 C. C. A. 311, 121 Fed. 973. That decision has become the law of the case, and those points, again elaborately discussed by counsel for appellant, are not open to further consideration.

The appellant, in its answer to the bill, denies that the appellee is now, or ever was, in the possession of, or entitled to the possession of, the Stemwinder lode claim, as described in the bill, or was ever in the possession of any part of the Stemwinder lode claim, except as particulary set forth in the answer; denies that the diagram annexed to the bill as an exhibit correctly shows the surface boundaries of the

Stemwinder claim, or the course of the apex of the vein, or of any veins, at the surface through that claim, or that such vein or any vein passes through the surface of the Stemwinder claim as shown upon that diagram. The appellant admits in its answer that there is within what it terms the pretended Stemwinder claim, and within the Emma and Last Chance lode claims, a vein of mineral-bearing rock, but denies that the general course or top or apex of the same at the surface is as stated in the bill, or as shown upon the diagram annexed thereto; denies that the Stemwinder claim has any northerly boundary line, except as the southerly line of the Emma lode claim may be so considered; denies that the lode or vein has a downward course as indicated upon the diagram annexed to the bill, and denies that it passes on its downward course between the end lines claimed by the appellee as the end lines of the Stemwinder claim, or extends indefinitely beyond a vertical plane drawn through the line claimed by the appellee as the westerly boundary thereof; denies that the appellee is or ever was the owner in fee of the Stemwinder claim, or is or ever was the owner in fee or at all of the vein beyond the westerly line of the Stemwinder claim; denies that the appellant claims any estate, right, title, or interest in the Stemwinder claim, and denies that the appellee has any interest, right, or title to any vein which may intersect or lie within the Stemwinder claim after such vein has departed from the exterior boundary lines thereof, or to any vein lying westerly of and beyond the westerly boundary line of the Stemwinder claim, or beyond the northwesterly boundary line of the Last Chance claim, between vertical planes drawn through the end lines of the Stemwinder, as claimed by the appellee; denies that the Stemwinder claim is of any value, but admits that the portion of the vein in controversy is of the value of $50,000. The appellant then alleges that it is the owner of the ledge and ore bodies here in controversy, because of its ownership of the San Carlos lode claim; that the vein in which the said ore bodies lie passes on its strike or course through both end lines of the San Carlos claim, and outcrops throughout the entire length thereof, and descends into the earth on planes drawn through the end lines thereof in a southerly direction to and through the ore bodies claimed by the appellee in this suit, and that such ore bodies are the property of the appellant by reason of the fact that they are a part of the lode having its top or apex within the San Carlos claim, and are reached through continuous workings on that claim, following on the downward course of the ledge within planes drawn on the end lines thereof, and not otherwise; that the Stemwinder claim is unpatented, and that its boundaries are not marked upon the ground at all; that it lies far to the east of the ledge and ore bodies sought to be recovered in this suit, and has no connection therewith; that there is no means of approach to said ore bodies or to said portions of the ledge from the Stemwinder claim, and that no developments from the Stemwinder claim to the ore bodies in controversy have been made, and that there are intervening between the said ore bodies and the Stemwinder claim the Emma and Last Chance patented mining claims, belonging to the Last Chance Mining Company, not a party to this suit; that, in a suit heretofore pending and determined in this court, the Last

Chance Mining Company was adjudged to be the owner of the Last Chance and Emma lode claims, and of the ledge and ores therein, as against the appellee, by reason of priority and right of title thereto; that the appellee has no right of way or ingress or egress through the said Emma and Last Chance claims, and has no right to follow from the Stemwinder claim to the ore bodies in controversy through or over the Emma and Last Chance claims. The appellant then alleges that the Stemwinder claim, such as it is, is junior in point of time and right to the Viola, San Carlos, and Skookum lode claims, owned by the appellant; that the Stemwinder claim never did extend north of the south line of the Emma claim, as patented, and that the locators and claimants of the Stemwinder claim, under whom the appellee claims title, did, by agreement, in conjunction with the owners of the Emma and Last Chance claims, erect a monument on the south line of the Emma claim for the purpose of marking the extreme northern limit of the Stemwinder claim, and of any right which that claim had on the surface or underground; that no stakes or monuments marking the pretended north end line of the Stemwinder claim, or marking any corner or line of that claim, were ever placed on or within the Last Chance or Emma claims with the consent of the owners thereof, but that every attempt to place any stakes of the Stemwinder upon the Emma or Last Chance claims was forbidden and prevented by such owners, and the parties so placing said stakes were compelled to withdraw them, and that, in order to definitely establish the limit of the Stemwinder location to the northward, the said monument was erected jointly by the owners of the Emma and Last Chance and Stemwinder claims; that, in patenting the Emma lode claim, the said monument was recognized as the boundary, and the official line established thereon; that, notwithstanding the said monument and the patenting of the said Emma claim, the successors in interest of the Stemwinder claim undertook to ignore the said boundary and the monument, and, upon the making of the application for patent by the owner of the Emma location, the then owner of the Stemwinder claim filed an adverse claim in the United States land office, and commenced a suit in support thereof against said application for patent, which suit involved the question of whether the Stemwinder claim ever extended over a part of the Emma and Last Chance claims, or north of the said monument and south line of the Emma claim, as surveyed for patent; that the said suit was tried, and judgment rendered therein against the Stemwinder claim, and that it was decreed that the ground in controversy between the Emma and the Stemwinder claims was a part of the Emma claim, as located and claimed by the locators thereof on the 17th day of September, 1885; that this judgment remains unreversed, and was affirmed in the Supreme Court of Idaho (21 Pac. 1040) and by the Supreme Court of the United States (13 Sup. Ct. 1052, 37 L. Ed. 960); that the owners of the Last Chance lode claim made application for United States patent, and gave notice thereof in the usual manner, and that the claimants of the Stemwinder claim filed no adverse claim against such application for patent; that at the time of the attempted location of the Stemwinder claim, on the 17th day of September, 1885, the lode and surface ground

attempted to be located was not a part of the vacant, unappropriated public land of the United States, and that the location thereof was void as to every part thereof north of the original south line of the Emma location; that the claim attempted to be located as the Stemwinder was not the same location or lode claim that appellee now claims and seeks to recover upon in this suit, as to shape, direction, or identity; that the appellee has been guilty of laches in asserting its pretended claim, inasmuch as the appellant has openly claimed the premises sued for since 1898, and has openly mined upon and extracted ore therefrom, and been in the open and notorious possession thereof, since 1899, of which the appellee has had full knowledge. The appellant then alleges that the plane upon which the appellee is seeking to follow between its pretended end lines is laid along the strike of the ledge, and not upon its downward course or dip, and that the ore bodies claimed by the appellee in this suit are not upon the downward course of any ledge having its top or apex within the Stemwinder claim.

To this answer the appellee filed its replication, and upon the issues thus raised the cause was tried in the court below.

Allusion has already been made to the previous decision of this court in respect to the sufficiency of the bill, and of the pleas thereto interposed by the appellant. Another point again argued by the learned counsel for the appellant was also determined adversely to his contention in our former decision in this cause, namely, that the intervention of the extralateral rights of the Emma and Last Chance claims did not cut off or extinguish the right of the owner of the Stemwinder to follow its vein or lode beyond the end-line planes of the Emma and Last Chance, 58 C. C. A. 311, 121 Fed. 973. And still another point urged by appellant's counsel, to wit, that the awarding the appellee the extralateral right in question is to permit it to follow the vein more upon its strike than upon its dip, was decided against his contention at the present term, in the case of Last Chance Mining Co. et al. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 Fed. 579. Several other points, however, remain to be considered and determined.

The case shows that the Stemwinder claim was originally located in September, 1885; its location notice bearing date September 17th of that year. At the time of such location it was thought by its locator that the vein outcropping within the claim ran easterly and westerly. Accordingly its length was laid in that direction, as is indicated on the diagram. The same mistake was made by the locators of the Emma and Last Chance claims, and of other claims in the same vicinity, as appears in this and other records in this court. The Stemwinder has not been patented, and it is contended by the appellant that it does not appear from the record that that claim ever was marked or staked on the ground as claimed by the appellee. One Devine was its original locator. His testimony in respect to the marking of the boundaries of the claim is as follows:

"Q. What did you do, if anything, with reference to marking the boundaries of that claim? A. I put up three stakes on the east end; that is, I blazed them. I had a small ax, and I blazed them that day, and put up one stake—made a monument and put up one stake on the northeast corner—and the other two were blazed on the east end. On the west end I blazed two trees, and

did not put up my southwest corner stake that day. I put them all up but one that day. Q. When did you put up the last stake? A. Shortly afterwards. Q. Within how many days afterwards? A. I think the next day, or the next day but one. Q. Now, let us go to those corners, and see if you can recollect what the character of them was, and how they were marked. What was the northwest corner? A. It was a pine tree, about 12 inches through, I guess. We afterwards squared it up and cut the tree off. Q. Made a stump of it? A. Made a stump of it; yes, sir. A stake of it, proper. Q. How was that tree marked? A. It was marked, 'Northwest corner of Stemwinder claim.' Q. Did you set a stake at the west center end? A. No, sir. I marked on a stub—a big stub, probably 50 feet high; blazed it on each side. I didn't cut that off. Q. A standing tree? A. No, sir; it was a stub at the time, probably 40 to 60 feet high. Q. A dead tree? A. Yes, sir. Q. Standing in its natural position? A. Yes, sir. Q. Did you square that? A. I squared it on four sides, but I did not cut it down. Q. How did you mark it? A. I marked it, 'West center end of the Stemwinder.' Q. With regard to the southwest corner, what was the character of the marking at that point? A. Well, that day I did not put up any mark there. Q. You put it up on the next day? A. On the next day or two I put up a stake. Q. What was the size of the stake, and how high did it stand up above the ground? A. Oh, the stake was probably five inches through after it was squared up, and stood four or five feet above the top of the ground —I suppose, four and a half feet. I don't know exactly. I know I got it long enough. Q. Was it firmly planted in the ground? A. Yes, sir. Q. How was it marked? A. It was marked, 'Southwest corner of Stemwinder.' Q. What marking, if any, did you place at the southeast corner of the claim? A. At the southeast corner? Q. Yes. A. I blazed the tree and cut that off, on the southeast corner, and made a stake of it. It was a stub at the time I cut it off. Q. You squared the tree, did you? A. Yes, sir. Q. What was the size of it after it was squared? A. Oh, I suppose it was five or six inches through. Q. Five or six inches square? A. I think so; yes, sir. Q. How was it marked? A. Marked, 'Southeast corner Stemwinder claim.' I posted the notice on it—the same as all the stakes I put on the ground. Q. What marks did you make at the east center end, if any? A. The east center end was a tree about 12 or 14 inches through. Q. A live tree? A. No, sir, it was dead; and I marked that, 'East center end of the Stemwinder,' and afterwards cut the tree down. Q. Did you substitute anything for the tree afterwards? A. No, sir. There was a stake there, yes; but then there was also the notice on the tree when I cut it down, making a stake of it, too. Q. Was there a post subtituted for that center end? A. Yes, sir. Q. What was the character of the post? A. It was a hewed post, probably five or six inches through, squared up. Q. How high did it stand above the ground? A. Four or five feet. I don't know exactly. Q. What did you place, if anything, by the northeast corner? A. At the northeast corner was a little monument of rocks, and I placed a little stake in that, the day I located the claim, and afterwards put a good stake there, probably four or five inches through. That was the northeast corner. Q. How did you mark that? A. 'Northeast corner of the Stemwinder.' Q. Did you mark the east center end stake? A. Yes, sir. Q. How did you mark that? A. Marked it, 'East center end of the Stemwinder.' Q. Wherever there were stakes placed in the ground, were they all firmly placed? A. Yes, sir. Q. I will ask you, with reference to this marking, whether or no the lines could be readily traced from this marking? A. Yes, sir; they could. Q. Where did the Stemwinder claim lie with reference to the Bunker Hill? A. It laid very nearly north of the Bunker Hill—a northerly direction. Q. How close to it? A. It laid right next to the Bunker Hill. Q. And northerly from it? A. Yes, sir; northerly."

We also extract from the examination of the surveyor who marked the boundaries of the amended location of the Stemwinder the following:

"Q. Mr. Loring, you testified yesterday that you had made an amended location of the Stemwinder for the Stemwinder Mining Company, and, I believe, testified and identified the notice which was posted, copy of which was re-

corded. What did you do with reference to marking that claim on the surface? A. I established a post at either corner, and at the north and south end centers. Q. Describe the character of the posts, and the markings that were placed upon them. Mr. Heyburn: Wasn't that all gone into? Mr. Lindley: No, sir; it was overlooked. Mr. Heyburn: If counsel will state that, perhaps, we may shorten— What is it you want? Mr. Lindley: The stakes of the amended location of the Stemwinder. I wish to prove that they were properly marked, and, with regard to the northwest corner stake, the manner in which he ultimately tied that stake to a certain point. The stake itself in later years, of course, has been—is gone. It has been replaced by data furnished by Mr. Loring. Mr. Heyburn: Is it not a fact that, as a matter of law, you would be bound by the point fixed upon, if there has been an official survey, and that the Surveyor General would require that post put on that point if there is any dispute about it? Mr. Lindley: All I wish to show by this witness is that the Stemwinder stakes were all of the proper size required by law, of the amended location, and that they were properly marked according to law, and that the northeast corner stake, as now delineated on the maps of James M. Porter, is where Mr. Loring placed it. Mr. Heyburn: There is no controversy about it. We will let it go in. Mr. Lindley: Q. Go ahead. A. The south end center was a post six feet long and six inches square, and marked, 'South end center of the amended location of the Stemwinder.' The southwest corner was a post five feet long, four inches in diameter, squared, and marked, 'Southwest corner Stemwinder lode amended location.' Southeast corner was a post four inches in diameter, five feet long, marked, 'Southeast corner Stemwinder lode, amended location;' and the southeast corner, as I described, was 207.8 feet from the northwest corner of the Bunker Hill lode, as originally staked. The northwest corner was a post four inches in diameter, squared, and five feet long, and marked, 'Northwest corner of Stemwinder lode, amended location;' and the northeast corner was a post five inches in diameter, squared, five feet long, marked, 'Northeast corner Stemwinder lode, amended location.' The north end center I think I have not described yet. A post four inches in diameter, squared, five feet long, marked, 'North end center Stemwinder lode, amended location.' Q. Does that complete the marking? A. It did. Q. In any subsequent period, Mr. Loring, did you have occasion to fix the locality where that stake stood with reference to any other survey? A. You refer to the northwest corner? I did. Q. State how you tied that particular corner stake subsequently. A. In July of that year I made a survey and planted center corners. I then connected the northwest corner of the Stemwinder lode, amended location, with that center corner. Mr. Heyburn: The corner of this claim? A. Of a survey I made. Mr. McBride: July of what year? A. 1887. Mr. Lindley: Q. At that time the corner stake of the Stemwinder was still standing? A. They were all standing for at least two years thereafter."

At the time of the making of the original location of the Stemwinder, no objection appears to have been made by anybody to its lines as laid.

Although, as has already been said, it has been determined in previous litigation between the owners of the Stemwinder, Emma, and Last Chance that the two last-mentioned claims were prior in point of time to the Stemwinder, Devine's testimony in this case is to the effect that, as a matter of fact, at the time he marked the boundaries of the Stemwinder neither the Emma nor Last Chance had been located; and the testimony of J. I. Smith, one of the locators of the Emma and Last Chance, rather corroborates Devine in that particular. At all events, the boundaries of these three claims, all of which were located on the same day, and all upon the mistaken impression of their locators that the vein or lode outcropping within them ran easterly and westerly, overlapped; and the question of the overlapping having arisen between the owners of those claims, who seem to have been friendly at the time, they went upon the ground and measured 300 feet northerly from the

Stemwinder discovery point, and there built a stone monument, which they orally agreed should be a point in the northerly line of the Stemwinder and the southerly line of the Emma. So far as appears, no other point in such line was designated, and no record anywhere made of such oral agreement. Time ran on, and on the 15th of March, 1887, the Stemwinder Mining Company, a corporation, acquired the Stemwinder claim, without, so far as appears, any knowledge of the oral agreement concerning the stone monument, and on the 23d of May, 1887, amended the location of the Stemwinder in the manner indicated on the diagram, from which it will be seen that the amended location is almost entirely within the original, although, in defining the end lines of the amended location, courses very slightly varying from those of the original side-end lines were given. At different times, commencing with February 20, 1886, and ending with May 21, 1887, the Viola, Skookum, San Carlos, Cariboo, and Jersey Fraction claims, belonging to the appellant herein, were located. The relative position of these intervening claims is also shown on the diagram. The purpose of amending the Stemwinder location was thus stated in the notice of such location:

"That said mining claim was duly located on the 17th day of September, 1885, by S. R. Devine, who was a citizen of the United States over the age of 21 years, and notice thereof posted on the claim, and recorded in the records of Shoshone County, Idaho Territory, in Vol. C of quartz locations, page 318, on the 26th day of September, 1885, to which record reference is hereby had, and made a part of this amended location, and as a basis thereof, and thereafter said locators by conveyances duly made and recorded sold the same, and the said company by divers mesne conveyances has become and is now the owner of said mining claim, and is in possession thereof and owns all the right, title and interest of said locators therein formerly owned and held by them. That since said original location was made the true course, position, and the strike of the vein as originally located, marked out and defined as the Stemwinder vein or lode, has been demonstrated and determined, and within the line as originally staked and located herein, and by survey it has also been demonstrated that said locators staked out on each side of said vein, ground in excess of 300 feet on each side of said vein, and the object of this amended location is to conform to the laws relating to mining claims, both national and local, and to mark and define and record the same to the extent and with the boundaries hereinafter set forth, the same being within the boundaries so located, marked, and staked in the original location hereof, and not otherwise. Therefore, the said the Stemwinder Mining Company, by and through its said officers duly authorized hereby, give notice that it hereby locates the vein and lode so discovered originally by way of Amended Location for the purposes aforesaid, and hereby claim the vein within the limits and to the extent as follows, to wit:

"Beginning at center of southeasterly end of claim at a post upon which amended location notice is posted, thence north 69° 40′ west 356.85 feet to southwest corner, whence a prominent peak bears south 8° 22′ east, another prominent peak bears north 84° 35′ east—northwest corner, Bunker Hill lode bears north 69° 40′ west, 207.8 feet, thence north 12° 28′ west, 619.6 feet to northwest corner, thence south 69° 40′ east 713.7 feet to the northeast corner, thence south 12° 28′ east 619.6 feet to the southeast corner, thence north 69° 40′ west 356.85 feet to place of beginning, situate about one-half mile southwesterly from town of Wardner, on easterly hillside in Yreka Mining District, County of Shoshone, and Territory of Idaho.

"And that said company intends to hold and work said above-described mining claim as provided by the local laws and customs and the mining laws, both local and national. It is further intended herein not to abandon in any manner

or by implication any rights, privileges, property, possession, or title derived, originated, owned or held under the original location hereof; but that the purpose hereof is to more particularly mark, locate, define and describe the ground, vein and premises held by said company, without waiving any rights under said original location, all of which the said company claims as the legal successor in interest and title and possession derived from said original locators."

The decree of the court below excepted the rights—surface and extralateral—pertaining to the Emma and Last Chance claims, and gave to the appellee the balance of the surface embraced by the lines of the amended location of the Stemwinder, and such portions of the underground segment of the vein apexing within its surface boundaries as lie northwesterly of and beyond a vertical plane drawn downward through the northwesterly line of the Last Chance claim, and between vertical planes drawn downward through the amended north and the amended south lines of the Stemwinder, extended westwardly indefinitely—

"Save and except such as accrue to said respondent [appellant] under and by virtue of its ownership of the Viola, San Carlos, Skookum, Jersey Fraction, and Cariboo claims, shown upon said Exhibit A [the diagram above set out]; that, as against the rights accruing to said respondent [appellant] by virtue of its ownership of the Viola, San Carlos, Skookum, Jersey Fraction, and Cariboo claims, this complainant is the owner of all such underground parts of said vein as lie between a vertical plane drawn downward through the southerly boundary line of said Stemwinder lode claim, and such line produced indefinitely in its own direction north, 69° 40′ west, marked on said Exhibit A, 'Amended south line of Stemwinder,' and a vertical plane drawn downward through the original north location line of said Stemwinder, and such line extended indefinitely in its own direction north, 72° 54′ west, being the line marked on Exhibit A as 'Original north line of Stemwinder.'"

While disputes have been many, and seemingly bitter, between the present owners of the respective claims in question, and objections were made by some of the appellant's grantors to some of the lines and stakes of the Stemwinder, subsequent to its original and amended locations, it does not appear that such parts of the lines of either the original or amended Stemwinder claim as were laid upon the Emma and Last Chance ground were put there forcibly or surreptitiously or otherwise fraudulently or against the consent of the owners of either of those claims at the time. The same conditions appeared in the case between the present parties and others reported in 109 Fed. 538, 48 C. C. A. 665, where we said:

"The priority of location of the Emma over the Stemwinder claim is not only found as a fact by the court below, but is conceded by the plaintiff in error; and the plaintiff further concedes, not only in its brief, but in its complaint, that the Emma has the right to follow the vein in its dip between vertical planes drawn through its converging end lines to the point of their intersection. The underground segment of the vein included within the triangle formed by the prolongation of those two vertical converging end lines and the westerly side line of the Emma, as well as the surface and everything under the surface of the Emma claim, is thereby eliminated from controversy. Notwithstanding the location and rights of the Emma, the Stemwinder claim was so located as to include within its lines a considerable portion of the Emma surface. The lines of the Stemwinder that cross the vein are parallel, and are therefore, in law, the end lines of that claim, whether so intended by the locator at the time of its location or not. Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed.

1140; King v. Mining Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419. No doubt, the owner of the Emma could have lawfully prevented any intrusion upon his claim, and have maintained the exclusive possession thereof. As said by the Supreme Court in Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 55, 83, 18 Sup. Ct. 895, 43 L. Ed. 85: 'A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, unenclosed, and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain, and where the validity of apparent locations is unsettled and doubtful. Under those circumstances, it is not strange—on the contrary, it is something to be expected, and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why,' asks the court, 'should a subsequent location be held absolutely void for all purposes, and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must, when it appears that his lines are to any extent upon territory covered by a prior valid location, go through the form of making a relocation, simply works delay, and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines. In this connection,' continued the court, 'it may be properly inquired, what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be, like the ordinary public surveys, in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township, and section system? Clearly not. While the contemplation of Congress may have been that every location should be in the form of a parallelogram, not exceeding 1,500 by 600 feet in size, yet the purpose, also, was to permit the location in such a way as to secure not exceeding 1,500 feet of the length of a discovered vein; and it was expected that the locator would so place it as, in his judgment, would make the location lengthwise cover the course of vein. There is no command that the side lines should be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downward outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel, in order that going downward he shall acquire no further length of the vein than the planes of those lines extended downward inclose. If the end lines are not parallel, then, following their planes downward, his rights will be either converging and diminishing, or diverging and increasing, the further he descends into the earth. In view of this purpose and effect of the parallel end lines, it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights.'

"The court accordingly answered in the affirmative this question propounded to it by the Circuit Court of Appeals for the Eighth Circuit: 'May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?'

"In the case of the Hidee Gold-Mining Company, decided by the Secretary of the Interior January 30, 1901 (advance sheets), it was held that the location of a lode mining claim may even be laid within, upon, or across the surface of patented lode mining claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines are established openly and peaceably, and do not embrace any larger area of surface, claimed and unclaimed, than the law permits.

"As, therefore, upon the facts appearing, there was no valid objection to the Stemwinder location, the next question is, what rights did the owner of that location thereby secure? Confessedly, he acquired nothing as against the Emma, either on the surface or underground. But how is it as against the government and every subsequent locator? In the absence of any objection on the part of the owner of the Emma, the locator of the Stemwinder had, as we have seen, the legal right to extend his lines upon and across that claim. The ground to the north and south of the Emma was, according to the findings, open and unappropriated public land, with a mineral-bearing ledge passing in a northwesterly and southeasterly direction through the Emma and into the adjoining unappropriated public land to the north and south of that claim. Across that ledge and on unappropriated public land the locator of the Stemwinder laid his southerly end line, and along the course of the ledge and on unappropriated public land he laid his westerly side line. Across the ledge, partly on unappropriated public land and partly on the prior Emma location, he laid his northerly end line, parallel with his southerly end line, and along the course of the ledge, partly on the Emma and partly on unappropriated public land, he laid his easterly side line, almost, if not quite, parallel with his westerly side line. As, in the absence of any objection on the part of the owner of the Emma, the locator of the Stemwinder had the legal right to cross the prior location, his lines, as against the government and all subsequent locators, would therefore seem to have been perfectly laid. 'Under such circumstances, we are unable to see why, as against the government and all subsequent locators, the location should not carry precisely the same rights, surface and extralateral, that it would carry if none of the lines had been laid upon or over a prior location, which, under the statute governing extralateral rights, would give to the locator of the Stemwinder, as against the government and all subsequent locators, the right to follow the dip of the vein in its departure from the westerly side line of the claim indefinitely between vertical planes drawn through the parallel end lines extended indefinitely in their own direction. We think, too, that this is the logical deduction to be drawn from the reasoning upon which the judgment of the Supreme Court in the case of Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., supra, was based. In effect, the court below made the south line of the Emma the north end line of the Stemwinder, thereby destroying the parallelism of the end lines of the Stemwinder fixed by its locator, and either destroying all of its extralateral rights entirely, or limiting them to converging lines intersecting at the point Y on the diagram. This is in conflict with what was held by the Supreme Court in the Del Monte Case in respect to the line, e, i, of the New York claim. That line, which was the northerly side line of the New York, stood in the same relative position to the Last Chance claim there involved as the south boundary of the Emma claim does to the Stemwinder; and the Supreme Court, in answer to the third question submitted to it by the Circuit Court of Appeals for the Eighth Circuit, held that the easterly side line of the New York did not constitute the end line of the Last Chance claim there in question. Locations of lode mining claims are made for the purpose of reaching the underground veins. 'The area of surface,' said the court in the Del Monte Case, 'is not the matter of moment. The thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced, vein as is possible.' 171 U. S. 75, 18 Sup. Ct. 895, 43 L. Ed. 85."

It cannot, therefore, be now held, as claimed by the appellant, that no extralateral right pertains to the Stemwinder claim. Nor are we

able to agree with the appellant's counsel that the extralateral right of the Stemwinder should be bounded on the northerly side by a vertical plane drawn downward through the patented south line of the Emma claim because of the placing of the stone monument already referred to; and this for several reasons: First, it does not appear that the Stemwinder Mining Company, or its successor in interest, the appellee herein, knew anything about the stone monument, or the oral agreement under which it was built, at the time they acquired their interest; second, the monument was but one point, and was insufficient to indicate any boundary line; and, third, no connection is shown between the appellant and the Emma and Last Chance claims, or any of their owners or locators—there was no privity between them, or any of them.

Did the court below err, as against the intervening claims of the appellant, in fixing the bounding planes of the extralateral right of the Stemwinder through the original north line of the Stemwinder, and through its amended south line? By this decision, it will be seen, the court confined the extralateral right of the Stemwinder within the limits of its original location, and did not extend it beyond the planes of its amended location; and in confining it, as it did, to planes drawn through the northerly end line of the original location and the southerly end line of the amended location, it is given less of the vein on its dip than would be included within planes drawn through the end lines of its amended location. Was it right, in going back to the original north line of the Stemwinder, in fixing its extralateral right as against the intervening claims of the appellant? That question, it seems to us, depends upon whether or not the amendment of the location in question was an abandonment, for all purposes, of the original? If so, it would follow that the court below was in error in this particular. That there was no such intention on the part of the Stemwinder Mining Company was expressly declared in its notice of amended location, wherein it was stated that, the error in the course of the vein having been discovered—

"The object of this amended location is to conform to the laws relating to mining claims, both national and local, and to mark and define and record the same to the extent and with the boundaries hereinafter set forth, the same being within the boundaries so located, marked, and staked in the original location hereof, and not otherwise."

Again it is declared in the amended notice of location:

"It is further intended herein not to abandon in any manner or by implication any rights, privileges, property, possession, or title derived, originated, owned or held under the original location hereof; but that the purpose hereof is to more particularly mark, locate, define and describe the ground, vein, and premises held by said company, without waiving any rights under said original location, all of which the said company claims as the legal successor in interest and title and possession derived from said original locators."

At the time of the original location of the Stemwinder, none of the claims here set up by the appellant had been located. At the time of its location, it being supposed by its locator that the vein or lode outcropping within its surface boundaries ran in an easterly and westerly direction, and its then supposed side lines being, as a matter of fact, laid across the vein, and being substantially parallel, the law declares that

those which the locator called his side lines were in fact his end lines. Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; King v. Amy Silversmith M. Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 48 C. C. A. 665; Empire M. & M. Co. v. Tombstone M. & M. Co. (C. C.) 100 Fed. 910; Cosmopolitan M. Co. v. Foote (C. C.) 101 Fed. 518; Tyler M. Co. v. Sweeney, 54 Fed. 284, 4 C. C. A. 329. And as they were laid, as the evidence shows, openly and aboveboard, without any forcible, clandestine, surreptitious, or otherwise fraudulent entry upon the ground of another, and without objection on the part of any one, the location of the Stemwinder thus made, carved out, as against the government, and any and every subsequent locator, a segment of the vein throughout its entire depth, which belonged to its locator. Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 52 C. C. A. 219.

Unless the amended location of the Stemwinder operated as a total abandonment of the original, that segment of the vein, within the limits of the planes of the amended location, remains the property of the successors in interest of the original locator, against all persons not possessed of some prior right. That such amended location was not intended to operate as any such abandonment has already been shown by the express declarations of the notice of amended location above quoted; and that, as a matter of law, it was not an abandonment of the original location, is equally clear. Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Hallack v. Traber, 23 Colo. 14, 46 Pac. 110; McEvoy v. Hyman, 25 Fed. 596; Morrison v. Regan (Idaho) 67 Pac. 955; Duncan v. Fulton (Colo. App.) 61 Pac. 244.

The great width of the vein or lode in question is also again pressed upon our attention by the learned counsel for the appellant; extending, as he insists the evidence shows, beyond the west side line of the Stemwinder claim. In respect to this matter the court below said in its opinion:

"The defendant also maintains that the apex of this ledge is so wide that it extends far to the westward of the west line of the Stemwinder. Upon this subject there is much and some very interesting testimony by experienced and scientific mining men, but no one has been able to set definite limits to the ledge, and that it has no distinct hanging wall cannot be doubted. Its one distinct and persistent feature is its foot wall. It was the axis of action. Upon it the superincumbent mass of hanging country had its oscillating and grinding motion, resulting in the creation of that heavy selvage or gouge now found upon it, and in so shaking and breaking up that hanging country as to change the relation of its component parts; thus creating large masses of brecciated rock, fissures and cavities, through which the circulating mineral elements deposited their ores. It would be expected that those conditions would decrease as we advance from the line of fissure and action, until reaching a point where there had been no disturbance of the rocks. We would expect the evidence of mineralization to extend far beyond the ore deposits, and as far as the country had been disturbed, displaced, or brecciated, but we cannot conclude that the

legal hanging wall extends to the limits of these influences. It is a fact that in many ledges having a distinct hanging and foot wall, the country beyond either is more or less mineralized, and at times even small deposits of ore are found beyond the lines of the walls. Yet no miner would say that such mineralized country rock constituted a part of the ledge. It appears that in this ledge the foot-wall country has very little mineralization or even mineral stains. The reason is evident. The heavy gouge prevented the escape in that direction of the mineral elements, and the rocks having preserved their original compact formation, there were no cavities through which the mineral elements could circulate. To hold that the ledge extends to the extreme limits of all evidence of mineralization is not a reasonable or practicable proposition in such a formation as this. If not there, where then? Not beyond the ore deposit line, or where such strong indications of it are found that the miner could work or explore with the expectation of compensation. It cannot be doubted from the evidence that far beyond the line where any miner, acquainted with this formation, would work for ore, there is much evidence of mineralized rock, quite similar to the material recognized as clearly within the ledge. So far as can thus far be concluded from all the evidence of ore developments, at and within a reasonable distance below the surface in the Stemwinder, I doubt that the apex proper in that claim exceeds 250 to 300 feet in width. Suppose, however, that it does extend beyond the west line of the claim; the only effect would be, under the holding of the Court of Appeals in the King Case, 114 Fed. 417, 52 C. C. A. 219, that, if defendant owns that surface, it would own so much of the apex as lies within it. What its underground rights would be, is a problem I am not called upon to now solve."

We are not prepared to hold that the court below was in error in the view thus taken of the evidence in the cause. But if it be conceded that the vein or lode be as extensive in width upon the surface as contended by the appellant, the priority of the original Stemwinder location over the claims of the appellant here set up being established, the extralateral right of the appellee would remain as fixed and decreed by the court below. Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co. (decided at the present term), 131 Fed. 579; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 52 C. C. A. 219; St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725, and cases there cited.

The judgment is affirmed.

REGINA MUSIC BOX CO. v. NEWELL et al.

(Circuit Court, S. D. New York. July 11, 1904.)

1. PATENTS—INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.

Mortgage trustees of a corporation licensed under a patent, who have taken possession of the property on default, and through their agents have continued the business and to manufacture and sell the patented article, placing the patent stamp thereon, are estopped to deny the validity of the patent when sued for the infringement.

In Equity. Suit for infringement of patent. On demurrer to bill.

Briessen & Knauth, for complainant.
Clifford E. Dunn, Esq., for defendants.

PLATT, District Judge. The second ground of demurrer is the only one pressed by the defendants, viz.: That the letters patent in suit are absolutely void for want of invention, by reason of matters patent upon their face, or of which the court will take judicial notice. By filing the demurrer the defendants admit the truth of certain salient facts alleged in the bill, which I will recount as clearly and briefly as time and capacity will permit. Complainant, having title to letters patent for music box, No. 500,371, did, on December 4, 1897, sue for infringement one Alfred E. Paillard, who sold in New York the infringing product of the factory of a corporation, F. G. Otto & Sons, of New Jersey. Said corporation paid for the defense of said suit and furnished Paillard with counsel. On June 28, 1898, after proofs had been taken, it was agreed between complainant and said corporation that a decree for a perpetual injunction should be entered against Paillard, and that said corporation should have a license, which was not assignable, transferable, or divisible, for the full term of the patent. This was done, and the corporation did business in New Jersey under the license. On April 1, 1900, the corporation became financially embarrassed, and made a mortgage to Trumbull and Lewis as trustees. On May 18, 1903, said corporation defaulted in the payments of interest, and said trustees took possession. Said trustees placed Madison, Otto, and Schaub, who had been managers of the corporation, in charge of its business as their agents, and as such agents the trio conducted the business. After obtaining the license, the corporation naturally placed the patent stamp on the music boxes which it made and sold, and since the three officers and managers have been in charge as agents for the trustees they have continued to make and sell music boxes with the patent stamp upon them. The five parties are jointly sued for infringement.

Are the trustees in a position where they can avail themselves of the defense indicated by the demurrer? They insist that they can, because the license expired under its own terms by the transfer of possession. But they have permitted the former managers of the corporation to continue the manufacture of music boxes as their agents, and to place the patent stamp upon them, thereby leading the purchaser to believe

¶ 1. See Patents, vol. 38, Cent. Dig. § 184.

that the license still continues; and it would seem that in equity they are estopped from now attacking the validity of the patent, under which they were made by the corporation, and which it is now alleged the agents are assisting the trustees to infringe. It is not incumbent upon the court at this time to seek out the shoulders upon which the blame for the present situation should be placed, but certainly its aid cannot, in all fairness, be invoked in an enterprise which was not attempted by the corporation at a time when the path was plainly open, when it was furnishing the sinews of war to Paillard in the early litigation.

Let the demurrer be overruled.

WESTINGHOUSE et al. v. NEW YORK AIR BRAKE CO. et al.

(Circuit Court, S. D. New York. July 14, 1904.)

No. 4,977.

1. PATENTS—INFRINGEMENT—DAMAGES RECOVERABLE.
   On an accounting for infringement of a patent, complainant is entitled to recover the amount of the profits he would have realized, if he had made the sales which were made by defendant, where he was prepared to supply the demand, although it may exceed the profits made by defendant.

2. SAME—AIR BRAKES.
   Profits and damages for infringement of the Westinghouse patent, No. 376,837, for an improvement in air brakes, must be based on the sales by defendant of the entire triple valve structure, of which the emergency valve of the patent is the dominating feature, without which the entire structure would be without marketability.

In Equity. Suit for infringement of letters patent No. 376,837, for an improvement in air brakes, granted to George Westinghouse, Jr. On exceptions to master's report.

See 115 Fed. 645.

Betts, Betts, Sheffield & Betts, for complainants.

Charles Neave, for defendants.

PLATT, District Judge. This wearisome contention ought to end at the earliest practicable date. I have tried to give it such attention as so large a matter deserves, and being well aware that my action is merely a necessary stepping-stone to the final outcome, I present my conclusions in all brevity, trusting that I may be credited with having performed my duties with scrupulous care, and insisting that silence upon many points before me in no wise indicates a lack of appreciative interest.

For obvious reasons, the law of the case must be accepted as laid down at the last hearing on the circuit. Any inclination toward an independent judgment upon the main question will, therefore, be sternly repressed, although it will not excite profound surprise if further proceedings shall carry the doctrine of Wales v. Waterbury a

¶ 1. Accounting by infringer of patent for profits, see note to Brickell v. Mayor, etc., of City of New York, 50 C. C. A. 8.

See Patents, vol. 38, Cent. Dig. §§ 567, 571.

step beyond the point at which necessity compelled the master to pause in his supplemental report. I am satisfied that the master's action therein is based upon a correct interpretation of the decretal order, whether examined from the view-point of its letter or of its spirit. The opinion of the Court of Appeals (63 Fed. 962, 11 C. C. A. 528), coupled with the facts found by the master in his original report, and the position taken by defendants upon those facts—in short, the entire situation which confronted Judge Wheeler at the hearing—makes it impossible to suspect that he was influenced toward so narrow and astute a construction of the injunctive order as that which the defendants insist that he adopted.

The emergency valve could not be separated from the triple valve structure, the entire structure was an integral device, it was unitary, it had a catalogue price, and no way of dividing the cost existed; and then, again, the emergency valve feature was not only a part of the triple valve structure, but dominated it, so that without that valve the entire structure had no marketability, and, whatever may be said of the other equipments, it is beyond dispute that no buyer would take at any price during the period of the accounting the triple valve structure, unless the emergency valve were made a part of it. Such a structure the complainants were amply prepared to supply to any and every would-be purchaser. Structures containing the infringing combination were supplied by the defendants. The rule is clear that the profits which the complainant might have gained by supplying such demand are recoverable as damages which it suffered thereby. It is also clear that, if such sum exceeds the profits which the defendants gained, such profits can be enlarged until they equal the complainants' losses, but that the two amounts cannot be added together and charged up to the defendants. In this situation, the problem becomes an exceedingly simple one. The amount of profits which complainants would have made, if they had obtained the market supplied by defendants with infringing quick-action valve structures, would have been $128,397.40.

The master's report is accepted, and the above sum is found to be due to the complainants from the defendants, with costs.

BLUMBERG v. A. B. & E. L. SHAW CO.

(Circuit Court, S. D. New York. July 19, 1904.)

No. 2.

1. REMOVAL OF CAUSES—EFFECT ON ATTACHMENT.

An attachment granted by a state court in a suit in which service was made by publication cannot be vacated by the federal court on removal, because the action is one in which such service is not provided for by the federal practice, but under section 4 of the removal statute (Act March 3, 1875, c. 137, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511]) it must stand as it would in the state court, whatever effect the failure to obtain personal service may have on its efficacy.

On Motion to Remand to State Court, and Motion by Defendant to Vacate Attachment.

Wales F. Severance, for plaintiff.
Daly, Hoyt & Mason, for defendant.

LACOMBE, Circuit Judge. 1. The motion to remand this cause to the state court is denied.

2. The motion to vacate the attachment granted by the state court is denied on the sole ground that the removal act (Act March 3, 1875, c. 137, § 4, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511]) provides that it shall not be disturbed, and without expressing any opinion as to whether the attachment can ever become fruitful in the event that no personal service be effected nor appearance entered, service by publication not being provided for by federal practice in actions such as this.

KANE v. LUCKMAN.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. July 29, 1904.)

No. 28.

1. SPECIFIC PERFORMANCE—CONTRACT ENFORCEABLE—DEFINITENESS OF TERMS.
Plaintiff in a suit for specific performance testified to the making of an oral contract with defendant for the purchase of 510 cows, in exchange for which he was to convey to defendant a farm situated in Missouri at a stated price, paying the difference in cash, and that he gave defendant a check for $100 to apply thereon. He was to some extent corroborated by another witness. Defendant testified that the agreement was conditional: that he was to go to see the land, and, if found to be as represented by plaintiff, on his return a written contract was to be made, and the check cashed and applied thereon. It was shown, without dispute, that he started the next day to see the land, taking another with him, and that on his return he stated to plaintiff that the land was not at all as represented, and refused to complete the trade, and tore up the check. It was also admitted by plaintiff that there was a mortgage on the land, and that it was not agreed whether he should pay it, or it should be assumed by defendant, which matter was to be determined later. *Held*, that such evidence did not entitle plaintiff to a decree for specific performance, under the settled rule that it must be clearly shown that the contract was completed, and that its terms were fair, and so definite and certain that they could not be reasonably misunderstood.

2. SAME.
An offer by plaintiff to pay the mortgage did not relieve the contract from the objection of incompleteness, since neither plaintiff nor the court had power to complete it to bind defendant.

3. SAME—MUTUALITY OF CONTRACT.
Such contract, even if admitted, could not be specifically enforced by plaintiff, for want of mutuality in obligation, since, under the statute of frauds, both of Iowa, where it was made, and of Missouri, where the land was situated, it did not bind him to convey the land.

4. SAME—ADEQUATE REMEDY AT LAW—CONTRACT FOR PURCHASE OF CHATTELS.
Under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], which provides that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law, such a court is without jurisdiction to decree the specific performance of a contract for the sale to plaintiff of a number of cows at a

stated price per head, where there is no evidence to show that the cows have any distinctive or peculiar value, which cannot be determined in an action at law for damages, or that defendant is insolvent.

5. FEDERAL COURTS—EQUITY JURISDICTION—OBJECTION ON GROUND OF ADEQUATE REMEDY AT LAW.

In a suit in equity in a federal court, the objection that plaintiff has an adequate remedy at law is jurisdictional, and may be made at any stage of the case.

6. COSTS—ALLOWANCE IN EQUITY—EXAMINING UNNECESSARY NUMBER OF WITNESSES.

Where the successful party in a suit in equity has taken the testimony of a largely unnecessary number of witnesses on an issue, he will be allowed as costs the fees and cost of examination of only such number as the court deems reasonable.

In Equity. Suit for specific performance of contract.

Suit in equity to enforce specific performance of an alleged oral contract for the purchase by plaintiff from defendant of 510 cows. It was commenced in the district court of Iowa in and for Johnson county, and removed to this court by the defendant upon the ground of diverse citizenship of the parties. The petition was filed January 20, 1903, and therein it is alleged, in substance: "That on January 8, 1903, the plaintiff bought of the defendant five hundred and ten cows then in the hands of farmers in Johnson and other counties in Iowa, under contracts with defendant therefor, at the agreed price of twenty-five dollars a head, to be paid in a reasonable time. That such agreement was as follows: That plaintiff, having been the owner of three hundred and fifty-seven acres of land in Ralls county, Missouri [describing it], should pay by check the sum of one hundred dollars down upon the cows aforesaid, and execute a good and sufficient deed and furnish an abstract of title to said land to the defendant (said land to be figured at thirty dollars an acre); and, if defendant had exactly five hundred and ten cows, the plaintiff, in addition to the one hundred dollars paid by check, was to pay defendant the remainder of the difference in value between the land at thirty dollars an acre and the cost of the cows, but, if the number of cows was greater or less than five hundred and ten, then the cows were to be valued at twenty-five dollars a head; and said parties mutually and orally agreed to the terms of such sale. That the complainant at the time of such agreement executed and delivered to defendant a check of one hundred dollars as part payment on the purchase price of said cows, and defendant so accepted and received said check, which would have been paid on presentation to the bank upon which it was drawn. That defendant unlawfully and unjustly refuses to stand by or further execute the oral contract herein alleged. That the contracts between defendant and the farmers in whose possession said cows were, are advantageous to the owner of said cows. That by the terms of such contracts the farmers agreed to pay defendant, as rent per annum for said cows, six dollars each for some, and seven dollars each for others, which contracts enhance the value of said cows, and provide employment and use for the same; and the cows so under contract have a peculiar and distinctive value, that they would not have but for such contracts, and complainant cannot be fully compensated by a money judgment in lieu of the specific performance of said oral contract. That the plaintiff has a clear legal title to said land before described, free from incumbrance, except a mortgage of about six thousand dollars. That, in regard to said mortgage, the defendant agreed to inform plaintiff whether defendant would take the land subject to said mortgage, and assume payment of the same, or require plaintiff to pay the same. That plaintiff brings into court for defendant's use, and tenders herewith, an abstract of title of said land, and a warranty deed thereof, and asks defendant to inform plaintiff whether he desires to assume the said mortgage,

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¶ 5. See Equity, vol. 19, Cent. Dig. §§ 173–176.

¶ 6. Right to costs in equity, see note to Tug River Coal & Salt Co. v. Birgel, 17 C. C. A. 368.

as a part of the consideration of said premises, or whether he desires to have plaintiff pay the same and free the land of said incumbrance. That defendant has no tangible property in Iowa, except said cows, and plaintiff fears defendant will, unless restrained, sell or dispose of his interest in said cows, or a part thereof. That, if said cows were sold by defendant, plaintiff would lose the beneficial contracts under which farmers and others hold the same, and would suffer irreparable loss and injury. Wherefore the petitioner asks that a temporary writ of injunction issue, restraining defendant from selling or disposing of said cows, or making any contracts in relation thereto; * * * that, upon the final hearing, petitioner have a decree of specific performance against defendant, conveying and quieting the title in plaintiff of all of said cows; that the court determine whether plaintiff is to cancel and pay off said mortgage, or whether defendant will assume the same as a part of the consideration of said land; and for such other and further relief as may be equitable."

February 12, 1903, a supplemental petition was filed in the state court, in which it is alleged, in substance, "that the cows bought by plaintiff from defendant are in the hands of farmers, in lots of from one to five or ten, and held under many contracts, some of which expire March 1, 1903, and others do not so expire, but the cows are to be held thereunder; that, by the agreement between plaintiff and defendant, plaintiff was to take said cows as of the date of March 1, 1903, and renew or otherwise change the contracts under which said cows are held at this time, or assume the liability of defendant therein, and, in any event, plaintiff was to be the owner of said cows in the contracts aforesaid, and to be entitled to all the benefit, profit, or issue arising thereunder, as well as to assume the liability of said defendant; * * * that the lease of the land described in the original petition, which plaintiff traded to defendant, expires March 1, 1903; that plaintiff is ready to deliver his warranty deed according to his contract, and to give defendant possession thereof."

A temporary injunction was issued by the state court as prayed. The answer of defendant is, in substance: "That he denies the allegations of the petition and supplement, except as admitted. Admits that he owns the five hundred and ten cows as alleged. That plaintiff and defendant verbally agreed upon a trade whereby defendant was to sell to plaintiff said cows at twenty-five dollars a head, and take in part payment therefor three hundred and fifty-seven acres of land in Ralls county, Missouri, at thirty dollars an acre, which was to include the crop of 1902 raised upon said land, and the balance in cash, providing said land was as represented by plaintiff. That defendant had never seen said land, and, to induce defendant to enter into said verbal agreement, plaintiff verbally represented and said to defendant that said land was a good prairie farm, all tillable land, suitable for farm purposes, except about forty or fifty acres of timber land, which was not more than needed for said farm, which timber land could be easily cleared off, and the land converted into good, tillable land; that the buildings on said land were all located on or near a public highway. That said agreement was to be reduced to writing, and plaintiff was to make defendant a warranty deed, and furnish an abstract showing the land to be free and clear of all liens and incumbrances. That plaintiff did deliver to defendant a check for one hundred dollars, which was accepted by defendant with the express understanding that, if said land was as represented by plaintiff, then the oral contract was to be reduced to writing, signed by both parties, and the check was then to be considered as part payment on said cows. That in pursuance of said verbal agreement this defendant went from Iowa City, Iowa, to Ralls county, Missouri, on January 9, 1903, saw said land, and found that the same was not as represented by plaintiff, and not worth more than four or five dollars an acre [and describing the particulars in which it was not as represented]. That he immediately returned to Iowa City, and so informed plaintiff, and told him that he (defendant) would not take the land, because it was not as plaintiff had represented it; that he would not complete the agreement. And defendant thereupon destroyed the check for one hundred dollars, which he had never presented for payment, and which, in fact, never was paid. That the representations of plaintiff as to the quality of said land were false and fraudulent, known by him to be so, and were made by plaintiff with intent to deceive and defraud defendant and induce said trade, and that defendant relied on said representations in making said deal. That the alleged contract

was never reduced to writing, nor signed by either of the parties, nor was any part of the price of said land ever paid by defendant, nor of said cows by plaintiff; and none of said land was ever delivered to, or possession thereof taken by, defendant, and none of said cows delivered to, or possession thereof taken by, plaintiff, and that said contract is wholly within the statute of frauds."

Remley & Ney and Ranck & Bradley, for complainant.
A. E. Maine and Dawley, Hubbard & Wheeler, for defendant.

REED, District Judge (after stating the facts). The controlling questions arising in this suit for determination are: (1) Has the complainant shown a completed contract between himself and the defendant, not within the statute of frauds? And (2) If he has, is it one that equity will decree to be specifically performed? A large amount of testimony has been taken, much of it conflicting, and that of plaintiff and defendant individually as to the consummation of a completed contract between them irreconcilably so. Such of it as it is deemed necessary to refer to will be stated in the course of the opinion.

1. Specific performance will not be decreed unless it is clearly shown that the contract is completed, and that its terms are fair, and so definite and certain that they cannot be reasonably misunderstood. Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253; Purcell v. Miner, 4 Wall. 514, 18 L. Ed. 435; Carr v. Duval, 14 Pet. 79, 10 L. Ed. 361; Nickerson v. Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355, 32 L. Ed. 314; Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Dalzell v. Dueber Watch Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; Wesley v. Eells, 177 U. S. 370, 20 Sup. Ct. 661, 44 L. Ed. 810; Minnesota Tribune Co. v. Associated Press, 83 Fed. 350, 27 C. C. A. 542.

In Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435, it is said:

"Mere breach of the parol promise will not make a case for the interference of a chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts, in order to their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory, and indubitable proof: First. Of the contract and its terms. Such proof must be clear, definite, and conclusive, and must show a contract leaving no jus deliberandi or locus pœnitentiæ. It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, in which the witness had no reason to recollect, from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated—testimony, therefore, impossible to be contradicted. Second. That the consideration has been paid or tendered. But the mere payment of the price, in part or in whole, will not of itself be sufficient for the interference of a court of equity; the party having a sufficient remedy at law to recover back the money. Third. Such a part performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law."

In Minnesota Tribune Co. v. Associated Press, 83 Fed. 350, 27 C. C. A. 542, Thayer, Circuit Judge, speaking for the Circuit Court of Appeals for this circuit, says:

"A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. If the contract which the complainant seeks to enforce is vague or uncertain, a

court of equity will not interfere, but will leave him to his legal remedies; and, where the contract is clearly susceptible of different interpretations, a court of equity ought not to take the chances of decreeing its specific execution in a way which will possibly do violence to the intention of the parties thereto. In all such cases, as well as where a contract is not fair and just in all its parts, * * * the party seeking to enforce it should be remitted to his action for damages."

The other cases cited are to the same effect, and they establish the rule by which this controversy must be determined. Has the plaintiff, by his testimony, brought himself within this rule? Much of the testimony goes to the question as to who first proposed, and was the more anxious, to make the trade which is the subject of the controversy between the parties. This is not of great importance. The vital question is, did the parties get beyond negotiations, and finally agree upon definite terms for an exchange of their properties, and that such agreement was not within the statute of frauds? It is completed contracts that conclude parties, and not mere negotiations. From the testimony it appears that the parties were negotiating for several days. The plaintiff at first wanted $30 an acre for his land, not including the crop of 1902 raised thereon; and the defendant wanted to turn in only a part of his cows, at $30 a head. Defendant had never seen the land, and plaintiff several times during the negotiations suggested to him that he go and look at it. Defendant says that, in reply to these suggestions, he told plaintiff there was no use in going to look at the land until it was certain they could agree upon terms of an exchange, and then he would go and look at it. A Mr. Hill was instrumental in trying to bring about the deal, and was employed by defendant, after negotiations had been pending for some days, to do so. Plaintiff says that on January 8th defendant was around his store nearly all day, urging a trade, and that upon that day they finally agreed upon a contract. In regard to this he says, after telling of the negotiations:

"Q. Did you finally reach a conclusion on January 8th as to the sale of the land? A. Yes, sir; it was just about six o'clock, and I said I would see him in the morning. He says: 'No, sir, you won't; you will see me right now. We will close this right now. I worked too hard to get this deal to have any fooling about it.' * * * Charley Chansky, my workman, was in the store. That was all. I said, 'What do you want to do?' He said, 'Mr. Maine is my lawyer, and we will go there.' We started, but Mr. Maine's office was closed—there was no light there—and we came back into the store; and, before going in, Mr. Hill made a proposition to give him a hundred dollars, and I gave him a check for a hundred dollars. He says, 'Come back after supper,' and I says, 'No; I won't come back.' Q. What was said about how you would trade? A. Well, I was to take the cows at twenty-five dollars a head, and he was to take the land at thirty dollars an acre. Anything under the number of cows— I was to have twenty-five dollars in cash for any number of cows he couldn't furnish up to five hundred or five hundred and ten. I told him there was a mortgage on the place; I would clear it if he wanted me to. I believe he rather talked as though he would like to have it clear. I believe that is about the way he wanted it. But I told him it was immaterial to me; that I would clear it or leave it as it was; that it was only bearing 5%. This conversation occurred several times before I gave him the check. We were going to Maine's office to close the deal in the way you would close up a deal, I suppose—to put it in writing. We were to go there and put it in writing. When we didn't find him, we closed it by his accepting one hundred dollars. Q. How did the check read? A. 'Payment on 500 cows on land deal.' It was dated January 8, 1903, payable to order of Frank Luckman, one hundred dollars, on Iowa City State Bank. I

had plenty of money in the bank at that time to pay the check. 'Couldn't say where that check is now. I saw it since. * * * He never offered me the check back, not at that time. Hill said, 'Write a check for a hundred dollars.' He was not satisfied, on account of Mr. Maine not being at his office, and, to satisfy him, Hill asked him, would he be satisfied with a check, and he said he would. Hill first made the proposition that I pay him some money, but I had none in the safe. Then Hill asked if he would be satisfied with the check, and he said he would. When I delivered him the check, I went home, and left Hill and Luckman in the store. * * * I saw them next day. Luckman said: 'If you don't take two hundred head of cows, I won't call it a trade, and I will go down and look at the land; and, if it don't suit me, I won't take it.' I told him: 'No; I traded for five hundred. I won't take two hundred.' I saw him after that several times. * * * In the trade there that evening there was nothing said about the lease of the land. I showed him the lease January 8th. I was to assign him the lease. That was the proposition finally accepted—that he was to have the deal just as I got it. * * * The mortgage is still on that land. I can pay it off, or give it with the mortgage. Either way suits me. I don't care. * * *

Cross-examination: "Up to the night that this trade was made, we had reached no definite agreement. Up to that time he refused to trade me all of his cows, and I had refused to trade my land with the crop. * * * Next day after the trade, Luckman told me he was going to Missouri. He told me who was going with him. I can't recollect what I said, but possibly I did say, 'Why can't Jim [my brother] go down with you?' If I did, I had reasons for it. After he came back from Missouri, I think he did tell me the farm was not anything like I represented. I know that he complained about the farm. I learned that he tore up the check that I gave him."

Redirect examination: "I didn't understand that the cows were to be moved out of the hands of the farmers who had them under contract. * * * I understood there was simply to be a deed made to Luckman after the time I gave the check, and he was to turn over the contracts to me, and the difference in value, if any, was to be settled. The time for doing any part of that at the time of making the contract and delivery of this check was not fixed. Prior to the time of making the contract, we talked about the rent that they were paying for the cows, and how long the contracts run—some of them run for four years; the shortest for a year. We had one of his contracts, which we examined many times. I knew what they were."

This is substantially all of the testimony of the plaintiff as to what occurred at the time the check was delivered and the contract completed as he claims. It is over the objection of defendant as being within the statute of frauds. Mr. Hill substantiates him in many particulars, but not in all.

The defendant, after relating their negotiations for several days, says:

"I saw Kane January 8th at his store. Mr. Hill was with me there in the afternoon, and after six o'clock there was nobody but Kane when Hill and I came in."

After relating some of the negotiations, the witness continues:

"Well, I says, 'I will put in 510 [cows], and I will go down to-morrow and look at the farm, and, if the farm is what you claim it is, when I come back we will make a trade.' There was a check given. Mr. Hill said, 'Better give Frank a check for $100.' I said, 'No; there is no need of it. Wait until I come back from Missouri.' Hill said, 'Better give him a check.' 'Yes,' says Kane; 'better give him a check for $100.' They insisted on my taking it, and I took it and put it in my pocket. The contract was to be drawn when I came back from Missouri, if I was satisfied about the farm. If the bargain went through, the cattle were to be delivered the 1st of March, and I was to get possession of the land the 1st of March. This was about half past six o'clock in the evening. Mr. Kane went north, and Hill and I went south. It was all done in fifteen

minutes' time. I saw Kane at his store next morning about eight o'clock, and said, 'Which is the best way to go down to this farm?' And he says, 'There is two ways of going. Let's go up to Dayton's office, and he will know better than I do.' We went to Dayton's office, and Kane asked Dayton which was the best way to go down, and Dayton said, 'You can't go until this evening, but the best way is to go to Quincy, Ill., change cars, and go to Monroe City.' And they gave me directions to go from Monroe City to reach the farm. They called it the 'Lundburg Farm.' Up to this time I didn't know where the farm was located. At the time of the conversation that morning, as we came down from Dayton's office, Mr. Kane says, 'Is there anybody going down with you?' I says I was going to try to get Will Havard; and Kane says, 'Why can't Jim go?' I says, 'Yes; Jim can go if he wants to;' and he says, 'Will you pay his way?' and I says, 'No.' Jim didn't go with us. I went down that evening to the farm, and we went out to see it Saturday morning. Havard was with me. We went over the farm. [Witness described the farm in detail, and says that it was nothing like what Kane represented it to be.] I got back to Iowa City Sunday morning, January 11th, and saw Kane Monday morning at his store, and I said to him: 'Mr. Kane, you are a good one. You are a dandy, for to have me go down to Missouri to look at this farm. Why in the world didn't you tell me what this farm was? It is no prairie farm. It is no such thing. It is pretty nearly all timber, brush, and cañons. There is places on there that a goat couldn't climb.' 'Well,' he says, 'If you don't want to trade, what is the use of running the farm down?' I says, 'I ain't running it down.' 'Well,' he says, 'Havard is running it down all around town.' Afterwards I tore up the check, and Hill said I ought not to have done so, and I said it was no good."

Several witnesses testified in behalf of complainant that defendant told them he had made a trade with Kane. Defendant admits conversations with some or all of these witnesses, but denies that he told them he had made a trade, but did say that he was talking with Kane of trading for the land. At least one witness testifies that Kane told him that he (Kane) was trying to trade this land in Missouri to Luckman, that Luckman had gone to Missouri to look at it, and that, if they didn't complete the trade, complainant would then talk with the witness about trading with him.

Without further stating the testimony, it must suffice to say that defendant positively denies that a trade was completed, and says that the agreement, so far as reached, was conditional upon the land being as represented by complainant; that he was to go to Missouri and look at it, and that the check was received by him with the express understanding that, if the land was as represented, the contract was to be put in writing, signed by the parties, and the check was then to be considered as part payment, and the deal finally settled by March 1st; that he did go to Missouri, starting on January 9th, and saw the land; that it was not as represented by complainant; that he at once returned to Iowa City, and so informed complainant, and that he would go no further with the deal, and tore up the check, which had never been presented for payment, and never was, in fact, paid. That defendant did go to Missouri, saw the land, returned at once, and told complainant it was not as represented, and that he would go no further with the deal, is established beyond controversy. Complainant alleges in his petition that he was to take the cows as of March 1st, but, in his testimony, says that nothing was said about this. In regard to the mortgage, it clearly appears that no agreement was reached as to whether complainant was to pay the same, or defendant was to as-

sume it, and the prayer of the petition is that the court shall determine which shall be done. The testimony is silent as to the amount of this mortgage, its date, and when it matures. All that complainant says about it is that it bears 5 per cent. This might be a favorable rate of interest, but whether the loan would be a desirable one for defendant to carry would depend upon other terms of the mortgage. In the petition the complainant alleges that defendant was to determine whether or not he would assume the mortgage. The parties had a right to agree to this, and, if it was a part of their negotiations, and they did not agree thereon, then the terms of the exchange were not finally completed. It also appears from the testimony that these parties met the morning after the alleged agreement, and had a conversation about the deal, and about defendant's going to Missouri to look at the land. They do not agree as to what the conversation was, but the fact that it was had, that the check was not presented for payment, and that defendant started on the first train that he could go on to see the land, tend at least to corroborate defendant that the trade was not finally consummated. True, the passing of the check tends to show an agreement of some kind, but that is not conclusive, and if it was received with the understanding that the agreement, whatever it was, was conditioned upon the land being as represented by the complainant, the parties had not passed the stage of negotiations, and either might still withdraw therefrom.

In argument, counsel for complainant anticipated that the question of the completion of the contract, because of the failure of the parties to agree in respect to the mortgage and the time of the final settlement, would be raised, and said that it might be conceded that the deal was to be settled March 1st, as claimed by defendant, and that, as to the mortgage, the complainant would pay it, and relieve defendant therefrom, and that would eliminate these questions. But that would be permitting the complainant to make the contract, which the parties have failed to agree upon. These matters go deeper than counsel seem to suppose, and to the vital question of the case, which is, did the parties finally agree upon the terms of the contract? If they did not, negotiations were still pending, and the court cannot complete the contract for them.

In Dalzell v. Dueber Watch Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749, above, Mr. Justice Harlan says:

"From the time of Lord Hardwicke, it has been the established rule that a court of chancery will not decree specific performance unless the agreement is certain, fair, and just in all its parts [citing the authorities], and the rule has been repeatedly affirmed and acted upon by this court. * * * So this court has said that chancery will not decree specific performance if it be doubtful whether an agreement has been concluded or is a mere negotiation, nor unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms."

In Pom. Spec. Per. § 145, it is said:

"In order that any agreement, whether covered by the statute or not, whether written or verbal, may be specifically enforced, it must be complete in all its parts; that is, all the terms which the parties have adopted as portions of their contract must be finally and definitely settled; and none must

be left to be determined by future negotiation; and this is true without any regard to the comparative importance or unimportance of these several terms."

It is alleged in the petition that complainant was to assume the liability of defendant in the leases of the cows to the farmers. What this liability is, nowhere appears in the evidence; but, if it did, how could the court in its decree compel the farmers to accept complainant in lieu of defendant for such liability, whatever it is, and absolve defendant therefrom? It is, to say the least, doubtful, under this testimony, whether an agreement was finally concluded, and its terms definitely settled by these parties.

Again, the general rule is that the contract must be mutual in obligation, at least before it will be specifically enforced against either of the parties. If, therefore, from the nature or form of the contract itself, or for any other reason, the agreement devolves no obligation upon one of the parties, or if it cannot for any reason be specifically enforced against him, then he is not entitled to the remedy of specific performance against the other, even though in a bill therefor he expresses a willingness or offers therein to perform on his part. Luse v. Deitz, 46 Iowa, 205; Bodine v. Glading, 21 Pa. 50, 59 Am. Dec. 749; Hawley v. Sheldon, Har. Ch. (Mich.) 420; Fry on Spec. Perf. § 286; Pom. Spec. Perf. § 163 et seq. The Iowa and Missouri statutes both require an agreement for the sale of land to be in writing, and signed by the party to be charged.

The Iowa statute is as follows:

Section 4625, Code 1897: "Except where otherwise especially provided, no evidence of the following enumerated contracts is competent unless it be in writing, signed by the party charged or his authorized agent: (1) Those relating to the sale of personal property where no part of the property is delivered and no part of the price paid; * * * (4) those for the creation or transfer of any interest in lands."

Section 4626: "The provisions of the * * * 4th subdivision of the preceding section do not apply where the purchase money or any portion thereof has been received by the vendor, or when the vendee with the actual or implied consent of the vendor has taken and held possession under the contract. * * *"

This statute, in effect, is the same as the English statute, and the decisions construing that statute are applicable to this. Westheimer v. Peacock, 2 Iowa, 528. The words "purchase money" mean consideration to be paid for the land. Devin v. Himer, 29 Iowa, 297.

The statute of Missouri is:

"No action shall be brought * * * upon any contract made for the sale of lands or any interest in or concerning them * * * unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized in writing." Rev. St. Mo. 1899, § 3418.

This alleged contract, so far as it relates to the cows and leases thereof, might be controlled by the Iowa statute; but, as the land is in Missouri, any sale or contract for the sale thereof, to be valid, must conform to the law of that state. United States v. Crosby, 7 Cranch, 115, 3 L. Ed. 287; Kerr v. Moon, 9 Wheat. 566, 6 L. Ed. 161; Mc-

Cormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Story's Conflict (7th Ed.) §§ 435, 436.

In United States v. Fox, above, it is said:

"It is an established principle of the law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

Under either of these statutes, could the contract in this case, as claimed by the complainant, be enforced against him? If not, is there such a mutuality of obligation that it could be enforced against defendant either at law or in equity? It was not signed by the complainant or his authorized agent; no part of the consideration to be paid for the land was received by him, or possession of the land taken by the defendant. The words, "Payment on 500 cows on land deal," if written upon the check which it is claimed was accepted by defendant as part payment of the cows, cannot be construed as an agreement or memorandum by the complainant to convey the land; and, even if it could be, such agreement would be void for incompleteness and uncertainty. Williams v. Morris, 95 U. S. 444–455, 456, 24 L. Ed. 360. The check was intended as part payment by complainant on the cows, and not as part payment to be received by him on the land. There is nothing, therefore, to take the case out of the statute of frauds of either state, so far as the complainant is concerned; and, if suit was brought against him by defendant in either state to enforce conveyance of the land, it seems clear that the complainant could successfully defend upon this ground alone. The alleged contract is entire, and, unless it could be enforced in its entirety against complainant, it should not be enforced against the defendant.

2. Is the contract, as claimed by complainant, one that a court of equity, in any event, will decree to be specifically performed?

The Revised Statutes of the United States provide:

"Sec. 723. Suits in equity shall not be sustained in any of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." [U. S. Comp. St. 1901, p. 583.]

In New York Guaranty Co. v. Memphis Water Co., 107 U. S. 214, 2 Sup. Ct. 286, 27 L. Ed. 484, it is said:

"This enactment" (section 723, Rev. St. [U. S. Comp. St. 1901, p. 583]) "certainly means something, and, if only declaratory of what was always the law, it must at least have been enacted to emphasize the rule and impress it upon the attention of the courts."

In Root v. Ry. Co., 105 U. S. 189, 26 L. Ed. 975, the grounds upon which courts of equity will entertain suits and afford relief are clearly stated. At page 212, 105 U. S., 26 L. Ed. 975, it is said:

"The result of the argument is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain. adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

To the same effect is Hipp v. Babin, 19 How. 271, 15 L. Ed. 633, and Parker v. Mfg. Co., 2 Black, 545, 17 L. Ed. 333.

That a contract for the purchase of chattels will not ordinarily be decreed to be specifically performed by a court of equity because the law affords an adequate remedy in damages for the breach of such a contract, is not seriously questioned. That such is the rule is plain. Clark v. White, 12 Pet. 178, 9 L. Ed. 1046; Richmond v. Ry. Co., 33 Iowa, at page 480; First Nat. Bank v. Day, 52 Iowa, 680, 3 N. W. 728; Hull v. Hull, 117 Iowa, 63, 90 N. W. 496; Pierce v. Plumb, 74 Ill. 326; Moulton v. Warren Mfg. Co., 81 Minn. 259, 83 N. W. 1082; 3 Parsons' Contracts, 364, 365; 3 Pomeroy's Equity (2d Ed.) § 1402; Pomeroy's Specific Performance of Contracts, § 11 et seq.; 2 Story's Equity, § 717.

In section 1402, 3 Pomeroy's Equity, it is said:

"Whenever a contract conveying real property is unobjectionable * * * it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for its breach. As to chattels, the doctrine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning them, because their money value, recovered as damages, will enable the party to purchase others of like kind and quality. * * * But where particular chattels have some special value to the owner over and above any pecuniary estimate, * * * or where they are unique, rare, and incapable of being reproduced by money damages, equity will decree specific delivery of them to their owner, and the specific performance of contracts concerning them."

The rule and the exceptions thereto are more fully stated in Pomeroy on Specific Performance of Contracts, §§ 11, 12.

In Story's Equity, § 717, it is said:

"So courts of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because the damages at law, calculated on the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may ordinarily purchase the same quantity of like stock or goods."

It is urged in behalf of the complainant that the case, upon its facts, is within the exception to the general rule stated in the authorities above cited, because of the allegation in the petition as amended "that the value of the cows is enhanced by reason of the contracts under which they are held by the farmers; that the cows so under contracts have a peculiar and distinctive value, that they would not have but for such contracts; and that plaintiff cannot be fully compensated by a money judgment in lieu of the specific performance of such contract." The last clause is, of course, a mere conclusion. There is an entire absence of proof, however, to sustain this allegation, conceding it to be sufficient to make a case for equitable cognizance. The testimony of the plaintiff is silent upon the value of the cows, whether under lease or not. It is true, complainant himself says that defendant told him he was getting $6 a head a year for some, and $7 for others, and that the leases were to run from one to four years, and that the cows were to be valued at $25 a head in the trade; but, aside from this, there is no evidence whatever showing that the value of the cows was enhanced because of the contracts under which they were held, or that they were of any distinct or peculiar value because of such contracts, that could not be fully measured in dollars. It surely cannot be said, as a matter of law, in the absence of all evidence, that, because the

owner of a cow leases or lets her to a farmer for one, two, or three years for an annual rental or compensation of $6 or $7, the animal, regardless of peculiar conditions or characteristics, is thereby endowed with any unique or peculiar traits or qualities that would render her value, or the contract under which she is held, incapable or even difficult of being estimated in money; nor would the fact that 510 of such animals were so leased or let render the value of that number incapable of being proven or determined in a court of law. This allegation, in the absence of any evidence to sustain it, is the only ground upon which complainant relies to bring this case within the cognizance of a court of equity. By his own testimony, however, he agreed with the defendant upon the value of such animals under contract at $25 a head. Equity will not decree specific performance of chattels, though unique or peculiar in character, even, when their pecuniary value has been fixed by agreement of the parties, or can be readily ascertained, so that an adequate compensation in damages can be recovered at law. Pomeroy's Specific Performance of Contracts, § 12; Bodine v. Glading, 21 Pa. 50, 59 Am. Dec. 749. If the value fixed by complainant and defendant was less than the actual value of these contracts and cows, so that complainant obtained by his alleged agreement a valuable contract, nothing whatever is shown why the value in excess of the contract price cannot be fully proven, and the amount of such excess recovered at law. There is no averment or proof that defendant is insolvent. It is true, the petition avers the defendant has no tangible property in Iowa, other than this lot of cows, but that is far short of an allegation of insolvency. And if it were inconvenient, even, to fully prove the value of the animals and contracts, which, however, is not shown, that is not sufficient to show that the remedy at law is incomplete or inadequate. The presumption is that the value of the cows as agreed upon by the parties is their fair value, and it cannot be inferred, in the absence of testimony, that their actual value was in excess of the agreed value, or that the whole lot would not be sufficient to satisfy the excess of value which the testimony might show, if any. If this were shown, then the contract whereby their value was fixed at such price that a breach of it would require the whole or any considerable portion of the entire lot to satisfy this excess of value would be such an unconscionable one that a court of equity would not under any circumstances enforce it.

Counsel for complainant cite and rely upon authorities which, in effect, hold that when one contracts for the purchase of stocks of corporations, or chattels or commodities for a specific purpose or of peculiar value, which are scarce or cannot be obtained generally in the market, or have no established market value which can be shown as a basis for damages, equity will decree the specific performance of such contracts. This rule may be conceded, but the facts in the present case do not come within it. McNamara v. Home Land & Cattle Co. (C. C.) 105 Fed. 202, is so cited. This was a bill filed to enforce specific performance of an agreement for the purchase of a lot of cattle, and it was alleged, among other things, that the purchase was made by plaintiffs to enable them to fulfill contracts which they had with the government. Specific performance was decreed by the Circuit

Court, but the decree was reversed by the Court of Appeals for the Ninth Circuit. Home Land & Cattle Company v. McNamara, 111 Fed. 822, 49 C. C. A. 642. That court, in its opinion, says:

"The bill alleges, it is true, that the cattle under contract possessed a special and peculiar value to the appellees, which could not be adequately compensated for in money damages. This averment is evidently inserted for the purpose of showing that the case is one for specific performance, * * * but there is no evidence whatever of any such damages."

The decree was reversed and the case remanded, with instructions to dismiss the bill.

The complainant has in fact paid nothing upon this alleged contract, and, if it is not enforced against defendant, he suffers nothing but the loss of his bargain, and this alone is not sufficient to warrant a decree for its specific performance.

It may be that the tendency of modern decisions is to enlarge, rather than restrict, the right to the specific performance of contracts fairly entered into, both as to real and personal property. The right, however, is not absolute, but rests in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. Willard v. Tayloe, 8 Wall. 557–565, 19 L. Ed. 501. And when it appears in the particular case that the remedy at law is complete, and in its ordinary course will afford a full compensation by way of damages, the party will be remitted to his legal remedy. Especially is this true of the federal courts, under section 723, Rev. St. [U. S. Comp. St. 1901, p. 583], above.

It is urged that this objection should have been raised by demurrer, or in some way before answer, and that it is too late to do so upon the final hearing. In the courts of the United States this objection is regarded as jurisdictional, and to be enforced by the court upon its own motion, though not raised by the pleadings or suggested by counsel. Hipp v. Babin, 19 How. 271, 15 L. Ed. 633; Parker v. Mfg. Co., 2 Black, 545, 17 L. Ed. 333; Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Allen v. Pullman's Palace Car Co., 139 U. S. 658, 11 Sup. Ct. 682, 35 L. Ed. 303. See, also, Keokuk Ry. Co. v. Donnell, 77 Iowa, 221, 42 N. W. 176.

It is unnecessary to consider the questions as to the character and value of the land, for, upon any view that can be taken of the case, the conclusion is that the complainant is not entitled to a decree; that the injunction should be dissolved, and the bill dismissed; and it is so ordered.

4. The case is one that calls for an equitable disposition of the costs. The testimony consists of more than 4,000 typewritten pages of legal cap. The complainant's abstract of it consists of 680 such pages, and the defendant's of 360 such pages. Much testimony was taken by both parties of witnesses residing in Missouri in regard to the character, quality, and value of the land. Defendant had the land surveyed, and a plat made, minutely describing it; and the surveyer who made these testified at length as to the character, quality, location, and value of the land. In addition to the surveyor, defendant produced and examined 20 witnesses, all or nearly all of whom decribed the land in detail as the surveyor had done; thus largely increasing the volume

of the testimony, and expense of taking the same. Five competent witnesses, including the surveyor, would have given full and complete information as to the character of this land and its value. The complainant examined eight witnesses to impeach the defendant, and the defendant examined twenty-two witnesses upon this point. Upon the reading of the testimony, the court limited each side to six witnesses upon this question. The defendant will be allowed, as costs, the fees of five of the witnesses examined in Missouri, including the surveyor, and the expense of taking their testimony; the fees of six witnesses in the matter of impeachment, and the expenses of taking their testimony; and the fees of the five witnesses taken at Iowa City as to the negotiations and alleged contract between the parties, and the expense of taking their testimony. These fees and the other costs of the case upon the merits will be taxed against complainant. The fees of all other of defendant's witnesses upon the merits, and the expense of taking their testimony, will not be so taxed.

Ordered accordingly.

THE ECHO.

(District Court, S. D. Alabama. May 21, 1904.)

No. 1,016.

1. COLLISION—STEAMER AND TUG AND TOW MEETING—LIABILITY OF TUG.

Where the navigation of a fleet consisting of a tug and two barges in tow, one alongside having her own master and crew and the other on a line, is in charge of a pilot employed by the owners of the barges, who is on the first barge and directs all movements, the tug is not responsible for the position of the fleet in the channel, nor for the failure of the barges to carry proper lights, and cannot be held liable for a collision between the leading barge and a meeting steamer, resulting from a violation of the rules in either of such respects.

2. SAME.

Conflicting evidence considered, in respect to a collision in the evening between libelant's steamer, passing down the Mississippi opposite New Orleans, and a barge alongside of a tug passing up, and *held* not to sustain the burden resting on libelant to show fault on the part of the tug, either in relation to the lights carried, the signals given, or the position of the tow in the river, but to show by a preponderance of testimony that in all of such respects the tug was without fault, and that the collision occurred through the fault and negligent navigation of the steamer.

3. SAME—LOOKOUT.

A steamer passing down the Mississippi in front of New Orleans in the evening, where other vessels are liable to be encountered, should have a lookout other than the master, who has also other duties.

In Admiralty. Suit for collision.

W. S. Benedict and Gregory L. & H. T. Smith, for libelants.
Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. The libel alleges, among other things, that the steamboat Alma was, on the night of November 22, 1902,

¶ 3. See Collision, vol. 10, Cent. Dig. §§ 143, 211.

coming down the Mississippi river, and when at a point in the current of the river nearly opposite Napoleon avenue, in the city of New Orleans, the tug Echo, slowly ascending the river, collided with her, crashing into the starboard side of the Alma, greatly damaging her, and causing her final total loss. The libel charges that the collision would not have occurred, had the tug Echo, in accordance with the navigation laws of the United States, displayed proper lights and answered the proper signals of the Alma; that the collision could have been avoided, or prevented, had the said tug Echo, with her barges in tow, displayed the usual and customary lights, as required by the navigation laws of the United States; that it could have been avoided, had said tug, in accordance with the laws and regulations pertaining to navigation on inland waters, given the proper signals, or properly answered in due time those of the Alma; and that it could have been avoided, had said tug been in her proper place in the river, viz., ascending near the New Orleans bank.

The first question raised on the evidence and argument is whether the Echo is, under the circumstances of the case, responsible for the faults or acts of omission of the pilot on the tow, or of the crew of the tow, even if such faults or acts appear to have caused the collision? My opinion is that, in respect to a compliance with the general navigation laws, the tug Echo, so far as her own lights and signals are concerned, would be liable for her own faults or acts of omission, but that, so far as the faults or negligent acts of the pilot or crew of the barge Pendleton are concerned, as regards their own vessel, the latter was a separate and independent vessel, and would be solely liable; that is to say, if the collision was caused by the failure of the Echo to carry and display proper lights, or to make the proper signals, as required by the rules, it would be liable. If the collision was caused by the failure of the Pendleton to carry and display the proper light, the tug Echo would not be liable therefor; or if the collision was caused by the tug and tow not being in their proper place ascending the river, according to the custom, the tug would not be responsible. The barge Pendleton had her master and crew in charge of her, and a special river pilot aboard, employed by her owners, to control and navigate the fleet, which consisted of the tug and two barges in tow. The tug was bound to obey the orders of the pilot, at least so far as they did not conflict with the navigation rules. This certainly was true as relating to the fleet's proper place in the river; and I think the tug's nonliability as regards the lighting of the barge equally clear. Spencer on Marine Collisions, § 123; Hughes on Adm. p. 119; Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591.

Under the authorities I have some doubt that I am correct in the opinion that the tug would be liable for the failure to give proper signals, irrespective of the tow pilot's orders, in view of the circumstances of this case. However, from my view of the case, this is immaterial.

There is a great volume of testimony in the case, and, as is usual in cases of collision, much conflict of evidence on important questions involved in it.

1. The charge that the Echo did not, in accordance with the navigation laws of the United States, display proper lights.

For libelants: Witness Heuer testified that he was master of the tug Woods, and with his tug passed down the river on the New Orleans side on the night of November 22, 1902, between 7 and 8 o'clock, and at or about Race street met the Echo and tow ascending the river on his starboard, and seemingly in midstream; that he saw one bright white light and one green light on the Echo, the white light on her masthead, and the green light right above her boiler deck, alongside of the pilot house. He said he would not swear that she did not have two white lights, but was almost sure she had but one. Landry was mate of the Alma, and was in the pilot house with the pilot. He saw a white light. It was on the mast. He did not know at the time whether the Echo was stationary or moving. He did not see any red or green light at any time until he got aboard the barge Pendleton after the collision. The Pendleton was in tow of and on the port side of the Echo. Brinker was the master of the Alma. He did not see any light on the Echo or Pendleton until the searchlight was thrown on them by the pilot of the Alma, which first attracted his attention to them, and this was when they were about 100 or 150 feet away; that after the pilot threw the searchlight on the tug and tow he saw a white light—one or two, not positive which. At no time saw a red or green light on the tug Echo. Up to the time the searchlight was thrown he had not seen the tug and tow, or any lights. After he was on the Echo he saw red and green lights on the roof in boxes abaft the pilot house. This witness said he was on the roof of the Alma, sitting near the bell, at the time of and for some 20 minutes before the collision. Lilley, the carpenter of the Alma, who was also in the pilot house with the pilot, saw the white light, and no other light. He first saw it ahead. His attention was called to the light by the pilot, and then the pilot threw his searchlight on the tow. He said he would not swear that there was but one light on the mast of the Echo. He further said the boats were about heading each other. Childs, who was pilot of the Alma, testified that when he first saw the light on the Echo the Alma was near the bend on the right-hand, or Jefferson, side of the river. He saw white lights, and could not tell whether they were stationary or moving. As well as he could judge, they were about Louisiana avenue, nearest the Jefferson side. He steered towards the middle of the river, and as he got near the middle he saw a red light. When he saw the red light he pulled his boat hard to port, and supposes he was then about one-fourth of a mile above Stuyvesant docks. He first saw the tug and tow approaching him when he saw the red light. When he first saw the white light, it was on his starboard side. He saw the red light on the pilot house of the tug, and blew two whistles; but he commenced steering towards the New Orleans shore as soon as he saw the white light. He also said that, when he discovered the red light and blew two whistles, he saw a dark object coming right ahead for him. He put the searchlight on, but could not get it far enough around to see what it was. He also said that, when he blew the two whistles, the Alma and Echo were one-fourth or one-half a mile apart.

For claimant: Witness Meade testified that he was a licensed Mississippi river pilot, and was the pilot on the barge Pendleton on the

occasion of the collision. He was employed by the owners of the Pendleton, and was in charge of the fleet, composed of the tug Echo and the two barges, Pendleton and Texas, and directed the navigation of the fleet, in the course of which he gave orders to the master of the Echo, which furnished the motive power for the fleet. He testified that the Echo had two masthead lights, and a red and green light. The red and green lights were in light boxes screened. The Pendleton had a red light on her port side forward in the rigging. Pilgrim was master of the barge Pendleton. He testified that the tug Echo had two white lights in the mast, one above the other, three feet apart, and red and green lights in the screens on top of the pilot house. The red port light was over the rail of the barge. He could see it from his position on the barge. The lights on both tug and barge Pendleton were burning all right. Barry had no connection with either boat. He was sitting on the deck of the tug Schuh, moored on the Gretna side of the river. He saw the Echo and tow coming up the river and pass. He saw a red light and two bright white mast lights on the Echo, one above the other. They were three feet apart. Cornwall was a commission merchant. He had no connection with either boat, and no interest in the Echo. He was aboard the Echo as a passenger, going to the place of discharge of the Pendleton's cargo, in which he was interested. He saw a red light on the port side of the Pendleton. The Echo had a red and green light and two bright lights on her masthead. Bordman was master of a ferryboat from Louisiana avenue across to the Gretna side of the river. He was starting out from the ferry on New Orleans side, and observed the Echo and tow coming up the river. He saw a green light and two bright lights on the Echo. From the angle he was running he could not see the red light. The bright lights were on the masthead. He crossed under the stern of the tow just out from the Louisiana avenue. Eldridge, master of the Echo, testified that she was carrying a red and green light and two white masthead lights; that they were in order and properly burning.

The foregoing is substantially the evidence concerning the lights, on which I think there can be no doubt that the Echo had two white mast lights carried vertically, and on the starboard side a green light, and on the port side a red light, fitted with inboard screens, on or about the top of the pilot house. These are the lights required for steamers towing other vessels by the pilot rules for Western waters. See rule 10. The Pendleton was towed alongside of the Echo on her port side. According to the pilot rules referred to, she should have carried a red light on the port bow. It appears she carried a red light on the port side, not on the bow, but in the mizzen rigging, or forward in her rigging. But, even if the failure of the Pendleton to carry a red light on her port bow, as required by the rules, had been the cause of the collision, the Echo would not be responsible therefor, as hereinbefore suggested.

2. The charge as to signals.

Witness Landry testified that he heard no whistle blown by the Echo. The Alma blew two whistles, and pulled over to the port side, when the Echo was apparently about 100 yards distant from her. He heard

no answer from the Echo. The Alma kept on full speed, closing on the New Orleans side of the river. When she blew her whistles, she turned her searchlight on the Pendleton. The Pendleton was then right on her. Brinker testified that his attention was first called to the tug Echo and tow when the searchlight was thrown on; that when he saw them he told the pilot to blow his whistle. He blew two blasts. He told him to blow the danger signal, and he then blew three blasts. He said he heard one whistle from the Echo in answer to the Alma's two. Lilley heard no whistle from the Echo prior to the collision. He heard two whistles from the Alma after she put the searchlight on the tow. The boats were about 250 to 300 feet apart. They were about heading each other when the searchlight was turned on the tow. The Alma starboarded her wheel, and then it was she put the tow on her starboard side. In another part of his testimony he said the two whistles were blown before the lights were flashed; the three whistles or danger signals an instant thereafter. The Alma was about 200 feet from the tow when she starboarded her helm. Childs testified that he heard no signal from the Echo prior to the collision. The Alma blew two whistles. He supposes she was then one-fourth of a mile above Stuyvesant dock. He said he blew the two whistles as the Echo had given no signal, and he got no response to his signals. He blew the two whistles when he saw a dark object coming right ahead for him. He also said, when he saw the boat (tug) moving, he blew three short whistles, and put the searchlight on, but could not see what it was. Meade, pilot on the Pendleton, testified that he saw the Alma coming down about one-half mile off, and ordered one whistle blown by the Echo, which was done. He heard no response or whistle from the Alma, and ordered the captain of the Echo to blow another whistle, which was promptly done. He still heard no whistle from the Alma. Pilgrim testified that when he saw the Alma the Echo gave her one whistle. The boats were about one-half mile apart. He heard no response. When the Alma got about half way, the Echo gave another whistle. When the Alma got pretty close, she threw her searchlight on and blew two whistles. This was a very short time before the collision, not more than two minutes. Barry was familiar with the Echo's whistle. Not long after she passed up the river by him, probably a half hour, he heard her blow one whistle, and in a short time thereafter he heard another blast of her whistle. He heard no other whistles. Cornwall saw the Alma, and when she was about one-half mile away the Echo gave a signal of one whistle. He heard no reply from the Alma. In a few minutes another whistle was given. The Alma did not respond, but when she got dangerously close she threw her searchlight on the tow and blew two whistles. The boats were not more than 100 feet apart at that time. Eldridge testified that when he first saw the Alma coming around the bend he blew one whistle of the Echo; that in a few minutes he blew again one whistle; that after the second whistle was blown the Alma came close to him and starboarded her wheel. When she flashed her searchlight, the vessels were right together. He heard no response to either of the Echo's whistles. When the Alma blew her two blasts, she was going across the Echo's bow.

The two blasts and the searchlight were almost instantaneous, immediately before the collision.

The pilot rules for Western waters provide that:

Rule 1. "When steamers are approaching each other from opposite directions, the signals for passing shall be one blast of the steam whistle to pass to the right and two blasts of the steam whistle to pass to the left. The pilot on the ascending steamer shall be the first to indicate the side on which he desires to pass; but if the pilot on the descending steamer deems it dangerous to take the side indicated by the pilot of the ascending steamer, he shall at once signify that fact by sounding the alarm or danger signal of three or more blasts of the steam whistle, and it shall be the duty of the pilot of the ascending steamer to answer by a similar signal of three or more blasts of the whistle, after which the pilot of the descending steamer may indicate by his whistle the side on which he desires to pass. The signals for passing must be made, answered and understood before the steamers have arrived at a distance of 800 yards of each other."

Rule 2. "If from any cause the signals for passing are not made at the proper time, as provided in rule 1, * * * and either boat becomes imperiled thereby, the pilot on either steamer may be the first to sound the alarm or danger signal, which shall consist of three or more short blasts of the steam whistle in quick succession. Whenever the danger signal is given, the engines of both steamers must be stopped and backed until their headway has been fully checked."

Witness Brinker was clearly mistaken in saying that he heard one whistle from the Echo in answer to the Alma's two whistles. He is not corroborated by either of the other witnesses for libelants, and he is directly contradicted by the witnesses for claimant who testified on the subject. The latter testified that the Echo blew one whistle when the Alma was about one-half mile away, and a few minutes thereafter blew another whistle, and received no response to either, and that the Echo blew no other signal until after the collision. The evidence that the Echo blew no whistle at all before the collision is wholly negative. It is simply to the effect that the witnesses heard none, while the evidence for the claimant on that subject is distinct and positive that she blew two separate blasts. There can be no doubt from the evidence that the pilot of the Echo was the first to indicate by one blast of her whistle the side on which he desired to go, and that the Alma did not answer the signal, or blow her whistle at all, until at or about the time the searchlight was displayed; that the Echo's first whistle was blown when the boats were one-half mile apart, and the Alma's two whistles when they were not more than 100 to 200 feet apart. If the pilot of the Alma deemed it dangerous to take the side indicated by the pilot of the Echo, the rule required that he should at once signify that fact by sounding the alarm or danger signal of three or more blasts of his steam whistle. This he did not do, and the pilot of the Echo had a right to suppose that the signal of one blast, indicating that he desired to pass to the right, was heard and was satisfactory to the pilot of the Alma. I think it clear that no signal for passing was made at the proper time by the pilot of the Alma, and no proper signal indicating on which side he desired to pass. His reason for not giving the signals prescribed by the rule may have been his failure to hear the Echo's whistle, or it may have been that he did not deem it dangerous to take the side indicated by the pilot of the Echo, or, being already on and

descending the Jefferson, or right, side of the river, he did not consider it necessary to give any signals at all. But, as provided by rule 2:

"If from any cause the signals for passing are not made at the proper time, and either boat becomes imperiled thereby, the pilot on either steamer may be first to sound the alarm or danger signal, which consists in three or more short blasts in quick succession."

All the evidence on this point, except that of the pilot of the Alma, shows that the vessels were dangerously near together at the time the Alma blew her two whistles; and it shows that one or both of them were imperiled by the position they were in. When the pilot of the Alma saw the Echo and tow ahead of him, he threw the searchlight on them and blew two whistles, or blew two whistles and threw the searchlight. The evidence as to which was done first is contradictory. Whichever it may have been, it is shown that the two acts were very near together—almost simultaneous. The evidence is also contradictory as to whether the Alma blew the alarm or danger signal at all; but it is undisputed that she did not stop and back, or check her headway in the least, and it is equally undisputed that the Echo reversed her engine, and with the barge Pendleton backed until the latter came in contact with the barge Texas, which was in tow by a 50-foot line to the stern of the Pendleton, and that this occurred at or instantly before the searchlight was displayed. It is true the Echo did not answer the Alma's signals, made immediately before the collision, whether they were two blasts of the whistle or the danger signal of three blasts; but I think the evidence is agreed that nothing could then have been done to prevent the collision. Hence the failure of the Echo to answer said signals could not have been the cause of the collision, or in any wise have contributed thereto. It is also true that the pilot of the Alma testified that when he saw the red light of the Echo he blew two whistles, and that the two boats were one-fourth or one-half a mile apart at that time. But this evidence is not only inconsistent with the negative evidence of the claimant's witnesses, who heard no whistle by the Alma until immediately before the collision, but in conflict with the positive evidence of the master, mate, and carpenter of the Alma. Upon this evidence I can entertain no doubt that the Echo gave the signal of one blast of her whistle, and in due time, as required by rule 1 of the pilot rules, and that the Alma made no response of any kind to this signal; that the only signals given by the Alma were immediately before the collision occurred, and when it was too late for anything to be done by the Echo to prevent the collision.

3. The charge that the Echo was not in her proper place in the river —ascending near the New Orleans bank.

On this point there is greater conflict in the evidence than is found on the other points raised in this controversy. Before considering the conflicting evidence, it will be noted that there are certain conceded facts in the case. They are that the rule and custom was for vessels ascending the river to keep on the New Orleans side of the river, and for descending vessels to follow the bends or the middle of the river; that the collision occurred off the upper end of Stuyvesant docks, and

that said docks extend about one-fourth of a mile along the New Orleans shore, the lower end being at Louisiana avenue in that city; that Race street was about one and a half miles distance below; that the river at the point of collision is at least three-fourths of a mile wide; that the night on which the collision occurred was a dark starlight night, with no moon and no fog; that the barge Pendleton was a schooner-rigged vessel, full-ladened with a cargo of oil, and lashed to and along the port side of the tug Echo, with a flat scow-built barge, also with a cargo of oil, in tow by a 50-foot line behind the Pendleton; and that the Pendleton extended considerably forward and beyond the bow of the Echo.

Landry testified that when he first saw the white light of the fleet it was about 200 or 300 yards away on the Algiers side of the river; that he did not see the Echo at all, and did not see how the Pendleton was steering; that the Alma was coming down in the middle of the river just above the Stuyvesant docks; that the Alma pulled over to the New Orleans side, and the Pendleton came straight across the river to the New Orleans side, and struck the Alma on the starboard side about midships. He, however, said that he did not know the Pendleton was in motion until the searchlight was turned on her, and that this was done when she was right on the Alma. He also said that when the Alma blew her danger signal the two boats were so near together that nothing could have prevented the collision.

Brinker testified that his attention was first attracted to the Echo and tow when the searchlight was thrown on them; that they were heading quartering across the river to the New Orleans side, to the left of the middle of the river between the New Orleans side and the middle of the river, but nearer to the middle, and 100 to 150 feet distant from the Alma. The Alma was coming downstream to the right of the middle of the river, and at the time of the collision was heading a little towards the New Orleans side. Lilley testified that his attention was called to the light by the pilot, and when he first saw the tug and tow it was coming right ahead, the boats about heading each other; that then the searchlight was turned on, and the Alma starboarded her wheel and put the tug and tow on her starboard side; that this was a few minutes before the collision. He stated that at the time the searchlight was turned on there was nothing that would have prevented the collision. Childs testified that when he first saw the white lights the Alma was going down on the right, or Jefferson, side of the river, and steered to and descended in the middle of the river; that as near as he could judge the lights were about Louisiana avenue, nearer to the Jefferson side. As he got near the middle of the river he saw a red light, and then it was he saw the tug and tow approaching him, heading right across the river, and he supposed some 50 or 100 feet from him, and that he could have done nothing at that time to have avoided the collision. He further testified that, when he saw the tug and tow coming towards him, he "pulled hard to port, and was heading towards the city of New Orleans" at the point of collision, and the tug Echo was heading square across the river, pointing a little upstream, and that he was very near

Stuyvesant dock, on the New Orleans side, at the time of the collision.

Landry's evidence on the subject tends to support Childs, but their evidence is not very satisfactory as to the precise manner in which the collision occurred. I cannot accept their statements that the Echo and tow came straight across the river from the Jefferson side, and ran right into the Alma's starboard side. Their evidence is not only contradicted by the decided weight of evidence on this point, but it seems to me that there is an inherent improbability in their statements on the subject. If it be true that when Childs saw the Echo and tow approaching from the starboard side of his boat, heading square across the river from the Jefferson side, pointing a little upstream, and he then pulled the Alma hard to port and headed towards the city of New Orleans, and the Alma was running 10 miles an hour and the Echo and tow 3½ or 4 miles an hour, as shown by undisputed evidence, it is difficult to perceive how the Echo and tow overtook the Alma and ran into her starboard side, even if they were not more than 50 or 100 feet away at the time the Alma "pulled hard to port and headed for the New Orleans shore." It is, indeed, impossible to reconcile the evidence on the part of the libelants as to the position and course of the Echo and tow immediately before the collision, and to determine therefrom with any satisfaction such position and course; and equally difficult to reconcile their evidence as to the signals blown by the Alma, as to character, number and when made. Brinker testified that the Echo and tow were quartering across the river towards the New Orleans side, and were on the left side of the middle of the river; that is, between the middle of the river and the New Orleans side. The Alma was coming down the river to the right of the middle, headed a little towards the New Orleans side. Lilley said, when he saw the tug and tow, they were in the middle of the river, and they and the Alma were heading each other. The Alma starboarded her wheel, and put the Echo and tow on her starboard side.

On the part of claimant, Meade testified that the Echo and tow crossed from the Algiers side of the river to the New Orleans side far below Louisiana avenue, and came within 300 or 400 yards of the New Orleans side, and went straight up until they passed said avenue, closing in a little at the lower end of Stuyvesant docks, to about 200 or 250 yards from the New Orleans bank, and about one-fourth of a mile from the point of collision, and as they proceeded inclined a little in to the bank, to about 200 feet therefrom at the time of the collision, which occurred off the upper end of Stuyvesant docks. The witness first saw the Alma in the middle of the river. She crossed, heading quartering right towards the Echo and tow, pulled to port, and ran across the bow of the tow. Pilgrim, master on the Pendleton, and Cornwall, passenger on the Echo, testified substantially to the same effect. Barry and Bordman were neither on board of either boat, and both disinterested. The former testified that he saw the tug Echo and tow pass up the river near the New Orleans side about one-fourth of a mile above Jackson Avenue ferry and below Louisiana avenue; and the latter testified that he observed the Echo and tow

coming up the river near Louisiana avenue at about one-third of the river out from the New Orleans shore, leaving two-thirds of the river between the tow and the Algiers side of the river, and that at that time they were headed straight up and down the river, going upstream parallel with the shore. I think that the evidence is absolutely conclusive as to the fact that the Echo and tow were on the New Orleans side of the river, their proper place in the river according to the customary course of its navigation.

The burden is on the libelants to establish their case. Donald v. Guy (D. C.) 127 Fed. 228, and authorities therein cited. It is incumbent on them to point out some negligence or infraction of duty on the part of the tug Echo that contributed to the collision. They have done so in their libel, but have failed to sustain its allegations by the evidence. The decided weight of the evidence shows the Echo to be free from fault. But I think fault has been shown on the part of the Alma. It was manifestly an error for the pilot of the Alma to have starboarded her wheel, rather than ported it, at the time he "pulled her hard to port and headed for the New Orleans shore." If he was on the right of the middle of the river, as testified by Brinker and other witnesses, or in the middle of the river, as testified by himself and Lilley, for him to have changed his course and headed for the New Orleans side when he did seems to me to have been an inexcusable error. No reasonable excuse is shown why this was done. Had he kept his course down the river, as, under the circumstances, it was his duty to have done, and as the pilot of the Echo was justified in assuming he would do, it is clear there would have been no collision. He had abundant room to avoid the Echo and tow, having about two-thirds of the river open to him, and easy command of the movements of his boat. "A steamer having easy and perfect command of her own movements is bound to keep out of the way of a cumbersome tow going slowly, where there is nothing in the way to prevent her doing so." The Mayumba (D. C.) 21 Fed. 476.

There are indications, too, that the Alma was not keeping a proper lookout. She had no lookout other than the master. Although he was on the roof of his boat, sitting by the bell, he did not observe the lights on the Echo, or the whistles blown by her, or, indeed, know that she and her tow were approaching, until the searchlight was turned on them by the pilot of the Alma. "It is the duty of every steamer navigating the thoroughfares of commerce to have a trustworthy lookout, besides the helmsman. * * * When acting as an officer of the deck, and having charge of the navigation, the master of a steamer is not a proper lookout. Proper lookouts are persons other than officers of the deck or the helmsman." The Pilot Boy, 115 Fed. 873, 53 C. C. A. 329; Wilder S. S. Co. v. Low, 112 Fed. 161, 50 C. C. A. 473; The Ottawa, 3 Wall. 269, 18 L. Ed. 165; The Ariadne, 13 Wall. 475, 20 L. Ed. 542.

Upon the whole case my conclusion is that the libelants are not entitled to recover. A decree will be entered accordingly.

THE W. G. MASON.

THE W. I. BABCOCK.

(District Court, W. D. New York. May 28, 1904.)

1. TOWAGE—DUTY OF TUGS—STRANDING OF TOW.
   Where a large steamer, whose master was unacquainted with the harbor at that point, having loaded at a dock in Buffalo, employed two tugs to take her out beyond the inner breakwater through a narrow and crooked channel, the duty rested on the master of the leading or pilot tug to direct the movements of the steamer required for her safe passage, and his failure to seasonably signal her to start her engines forward after swinging her bow around a bend in the channel, by reason of which the current carried her against the side of the channel, where she stranded, was a fault which renders the tug liable for the resulting damages, where the signals given were promptly obeyed by the steamer, which was not required, under the circumstances, to take the initiative, and would not have been justified in so doing.
2. SAME—BURDEN OF PROOF.
   Where two tugs undertook to take a steamer out from her dock through a well-known and commonly used channel, and she stranded against one side of the channel, although it was shown that she promptly obeyed all signals from the leading tug, the presumption is that such stranding was due to a fault of one or both of the tugs.
3. SAME—JOINT SERVICE BY TWO TUGS—LIABILITY OF ONE FOR FAULT OF OTHER.
   Two tugs belonging to the same owner engaged to tow a steamer, and which co-operated in the service and in directing the movements of the steamer, are both liable for her stranding through the negligence of either.

In Admiralty. Suit against tugs to recover damages for stranding of tow.

Goulder, Holding & Masten (G. B. Marty, of counsel), for libelant.
Hoyt, Dustin & Kelley (H. A. Kelley, G. W. Cottrell, and Harvey L. Brown, of counsel), for respondents.

HAZEL, District Judge: This is a proceeding in rem instituted by the libelant, owner of the steamer W. H. Gratwick, against the steam tugs Mason and Babcock, to recover damages for injuries sustained by the steamer on account of her stranding while in tow of the respondent tugs, and owing to their negligence. The stranding occurred in Buffalo Harbor, October 18, 1901, at 6:15 o'clock p. m., and at a point approximately 150 feet north of the northeast end of the inner breakwater on the northerly channel bank of the Erie Basin. The state breakwater extends north and south. The distance from the Philadelphia & Reading Wharf, the starting point of the tow, to the breakwater, directly across the harbor, is about 600 feet. The Gratwick is 345 feet in length over all, and 45 feet beam. She was laden with 3,874 tons of coal, and drew 16 feet 8 inches forward and 16 feet 9 inches aft. A vessel of the dimensions of the Gratwick, heavily laden, leaving the above-mentioned wharf for the lake, requires care and caution on the part of her

¶ 3. See Towage, vol. 45, Cent. Dig. § 12.

towing tugs. Two steam tugs ordinarily perform the towing service. The course is through a narrow and tortuous, though much frequented, channel about 150 feet wide, which extends a short distance north from a point in the harbor near the wharf. There is shallow water on each side of the channel and near the end of the breakwater. The vessel's approach to the channel where the casualty occurred was sharply to starboard, and then, after being straightened, her course was almost at right angles to port. It was dark, though objects were discernible. Lights were plainly seen on the breakwater, and a range light on the shore. A moderate southwest wind was blowing, and weather clear. The steam tugs and the tow were each in charge of their own officers and crew. It is not questioned that each was properly manned and equipped. At the north end of the state breakwater, or near the place where the Gratwick stranded, a strong current flows in a northerly direction toward Niagara river. The current varies according to the state of the weather. The Gratwick was soon floated, but, after proceeding about 40 feet, she again grounded, and was not taken off until about 9 o'clock that evening. This, briefly, describes the situation where the injuries to the Gratwick, as charged in the libel, were received. The libel charges generally negligence and want of skill, together with ignorance of the channel and currents on the part of those in charge of the libeled tugs. The answer of the respondents describes the ordinary course which vessels take on leaving this wharf, and admits the strength and character of the current at the point where the accident occurred. It is alleged that when the tow of the Gratwick reached the current it became necessary that she should move ahead under a starboard helm; that the pilot tug should pull to port while the stern tug should guide or push the steamer's stern to starboard. It is then specifically charged as a fault that when the bow of the Gratwick, on the night in question, reached the current, which for a short distance was necessarily in her course, and the pilot tug signaled the steamer to come ahead with her own propeller, she failed to obey the directions given with promptitude, and therefore her stranding was inevitable. Neither the wind and weather nor the darkness rendered the towage service especially hazardous. The libelant contends that the principal fault attributable to the tugs was that the towing was carelessly and unskillfully performed, and, further, that the directions from the pilot tug to the propeller were inopportunely and unseasonably given. The established facts are these: The steamer, which was moored to the wharf, intended to proceed to the government breakwater for fuel, preparatory to leaving the port of Buffalo for the port of Milwaukee. Her master engaged the steam tugs Mason and Babcock to tow her. The first-named tug, more powerful than the latter, was the pilot tug. The Mason guided the steamer astern. When the steamer reached a point approximately 200 feet from the point of starting, it became necessary for her to make a turn into the channel toward the lake. Thereupon the Mason signaled the steamer to back so as to stop her headway. This direction was promptly executed, and in obedience to a second signal the Gratwick was quickly brought to a complete stop. Her bow was slowly pulled around to starboard, and she was straightened in the channel in a northwesterly direction, approximately 60

feet distant from the state breakwater on her port side. The vessel was then towed a short distance in the channel in the ordinary way toward the lake northeast of the state breakwater, when she received a signal to reverse her engine. The signal was obeyed. Instantly the Gratwick received another signal of one blast, and promptly stopped backing. In order to efficiently make the turn into the lake, the pilot tug pulled off sharply to port, the tug Babcock meanwhile lapping her port quarter, and pushing her stern to starboard. While the turn was being made, the Gratwick was directed by the pilot to come ahead strong. The master of the steamer, who stood upon the pilot house, near the bell pull connected with the engine room, promptly repeated the signals. The engineer, who was at his post, heard and obeyed them. Barker, engineer of the Gratwick, testified that the engine was in good working condition, and that he obeyed all signals with promptitude. It did not, he says, take to exceed 10 seconds to execute each direction; that when the steamer first brought up on the bank her propeller had been working ahead full speed for about a minute. She continued to work under a go-ahead signal for about five minutes before he received a direction to stop. This evidence of the engineer, expressly corroborated by others of the crew, satisfies me that in every instance, as heretofore observed, the signals of the pilot tug were obeyed with promptitude and alacrity. The Gratwick, however, directly after the signals last referred to, went aground on the starboard bank. The evidence as to whether such signals were answered promptly is in hopeless conflict. The witnesses for the respondents are positive in their declarations that the propeller did not respond until it was too late to avoid the disaster. Upon this controverted point the master of the Mason testifies that as soon as the steamer's bow was straightened in the channel, he signaled her to come ahead, and then, to accelerate her speed, he quickly sounded a "hurry-up" whistle of four rapid blasts. He asserts that as the pilot tug went to port he observed that the steamer did not increase her speed. In view of the darkness and the distance between the tug and the stern of the steamer, this observation can have little evidential weight. It is contended by the libelees that it was absolutely necessary that the steamer should have headway under her own power at this point to prevent drifting onto the starboard bank. Fontaine, master of the Babcock, testified that no answer was made by the steamer to the first signal to come ahead, nor to the hurry-up signal, which instantly followed. He is positive that her propeller wheel did not revolve; that he looked to see; that he intently fixed his eyes on the steamer's crew to see whether the signals were promptly heeded, and that he called the attention of his fireman to the steamer's delay and failure to obey them. I am not convinced of the correctness of this showing. To give it credence would be to assume that the witness anticipated the subsequent mishap. Accidents of this nature, fortunately, have not yet become so frequent in this port that masters and crews of tugs when they start with a tow have forebodings of their occurrence. Other testimony is found in the record tending to show that, if the steamer had used her propeller after she was straightened in the channel, or as her bow entered the current, her safety would not have been imperiled. After carefully considering the evidence, how-

ever, I have reached the conclusion that the evidence of the respondents in explanation of the stranding of the Gratwick is not entitled to probative weight, in view of the more reliable testimony of the master and crew of the Gratwick and the witness Boyer, a passenger. The Alexander Folsom, 52 Fed. 411, 3 C. C. A. 165; The Fannie, 11 Wall. 243, 20 L. Ed. 114. In my judgment, a preponderance of the evidence establishes fault imputable to the ahead tug on account of her failure to seasonably direct the movements of the steamer. Miscalculation as to the exact time for signaling, resulting in failure to safely make the turn into the lake, is a fault. The Brazos, Fed. Cas. No. 1,821. Had the signals been blown earlier, I am convinced that the grounding would not have happened. The master of the Gratwick, as heretofore stated, was observant, watchful, and attentive to his duties. He was not familiar with the channel and the force of the current near the turn into the lake. Therefore he was justified, I think, in relying upon the nautical skill and perspicacity of the pilot tug. Her master, prior to this, had frequently and successfully managed and directed the navigation of tows of similar tonnage and draft from the wharf and channel in question into the lake. He was not confronted by unusual conditions or obstructions. The force of the current and difficulties to be met were well known to him. Moreover, in blowing signals he was obliged to take into consideration the length and character of his tow, whether heavily laden, the effect of the current upon her, and also the interval of time which passes before her motive power would become effective. In explanation of the stranding Fontaine further testifies that the force of the current carried the steamer over on the starboard bank, and that the tugs were unable to guide her. This was probable. I incline, however, to the belief, in view of the manner in which the steamer was lapped by the tug astern on her port side, that she went aground, as heretofore stated, on account of the belated or tardy signals of the pilot tug.

Stress is laid upon the point that the Gratwick must be condemned on account of her failure to use her steering power at a crucial time irrespective of any signaling. I am not satisfied by the evidence that the custom and practice of the port required the Gratwick to make headway without having been directed to do so by the pilot tug. As already appears, the master of the Gratwick was a stranger to the situation. To have used the steamer's propeller of his own volition at that point might have proved destructive to her safety. The proposition is sound, I think, that the head tug dominated and controlled the movements and navigation of the tow. The undertaking to tow was not only to safely transport the steamer to the government breakwater, her destination, or to a point where she would be enabled to use her own steering power, but it was also to direct her course and movements during the operation. It was for the master of the pilot tug to say whether the steamer should hasten or slacken her speed by means of her own motive power, and at what intervals, and for what periods. In short, as indicated, he must manage and direct her course of navigation. Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477. To absolve the pilot tug in the absence of a prior arrangement establishing her liability, she must have exercised ordinary care and nautical skill,

as already suggested. Such care is demanded as a reasonably prudent man would exercise having regard to the particular circumstances under which the steamer was towed at the time the loss was sustained. The care and diligence used must be proportional to the magnitude of the peril. The control by the master of the head tug of the tow presupposes a familiarity with the locality, the channel, its obstructions, which might have been avoided by ordinary care and general knowledge of the situation and its difficulties. Such acquaintance presumptively enables him, as a prudent navigator, to pilot and safely transport the tow to her destination. The reciprocal duty of the steamer was to conform to and promptly obey the signals and directions of the tug. Such is the contract of employment. The grounding of the Gratwick was not caused by the perils of the sea. Any suggestion of inevitable accident of navigation is also without support. The liability asserted against the libeled tugs is based on a maritime tort, and is quite independent of the towage contract. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969; The Temple Emery (D. C.) 122 Fed. 180.

Under the facts of the case, the burden is upon the libelees to satisfactorily excuse their wrongful omission to exercise the degree of care demanded by the situation. A specific act of negligence need not be shown by libelant. The rule which requires affirmative proof of negligence against a tug by her tow is conspicuously distinct from the rule which is applied to a common carrier, who, when proceeded against on contract, is presumptively in fault. Not so, however, where the result indicates negligence upon the part of the tug having charge and control of her tow. It is perfectly true that the adjudications uniformly hold that an engagement to tow imposes neither the obligation to insure nor the liability of a common carrier, and accordingly negligence must be proven by the libelant. The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Lady Wimett (D. C.) 92 Fed. 400; The A. R. Robinson (D. C.) 57 Fed. 667; In re Thomas Wilson (D. C.) 124 Fed. 653; The J. P. Donaldson, 167 U. S. 603, 17 Sup. Ct. 951, 42 L. Ed. 292. The burden is always upon him who alleges the breach of a towing contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance. But the above cases do not strictly apply here. There are exceptions to this rule.

In The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774, the exception is stated in the following language, quoted from the opinion:

"Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

In the Ellen McGovern (D. C.) 27 Fed. 868, the rule is succinctly stated in the headnote in these words:

"Where one of a large number of boats in a tow is injured by striking some obstruction on a trip over a common and safe route, the burden is upon

the tug to give some rational explanation of the injury, or a consistent account of the trip, that may satisfy the court that there was no lack of due care in navigation."

In the cases from which these quotations are taken the facts are not identical with this case. Nevertheless, the principle as stated has undoubted application. See, also, The Henry Chapel (D. C.) 10 Fed. 777; Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160. The tug Mason has not satisfactorily excused or explained the disaster. The first stranding was not purely accidental. It would not have occurred unless the tugs, or at least one of them, were negligent. The evidence as to the later grounding is thought to be immaterial, and therefore it is not considered on the principal question here involved. Irrespective of any rule as to burden of proof, the evidence satisfies the court that negligence is imputable to the pilot tug. This charge has not been refuted by any evidence submitted on the part of the respondents. The tugs were both owned by the claimant, the Great Lakes Towing Company. At the time of the grounding the stern tug was also under the direction and control of the Mason. The evidence shows that signals were exchanged between them relating to the management of the steamer. Fontaine, master of the Babcock, testified that when he observed that the Gratwick did not work her propeller, he blew signals to her, and later, after the grounding, in a conversation had with the master of the Gratwick, insisted that his signals should have been complied with. In these circumstances I have no hesitation in holding that the movements of the stern tug, together with those of the Mason, were directed towards the navigation of the steamer, and she was as much a part of the moving power as the pilot tug. Each tug is, therefore, reciprocally responsible for the negligence of the other. In fact, both tugs were engaged from a common owner to tow the steamer. It was immaterial which tug assumed the duties of pilot, and thereby became the controlling agent. This conclusion is based on principle, and high authority is found in support thereof. In The Bordentown (D. C.) 40 Fed. 683, Judge Brown held a tug liable which was under the control of another tug, where both belonged to the same owner, and where specific negligence was chargeable only to the tug in control. It was there held that:

"Where all the tugs employed belong to the same owner, and are under one common direction, and are engaged in the service at the time when the fault is committed, they are in the same situation * * * as a single vessel, as respects responsibility for the negligence of the common head. The words 'such vessel' in section 4283 embrace all such tugs."

—Citing The Arturo (D. C.) 6 Fed. 308. To the same effect, see Van Eyken v. Erie R. Co. (D. C.) 117 Fed. 717; The Columbia, 73 Fed. 226, 19 C. C. A. 436.

It was suggested on argument that the Babcock is also in fault on account of slewing around the steamer's stern, and some criticism was made upon the manner in which she lapped the steamer's port quarter. The cross-examination of the witness Fontaine would seem to indicate that it was the theory of counsel for libelant that when the steamer's bow entered the current, and when the Babcock was going ahead on her port quarter, the tendency would be to throw her bow to starboard.

This manifestly would be the result of such maneuvering unless the helm of the stern tug was put to port. The evidence is not susceptible of any inference that her helm was at starboard longer than was necessary to straighten up alongside of the steamer's port quarter. She was properly steadied on a port helm, and, having been made fast to the steamer, went ahead. There was ample depth of water—approximately 50 to 75 feet—on the Gratwick's side. It is not perceived, even if her stern was shoved for a short distance toward the starboard bank, assuming this to have been the effect of the Babcock's porting, that such maneuver was in itself an act of negligence. The witness testifies that after the Babcock straightened alongside her wheel was a trifle to port, and, as the Mason was pulling the bow of the steamer in a southerly direction about two points to port, the tendency of the combined actions of the tugs was to keep the steamer from grounding. The Babcock, by lapping on the port quarter of the steamer, was performing her duties in the usual and customary way. Having lapped alongside as stated, she put her helm to port to assist the steamer in making the turn into the lake. I see no ground upon which the Babcock can be held in fault, except that she and the Mason became one vessel for the purpose of carrying out the towage contract. She must be held equally in fault with the pilot tug under the doctrine of the Bordentown Case.

The respondents have asserted limitation of liability, and in furtherance of that defense have secured an appraisal of both tugs. It is not necessary to pass upon the effect of such defense and proceedings thereunder until the ascertainment of the damages and the entry of the final decree.

My conclusion is that the injury was due solely to the negligence of the steam tugs Mason and Babcock, which were engaged in a joint venture to safely tow the Gratwick. Having failed in that duty, there must be a decree in favor of the libelant against both tugs, with an order of reference to ascertain the amount of damages.

THE ROBERT RICKMERS.

(District Court, D. Washington, W. D. July 22, 1904.)

No. 364.

1. COLLISION—ANCHORED VESSELS—DRAGGING ANCHOR IN GALE.

An anchored schooner *held* not in fault for a collision with another vessel which dragged anchor and drifted against her at night in a gale, either because her captain was on shore, or because she did not hoist sail and attempt to move out of the way, where it appeared that those in charge were competent, and it did not appear that the setting of the sails would not have been as likely to increase as to diminish the danger, and it would have been likely to cause her to drag her own anchor.

2. SAME.

A vessel which came into an open bay in tow of a tug while a high wind was blowing, and anchored for the night in the vicinity of other anchored vessels, and which during the night dragged her anchors and drifted against a schooner anchored at a distance of half a mile, *held*, on the evidence, in fault for the collision, either because not equipped with suitable

and safe anchors, or because she was not properly anchored; the anchors of all other vessels in the bay, of which there were a number, having held.

8. SAME—IMPROPER PLACE OF ANCHORAGE—SELECTION BY MASTER OF TUG.

The fact that the place of anchorage of a sailing vessel during a high wind was selected by the master of a tug having her in tow does not relieve her from liability for damage caused to another vessel against which she drifted, having lost one anchor and dragged the other, due to the fact that she was placed so near other vessels that she could not be given sufficient room to swing, or to secure the combined holding power of both her anchors.

In Admiralty. Suit in rem to recover damages for injuries inflicted upon a vessel at anchor by another vessel dragging her anchor in a gale. Heard on the merits. Payment of damages decreed, on the ground that the drifting vessel was in fault for not being more securely moored.

Hughes, McMicken, Dovell & Ramsey, for libelant.
James M. Ashton, for respondent.

HANFORD, District Judge. This is a suit in rem to recover damages for injuries to the four-masted schooner Stimson, caused by the German bark Rickmers. The locality of the mishap is that part of the waters of Puget Sound designated on the charts as "Shilshole Bay," on which the city of Ballard is located. The bay, so-called, is formed by a mere curvature of the eastern shore of Puget Sound, and is more of an open roadstead than a sheltered harbor; but the depth of water and material of the bottom afford good anchorage and plenty of room for a large number of vessels to lie at anchor with sufficient length of cables for safety. The time of the mishap was about 11 o'clock p. m., December 25, 1901, the night being dark, but clear, and the weather tempestuous; that is to say, there was a high wind, which, during the night and the day previous, came in gusts of varying force, and veering in direction from southwest to southeast. The Stimson is a large four-masted schooner, of approximately 700 tons burden, and at the time referred to was partly loaded with a cargo of lumber, and was at anchor about five-eighths of a mile off shore, and held securely by one anchor with 105 fathoms of chain; the depth of water at that place being approximately 27 fathoms. The schooner Mildred and the schooner Corona were also anchored in the bay about half a mile southward from the Stimson, and a little less than one-quarter of a mile from each other, the Mildred being farthest off shore; and both the Stimson and the Mildred were to the westward of a line drawn straight from West Point to Meadow Point, which are the headlands of the so-called bay, so that both vessels were outside of Shilshole Bay, in the open waters of Puget Sound. The Rickmers, a German bark of about 2,200 tons burden, on the afternoon previous to the accident, while being towed to Tacoma in ballast, was brought into the bay for anchorage, on account of a strong head wind, and taken to a position a little less than a quarter of a mile to the eastward and in shore from the Mildred, and about the same distance southwest from the Corona, where she dropped her port anchor, in 14 fathoms of water, and paid out about 40 fathoms of cable. Instead of fetching up properly and being held by her an-

chor, her compressor—which is a contrivance for clutching the anchor chain to ease the strain upon the windlass—broke, and 10 or more fathoms of additional chain was paid out from the windlass, and the vessel drifted towards the schooner Corona, and into dangerous proximity, so that a collision with her was imminent. The latter vessel was maneuvered by use of her sails in a manner to assist in avoiding a collision. The tug again attached her tow line to the Rickmers, and pulled her back to very nearly the position first selected for anchorage, without lifting her port anchor. The Rickmers' starboard anchor was then dropped, with about 30 fathoms of cable, and she was left in that position by the tugboat. Lines connecting the positions of the Rickmers, Mildred, and Stimson upon the chart form an isosceles triangle; the Rickmers and Mildred being at the two ends of the base, or short line, of the triangle, and each of them being proximately half a mile southward from the Stimson. At 10 p. m. the wind was blowing a gale from the southeast, and the force thereof caused the Rickmers to drag her anchors, and drift towards the Mildred, and she actually came into collision with the jib-boom of that vessel, doing some damage, and then continued drifting, and sheered to the northward towards the Stimson. After getting clear of the Mildred, it was discovered that the Rickmers had lost her port anchor, and then more anchor chain was paid out to the starboard anchor, until the total length of cable on her starboard anchor was 90 fathoms. She continued to drag anchor, and drifted northward until she came into collision with the Stimson, and locked with her, and both vessels dragged their anchors and were driven northward several miles before they were separated, and by the collision the Stimson suffered the injuries for which damages are claimed in this suit.

The respondent defends on two grounds, viz.: First, the casualty was an inevitable consequence of the extreme violence of the storm, and the Rickmers was blameless; second, the Stimson was herself in fault, because her captain was ashore, and she did not have a vigilant lookout, and neglected to attempt any maneuver to avoid the collision. In support of both of these defenses testimony of expert witnesses has been introduced. I feel obliged to treat these defenses seriously, because able and experienced counsel has argued the propositions earnestly and with great ingenuity.

I will dispose of the second proposition first, and in this connection I find that the Stimson was securely anchored at a place where she had a lawful right to be; that the officers and crew on board at the time of the accident were competent to take proper care of a vessel at anchor, the regulation anchor light was set, and a vigilant watch was kept. While the storm prevailed, she depended for safety upon her anchor, which proved to be sufficient to keep her in her place until the added weight of the Rickmers caused her to drag. She was not under any legal or moral obligation to abandon the security which her anchor afforded merely because a strange vessel had come into her vicinity. The duties of a captain do not require him to remain on board of his vessel constantly while she is at anchor, and there is no reason to suppose that the casualty could have been averted by the Stimson's captain, if he had been on board. The captain of the Rickmers, in his

testimony, blames the Stimson for failure to put her helm hard-astarboard. He appears to think that, if that had been done, the collision would not have happened. It is my understanding that a vessel cannot be made to change her position by use of her helm when she does not have steerageway, and the testimony of the captain does not directly controvert this principle of natural philosophy; nor does he assign any reasons for supposing that, if the Stimson's helm had been put hard-astarboard, it would have had any effect either to check or change the movements of the Rickmers. The argument in behalf of the respondent, based upon testimony of expert witnesses, assumes that it would have been possible for the Stimson to have used her sails in a manner to have forced her to swing on her cable inshore, so that the Rickmers might have passed without colliding. This, however, is only a suggestion of a mere possibility. To be fair, the Stimson cannot be convicted of a fault upon any theory which ignores the obvious hazard of any attempt to set her sails at a time when the wind was blowing with such force as to drive the Rickmers, without sails and against the resistance of her anchors. If the Stimson's sails had been set and filled for the purpose of changing her position while the gale continued, in which direction would she have moved, and where would she have fetched up? Unless an intelligent answer to this inquiry can be given, there can be no basis whatever for supposing that the Stimson could have changed her position without increasing, instead of diminishing, the danger to which she was exposed. In the argument, the action of the Corona is instanced, and it is said that equal vigilance and skill on board the Stimson would have kept her out of the path of the Rickmers. There are differences, however, which I am bound to notice; differences both in direction and velocity of the wind. The position of the Rickmers, when she commenced to drift, after dropping her anchor the first time, was southwest of the Corona, and the wind at that time was from the west or southwest, and its velocity was only 10 miles per hour. The Corona could very well, under those conditions, be moved a short distance without any imprudence. That event was at about 5 o'clock p. m. At 11 o'clock, when the Rickmers made trouble for the Stimson, the wind had increased to 35 miles per hour and was coming offshore from the southeast, the Rickmers had dragged her anchor westward one-fourth of a mile when she came into collision with the Mildred, and her position there was a little west of south from the Stimson, and, as I have before indicated, the distance was half a mile. If her movements could have been observed in the darkness, they indicated nothing as to her course, except that she was not under control. Therefore the Stimson could not execute any movement to get out of her way which would not be as likely to bring the two vessels into collision as to avoid a collision.

Recurring, now, to the main question in the case, which is whether the Rickmers was in fault, I will say, preliminarily, that the Stimson being entirely free from blame, and, the Rickmers being the aggressor, there is a natural and legal presumption that the damage which she caused was due to her fault, and to be entitled to exemption from lia-

bility she must prove good seamanship in her management, and that her ground tackle was in condition fit for the service required, so that there was no imprudence in releasing the tug and trusting her anchors, in view of the existing conditions. The natural presumption is strengthened in this case by the indisputable fact that the other vessels exposed to the same force were held securely by their anchors, proving that, if the Rickmers had been equipped with suitable anchors for a vessel of her size, and with sound cables of sufficient strength, and if she had been carefully moored by placing her anchors properly, so as to have secured the advantage of their combined holding power, with sufficient length of chains and room to swing without coming in contact with the other vessels, she, too, would have withstood the storm without damage; but, instead of behaving as other vessels in the bay behaved, the Rickmers acted like an evil sprite, first making a hostile demonstration towards the Corona, which frightened that little craft into making extraordinary maneuvers, later striking out to the westward, breaking the Mildred's nose, and then rushing north to embrace the Stimson, and wildly dancing with her to the music of the hurricane for a distance of seven or eight miles. I can admire, though I cannot adopt, the ingenious theories of the expert witnesses by which they exculpate the Rickmers from all blame, and also condemn the Stimson for not being sufficiently alert and nimble to keep out of the reach of the impetuous stranger. The word "expert" appears to be peculiarly apt and appropriate for describing the testimony upon which the respondent relies. Considering the threatening weather when the Rickmers came into the bay, and the unbroken sweep of the wind, with the exception of the little protection afforded by Magnolia Bluff, a careful navigator would have chosen a position for anchorage which would have enabled his vessel to swing with ample scope of cable without danger of colliding with other vessels previously anchored in the bay. The excuse offered for not paying out more cable than 40 fathoms on the port anchor and 30 fathoms on the starboard anchor was that greater length of chain would have caused the Rickmers to swing dangerously near the Mildred and the Corona. This proves that an inexcusable error was committed in choosing the place for anchoring, and the captain of the Rickmers in his testimony claims that he was not satisfied with the location, but dropped anchor at the place indicated by the captain of the tug, who, it is insisted, must be held responsible as a local pilot. This, however, does not relieve the Rickmers from legal liability. She is answerable for damages caused by the inexcusable errors of whoever for the time being had control of her movements, whether in the capacity of master, chief mate, or local pilot. Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; The China v. Walsh, 7 Wall. 53, 19 L. Ed. 67; The Merrimac, 14 Wall. 199, 20 L. Ed. 873; Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742; The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969; The Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954; Harrison v. Hughes, 125 Fed. 860, 60 C. C. A. 442.

From the evidence I find that the actual damages to the Stimson legitimately chargeable to the collision amount to the aggregate sum of $18,-

680, for which amount, with interest and costs, a decree will be given in favor of the libelant. In this amount there is included $9,388 for expenses paid for repairs, and for unloading and reloading, and necessary expenses of the ship during 74 days of detention; $5,000 for estimated permanent damage by impairment of the salable value of the ship; and $4,292 for demurrage at the rate of $58 per day for 74 days.

In re GOLDFARB BROS.

(District Court, N. D. Georgia. May 16, 1904.)

No. 1,151.

1. BANKRUPTCY—CONTEMPT PROCEEDING FOR FAILURE TO SURRENDER PROPERTY—SUFFICIENCY OF EVIDENCE.

To justify an order requiring a bankrupt to turn over money or property to his trustee under penalty of imprisonment for contempt, it must be shown clearly, satisfactorily, and beyond a reasonable doubt that he has such money or property in his possession or under his control. Where the evidence establishes only a strong probability that he has some money or property which has not been accounted for, without furnishing any basis for a finding as to the amount, it is insufficient.

In Bankruptcy. On rule against bankrupts for contempt for failure to surrender property to the trustee.

Mayson, Hill & McGill, for trustee.
Slaton & Phillips, for bankrupts.

NEWMAN, District Judge. This is a proceeding as for contempt against the bankrupts Herman and Max Goldfarb, trading under the firm name of Goldfarb Bros. The proceeding is based upon the allegation that the bankrupts have failed to turn over to the trustee in bankruptcy a considerable amount of merchandise, or the cash which should be the proceeds of the same. This petition was referred to the referee, and he has taken some evidence, and makes a report finding that the bankrupts "should be chargeable with the shortage in their goods and their money in the sum of $6,245.25." The referee reaches this conclusion by a calculation based on purchases made by the bankrupts in June, July, and August, 1903, and certain inferences from their bank account, and checks in evidence, and the amount of goods found in the stores when the receiver in the bankruptcy case took possession.

I have gone over the report of the referee and the evidence in this case several times, without being able to reach any satisfactory conclusion; and have within the last two days gone over all of it again, and am still uncertain as to what should be done in the case. The referee admitted in evidence before him a statement handed by one of the counsel for the bankrupts to counsel for certain creditors (now counsel for the trustee), which states their recent purchases at $12,701.83. As the basis of the whole proceeding was to show goods in the hands of the bankrupts recently purchased, I do not think this paper could properly be admitted in evidence; at least without being

supplemented by proof that the goods actually went into the possession of the bankrupts. There was an admission by one of the bankrupts that they had received goods in their store amounting to about $10,000, and this may perhaps be properly taken as a basis of calculation as to what they should have had on hand at the time the bankruptcy proceeding was instituted. If it be so taken, then, so far as I can ascertain from the statements made by the bankrupts, whose testimony was taken before the referee in this contempt proceeding, they would be entitled to a deduction from this sum of $8,750.41, and, in addition thereto, any amount for which they may have sold goods for cash, which cash was paid out by them to creditors or otherwise, and which is not now under their custody or control. It is utterly impossible to tell how much this is, and there is no satisfactory way of inferring, so far as inferences be permissible, from any other facts in the case. If this could be fairly ascertained, and the amount of stock on hand about the 1st of June, 1903, could also be ascertained, then the deduction of one from the other would seem to give the amount which the bankrupts ought to have in their possession, and which would appear to be unaccounted for; this, of course, depending upon whether or not such cash sales during the three months referred to would be as much in amount as the goods on hand on the 1st of June plus $1,249.59, the difference between $8,750.41 and $10,000. It is fair to the bankrupts, however, to say that the $8,750.41 allowed them only includes $800 for goods sold on credit, as this is the only amount given in the evidence. This is stated by the trustee, who testified, to be the amount of "good accounts." How many bad accounts there were, or how many he did not class as "good" accounts, is not stated. But whatever amount there was of these accounts for goods sold during the three months should also be allowed the bankrupts in this calculation. This is the only method that I see by which any satisfactory conclusion in this case can be reached.

I am unable to follow the referee in the calculation he makes, and from which he derives the result which has been stated. It is entirely clear, and counsel for the trustee so concedes, that the finding of the referee that the amount of difference between the checks returned by the Third National Bank to the bankrupts and the amount of checks found by the receiver in the store should be charged to the bankrupts upon the idea that they must have drawn out the money in their own name and appropriated it, would be a rather violent inference in any case, and certainly not justifiable in a quasi criminal proceeding such as this. The bankrupts emphatically deny that they have any money or effects in their possession. In their evidence they mention several ways by which they seem to think the property may have been lost to them and to their creditors. None of these, however, although possible, are satisfactory. It will not do, of course, to say that the mere denial of the bankrupt that he has any money or effects in his possession should be sufficient to exonerate him from a charge of this kind.

I stated in the opinion filed in the contempt proceeding (In re Shachter [D. C.] 119 Fed. 1010–1015) that, if this were allowed, "the court

would be powerless, in the face of the bankrupt's oath, to require the production of property, however conclusive might be the evidence that such property was in his possession or control." The case referred to (In re Shachter) was heard in the District Court without having been sent to the referee. That case was similar to the one now before the court as respects the manner in which the conclusion was reached, and the opinion shows that the goods were traced beyond question into the possession of the bankrupts, and not satisfactorily accounted for. I would be unwilling to depart from the rule which I followed in that case, and which has been adopted by a number of judges. Ripon Knitting Works et al. v. Schrieber (D. C.) 101 Fed. 810 (in which case the petition for revision was denied by the Circuit Court of Appeals for the Ninth Circuit—104 Fed. 1006, 43 C. C. A. 682); In re Gerstel (D. C.) 123 Fed. 166; In re Kane (D. C.) 125 Fed. 984. The same rule was laid down by Sanborn, Circuit Judge, in a concurring opinion in the case of Boyd v. Glucklich, 116 Fed. 131–142, 53 C. C. A. 451.

As was stated in the Shachter Case, I see nothing in the opinion of the majority of the court in this last case which denies the right of the bankrupt court "to proceed as for contempt against a bankrupt who wrongfully refuses to turn over assets to a receiver or to a trustee in bankruptcy."

The foregoing, however, should be taken in connection with another rule, which is that a bankrupt cannot be required, under a proceeding for contempt, to do that which it is out of his power to do. The evidence in such a proceeding should satisfy the court beyond a reasonable doubt that the bankrupt has the money or goods in his possession and control, and is able to turn them over when so ordered. If he has placed them out of his possession and control, no matter how foolishly or how wrongfully, he cannot be required by an order to turn them over to a receiver or to a trustee. In a recent case in the Circuit Court of Appeals for the Third Circuit (Trust Co. v. Wallis, 126 Fed. 464), in the opinion by Circuit Judge Gray it is said:

"The court may, by summary order, direct the delivery and turning over to the trustee by the bankrupt, or by any third person holding the same under his order and control, any property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. For disobedience of such order the court in bankruptcy undoubtedly has the power, by attachment for contempt, to enforce compliance with such order, and punish refusal to comply. This power, however, is far-reaching and drastic, and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property, or if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the

property required by the order, then, confessedly, proceedings for contempt, by fine and imprisonment, would result in nothing; certainly not in a compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty."

In a proceeding of this sort, it should appear from the evidence, beyond a reasonable doubt, that the bankrupt has in his possession money and effects which should go into the hands of the trustee in bankruptcy. Judge Gray's language is that over the bankrupt's denial that he has such possession or control of the money or effects the evidence should "indisputably show" the contrary. This may be shown in the manner referred to above, or by the method followed in the Shachter Case, supra; but it should be shown clearly, satisfactorily, and beyond a reasonable doubt.

While the evidence in the case at bar shows very strong probability, and even more than a probability, that the bankrupts in this case have not dealt fairly with their creditors or with the trustee, it is not to my mind sufficiently definite and convincing to justify the conclusion that they are withholding any definite amount, or even an approximate amount, of money or goods from the trustee. Certainly it fails to show with any degree of satisfaction that they have withheld the amount found by the referee to be in their hands. If there was evidence in the record to show with some definiteness the amount of stock on hand in the bankrupts' stores on the 1st of June, 1903, and any evidence to show the amount of goods sold by them for cash which they did not deposit in bank; how much of this money was paid out, or, if not paid out, with some degree of certainty, how much was retained—data would then be had from which to make some fair calculation. But in the absence of this I do not think that any one can take this evidence, and this entire record, and say that the bankrupts have any amount of goods or money, fixing it even approximately, in their hands, which has not been turned over to the trustee.

This is a case which should have further investigation; and, while the finding of the referee cannot be approved, the contempt proceeding will be retained in court to hear additional evidence, if counsel for movant should desire to offer the same, in conformity and in line with what has been hereinbefore stated.

The order is that the finding of the referee be disapproved, but the contempt proceeding be retained for such further action as may be proper.

In re TUCKER et al.

Ex parte NEW YORK COTTON EXCH.

(District Court, D. Massachusetts. July 22, 1904.)

No. 7,815.

1. BANKRUPTCY—LOAN BY WIFE—PROPERTY RECEIVED FROM HUSBAND AS GIFT.
A transfer of corporate stock by a husband to his wife as a gift by surrendering certificates owned by him and causing new ones to be issued in her name, was, in effect, a direct transfer to her, and void under the law of Massachusetts, where the parties resided, and, the stock being in law his property, its retransfer to him by his wife as a loan affords no basis for a claim by her against his estate in bankruptcy.

In Bankruptcy. On review of decision of referee.

I. R. Clark, for Gertrude F. Tucker.
Robert K. Dickerman and John A. Curtin, for trustee.

LOWELL, District Judge. Tracey Tucker, one of the bankrupt partners, before his bankruptcy, assigned to his wife a seat in the New York Cotton Exchange, standing in his name, as security for the redelivery of 25 shares of Amalgamated Copper stock and 40 shares of United States Steel stock, preferred, alleged to have been lent by her to him, or to the firm. If the shares thus lent were the separate property of the wife, she is entitled to reimbursement, according to the principles of equity which control the federal courts, whatever be the statutes and decisions of Massachusetts. James v. Gray (C. C. A., 1st Circuit, July 6, 1904) 131 Fed. 401. Counsel for the trustee in bankruptcy has contended that this stock did not belong to the bankrupt's wife, but to the bankrupt himself, or to his firm. It was not disputed at the argument, and I so find, that the certificates of stock in question, indorsed in blank, were in the possession of Tracey Tucker as his own property before his marriage; that the indorsements were filled out to Mrs. Tucker after the marriage, and the certificates were sent to the transfer agent, the intention being to give her the stock, and no consideration passing between the parties; that certificates in the name of Mrs. Tucker were duly issued and delivered to her, and that these certificates were by her indorsed in blank, and delivered for the benefit of the bankrupt firm. It was not disputed that the title to this stock, when represented by certificates so indorsed, passed by delivery to the holder. Under the statutes of Massachusetts, a gift from husband to wife is void unless it is made under conditions not here complied with. The gift by Tracey Tucker to his wife was, therefore, void, and the stock handed by Mrs. Tucker to the firm did not belong to her.

Some language in James v. Gray, above cited, may be taken to mean that a federal court like this, which does equity, will disregard the statutes of Massachusetts as interpreted by its courts, and will uphold transfers made directly from husband to wife; but this language, I think, was not intended by the Court of Appeals to apply to a transfer by way of pure gift, under the circumstances here presented. As this point was not argued before me—because James v. Gray had not then

overruled In re Talbot (D. C.) 110 Fed. 924—counsel may apply for a reargument on this point alone, if they wish to do so. See Wallingsford v. Allen, 10 Pet. 583, 594, 9 L. Ed. 542; Lucas v. Lucas, 1 Atk. 270. Some suggestion was made of an antenuptial agreement between Mr. and Mrs. Tucker, but counsel for Mrs. Tucker has called the attention of the court to no evidence establishing such an agreement. He argued chiefly that the corporation itself constituted such a conduit between Mr. and Mrs. Tucker as to validate his gift of the stock to her, in the same manner that a gift of real estate is validated by being passed through a third person. But the cases are not analogous. Here the corporation did not take the title to the stock, which passed directly from the transferror to the transferee.

Judgment of the referee affirmed.

HALL & BISHOP v. UNITED STATES.

(Circuit Court, S. D. New York. May 23, 1904.)

No. 3,306.

1. CUSTOMS DUTIES—CLASSIFICATION—DRESS GOODS—EMBROIDERED WOOLEN ARTICLES.

Held, that embroidered dress goods of wool are dutiable, under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 369, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], as "dress goods * * * of wool, and not specially provided for," rather than as "articles embroidered by hand or machinery, * * * made of wool," under paragraph 371 of said act (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]).

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

On application for review of a decision of the Board of General Appraisers. The decision in question affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Hall & Bishop.

Frederick W. Brooks, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question was assessed for duty as "women's and children's dress goods, not specially provided for," under the provisions of paragraph 369 of the tariff act of July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667]. The importers protested, claiming that the goods in question were dutiable under the provisions of paragraph 371 (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]), of said act, as "embroideries and articles embroidered by hand or machinery, made of wool, or of which wool is a component material." The Board of General Appraisers has found that the articles in question are women's dress goods, and also that they are articles embroidered by hand or machinery.

The sole contention of the importers herein is that inasmuch as paragraph 371, under which they claim, is unqualified, while the provisions of paragraph 369 are qualified by the words "not specially provided for,"

the merchandise is dutiable under the former provision. This contention is supported by decisions of the Supreme Court of the United States and by various decisions in this circuit. The precise question, however, as applied to this merchandise, has been decided adversely to these appellants by the Circuit Court of Appeals in the Third Circuit in the case of Thomas v. Wanamaker (C. C. A.) 129 Fed. 92. It appears that the decision therein was based upon other grounds, and it is claimed that the question herein was not presented to the court in the Third Circuit. In accordance with the established rule I feel obliged to follow the decision of the Court of Appeals in the Third Circuit, and solely on that ground I am constrained to affirm the decision of the Board of General Appraisers.

Decision affirmed.

J. R. SIMON & CO. v. UNITED STATES.

B. ULMANN & CO. v. SAME.

(Circuit Court, S. D. New York. May 25, 1904.)

Nos. 3,307, 3,361.

1. CUSTOMS DUTIES—CLASSIFICATION—DRAWN WORK—FLAX FABRICS—IMITATION LACE.

   Held, that articles of so-called "drawn work," composed of flax, made by drawing some of the threads and tying and looping them with other threads to form figures, are not dutiable as articles made in imitation of lace, under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], but as fabrics of flax under paragraph 346 of said act (30 Stat. 181 [U. S. Comp. St. 1901 p. 1663]).

2. SAME—COUNTABLE FLAX FABRICS—DRAWN WORK—VARIATION IN THREAD COUNT.

   In construing the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 346, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663], of different rates of duty on fabrics of flax, varying according to thread count, etc., *held* that it is not necessary that a fabric should be homogeneous throughout in order to bring it within said paragraph, and that the paragraph may include so-called "drawn work" from which some of the threads have been removed.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

On application for review of decision of the Board of General Appraisers. These proceedings were brought by J. R. Simon & Co. and B. Ulmann & Co. for review of two decisions of the Board of General Appraisers which affirmed the assessment of duty by the collector of customs at the port of New York. Note G. A. 5,329, T. D. 24,373, and G. A. 4,643, T. D. 21,944.

Howard T. Walden, for J. R. Simon & Co.
W. Wickham Smith, for B. Ulmann & Co.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The articles in question are linen doilies and similar articles, made by drawing some of the threads and tying and looping them with other threads to form figures. They were

assessed for duty at 60 per cent. ad valorem as articles made in part of imitation of lace, made of flax, not otherwise specially provided for, under paragraph 339 of the act of July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], and are claimed to be dutiable as woven fabrics of flax, etc., under paragraph 346 (30 Stat. 181 [U. S. Comp. St. 1901, p. 1663]), of said act. The articles in question are woven fabrics of flax (U. S. v. McBratney, 105 Fed. 767, 45 C. C. A. 37), and it is not necessary that the fabric should be homogeneous throughout in order to be dutiable under the countable provisions of the act (Hedden v. Robertson, 151 U. S. 521, 14 Sup. Ct. 434, 38 L. Ed. 257; United States v. Albert, 60 Fed. 1012, 9 C. C. A. 332). The Board of General Appraisers has found as a fact that the merchandise in question is imitation of lace. Inasmuch as there is not a particle of testimony to support this finding of the board, and inasmuch as a mere inspection of the articles confirms the testimony that they are not imitation of lace, this finding cannot be sustained. Furthermore, it appears from an examination of paragraphs 312, 388, and 390 of the act that Congress is legislating concerning the duty on handkerchiefs, has specifically provided for a duty on handkerchiefs having drawn threads by virtue of the provisions of paragraph 388, while in paragraph 390 they have imposed a similar duty on laces and articles made wholly or in part of lace. This distinction between drawn work and lace supports the foregoing conclusion.

The decision of the Board of General Appraisers is reversed.

NISHIMIYA v. UNITED STATES.

(Circuit Court, S. D. New York. May 25, 1904.)

No. 3,451.

1. CUSTOMS DUTIES—CLASSIFICATION—SAKÉ—SIMILITUDE.

Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], provides that any unenumerated article "which is similar either in material, quality, texture or the use to which it may be applied to any article enumerated * * * as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned." In regard to sake', a Japanese alcoholic beverage made from rice by processes similar to those employed in making beer, which resembles still wine in its percentage of alcohol, which in quality is only remotely similar to wine or beer, though in some respects like either in point of use, *held*, that the article is not sufficiently similar to wine to warrant its classification as such under Act July 24, 1897, c. 11, § 1, Schedule H, par. 296 (30 Stat. 174 [U. S. Comp. St. 1901, p. 1654]), nor to beer or ale to permit its classification as either under paragraph 297 of said act (30 Stat. 174 [U. S. Comp. St. 1901, p. 1655]), but that its proper classification is as an unenumerated manufactured article under section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

On application for review of a decision of the Board of General Appraisers. The decision under review affirmed the assessment of duty by

the collector of customs at the port of New York on an importation by W. Nishimiya. Note G. A. 5,334, T. D. 24,410, and Murphy v. Arnson, 96 U. S. 131, 24 L. Ed. 773.

Albert Comstock and Percy W. Crane, for importer.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question is saké, imported from Japan. The Board of Appraisers finds that it is a beverage made from rice by processes similar to those employed in making beer, but which in alcoholic strength, quality, general appearance, and otherwise resembles still wine, and therefore held it to be dutiable at 50 cents per gallon, by similitude to still wines containing more than 14 per cent. of absolute alcohol, under the provisions of paragraph 296 of the tariff act of 1897. Act July 24, 1897, c. 11, § 1, Schedule H, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654]. The importer protests on the ground that the beverage is dutiable either as ale or beer, under the provisions of paragraph 297 of said act, either directly or by similitude; or as a nonenumerated manufactured article under section 6 of said act. This beverage is neither ale, beer, nor still wine. It is similar to ale or beer, in that the material from which it is made is rice, and in the fact that it is, like beer or ale, fermented with yeast. It is more like wine than beer in its quality, as the percentage of alcohol contained in it is about 17 per cent., while the percentage of alcohol in beer ranges between 3½ and 9 per cent., and in wine between 7½ and 16 per cent. A test of the sample by taste and smell and examination indicates that it is only remotely similar in quality to either wine or beer. In use it is like either liquid, being drank for flavor and exhilaration. It is unlike them in that it is ordinarily drank hot. In quality it is more like wine in the sense that it is still, as distinguished from the ordinary effervescent ale or beer. In these circumstances saké is not sufficiently similar to still wine to warrant its assessment for duty under paragraph 296 of the act; and because of the high percentage of alcohol therein, the absence of effervescence, and its quality, taste, and use, as aforesaid, it does not seem to be sufficiently like beer or ale to permit of its inclusion under paragraph 297. The conclusion reached is that it is so radically different from the articles covered by both of said paragraphs that it should have been classified for duty as a nonenumerated manufactured article under section 6 of said act.

The decision of the Board of Appraisers is reversed.

TILGHMAN et al. v. EIDMAN, Internal Revenue Collector.

(Circuit Court, S. D. New York. May 25, 1904.)

1. **Succession Tax—Repeal—Saving Clause.**

Where no succession tax provided for by Act Cong. June 13, 1898, c. 448, 30 Stat. 450 [U. S. Comp. St. 1901, p. 2291], was due, payable, or a lien on the property of the deceased at the time the act was repealed by Act Cong. April 12, 1902, c. 500, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279], in effect July 1, 1902, the tax to which the estate would otherwise

have been subject was not "imposed" at the date of the repeal within the saving clause of section 8 of the repealing act, providing that taxes previously imposed should not be affected by the repeal.

Demurrer to Complaint.

Charles Duane Baker, Asst. U. S. Atty., for the demurrer.
Edward B. Whitney, opposed.

LACOMBE, Circuit Judge. I am unable to distinguish this case from Mason v. Sargent, 104 U. S. 689, 26 L. Ed. 894. Under the statute and amendments and the principle enunciated in that case, no tax was due or payable, nor was there a lien for any tax upon the property of the deceased, at the time the repealing act of April 12, 1902, went into effect (July 1, 1902). Under these circumstances it cannot be said that any tax was "imposed" within the meaning of the saving clause, section 8 of the act last cited. Act April 12, 1902, c. 500, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279].

The demurrer is overruled, with leave to answer within 10 days after entry of order.

JOHN CHURCH CO. et al. v. ZIMMERMANN.

(Circuit Court, E. D. Wisconsin. July 11, 1904.)

1. FEDERAL COURTS—EQUITY—BILL—INTERROGATORIES—FAILURE TO ANSWER—EXCEPTIONS.

Where a bill in the federal courts for infringement of copyright prayed the usual discovery in an answer by the defendant both to the allegations and interrogatories, the waiver of an answer under oath did not entitle defendant to file an answer consisting of a mere general denial neither responding to the interrogatories nor stating "the circumstances of which the defendant intends to avail himself by way of defense," as required by the federal equity rules; and an answer so filed was subject to exceptions.

In Equity. On exceptions to the answer for insufficiency.

Bloodgood, Kemper & Bloodgood, for complainants.
Voigt & Voigt, for defendant.

SEAMAN, District Judge. The bill in this case is founded on an alleged copyright and alleged infringements thereof by the defendant, and the usual discovery is sought in an answer by the defendant, both to allegations and interrogations, oath thereto being waived. The answer is a mere general denial, neither responding to the interrogatories nor stating "the circumstances of which the defendant intends to avail himself by way of defense" (1 Daniell's Ch. Pl. & Pr. [6th Am. Ed.] 712), nor otherwise complying with the fundamental rule in equity that "he shall answer fully to all the matters of the bill" (rule 39) when he "submits to answer." On exception thereto for manifest insufficiency the question is raised whether the answer is subject to such exception when oath is waived. That this exception is well taken under the equity practice of the federal jurisdiction is settled by the equity rules adopted by the Supreme Court (pursuant to sections 913, 917, Rev. St. [U. S. Comp. St. 1901, pp. 683, 684]) and the line of decisions

thereunder. 1 Bates on Federal Eq. Prac. §§ 118, 334, and citations; 1 Foster's Fed. Prac. §§ 148, 153; 3 Desty's Fed. Prac. 1757. Confusion has arisen upon this question through the rulings in various state courts and statements in text-books of a general rule in equity that no exception for insufficiency lies where the answer is not under oath. The decisions pro and con in the several states are largely, though not in all instances, due to special provisions by statute or rule, and, however instructive, cannot govern the federal procedure. Of the text-books cited it is sufficient to refer to a leading authority, Daniell's Chancery Pl. & Pr., wherein it is remarked in the text (volume 1, p. 737 [6th Am. Ed.]) that "no exception can be taken to an answer put in without oath or signature or attestation of honor," citing in the note Hill v. Earl of Bute, 2 Fowl. Ex. Pr. 10, and New York and Tennessee cases; and the same view is repeated in the notes, page 760. The rule thus stated, however, cannot prevail under the rules of equity practice promulgated by the Supreme Court to supplant "the slow and oppressive procedure of the English practice for compelling an appearance and answer" with the "simple, speedy, and effectual procedure" established by the rules. 1 Bates on Fed. Eq. Prac. § 334. Preserving the original and inherent power of equity to enforce discovery, these rules are unmistakable in requiring the defendant "to search his conscience," and answer fully, with or without oath. Waiver of oath to the answer "is not a waiver of the right to a full answer," and affects only the evidential character of the pleading. 1 Bates, § 118, and cases cited. The single instance of departure from this view in U. S. v. McLaughlin (C. C.) 24 Fed. 823, is disapproved in the cases thus cited, including Whittemore v. Patten (C. C.) 81 Fed. 527, in the same circuit.

The exceptions to the answer are sustained, and the defendant is required to answer fully on or before the next rule day.

UNITED STATES v. R. F. DOWNING & CO.

SAME v. GODILLOT & CO.

(Circuit Court, S. D. New York. May 23, 1904.)

Nos. 3,440, 3,441.

1. CUSTOMS DUTIES—MARKET VALUE—REMISSION OF LOCAL TAXES—DROIT DE VILLE—OCTROI TAX.

Held, in regard to merchandise imported from France, that its "market value," as defined in Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], does not include the amount of certain internal revenue imposts of that country known as the "octroi tax" and the "droit de ville," which are not general in their application, but vary with the locality, and which are not collected if the merchandise is exported.

On Application for Review of Decisions of the Board of General Appraisers.

The decisions under review reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by R. F. Down-

ing & Co. and Godillot & Co. Duty had been assessed on the basis of an appraisement of the market value of the goods, that included the amount of certain internal revenue imposts of France, known as the "octroi tax" and the "droit de ville," which are not general in their application, but vary with the locality, and which are not collected if the merchandise is exported. The board held that the case was not within the rule of United States v. Passavant, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. Ed. 644, where it was decided by the Supreme Court that the so-called bonification of tax by the German government, which was in effect the remission, on the exportation of merchandise from that country, of a general tax that would have been collected, had the merchandise not been exported, constituted an element of market value, as defined in Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]. Note G. A. 5,414, T. D. 20,761.

Charles Duane Baker, Asst. U. S. Atty.
W. Wickham Smith, for R. F. Downing & Co.
Albert Comstock, for Godillot & Co.

TOWNSEND, Circuit Judge. The decisions of the Board of General Appraisers are affirmed on the authority of Rheinstrom et al. v. U. S. (C. C.) 118 Fed. 303.

In re SUTTER BROS.

(District Court, S. D. New York. April 28, 1904.)

1. BANKRUPTCY—COURTS—ANCILLARY JURISDICTION.

Where proceedings were had in a federal District Court other than that in which a corporation was adjudged a bankrupt, by which a receivership was extended to property located in such other district, and various other orders were made by such court, it had ancillary jurisdiction to grant a creditor's application for the examination of witnesses as authorized by Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].

Sutter Bros., a corporation, was adjudged a bankrupt in the United States District Court for the Northern District of Illinois. Receivers were appointed by that court, and the receivership extended to property in the Southern District of New York on application made to the District Court of that district by petitioning creditors. Various orders were made in the Southern District of New York, in the proceeding, relating to property in that district, after which an application was made by a creditor to the District Court for the Southern District of New York, under Bankr. Act, § 21a, for the examination of witnesses, which application was granted ex parte, and an order made accordingly, after which the bankrupt moved to vacate such order for lack of jurisdiction. Motion denied.

Stern, Sanger & Barr (William J. Barr, of counsel), for the motion.
Lesser Bros. (William Lesser, of counsel), opposed.

HOLT, District Judge. I think that the order of this court making the Chicago receivers, receivers here, and the various orders made here since, make this a case pending in this court in such a sense as to authorize the order objected to, to be made. Even if no previous proceedings had been had in this court, I think that such an order could be made

here if previously authorized in the court where the proceeding is pending. With sincere respect for the court rendering the opinion in In re Williams, 10 Am. Bankr. R. 538, 123 Fed. 321, I cannot concur in it.

Motion denied.

GEORGE LUEDERS & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 25, 1904.)

No. 3,207.

1. CUSTOMS DUTIES—CLASSIFICATION—SANDALWOOD—LOGS OF WOOD.

Held, that sandalwood, in pieces of varying sizes, several feet long and several inches thick, to which nothing has been done beyond removing the bark and sawing the wood into lengths convenient for transportation, is not dutiable under paragraph 198, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646], as "wood, unmanufactured, not specially provided for," but is free of duty, under the provision in paragraph 699 of said act, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], for "logs of wood."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

On application for review of a decision of the Board of General Appraisers. The decision under review affirmed the decision of the collector of customs at the port of New York in assessing duty on certain merchandise imported by George Lueders & Co. Note In re Parke, G. A. 4,845, T. D. 22,755.

J. Stuart Tompkins, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question consists of pieces of sandalwood, not uniform in size, several feet long and several inches thick. The importation was assessed at 20 per cent. ad valorem, under paragraph 198 of the tariff act of July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646], which is as follows:

"(198) Sawed boards, planks, deals, and all forms of sawed cedar, lignum vitæ, lancewood, ebony, box, granadilla, mahogany, rosewood, satinwood, and all cabinet woods not further manufactured than sawed, fifteen per centum ad valorem; veneers of wood, and wood, unmanufactured, not specially provided for in this act, twenty per centum ad valorem."

The importers duly protested against such classification, claiming that the wood was free of duty, under paragraph 699 of said act, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], covering "Wood: Logs and round unmanufactured timber, including pulpwoods, firewood, handle-bolts, shingle bolts, gun-blocks for gun-stocks, rough, hewn or sawed, or planed on one side, hop-poles, ship-timber and ship-planking; all the foregoing not specially provided for in this act" —or under paragraph 700, providing for "all forms of cabinet woods in the log, rough or hewn only," and "woods not specially provided for in this act, in the rough. * * *"

The board states in its return that duty was assessed on the sandalwood as "wood in the log, unmanufactured." The only witness in this court testified that the sample produced fairly represented the logs comprised in the importation in question. This sample is a log, and nothing has been done to it except to take off the bark and saw it into logs of a convenient length for importation. It is not of the character of woods provided for in paragraph 198, including "sawed boards," "veneers," and similar unmanufactured woods, but is merely a log, and, as such, is entitled to free entry under paragraph 699 of said act.

The decision of the Board of General Appraisers is reversed.

UNITED STATES v. AMERICAN EXPRESS CO.

(Circuit Court, S. D. New York. May 26, 1904.)

No. 3,467.

1. CUSTOMS DUTIES—CLASSIFICATION—SOAP PENCILS—UNENUMERATED ARTICLES.

So-called soap pencils, composed of wood and soap, soap being the component material of chief value, are dutiable as unenumerated manufactured articles, under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question (G. A. 5,528, T. D. 24,881) reversed the assessment of duty by the collector of customs at the port of New York.

Charles Duane Baker, Asst. U. S. Atty.

Howard T. Walden, for the importer.

TOWNSEND, Circuit Judge. The merchandise in question consists of soap pencils, so called, on which duty was assessed at the rate of 35 per cent. ad valorem, under the provisions of paragraph 208 of the tariff act of July 24, 1897 (Act July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1646]), as manufactures in chief value of wood. The importer claims that the articles are properly dutiable at the rate of 20 per cent. ad valorem, as a nonenumerated manufactured article, under the provisions of section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]). The Board of General Appraisers sustained the claim of the importer.

It appears from the reports of the local appraiser and of the United States chemist that soap is the component material of chief value in these pencils. Inasmuch as there is no provision in the act of 1897 for manufactures of which soap is the component material of chief value, the articles are properly dutiable as nonenumerated manufactured articles, under section 6 of said act, and the decision of the Board of General Appraisers is therefore affirmed.

ATLANTA, K. & N. RY. CO. v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. August 2, 1904.)

No. 1,303.

1. REMOVAL OF CAUSES—WAIVER OF RIGHT—FILING ANSWER AND MOTION TO DISSOLVE INJUNCTION.

   The filing by a defendant in a state court of an answer and a motion, supported by affidavits, for the dissolution of a preliminary injunction or restraining order which had been granted ex parte, and the hearing of such motion on ex parte affidavits by the judge in chambers, where he had no power to determine any question on the merits, do not preclude the defendant from removing the cause where his petition therefor was presented before the time when, by the laws of the state or the rules of the court, he was required to plead.

2. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—EFFECT OF UNAUTHORIZED ENTRY.

   Shannon's Code Tenn. §§ 1844–1867, providing for the condemnation of right of way by railroad companies, do not authorize an entry on the land without consent of the owner until his compensation has been ascertained and either paid or secured, unless, perhaps, for the purpose of making a survey; and a company can acquire no rights by going upon the land and commencing construction work without the owner's consent after it has filed a petition for condemnation.

3. SAME—PRIORITY OF RIGHT—UNRECORDED CONVEYANCE.

   A statutory proceeding for the condemnation of right of way for railroad purposes is but a substitute for its acquisition by contract, and the filing of a petition for condemnation by a railroad company gives it no right as against another company, which previously obtained a deed from the owner for the same purpose, although such deed was not recorded, and especially where, as by the Tennessee statute, it is expressly provided that such proceedings shall affect only the interests of the parties thereto and unborn remaindermen, and the grantee company is not a party.

4. SAME—PRELIMINARY SURVEY.

   There being no statute in Tennessee requiring a survey before the institution of proceedings to condemn right of way for railroad purposes, or authorizing the recording of surveys, such a survey gives no priority of right as against another company which subsequently acquires right of way over the land by conveyance from the owner.

5. SAME—EXECUTORY CONTRACT—STATUTE OF FRAUDS.

   A contract for the sale or conveyance by a landowner of right of way to a railroad company, although in parol and executory, is good as against another company which subsequently institutes proceedings for condemnation of the same land, with notice that such an agreement had been made, such company not being an innocent purchaser protected by the statute of frauds.

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

John B. Keeble (Chas. N. Burch, of counsel), for appellant.

R. H. Sansom, Leon Jourolmon, Henry Hudson (W. A. Henderson, Alex P. Humphrey, and Jourolmon, Welcker & Hudson, of counsel), for appellee.

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

¶ 1. See Removal of Causes, vol. 42, Cent. Dig. § 10.

LURTON, Circuit Judge. This is an appeal under the seventh section of the Court of Appeals Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550], from an interlocutory decree granting an injunction pendente lite. The controversy is between two antagonistic railway companies over a right of way across the same property, desired by each for the purpose of constructing and operating a spur track to reach certain manufacturing industries upon the south bank of the Tennessee river, in the vicinity of Knoxville, Tenn. For some time before this litigation these industries had been endeavoring to secure such a spur track, and had been negotiating with both companies to that end. The evidence tends to show that the only practicable approach for either company was over a narrow strip of land lying between the river and the base of a bluff, the property of one S. B. Luttrell. This narrow strip between the bluff and the river is insufficient for two independent railway approaches, even if it had been desirable and profitable for each company to own and operate a spur for its own use. Negotiations were proceeding upon the basis that the right of way across Luttrell's land, as well as for other parts of the route, would be secured by the industries to be served and donated to the railway company with whom an agreement should be finally concluded. The evidence tends to show, however, that the appellant company was understood as also requiring that the expense of grading should be borne by these industries. Preliminary surveys were made by each company, but the Southern Railway Company first came to an agreement, and first made a location definite and final. This agreement seems to have been concluded, though possibly not fully executed until a day or two later, on June 29, 1903. By the terms of this agreement the industries agreed to procure the necessary rights of way and the railroad company to grade, construct, and operate the desired spur. Upon the next day—June 30th—several rights of way were secured, including the right of way over the Luttrell property, now in dispute. As early as this date—June 30th—if not earlier, the appellant company heard disquieting reports that the Southern Railway Company had come to an agreement under which it was to construct the spur in question. Its own plans and purposes do not seem to have been definite prior to this, for only on this day did the company's engineer file in the office of Mr. Ellis, the company's general manager, the plans and estimates upon which a final conclusion could be reached and a proposal made to or accepted from the manufacturing companies to be accommodated. On the next day—July 1st—Mr. Ellis began inquiries with a view of ascertaining the truth of the reported agreement with the Southern Railway. As this matter of notice to the appellant of the steps taken by the Southern Railway to acquire a right of way from Luttrell may be of importance, we quote from the ex parte affidavit of Mr. Ellis, who, after stating that on June 30th, and while absent from the city of Knoxville, the company's engineer had filed in his office the completed survey and estimates for a spur track, says:

"On the following day (July 1st) I began the preparation of a report and letter to President Smith, but, having various outside intimations that there might be some truth in the reported negotiations with the Southern Railway Company, on the first day of July I called upon Mr. Gaut, and asked if he knew

what the facts were, and inquiry by him developed the fact that an agreement had been reached, although perhaps not executed, by the parties with the Southern Railway Company. I then addressed a letter to President Smith, setting out the facts, and received telegraphic authority to proceed. * * *"

The Mr. Gaut referred to above had, on some former occasions, endeavored to bring about an agreement between the appellant railroad and these industries. In a brief affidavit Mr. Gaut says that on July 1, 1903, Mr. Ellis called on him "to ascertain whether the newspaper reports that a contract had been signed between these companies and the Southern Railway Company were correct or not. I made inquiries concerning the matter at once, and learned that, while the conveyances for right of way had not been executed, the agreements had been reached whereby they were to be executed." After receiving authority to construct a spur according to this survey, and without further effort to come to any agreement with the enterprises to be served, and wholly independent of any assistance from or agreement with the parties desiring the spur, the appellant company, on the night of July 2, 1903, began operations to secure priority of right over the Luttrell property, knowing at the time that at least a parol agreement had been already concluded by the defendant company for the rights of way essential to the construction of a spur over the same route. The supposition that possibly the right of way over Luttrell's land had not been conveyed by an instrument in writing proved to be erroneous, for the evidence tends to show quite satisfactorily that on June 30th Mr. Luttrell executed and delivered his deed, though it was not placed on record until July 3d.

To secure priority of right over the Luttrell land, notwithstanding the situation as confessedly known, and to obtain what advantage there might be, in view of the possibility that deeds for the right of way had not been executed, the complainant company, on the night of July 2d, filed a petition in the state circuit court for Knox county, Tenn., against S. B. Luttrell, seeking to condemn the right of way now involved, and being the same previously conveyed by the unrecorded deed of the owner. On the same night, and before service of process or notice or knowledge of either Luttrell or the Southern Railway Company, a civil engineer in appellant's service, with a small force, went upon the proposed right of way for the alleged purpose of taking possession and beginning the construction of the proposed track. Knowledge of this latter step was obtained by the Southern Railway Company, and very early in the morning of the 3d of July it also sent a force of men upon the Luttrell property, and began at once the construction of a track, claiming a right to do so under Luttrell's grant and conveyance. On the same morning, and after this movement in the interest of the Southern Railway Company, the appellant company filed the present bill in the Chancery Court of the state, and obtained an ex parte injunction restraining the defendant company from interfering with its alleged prior right and prior possession. Upon the same day, but at a later hour, the defendant filed a similar bill in the same court, and was also granted an ex parte injunction. Thus both companies were forbidden to proceed with the construction of the said spur across the land of said Luttrell until the court should determine which had the better right. Answers were at once filed to each bill, and ex parte affidavits taken

and filed, under consent and agreement, to be used upon motions to dissolve the injunctions granted. The two cases, on July 11, 1903, were heard at the same time, upon motions to dissolve. The chancellor denied the motion to dissolve the injunction granted under the bill of appellant, and sustained the motion to dissolve the injunction granted under the bill filed by the appellee company. On August 1st the Southern Railway Company dismissed its said bill without prejudice, and removed the case of the appellant company into the court below. A motion to remand to the state court was seasonably made by the appellant company, and denied. The defendant, under leave, filed a cross-bill, seeking affirmative relief against the occupation of the right of way in question by the Atlanta, Knoxville & Northern Railway Company, and asserted its own exclusive rights under the deed of Luttrell. Subsequently the cause was heard upon a motion to dissolve the preliminary injunction granted by the state chancellor, and to allow a pendente litem injunction under the cross-bill. Both these motions were granted, and from the order allowing an injunction upon the said cross-bill this appeal has been taken.

1. It is first insisted that, although this suit was one which might have been removed by the Southern Railway Company into the circuit court, the right to remove was waived by the proceedings which occurred in the state court before the petition to remove was filed. The question is one which goes, in a sense, to the jurisdiction of the court below, and, although this is only an appeal from an interlocutory injunction, should be decided before considering the merits. Bissell Co. v. Goshen Co., 19 C. C. A. 25, 72 Fed. 545; Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; In re Tampa R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589. The provision of Act March 3, 1887, c. 373, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 510], as amended by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 433 [U. S. Comp. St. 1901, p. 510], in respect to the time for the removal of a cause, is that the party entitled to remove shall file his petition in such suit in the state court "at the time, or any time before, the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." This means that a petition for removal must be filed as soon as the defendant is called upon by the local law to make any defense, either to the jurisdiction or merits. Martin v. B. & O. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. But under the state law the earliest day at which the Southern Railway Company was obliged to make any defense whatever to the bill of the Atlanta, Knoxville & Northern Railroad Company was upon the first rule day in August, which was Monday, August 3d. The petition to remove was filed August 1st. It therefore follows that the petition for removal was filed within the time required by law. But it is said that, although the petition was filed before any defense was due, and therefore within time, the right to remove had been waived by the filing of an answer and by the hearing had in the state court upon the question of the dissolution of the ex parte preliminary injunction granted upon the filing of the bill. The citizenship of the parties was such as to bring the case within the constitutional jurisdiction of a United States court. The time of removal

was not of the essence, and any objection for failure to remove within the time required by the statute must be made promptly, or the right to object for that reason is lost. Newman v. Schwerin, 61 Fed. 865, 10 C. C. A. 129; Martin v. B. & O. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. Upon the same line of reasoning a defendant should not be deprived of his constitutional and statutory right to a trial in a court of the United States upon the ground of waiver unless a clear case of intent to submit and have a hearing in the state court is made to appear. The mere filing of any answer or plea or any other defense before it is due under the law or rule of the state court is not inconsistent with the subsequent removal of the case. The premature filing of a defense is in no sense a trial or hearing, and is not conduct establishing a waiver of the right to remove. The statute does not require the petition to be filed before any defense is filed, but only before the time when the first defense is required to be filed. Gavin v. Vance (C. C.) 33 Fed. 84; Conner v. Coal Co. (C. C.) 45 Fed. 802; Duncan v. Associated Press (C. C.) 81 Fed. 417–422; Champlain Const. Co. v. O'Brien (C. C.) 104 Fed. 930.

This brings us to the question as to whether the hearing in the state court upon the motion to discharge the ex parte preliminary injunction should operate to defeat the right to remove, although the petition was filed within the time prescribed by the statute. In view of the fact that the law requires the petition to remove to be filed on or before the time when the first reading by the defendants may be required, it may be inferred that Congress did not intend to allow a removal after the trial of the case, or any question in the case, even though such trial should occur before the time when the first defense was due under the law. Under Act March 3, 1875, c. 137, § 3, 18 Stat. 470 [U. S. Comp. St. 1901, p. 510], which allowed a removal at or before the time at which the case could be first tried, "and before the trial," it was held that a hearing upon a demurrer was a trial of the action within the meaning of that act. Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491. In Removal Cases, 100 U. S. 457, 473, 25 L. Ed. 593, it was held that, if the trial had actually begun before the application to remove, the right of removal was gone, though there had been no judgment. The court in that case said that Congress did not intend by the expression "before trial" to allow a party to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal. If there was any hearing of the appellant's case, or if any hearing was begun, though no judgment had been rendered, before the filing of the petition to remove, the right to remove may well be regarded as waived, the hearing concluded or begun being inconsistent with the clear purpose of the act that the removal shall occur before any such experimenting with the state court. The question, then, to be decided is whether by the filing of an answer and by the hearing which did occur before the petition to remove was filed the right of removal was waived or lost. This hearing, which was had before the removal, was upon a motion to dissolve a preliminary injunction which had been granted without notice. In effect, it was neither more nor less than a motion for an injunction pendente lite, for the injunction allowed was without notice, and nothing more than a restrain-

ing order to stand until there could be a hearing upon notice of the question of the allowance of an injunction to preserve the status until a final hearing. The question to be decided was whether there was a probable right which might be jeopardized unless an injunction should preserve the status until a final hearing. It is a question which largely appeals to the discretion of the chancellor, regulated by the balance of inconvenience or danger to the parties. Flippen v. Knaffle, 2 Tenn. Ch. 238; Blount v. Societe, etc., 53 Fed. 98, 3 C. C. A. 455, 457; Glascott v. Lang, 3 Mylne & C. 451, 455; Grt. Western Ry. Co. v. Birmingham & O. J. Ry. Co., 2 Phil. Ch. 602; Allison v. Corson, 88 Fed. 581, 32 C. C. A. 12.

In Blount v. Societe, etc., cited above, Jackson, Circuit Judge, speaking for this court, said:

"The object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs and according to the course and principles of courts of equity."

In Grt. Western R. Co. v. Birmingham R. Co., cited above, Lord Cottenham said:

"It is certain that the court will in many cases interfere and preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that the court will not so interfere if it thinks there is no real question between the parties; but, seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits."

Under the practice in the chancery courts of Tennessee, as stated by so eminent an equity judge as Chancellor Wm. F. Cooper, in Owen v. Brien, 2 Tenn. Ch. 295, the chancellor, though sitting in open court, will not ordinarily decide any matter upon its merits upon a motion to allow or dissolve a temporary injunction. But the hearing in this matter was not in open court, but at chambers, and the chancellor has at chambers no power to decide any cause upon its merits, unless it be a hearing by consent of some of the matters provided for by the Tennessee act of 1903, p. 577, c. 248; Shannon's Tenn. Code, 6220, 6223. A motion to dissolve or allow a mere temporary injunction is a matter which could always be heard at chambers, and the jurisdiction of a Tennessee chancellor at chambers in respect of such motions is not enlarged or regulated by the act cited. The hearing in this cause could not have been a hearing upon the facts, for the motion was heard only upon the bill, answer, and ex parte affidavits. Such affidavits are not legal proofs, and are admissible only for the purpose of guiding the discretion of the chancellor in allowing or disallowing a preliminary injunction. That the learned chancellor expressed opinions which bore upon the merits is of no moment, for he could do no more, and was called upon to do no more, than decide whether, upon such a prima facie showing, the complainant had a probable right which should be preserved until a hearing upon legal proofs and according to due course of equity could be had. To that extent the hearing before him at chambers went, and no further. The same motion might have been renewed

again and again, for the matter was not concluded by the disallowance of the motion made. Having regard to the fact that the hearing had was before a judge in chambers having no jurisdiction to hear the cause upon the facts, and upon ex parte affidavits, we conclude that the refusal of the court to discontinue the pending preliminary injunction was not a hearing upon the merits, nor the trial of the suit upon any question affecting the merits, and therefore not such a hearing as will defeat the right of removal. The question presented by the facts stated has not been authoritatively decided by the Supreme Court nor any of the Circuit Courts of Appeal. The decisions in the Circuit Courts are not altogether harmonious, but the decided weight of authority lends support to the conclusion we have reached. Gavin v. Vance (C. C.) 33 Fed. 84; Freeman v. Butler (C. C.) 39 Fed. 1; Garrard v. Silver Peak Mines Co. (C. C.) 76 Fed. 1; Duncan v. Associated Press (C. C.) 81 Fed. 417–422; Purdy v. Wallace Muller Co. (C. C.) 81 Fed. 513; Whitley v. Malleable Castings Co. (C. C.) 83 Fed. 853; Champlain Con. Co. v. O'Brien (C. C.) 104 Fed. 930; Sidway v. Missouri Land Co. (C. C.) 116 Fed. 382.

2. Did the district court abuse its discretion in denying a preliminary injunction to the Atlanta, Knoxville & Northern Railroad Company and awarding one to the Southern Railway Company upon its cross-bill? The contention is that the appellant, the Atlanta, Knoxville & Northern Railroad Company, acquired a priority of right to an easement of way across the land of said Luttrell by reason of the filing of its petition for a condemnation before the deed of Luttrell was put to record. It is true that the learned counsel have also laid some stress upon an alleged prior survey and location. But, as already indicated, we do not find, upon the present state of the record, that this claim is substantiated. Preliminary surveys were made by both companies, and it may be that the first preliminary reconnaissance was made by the appellant company. But the weight of evidence is that the Southern Railway Company completed its survey and location first, and first definitely determined upon the construction of the spur in question. It was only after the appellant company learned, through the press and by reports, that the Southern Railway Company had concluded an agreement with the establishments to be reached by the proposed spur that the complainant company definitely determined to build a spur, regardless of any agreement with the people with whom it had been negotiating. Neither do we attach any importance to the fact that on the night of July 2d, and after the filing of the condemnation proceedings, the appellant company placed a force of men at work upon the disputed premises. This it did without the consent or knowledge of either Mr. Luttrell or the Southern Railway Company, and without the slightest semblance of legal authority or moral right. The mere fact that it had theretofore surveyed a line across Mr. Luttrell's property, and had started condemnation proceedings, gave it no right to take possession without the consent of the owner, and in advance of a condemnation. The Tennessee statute regulating the taking of private property for public uses does not authorize an occupation before an assessment of damages, and no court of equity can afford to regard a bold act of trespass as a sound foundation for an equitable priority of right.

The question is thus narrowed down to this: Can one railroad company acquire a priority by filing a petition for the appropriation of a particular piece of property over a prior unrecorded acquisition of the same property by contract by another railroad company for an identical public use, with or without notice of the unrecorded prior conveyance? We pass, for the present, the effect of the notice of the prior rights of the Southern Railway Company heretofore set out. By an act of the Tennessee Legislature any railroad company is given authority to build and operate "lateral roads not exceeding fifteen miles in length, extending from the main stem or branch to any mill, quarry, mine, manufacturing plant," etc. Acts Tenn. 1903, p. 461, c. 210. Whether, and under what circumstances, private property can be taken for the construction of a spur to accommodate a private enterprise exclusively may be a matter of some doubt. The authorities are, perhaps, not harmonious, and the cases are noticed in 10 Am. & Eng. Ency. of Law (2d Ed.) p. 1078 et seq. See, also, Clark v. White, 2 Swan, 540; Memphis, etc., Co. v. Memphis, 4 Cold. 406, 424; Chattanooga Terminal Co. v. Felton (C. C.) 69 Fed. 273. We pretermit any expression of opinion, and for the purposes of this case shall assume that the Tennessee Legislature has the constitutional power to authorize the condemnation of private property for the purposes indicated by the proceeding instituted by the appellant corporation. The provisions of law conferring and regulating the right to condemn land for works of public improvement are contained in sections 1844 to 1867, inclusive, of Shannon's Code of Tennessee. The proceeding is by petition and notice to the owner, and section 1848 provides that the proceeding shall only "cover and affect the interest of those who are actually made parties," except unborn remaindermen. An analysis of the sections referred to indicates a careful observance of the rights of property owners and a purpose to prevent the acquisition of any rights by a corporation seeking to make an appropriation until a judgment of condemnation and an actual payment of the damages assessed. Section 1864 is supposed to confer some right to go upon and survey a right of way against the will of the owner, and before condemnation. The section reads thus:

"A person or company actually intending to make application for the privileges herein contemplated, and entering upon the land of another for the purpose of making the requisite examinations and surveys, and doing no unnecessary injury, is liable only for the actual damage done, and if sued in such case, the plaintiff shall recover only as much costs as damages."

If this be construed as permitting an entry against the will of an owner, it is, at most, an entry solely for the purpose of making the requisite examination and survey preliminary to the filing of a condemnation suit, and does not authorize any dispossession of the owner or occupancy for purposes of construction. But to make it plain that this provision shall not be regarded as affecting the owners' rights any further, the next section (1865) provides:

"No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way, until the damages assessed by the jury of inquest and the costs have been actually paid; or, if an appeal has been taken, until the bond has been given to abide by the final judgment as before provided."

When, however, the damages have been assessed by a jury of inquest, and the defendant takes an appeal because dissatisfied, the railroad company may proceed with its construction, upon giving bond and security as provided by section 1864. No right of occupancy exists unless such bond is given. White v. Rd. Co., 7 Heisk. 518.

Section 1866 is supposed to recognize some right to take possession prior to an actual legal appropriation. This is a mistake. This section simply provides that an owner whose land has been taken may petition for a jury of inquest, and have the damages assessed as if upon a petition by the company for a condemnation, or "sue for damages in the ordinary way." Instead of authorizing by implication or otherwise an occupancy without the consent of the owner, the statute simply intends to enlarge the remedies of the owner in case possession is taken either with or without the consent of the owner so as to permit him to sue for an assessment of damages by a jury of inquest, or resort to any other common-law remedy. The section has been construed in Duck River R. Co. v. Cochrane, 3 Lea, 478, and Parker v. Railroad, 13 Lea, 669; and in the last-named case a bill was sustained which sought to enjoin further possession or occupancy taken against the owner's will.

It is not essential to the validity of a law authorizing an appropriation of land that provision shall be made for the payment of compensation before the actual appropriation, unless there is an express constitutional provision to that effect, provided adequate provision is made whereby compensation may be certainly obtained. Cooley's Constitutional Limitations, 6545 et seq.; White v. Railroad, 7 Heisk. 518. What we mean to be understood as holding is that the provisions of the existing law of Tennessee, as found in the Code sections referred to above, do not authorize an appropriation without a condemnation and the payment of compensation, save in the case provided for by section 1864, where there is an appeal after the damages have been assessed by a jury of inquest, in which latter case a bond in double the value of the damages assessed may be given conditioned to perform the final judgment. White v. Railroad, 7 Heisk. 518. But it is a sound and inflexible principle of constitutional law that private property cannot be taken and appropriated to a public purpose under the power of eminent domain except in accordance with legislative regulation and in strict pursuance of statutory authority. The corporation claiming the right to appropriate must follow the proceedings authorized by law, for in no other way can it deprive a citizen of his property right. Cooley's Constitutional Limitations, 653 et seq.; White v. Railroad, 7 Heisk. 518; 7 Ency. Pl. & Pr. 468. The cases of Simms v. Memphis & Charleston R. R., 12 Heisk. 621, and Railroad v. Telford, 89 Tenn. 293, 14 S. W. 776, have been cited as constructions of section 1866, and as holding that a railroad company may, without compensation or the consent of the owner, occupy land for railroad purposes; and that the provision of this statute for obtaining compensation obviates any constitutional objection. Neither case involved any application of this Code provision, and both cases involved the rights of the owner of lands appropriated or occupied by railroad companies under the terms of private or special railway charters. In the Simms Case the remedy of the own-

er was held to be barred by the limitation provided by the charter. In Telford's Case the charter provided that, in the absence of a contract with the owner, a grant should be presumed, and the owner barred from recovering the land or compensation unless he should, within five years after the road was constructed over his land, sue for damages as provided by the charter. There is no statute in Tennessee prescribing the effect of a survey for a proposed line of railway, nor providing for such a survey as a preliminary to a condemnation, nor allowing its registration. Given two condemnation proceedings seeking to appropriate the same land, priority should doubtless be accorded to the proceeding first begun upon the principle "qui prior est tempore potior est jure." Lewis, Eminent Domain, § 306; Elliott on Railroads, § 927; Lake Merced Water Co. v. Cowles, 31 Cal. 215. The appellant acquired no title or interest in the land by merely commencing a proceeding for its appropriation, nor the landowner any right to require the petitioner to take the land it sought to appropriate. The purpose to appropriate may be abandoned even after the assessment of damages. Stacey v. Vt. Cont. R., 27 Vt. 39, 7 Ency. Pl. & Pr. 626, 673; Dimmick v. Council Bluffs R. Co., 58 Iowa, 637, 12 N. W. 710; Schreiber v. Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427; Matter of Military Parade Grounds, 60 N. Y. 319; First Nat. Bank v. West River R. Co., 49 Vt. 167. The only right which can be said to result from mere priority of time in the institution of such a proceeding is an equitable right of priority over a later effort to acquire the same property for a like purpose, whether by a like proceeding or contract with notice, actual or constructive. The case of Barre Railroad Co. v. Montpelier Companies, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877, and similar cases therein cited, stands upon the effect of the filing and registering of a definite survey and location made in pursuance of statute law. That case, and those upon which it rests, are placed upon the ground that by the requirement of a definite survey, and its registration, the Legislature intended that thereby a prior right to appropriate the lands pointed out should inure, and that this right is a lien or right or interest in the land, which would ripen into a title upon a purchase or condemnation. Mere priority of right accorded to one petitioner over another, upon the ground of priority in time should not have any retrospective operation, so as to give precedence over an earlier acquisition of the same right of way by contract. A proceeding to condemn is, in substance, a proceeding to compel a sale by the owner to the petitioner, and is justified only when the purpose for which the land is to be used is a public one. Under the statutes of most of the states such a proceeding can only be resorted to when the parties have been unable to agree upon terms of sale. 7 Ency. Pl. & Pr. 476, and cases cited. But in Tennessee the statute does not require that any effort shall be made for acquiring the property desired by private treaty, and there is no constitutional objection to a proceeding for condemnation before failure of negotiations. Bigelow v. Miss. Cent. R. Co., 2 Head, 624. Nevertheless, the proceeding to compel an appropriation is at least but a substitute for an acquisition by contract, and no superior equity is acquired by the institution of a suit for the purpose of condemnation over a prior agreement for the acquisition

of the same interest, valid between the parties, especially when this prior right was known to the petitioner when he started his proceeding. Treating the question as one of priority between mere equities, and each as equally innocent, that claimant first in order of time has, by virtue of that circumstance, the better right. He who is superior in time, in the absence of some higher equity, has, by virtue of that circumstance alone, the better right to the matter in dispute. Broom's Legal Maxims, p. 348. The case of M. & St. P. R. Co. v. Chicago, M. & St. P. R. Co., 116 Iowa, 681, 88 N. W. 1082, is much in point, and in its reasoning supports our conclusion.

The express provision of section 1848 is that "all parties having any interest in such land may be made defendants, and the proceedings will only cover and affect the interest of those who are actually made parties; unborn remaindermen being, however, bound by proceedings to which all living persons in interest are parties." To accord priority to such a petitioner over the interest acquired by a conveyance prior in date, though unrecorded, would be to bind and affect an interest not made a party, and in the teeth of the statute.

The registry statutes can have no important bearing, as under the Vermont statute construed in Barre R. Co. v. Montpelier Companies, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877, for the reason that there is no statute requiring or authorizing the registration of a railroad survey. Neither is a petitioner for condemnation in any sense a purchaser or a creditor within the purview of the registration statutes. If the complainant had actually acquired the right of way over the Luttrell land, and title had been vested by decree or deed, without notice of the prior purchase by the Southern Railway Company of the same easement, there would be much reason for holding it to be a bona fide purchaser under the case of Wilkins v. McCorkle (Tenn.) 80 S. W. 834, where the Tennessee Supreme Court held that a complainant under a rescission bill, who obtained a decree canceling a conveyance and revesting title without notice of an unrecorded deed by the defendant conveying the same land to a stranger, was a bona fide purchaser within the registration law. But that case is not applicable here, because the complainant acquired no charge, lien, title, or other interest before it had full notice of the conveyance to the Southern Railway Company.

3. But if the nonregistration of the Luttrell deed made it invalid as to the petitioner for condemnation of the land therein conveyed, although in no sense a creditor or purchaser, unless it had notice, then we are of opinion that knowledge of the fact that a contract for the construction of this very spur track over the identical route here in controversy had been concluded between the plants to be served and the Southern Railway Company, and that an agreement had been made for the conveyance of the requisite rights of way, is notice whether a conveyance had been executed or not. No one is an innocent purchaser for value who buys with knowledge of a prior sale of the same land by parol. Such a sale is not void, but voidable at the election of the parties only under the well-settled construction of the Tennessee statute of frauds; and a purchaser with notice of such an executory sale or contract is not a bona fide purchaser without notice within the

Tennessee registration statute. In this view of the case, we need not enter upon a consideration of the question as to whether the facts known were such as to devolve upon the complainant actual knowledge that an agreement for acquisition of this right of way existed, for whether that agreement was in parol or writing was of no importance to it. If the contracting parties elected to carry it out, it did not lie in the mouth of complainant to say that because it was not yet a written agreement it was invalid. Brakefield v. Anderson, 87 Tenn. 211, 10 S. W. 360; King v. Coleman, 98 Tenn. 562, 571, 40 S. W. 1082; Phillips v. Kimmons, 94 Tenn. 562, 29 S. W. 965.

Upon the whole case we see no reason for disturbing the order of the court below, which is therefore affirmed.

UNITED STATES v. DETROIT TIMBER & LUMBER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1904.)

No. 2,009.

1. GOVERNMENT LANDS—TITLE OF BONA FIDE PURCHASER AFTER PATENT UNASSAILABLE IN EQUITY.

The title of a bona fide purchaser of lands subsequent to the issue of the patents is superior to the equitable claim of the United States to avoid the patents and the title under them for fraud or error in the issue of the former.

2. SAME—PURCHASERS UNDER RECEIVER'S FINAL RECEIPTS.

Purchasers in good faith, without notice, for value, of the equitable title evidenced by receivers' final receipts upon which patents subsequently issue, have a complete defense of a bona fide purchase unassailable by a suit of the United States to avoid the patents and the titles under them for fraud, perjury, or error in the procurement of the former.

3. SAME—RECEIVER'S FINAL RECEIPTS—NOTICE TO PURCHASERS.

Receivers' final receipts are notice to purchasers of the equitable title they evidence, that they are voidable by the Land Department for fraud or error at any time before the patents issue upon them, but they are not notice that the equitable titles they disclose were procured by fraud, perjury, or irregularity. On the other hand, they are prima facie evidence that the lands they describe were honestly and regularly entered, and that the entrymen who obtained them are entitled to the patents for the land.

4. EQUITY—RIGHTS OF GOVERNMENT AND OF INDIVIDUALS.

The equities of the United States appeal to a court of chancery with the same, but with no greater or less, force than those of an individual in like circumstances.

5. BONA FIDE PURCHASER OF EQUITABLE ESTATE—SUBSEQUENTLY ACQUIRED LEGAL ESTATE.

Where equities are equal, the law prevails. A court of equity will not interfere at the suit of a holder of a prior equitable title or claim to deprive an innocent purchaser for value of a junior equitable estate of a legal estate or advantage which he has subsequently bought or obtained after notice.

6. BONA FIDE PURCHASER—DUTY OF INQUIRY.

Where a vendor presents conveyances to himself prima facie valid, and assures the purchaser that his title under them is perfect, no duty to in-

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¶ 1. See Public Lands, vol. 41, Cent. Dig. § 368.

vestigate farther is imposed upon the buyer in the absence of other facts and circumstances suggesting investigation.

7. SAME—ORDER OF ACQUISITION OF ELEMENTS IMMATERIAL.

The concurrence of the essential elements of good faith, absence of notice, payment of value, and legal estate in the purchaser at one time constitutes a complete defense of a bona fide purchase. The order in which these elements were acquired is not material.

(Syllabus by the Court.)

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

For opinion below, see 124 Fed. 393.

This is a suit to avoid 44 patents issued under the stone and timber act of June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], and all conveyances of the patented lands or of the timber upon them. The patentees and their immediate and remote grantees are defendants and appellees. The suit was commenced on April 5, 1902. The United States alleged in its amended bill that each of the patentees agreed before entering the land that the entry should be made for the Martin-Alexander Lumber Company, a corporation of Arkansas; that, if no such agreement was made, each patentee made his or her entry on speculation; that immediately after the lands were entered each of the entrymen and each of the entrywomen, with the exception of three, conveyed the timber growing on his or her land to the Martin Company; that patents were issued to all these lands between February 23, 1900, and May 9, 1901, and that on January 14, 1901, the Martin Company sold and assigned all the contracts for the timber on the lands to the Detroit Timber & Lumber Company, a corporation of Michigan, which had knowledge of the character of the entries and of the frauds which had been perpetrated in making them. The Detroit Company answered that the lands were regularly and lawfully entered and patented; that 41 of the patentees sold the timber on their lands to the Martin Company shortly after they entered them; and that on January 14, 1901, it purchased the timber contracts and all the other property of the Martin Company. It denied that the lands were entered on speculation, and that any agreement had been made that any of them should be entered for the benefit of the Martin Company. It denied that it had any notice or knowledge that any of the lands had been fraudulently entered before it purchased and paid for the timber contracts, or before the lands were patented; and averred that it bought and paid value for them in good faith, without notice of any fraud or defect in the title to them. The answer of the Martin-Alexander Company presents the same issues as that of the Detroit Company. The answers of the other defendants, if there were such, do not appear in the record, because the land without the timber is of no value. The salient facts disclosed by the evidence at the final hearing were these: The Martin-Alexander Lumber Company had a sawmill in the vicinity of the lands which are the subject of this controversy, and it was desirous of obtaining timber to manufacture into lumber. E. B. Martin owned 58½ per cent. of the stock of this corporation, and, with the exception of one share, A. V. Alexander controlled all of the remainder, which was owned by himself, his wife, and J. O. Means. Copeland was an employé of the company, and an intelligent and influential man. He obtained a copy of the act of June 3, 1878, consulted with one of the officers of the local land office relative to its proper construction, and told Alexander and Martin that he knew honest men who he thought would enter land of the government under this act if they could borrow the money to pay for it. Martin replied that he would loan such men money for that purpose. The stumpage value of the timber was 50 cents per thousand feet, and the Martin Company was offering and paying that price. At this price the average value of the timber on each 160 acres of this land was about $40 in excess of the government's price for the lands, which was $2.50 per acre, so that an entry was likely to entail no loss, and might yield the entryman some profit. Copeland informed some of his acquaintances of this situation and of the law, and asked them if they would like to enter some of the land. Others applied to him for this information, and he imparted it. The men and women thus informed made

the entries upon which the patents in suit are based. They were poor, and unable to pay for the land without borrowing money. Copeland assisted them to select the land and to make their entries. They made two journeys to the local land office, one to make their applications and one to pay for the land and obtain their final receipts. The Martin Company paid their traveling expenses upon these trips and the fees for the publication of the notices required by the statute. Twenty-five of the 44 patentees were employés of the Martin Company and 10 were wives of employés. When the time came to pay for the lands, the company loaned to each one of the patentees the amount required for that purpose, and he or his companion or agent paid for the land, and obtained the final receipt. Within a few days after the final receipt was obtained he made a promissory note for the amount he had paid for the land and interest at 8 per cent. per annum. He then made a written agreement with the Martin Company that in consideration of $1 and of the covenants recited therein he "has bargained, sold, and conveyed" unto the company all the timber and trees upon the land, and the right to enter and take them; that the company will pay him 50 cents per thousand feet scale measure for the lumber in the trees; that it has paid him the amount which he had borrowed and paid for the land, and that it will pay him the balance beyond that amount and 8 per cent. interest in monthly payments as the timber is cut and removed from the land. Upon the execution of this contract the note was canceled and surrendered. The transaction with all the entrymen but two and with all the entrywomen but one took the form which has been described. Two of the entrymen and one of the entrywomen refused to give notes or make timber contracts, although they borrowed the money and used it to pay for their lands. These three defendants entered their land July 5, 1900, and in April, 1901, they sold and conveyed it to the Detroit Company, through an agent of the latter, for the amount of their debts for the borrowed money and $75 each. The 44 entries were made at various times between August 21, 1899, and September 6, 1900, and the timber contracts were made immediately after the respective entries were completed. Patents were issued for all these lands prior to May 9, 1901. Thirteen of these patents were issued before January 14, 1901, and 40 before May 1, 1901. On January 14, 1901, the Detroit Timber & Lumber Company purchased all the property of the Martin Company for $60,000 and the assumption of its debts. The office and place of business of the Martin Company was in Pike City, Ark.; that of the Detroit Company in St. Louis, Mo., and U. L. Clark was its president. About December 20, 1900, Alexander went to St. Louis, and applied to Clark to purchase the property of the Martin Company for the Detroit Company. He requested Clark to purchase Martin's interest and to let him retain his interest. Clark declined, and told him that the Detroit Company would not purchase unless it could buy the entire property. Alexander then asked to be permitted to take stock in the Detroit Company for his interest. Clark replied that the latter company had no stock to sell; that he could not promise any; and that the purchase must be of the entire property of the Martin Company for cash; but that the Detroit Company might increase its stock, and, if it did so, it was possible that Alexander might obtain some. Alexander thereupon agreed that the entire property should be sold, and that he would sell his interest for cash at the same rate the Detroit Company should purchase Martin's interest, if the latter company did not increase its stock and pay him in that. Thereupon Clark sent the Detroit Company's inspector to Arkansas, and he examined the lands, and reported the amount of timber on them. Clark then went to Arkansas, and agreed with Martin to pay him $35,000 for his interest and that of J. O. Means on the basis of $60,000 for the entire property. Thereupon, on January 14, 1901, the board of directors of the Martin Company resolved that it sold all its property to the Detroit Company for $60,000 cash and the assumption of its liabilities; that the $60,000 should be divided among its stockholders in this way: to E. B. Martin, $34,850, to Mrs. B. M. Alexander, $24,850, to A. V. Alexander, $150, to J. O. Means, $150; that the sums due Martin and Means were then paid in cash by the Detroit Company, that the payment of the sums due the Alexanders was deferred until their application for stock of the Detroit Company was determined, and that, to relieve Martin, who resided in Chicago, from further attendance, his stock was transferred to Clark and to the Detroit Company, and

that Clark was elected temporary president of the Martin Company in the place of Martin, who resigned. The 41 timber contracts and deeds of other lands were then turned over to the Detroit Company. The Martin Company owed Martin $17,456.79, so that he was entitled to receive about $52,000 as his share of the proceeds of the sale. Clark gave him on that day in the form of a check of the Detroit Company $27,456.79, and he went to St. Louis with him immediately, and caused the Detroit Company to assign to him a promissory note of the Bodcan Lumber Company for $25,000, which it owned. As soon as practicable after this sale the affairs of the Martin Company were wound up. Clark disliked the trouble of keeping an account of the timber cut on the lands covered by the timber contracts, and between April 1, 1901, and September 10, 1901, he caused the Detroit Company to procure conveyances to it of the title to the lands held by 24 of the patentees who had made timber contracts, and from the 3 who had not made such contracts, so that by September 10, 1901, it held the legal title to the lands of 27 of the 44 patentees. The Detroit Company paid from $6.25 to $75 for each of these deeds, but it paid $25 for each of 18 of them. In fulfillment of the sale of January 14, 1901, the Detroit Company increased its stock, and on April 22, 1901, issued stock of the par value of $25,000 to the Alexanders in place of the cash due them from the sale. A formal deed of all its property by the Martin Company to the Detroit Company, dated March 1, 1901, and acknowledged May 2, 1901, was made and delivered on the latter date to the Detroit Company. Clark was not acquainted in Arkansas when he made this purchase. The deeds of the lands and the timber contracts were turned over to him. The timber on the lands covered by the timber contracts cost the Martin Company about $18,000, and this timber was but a part of the property for which the Detroit Company paid $60,000. Martin and Alexander told Clark when he made the purchase that all the people under whom the Martin Company held land or timber had patents or final receipts for their lands, and that the company's title to the timber was perfect. He believed their statements, had no suspicion that they were not true, and made no farther investigation of the titles. He always calculated that the title was all right if the party had a final receipt. Neither Clark nor any of the officers of the Detroit Company ever had any knowledge or suspicion that there was any fraud in the procurement or any defect in the title of any of the 44 patentees or in the title the company purchased until the last of September or the first of October, 1901, more than four months after it had paid all this consideration and had received its deed for the property, and more than four months after the United States had issued its patents to all the lands. Upon this state of facts the Circuit Court found that no one of the patentees entered his or her land on speculation, or made any agreement whereby the title to it should inure to any one except himself or herself, and dismissed the bill. The government challenges the decree of dismissal by this appeal.

F. A. Youmans and Fred A. Maynard (James K. Barnes, on the brief), for appellant.

W. E. Hemingway and James F. Read (Thomas C. McRea, J. B. McDonough, U. M. Rose, George B. Rose, and J. C. Pinnix, on the brief), for appellees.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

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

This is a suit in equity to enforce a forfeiture of the purchase price which the United States has received for certain of its lands, and to avoid the patents which constituted the consideration for the payment of this price. The act of June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], provides that upon certain conditions a citizen of the United States may purchase not exceeding

160 acres of certain lands of the United States, which are valuable chiefly for timber and are unfit for cultivation. One of the conditions of this purchase is that the applicant shall file with the register of the proper district a written statement under oath that he does not apply to purchase the land he seeks to buy on speculation, and that he has not made any agreement with any person or persons by which the title that he might acquire from the government would inure to the benefit of any person except himself. The act provides that, if any person who makes oath to this statement shall swear falsely in the premises, he shall forfeit the money he may have paid for the lands, and all right and title to them, and that any grant or conveyance he may have made, except in the hands of bona fide purchasers, shall be void. Forty-four of the defendants in this suit took this oath and entered, and paid the government price for 44 tracts of land at various times between August 21, 1899, and September 6, 1900. Forty-one of them conveyed the timber on their land to the Martin-Alexander Company immediately after they made their respective entries and obtained their respective final receipts. On January 14, 1901, the defendant the Detroit Lumber Company bought this timber of the Martin Company, and the consideration for that purchase was paid by it and the timber was conveyed to it before May 3, 1901. Patents were issued for all the lands before May 9, 1901. In the month of April, 1901, the Detroit Company purchased the lands of the three patentees who had declined to execute timber contracts, and the legal title to that land and to the timber upon it was thus vested in that company. Between April 1, 1901, and September 10, 1901, the company purchased the legal title to the lands entered by 24 of the patentees who had made timber contracts, and this title was duly conveyed to it. In the last days of September or the first days of October, 1901, the company for the first time learned that the United States was suggesting that these lands had been illegally entered, and on April 5, 1902, the government commenced this suit. The lands without the timber upon them are worthless, and the real controversy here is between the United States and the Detroit Company.

The suit presents two issues: (1) Whether or not the patentees applied to purchase the lands on speculation, or had made agreements before they filed their applications by which the titles they hoped to acquire would inure to the benefit of any person except themselves; and, if so, (2) whether or not the Detroit Company had knowledge or notice of that fact, so that the complainant is entitled in equity to an avoidance of the title to the timber which that company has acquired. The case of the government did not appeal with compelling force to the conscience of the chancellor below. He found the first issue in favor of the defendants, and dismissed the bill. This finding is vigorously assailed. If, however, the Detroit Company was a bona fide purchaser of the timber without notice of the alleged fraud and perjury of the patentees, it is not material to the issue between the government and that company whether or not the patentees were guilty of these crimes. The act of June 3, 1878, expressly exempts from avoidance

conveyances in the hands of bona fide purchasers. The evidence which conditions the issue of the fraud of the patentees is voluminous and contradictory, and for the purpose of the consideration of the other issue, which, if determined in favor of the Detroit Company, must practically dispose of this case, it is conceded that each of the patentees applied to enter the tract which he or she secured on speculation, or that he or she, before making the application, had made a contract whereby the title to the lands would inure to the benefit of the Martin-Alexander Lumber Company. The question then becomes, had the Detroit Company any notice or knowledge, actual or constructive, of this conceded fact, before it completed its purchase of the timber? It bought the timber contracts, together with all the property of the Martin Company, on January 14, 1901. It made its first payment of $27,456.29 in cash on that day, its second payment of $25,000 a day or two later, and its final payment of $25,000 of stock on April 22, 1901. The timber contracts, the deeds for the lands bought, and the possession and control of the property of the Martin Company were delivered to the Detroit Company on January 14, 1901, and the formal bill of sale and deed upon May 2, 1901. It is not material at what date prior to the 2d day of May, 1901, this sale is deemed effective, because the notice to the Detroit Company or the lack of it remained the same during all this time. On January 14, 1901, when the sale was initiated, receiver's final receipts had been issued to all of the 44 patentees, and patents had been delivered to 13 of them. On May 2, 1901, when the sale was completed, patents had been issued to 40 of them. The Detroit Company was dealing with the Martin Company at arm's length. It was the vendee; the Martin Company was the vendor. The latter exhibited its contracts and deeds, and declared that the titles under them were perfect, and that every grantor under whom it held had a patent or a final receipt for his land. Clark, the president of the Detroit Company, who conducted the negotiation and made the purchase, examined and checked the contracts and deeds, believed the statements of the officers of the vendor, and completed the purchase. The evidence is clear, positive, and without dispute that neither the Detroit Company nor its officers ever had any knowledge or suspicion that any of the lands here in controversy were irregularly or fraudulently entered until the latter part of September, 1901, more than four months after the purchase had been completed and after all the patents had issued.

But counsel for the government maintain that, although the purchaser had no actual notice, it had legal or constructive notice of the fraud in the entries of the lands, (1) because there was no actual sale of property by the Martin Company to the Detroit Company, but a mere merger of the two corporations into one; (2) because notice sufficient to put a person of ordinary prudence on inquiry is notice of all that a reasonably diligent investigation would disclose, and the Detroit Company had such notice; (3) because the timber contracts were not conveyances, but mere executory agreements to convey; and (4) because a legal estate is indispensable to the defense of a bona fide purchase, and the final receipts, which had not ripened into patents when the Detroit Company made its purchase, evidenced equitable titles only,

and constituted notice that their issue was induced by fraud and perjury. Let us consider these arguments in their order.

The complainant alleged in its bill, the defendant admitted in its answer, and the evidence demonstrated that the Martin Company sold, assigned, and transferred the timber contracts to the Detroit Company on January 14, 1901. No merger of the two corporations was pleaded; none was proved. The transfer of the stock of Martin in his company to Clark and to the Detroit Company and the substitution of Clark for Martin as president of the former company when the sale was made was nothing but a means to an end, a device to effect the sale and to transfer the immediate possession and control of the property to the vendee. That transfer was not intended to merge, and it did not merge, the two corporations into one, nor did it charge Clark or the Detroit Company with notice of any of the acts or transactions of the Martin Company of which he was not otherwise aware. In his relations to the Martin Company and to its grantors, the United States and the entrymen and entrywomen, Clark was still the agent and representative of the purchaser, and not of the seller. There is no evidence in this record that notice of facts sufficient to put a person of ordinary prudence on inquiry for fraud and perjury in the applications for the purchase of these lands was ever given to the Detroit Company, or to any of its officers, before it consummated its purchase; nor is there any evidence that a reasonably diligent inquiry would have discovered fraud or perjury if it had been instituted. Clark saw the timber contracts, and received the assurance of the vendor that all the grantors in them had patents or final receipts for their lands, and that the title under them was perfect. These were all the facts relative to this matter of which Clark received notice. The contracts were such as any entryman might lawfully make under the opinion of the Supreme Court in U. S. v. Budd, 144 U. S. 154, 163, 12 Sup. Ct. 575, 36 L. Ed. 384. They were not of the same date, but were executed at various times between July, 1899, and September 6, 1900. There was nothing here to incite a reasonably prudent man to inquire for fraud in the entries of the land. Nor would a reasonably diligent inquiry have discovered any fraud. If the question had been put to the entrymen, to the entrywomen, to Martin, and to Alexander, they would have answered with a single voice that the statements in the applications were true, for they have so testified here. If inquiry had been made of the officers of the land department, they would have replied that there was no falsehood in the statements and that the entries were lawfully and regularly made, for they issued the final receipts and the patents upon them in that belief.

Nor was there any duty upon this purchaser, in the absence of other facts suggesting inquiry, when the seller presented conveyances to it apparently valid, and gave its assurance that they vested perfect titles in it, to make further investigation. The presumption always is, in the absence of countervailing evidence, that men tell the truth and that bills of sale and deeds prima facie valid are actually so, and purchasers may lawfully act upon this presumption. Jones v. Simpson, 116 U. S. 609, 615, 6 Sup. Ct. 538, 29 L. Ed. 742. "Where a person has not

actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question." Ware v. Lord Egmont, 4 D. M. & G. 460, 473; Sugden on Vendors, 622; Wilson v. Wall, 73 U. S. 83, 91, 18 L. Ed. 727. "What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell." Meehan v. Williams, 48 Pa. 238, 241; Townsend v. Little, 109 U. S. 504, 511, 3 Sup. Ct. 357, 27 L. Ed. 1012; Colorado Coal Co. v. U. S., 123 U. S. 307, 316, 319, 8 Sup. Ct. 131, 31 L. Ed. 182; Crawford v. Neal, 144 U. S. 585, 595, 12 Sup. Ct. 759, 36 L. Ed. 552. The notice to the Detroit Company meets none of these tests of constructive notice where actual notice is absent.

The next contention is that the timber contracts conveyed nothing but an equitable claim to the title of the grantors in them to the timber, because they were executory contracts to sell, and that, therefore, the Detroit Company could not be a bona fide purchaser, because it acquired no legal estate under them. But the contracts were not executory agreements to sell, but absolute conveyances in præsenti of the timber growing upon the land. They therefore vested in the Martin Company and its grantors an interest in the real estate. White v. Foster, 102 Mass. 375; Russell v. Myers, 32 Mich. 522.

Finally, counsel for the government say—and this seems to be the argument upon which they most implicitly rely—that acquisition of the legal title was indispensable to the defense of a bona fide purchase; that the legal title to all but 13 of the 44 tracts was in the United States when the Detroit Company purchased; that the title to the timber on these 31 tracts which the Detroit Company bought was a mere equitable title evidenced by the final receipts; that these receipts constituted notice to the Detroit Company that they had been secured by the fraud and perjury of the entrymen and entrywomen, and that the company could not divest itself of this notice by the subsequent issue of the patents and the acquisition of the legal title which inured to it thereunder. There are many reasons why this argument is not persuasive. In the first place, conceding for the present, without admitting or deciding this to be the law, that a legal estate in the vendee is an essential condition of the defense of a bona fide purchase, such an estate vested in the Detroit Company before it received any notice of the alleged fraud. In the second place, the patents, when issued, related back to the dates of the applications upon which they were founded, and vested the legal estate in the timber in the Detroit Company as of the date of its purchase from the Martin Company, and before it had notice of the fraud. And, in the third place, the Detroit Company was an innocent purchaser for value, in good faith, of the equitable title to the timber, evidenced by the final receipts, and the legal title vested in it by the issuance of the patents before the government assailed either.

Counsel for the government cite in support of their position that one who innocently purchases the equitable title evidenced by receiv-

ers' final receipts, and subsequently acquires the legal estate evidenced by patents issued upon them, is charged with notice of fraud and perjury in the inception of his title from the government, and cannot be a bona fide purchaser. U. S. v. Steenerson, 50 Fed. 504, 1 C. C. A. 552; American Mortgage Co. v. Hopper (C. C.) 56 Fed. 67; Id., 64 Fed. 553, 559, 12 C. C. A. 293, 299; Diller v. Hawley, 81 Fed. 651, 655, 26 C. C. A. 514, 518; Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157; U. S. v. Bailey, 17 Land Dec. 468; Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; Parsons v. Venzke, 164 U. S. 89, 91, 17 Sup. Ct. 27, 41 L. Ed. 360; Guaranty Savings Bank v. Bladow, 176 U. S. 448, 453, 20 Sup. Ct. 425, 44 L. Ed. 540; California Redwood Co. v. Litle (C. C.) 79 Fed. 854; Id., 87 Fed. 1004, 31 C. C. A. 591. But these authorities fail to sustain the proposition. They are cases in which the final receipts which evidenced equitable titles were avoided by the officers of the Land Department before the legal estate had been vested in the innocent purchasers. In these cases the courts held that the receiver's final receipt is prima facie evidence of the right of the entrymen to a patent; that the power is vested in the Land Department to set this aside and to cancel the entry it evidences for fraud or error after proper notice to the parties in interest, and in this way to take away from the innocent purchaser his prima facie evidence of title; that this power is not arbitrary or unlimited, but its exercise is always subject to judicial inquiry; that it is limited in duration to the time anterior to the issue of the patent; and that the avoidance of the receipt and the cancellation of the entry do not strike down the right of the purchaser to enforce the equitable title which he has purchased in the courts of the land, but that its effect is to compel him to sustain that title by evidence de hors the receipt. But the case in hand is not ruled by these conclusions. The Land Department did not avoid, it confirmed, the voidable title which the Detroit Company purchased by adding to it the legal title. The receiver's final receipts were not notice of fraud and perjury in their procurement. They were notice of honesty and legality in the proceedings that induced their issue. They were prima facie evidence that those who received them had the right to patents to the lands, and they raised the legal presumption that entrymen and officers alike had complied with the law. They were notice to the Detroit Company of the power of the Land Department to avoid them for fraud or error before the patents were issued, and of no other defect or danger, and the authorities cited for complainant express no different opinion. The Detroit Company took its equitable title to the timber subject to this notice, and subject to the possible exercise by the Land Department of this power. That department exercised the power, as the legal presumption was that it would exercise it, by affirming the validity of the voidable titles and by issuing the patents upon them. Here the effect of the notice from the purchase of the equitable titles ceased. The only reason that purchase gave notice of a voidable title was the fact that it did not acquire the legal title. The moment the legal estate inured to the benefit of the Detroit Company by the issue of the patents without notice of any fraud or irregularity in their procurement, its defense of a bona fide purchase was complete. It contained every essential element

of a complete defense except the legal title before the patents were delivered. It was the lack of the legal title, and that alone, that made its defense vulnerable in the Land Office. When the patents had issued, the power of the Land Department had ceased, and the Detroit Company's position was conditioned by every attribute of that of a bona fide purchaser. Conceding that the indispensable elements of such a defense are absence of notice of the fraud or defect, good faith, payment of value, and the legal estate, it is not material at what time or in what order the purchaser acquires them. It is only necessary that they all concur in him at the same time. It is indispensable to this defense that the consideration should be paid before notice of the defect. But it is not essential that it should be paid before or at the time the title is conveyed. It is sufficient if the payment is completed at any time before notice of the defect is received. It is not more essential that the legal title should be secured before or at the time when the consideration is paid. It is enough if it is acquired before notice of the alleged fraud or perjury is fastened upon the purchaser.

The legal title to the timber upon 13 of the tracts in dispute vested in the Detroit Company on January 14, 1901, when it purchased of the Martin Company. Its defense to the attack upon the title to the timber upon these tracts did not, however, become complete until April 22, 1901, when it finished its payment of the purchase price of the property. Its title then became unassailable at the suit of the government for fraud or perjury which induced the issue of the patents. U. S. v. Winona & St. Peter R. Co., 15 C. C. A. 96, 109, 67 Fed. 948, 961; U. S. v. Burlington & M. R. Co., 98 U. S. 334, 342, 25 L. Ed. 198; U. S. v. California & Oregon Land Co., 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354. On May 9, 1901, four months before it received any intimation of any defect in its title and eleven months before this suit was instituted, the patents to the other 31 tracts had issued, and the legal estate in the timber upon them had been vested in the Detroit Company. The purchase price had been paid in full. The legal title had been acquired. No notice of any fraud or perjury in the inception of, or of any defect in, the title which it had bought, and which had passed from the complainant to it when the patents were issued (Sandels & H. Digest, § 699), had been received. Why was not its defense that it was a bona fide purchaser impregnable? No satisfactory answer to this question has occurred to us, and our conclusion is that one who purchases in good faith and pays value for the equitable title to land of the government evidenced by the receiver's final receipt, and who subsequently, and before receiving notice of any fraud or defect in h title, acquires the legal estate through the issue of the patent, is a bona fide purchaser, and his title is unassailable at the suit of the United States to avoid the patent for fraud or perjury of the immediate or r mote grantors of the purchaser. Colorado Coal Co. v. U. S., 123 U. S. 307, 309, 322, 8 Sup. Ct. 131, 31 L. Ed. 182; U. S. v. Clark (C. C.) 125 Fed. 774, 776.

Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances. Bona fide purchasers are the especial favorites of courts

of equity. In Boone v. Chiles, 10 Pet. 177, 209, 9 L. Ed. 388, Mr. Justice Baldwin, in delivering the opinion of the Supreme Court, said:

"A court of equity can act only on the conscience of a party. If he has done nothing that taints it; no demand can attach upon it so as to give any jurisdiction. Sugd. Vend. 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30–34), which a court of equity imparts liberally."

Conceding now, for the purpose of the remainder of this discussion, that the Detroit Company purchased and paid for the equitable estate evidenced by the final receipts in the first instance, and that it did not acquire the legal title until the patent issued, what has that company done to taint the conscience of any one, or to entitle the government to any relief against it in this suit? The record discloses nothing. The general rule in chancery is that, where equities are equal, the defendant prevails; that it is only when the case of the complainant appeals to the conscience of the court with the greater force that it will interfere to grant relief. St. Johnsbury v. Morrill, 55 Vt. 165, 169; 2 Pom. Eq. Jur. § 739; Colyer v. Finch, 5 House of Lords Cas. 694, 706; Medlicott v. O'Donel, 1 Ball & Beatty, 156, 171. Here the equity of the government is far less persuasive than that of the Detroit Company. The former has received and still retains $17,000, the purchase price which it fixed for these lands; and it asks this court that the timber upon them, which constitutes their only real value, be taken from the defendant, which has innocently bought and paid for it, and restored to the complainant. It issued its final receipts, which were prima facie evidence of a right in the grantees therein named to the title to these lands, and the Detroit Company purchased and paid for the timber upon them in reliance upon these certificates, without notice of any fraud in their procurement. The company seeks no relief, but prays only that it be permitted to retain that which it bought and paid for in good faith, while the complainant seeks to keep the purchase price of the property which it sold and to recover back the property itself. The equity of the defendant is the stronger. Not only this, but the Detroit Company has added to its equitable title the legal estate in the timber. Where equities are equal, the law must prevail. A court of equity will not interfere at the suit of the holder of a prior equitable title or claim to deprive the innocent purchaser for value of a junior equitable estate of equal strength of a legal title which he has subsequently bought or obtained after notice of the defect. It will not disarm a bona fide purchaser, or take from him the shield of any legal advantage. 1 Story, Eq. Jur. (13th Ed.) § 64c; 2 Pom. Eq. Jur. § 766; Bosset v. Nosworthy, 2 Leading Cases in Equity (4th Ed.) 71; Bayley v. Greenleaf, 7 Wheat. 46, 57, 5 L. Ed. 393; Lea v. Polk County Copper Co., 62 U. S. 493, 498, 16 L. Ed. 203; Dueber Watch-Case Mfg. Co. v. Dougherty, 62 Ohio St. 589, 596, 57 N. E. 455; Zollman v. Moore, 21 Grat. 313, 321. In Dueber Watch-Case Mfg. Co. v. Dougherty, one Coburn held stock in the company, for which he had paid nothing, and which he had agreed to transfer back to the corporation. While this stock

stood in his name he induced Dougherty and another to indorse his note by making an agreement with them that he would subsequently transfer the stock to them as collateral security for his liability to them upon their indorsement. At the time when the indorsement was made the indorsers had no notice of the right of the company to the stock, but they received notice of that right before Coburn assigned the stock to them. After this notice Coburn made the assignment. The court sustained the claim of the indorsers, and said:

"And here it will be observed that the claim of the company is not that of an innocent purchaser for value. Its claim is that of a mere equity for a reconveyance, prior in time, to the equity of the plaintiffs. The contest is simply between equities. In such cases the settled doctrine is stated by Pomeroy to be 'that, if a second or other subsequent holder, who would otherwise be postponed to the earlier ones, obtains the legal estate, or acquires the best right to call for the legal estate, he thereby secures an advantage which entitles him to priority. It is absolutely essential that he should have acquired his equitable interest without any notice of the prior claims.' Pomeroy, Eq. § 727; also section 729; Adams, Eq. 161, 162. * * * The plaintiffs seem to be clearly within the rule here stated. They had no knowledge of the company's claim when they acquired their equity, and had a right to protect it by taking an assignment of the stock for that purpose, which they did on January 7, 1892, though at that time they had knowledge of the company's claim. This gives to them an unquestioned priority over the company, and the right to a sale of the stock for the satisfaction of their claim."

The case at bar falls far within the rule which these cases illustrate, and differs from them only in the fact that the Detroit Company not only received no notice of the alleged fraud before it purchased its equitable estate, but it received no notice of it until it had also acquired the legal title to the timber.

For the reasons which have now been stated, perhaps at too great length, the United States is not entitled to recover from the Detroit Company the timber which it purchased, to enjoin it from removing that timber from the lands, or to avoid the conveyances which vested the title to the timber in the company.

For the same reasons the government is not entitled to a decree avoiding the patents or the subsequent conveyances of the 27 tracts of land which the Detroit Company purchased and obtained deeds of from the entrymen and entrywomen before it had notice of any defects in the titles, and before this suit was commenced.

There remain 17 tracts of land the title to which still stands in the original applicants and patentees. The Detroit Company owns the timber upon these lands, and has the right to remove it according to the terms of the timber contracts. The land without the timber is of little, perhaps of no, value. The evidence in this record has convinced, not that these applicants made any agreements by which the title which they might acquire should inure to the benefit of any person except themselves, but that each one of them applied to enter the lands he or she obtained on speculation for the use and benefit of the Martin-Alexander Lumber Company and not in good faith to appropriate it to his or her own exclusive benefit. The salient facts which were proved in this case and which have forced our minds to this conclusion appear in the statement which precedes this opinion, and no good purpose would be subserved by restating them here.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to enter a decree to the effect that the patents issued to the defendants John H. Scott, Thomas J. Clements, Jim P. Copeland, John H. Wilson, Robertson C. Gregory, Martha Gregory, Joseph O. Means, Archibald G. Winslow, Caroline H. Means, Emma Winslow, James F. Patterson, Gus C. Copeland, George T. Colston, Henry Jones, Sherman Garrison, Barbara Garrison, and Bill D. Copeland be avoided, with costs in favor of the United States against them and the Martin-Alexander Lumber Company, and that the complainant is entitled to no relief against the Detroit Timber & Lumber Company, and the bill against it and the other defendants not named above be dismissed, with costs. It is so ordered.

PATILLO et al. v. ALLEN-WEST COMMISSION CO.

(Circuit Court of Appeals, Eighth Circuit. August 8, 1904.)

No. 1,920.

1. LIMITATION OF ACTIONS—AMENDMENT OF PLEADING—RELATION TO BEGINNING OF ACTION.

An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the state, a plaintiff is only required in his pleading to state the facts which constitute his cause of action.

2. SAME—RULE APPLIED.

A complaint stated facts from which the law raises the legal presumption of a promise to pay the balance of an account stated, and demanded judgment for that amount. An amendment was made to this complaint by adding to it an averment of a promise to pay the balance of the stated account. *Held*, this amendment presented no new cause of action, but simply expanded the allegations in support of the cause of action presented in the original complaint, and the amendment related back to the commencement of the action, where the running of the statute of limitations against the cause of action upon the account stated ceased.

3. ACCOUNT STATED—ESTOPPEL TO DENY LIABILITY.

An account stated, conceded to disclose some just indebtedness received and retained by the debtor without objection for an unreasonable time, estops him, in the absence of fraud or mistake, from denying his liability for all the items it contains, and raises the legal presumption of his promise to pay the balance. A consideration and legal liability for each item outside of the stated account is not essential to sustain a cause of action to recover its balance. The balance is one debt, regardless of the items, and a consideration for that debt is sufficient.

4. TRIAL—COURT MAY WITHDRAW QUESTION OF FACT FROM JURY.

Where the evidence upon a question of fact is so clearly preponderant, or of such a conclusive character, that the court would be bound, in the

¶ 3. See Account Stated, vol. 1, Cent. Dig. §§ 31, 42.

exercise of a sound judicial discretion, to set aside a finding in opposition to it, it is its duty to withdraw the question from the jury and direct their finding.

(Syllabus by the Court.)

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

J. W. House (H. A. Tillett and M. House, on the brief), for plaintiffs in error.

J. M. Moore (G. B. Rose, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This is an action by the Allen-West Commission Company, the plaintiff below, a corporation, to recover of Smith, Patillo & Co., a partnership, a balance of an account current. This balance consists of three items—one of $1,025, due September 1, 1892; one of $1,198.75, due September 1, 1893; and one of $508, due September 1, 1894—for commissions on cotton not shipped, at the rate of $1.25 per bale. At the trial below the jury allowed the first two items upon the ground that they were parts of a stated account between the parties, and disallowed the third item, which is no longer in issue in this case.

The alleged error in the trial upon which the defendants place their chief reliance is that the cause of action upon the stated account arose in 1893, that it was barred by the statute of limitations in either three or five years thereafter, and that, although this action was commenced on April 25, 1895, the cause upon the stated account was first presented to the court below by an amendment to the complaint on July 15, 1903. This cause of action was undoubtedly barred by the statute of limitations if the effect of the amendment was not simply to vary or expand the allegations in support of the cause of action pleaded in the original complaint, but to introduce a new or different demand, not before presented in the pending suit. The rule of law upon this subject is that "an amendment to a petition which sets up no new cause of action or claim and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, not before introduced or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed." Whalen v. Gordon, 95 Fed. 305, 309, 37 C. C. A. 70, 74; Railway Co. v. Wyler, 158 U. S. 285, 289, 298, 15 Sup. Ct. 877, 39 L. Ed. 983; Railway Co. v. Cox, 145 U. S. 593, 601, 606, 12 Sup. Ct. 905, 36 L. Ed. 829; Sicard v. Davis, 6 Pet. 124, 8 L. Ed. 342; Van De Haar v. Van Domseler, 56 Iowa, 671, 676, 10 N. W. 227; Jacobs v. Insurance Co., 86 Iowa,

145, 53 N. W. 101; Buel v. Transfer Co., 45 Mo. 563; Scovill v. Glasner, 79 Mo. 449, 453; Crofford v. Cothran, 2 Sneed, 492; Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; Eylenfeldt v. Steel Co., 165 Ill. 185, 46 N. E. 266; Railroad Co. v. Campbell, 170 Ill. 163, 167, 49 N. E. 314; Christy v. Farlin, 49 Mich. 319, 13 N. W. 607; Flatley v. Railroad Co., 9 Heisk. 230, 237; Buntin v. Railway Co. (C. C.) 41 Fed. 744, 749; Newton v. Allis, 12 Wis. 378; Railroad Co. v. Smith, 81 Ala. 229, 1 South. 723. The only question here presented, therefore, is whether the amendment merely expanded the allegations in support of a cause of action upon a stated account which was propounded in the original complaint, or introduced a new and different cause and made a new demand which was not before presented in this action.

This is the third appearance of this case in this court, and its history is interesting. In the original complaint the plaintiff alleged that in the early part of the year 1891 the defendants applied to it to advance moneys to them to be used in their business of purchasing cotton, and agreed to ship to it 100 bales of cotton for every $1,000 advanced to them in the spring and summer of each year, and that, if they failed to ship that amount, they would pay to the plaintiff $1.25 for each bale of the deficiency each year as long as they retained the use of the plaintiff's money; that during the year 1891 and during subsequent years the plaintiff transacted business with the defendants, and advanced money to them; that "during the continuance of said business down to and including the year 1893 it furnished the defendants at stated periods, and at other times when requested, statements of the accounts between them, which were received without objection; that at the end of the year 1893 plaintiff furnished the defendants a statement of account showing a balance due it for advances made by the plaintiff to the defendants, and for commissions on cotton which defendants had theretofore failed to ship to plaintiff under and in accordance with the aforesaid agreement, whereupon shortly thereafter defendants, without objection, paid plaintiff on said account the sum of $2,996.27, leaving a balance due plaintiff of $2,504.75, which sum, with interest thereon, and the further sum of $508.53, due for commissions on 407 bales of cotton, which under the understanding and agreement between plaintiff and the defendants, as aforesaid, defendants should have shipped to plaintiff during the season of 1893 and 1894, and did not ship, is now due by the defendants to plaintiff." The defendants, by their answer, denied the agreement, admitted the advances and the receipt of the statements of account, averred objections to them, and that the agreement was usurious. There was a trial, and a verdict for the defendants. Thereupon the plaintiff removed the case to this court, where the judgment was reversed because the court below refused to charge the jury that, in view of the plaintiff's letters and statements of account, and the silence of the defendants, they could not dispute the item of $1,025 charged in the statement rendered them for commissions on cotton not sold. Allen-West Com. Co. v. Patillo, 90 Fed. 628, 630, 631, 632, 33 C. C. A. 194, 196, 197, 198. In the statement preceding the opinion

then rendered will be found a copy of the complaint, and in the opinion a review of the letters, statements of account, and acts of the parties which led to this decision. At all the trials there have been introduced in evidence a statement of account rendered to the defendants on July 1, 1892, which contained the item, "To Com. on 820 b/c at $1.25, 1025," and disclosed a balance of $15,388.14 due from the defendants to the plaintiff, and a statement of account rendered December 20, 1893, which contained the item, "To Commissions on 959 b/c, deficiency season 1892-93, should have shipped 1033 b/c, while you only shipped 74 b/c C 1.25 1198.75," and presented a balance due from the defendants to the plaintiff of $5,364.58. In the first opinion rendered in this case this court said:

"As we view it, this was a factor's charge for commission under his contract with his principal, and related to the same subject-matter as the interest and other commissions; that it could not have been omitted from the account stated without thereby waiving the right to it, and binding the plaintiff to a stated account which did not include it; and when the defendants received it, accepted it, and acted and permitted the plaintiff to act upon it, it became a stated account against them, which could only be set aside by proof of fraud or mistake. * * * If the law will presume an agreement from silence in any case, we think it will in this case, and that the accounts which have been rendered by the plaintiff, and received by the defendants without objection, must be considered as stated or settled accounts, and as liquidated by the parties, as fully so as if they had been signed by both. The balance is a debt as a matter of contract implied by the law. It is to be considered as one debt, and a recovery may be had upon it without regard to the items which compose it. Atkinson v. Allen, 71 Fed. 58, 60, 17 C. C. A. 570, 572, 36 U. S. App. 255, 260; Porter v. Price, 80 Fed. 655, 657, 26 C. C. A. 70, 72, 49 U. S. App. 295, 300"; 90 Fed. 631, 632, 33 C. C. A. 196, 197, 198.

Upon the second trial the Circuit Court instructed the jury to return a verdict for the plaintiff for the amount of the three items in dispute, less a small amount of interest, upon the ground that no objection to the account rendered and no fraud or mistake in them had been proved. The defendants sued out a writ of error, and when it was presented to this court the record disclosed evidence that timely objection had been made to the third item of $508.75, which was due September 1, 1894, so that it was necessary to again reverse the judgment. The majority of the court expressed the view, in which the writer of this opinion has never been able to concur (Patillo v. Allen-West Com. Co., 108 Fed. 723, 730, 731, 47 C. C. A. 637, 644, 645), that, although the complaint stated the facts from which a legal presumption of a promise to pay the balance of a stated account necessarily arises, it failed to state a cause of action upon an account stated, because it did not contain an express averment of the legal conclusion, the promise to pay the balance.

When the case returned to the court below for the third trial, and on January 15, 1903, the plaintiff amended its complaint by adding to the allegations which it originally contained the averment that at the various times when the defendants received the statements of account without objection they promised to pay the balances which appeared thereon to be due. This is the amendment which is challenged upon the ground that it introduced a new

and independent cause of action not before presented in this suit. Conceding that the opinion of the majority of this court at the last hearing that the original complaint did not contain a perfect statement of a cause of action upon a stated account because it did not contain the averment of the implied promise to pay the balance is now the law of this case, this averment cannot be said to have introduced a new or different cause of action, or to have made a new or different demand from those presented in the original complaint. The demand under the amended complaint is for the same items and for the same amount as that under the original complaint. The cause of action upon the stated account was so clearly propounded in the first complaint that the court below twice tried it, and this court once reviewed its trial, before any defect in its statement was discovered. The fact that the complaint stated two good reasons—the alleged contract and the stated account—why the plaintiff was entitled to a recovery, in no way detracts from the sufficiency of the statement of either cause of action. The truth is that the averment of the promise to pay the balances of the accounts rendered, which the law implied from the facts stated in the original complaint, was nothing but the expansion of the allegations in that pleading in support of the cause of action upon the account stated. It was germane to the cause of action stated in the original complaint. It wrought no departure from that pleading. The amendment which introduced it was properly allowed by the court below, and it related back to the commencement of the action where the running of the statute of limitations against the cause of action upon the account stated ceased. The contention that this cause of action was barred by the statute of limitations because it was not presented until this slight amendment to its statement was introduced cannot be sustained.

G. W. Smith, one of the defendants, testified that in the latter part of the summer of 1893 he told Exall, an agent of the plaintiff, that it was claiming that he made a contract to pay commissions on cotton not shipped, that the plaintiff had charged these commissions in some account rendered, that he had never made an agreement of this nature, and that the defendants could not and would not pay the commissions. This is the only evidence in the record of any objection to the statements of account or to the commissions for cotton not shipped prior to the month of February, 1894. Exall testified that Smith never had any such conversation with him. Allen, a witness for the plaintiff, testified, and Smith denied, that the latter agreed to pay commissions on cotton not shipped in the spring of the year 1891. The accounts which contain the charges of the two items of commissions in controversy were sent to the defendants on July 1, 1892, and December 20, 1893, respectively. In a letter to the defendants dated April 3, 1891, the plaintiff wrote: "Your Mr. George Smith has been here, and has returned home. He informed us that from this time forward your firm will do all your business with us and will guarantee us a bale of cotton for every $10 of spring and summer advances." On October 29, 1891, the plaintiff wrote: "Your agreement was to ship

us a bale of cotton for every $10 of the spring and summer advances, or pay the commission on the same. Our desire is always to do the work by selling the cotton. We never like to charge commissions when the cotton has not been shipped, but, so far, we have received bills of lading for only 200 and odd bales." On February 24, 1892, plaintiff wrote defendants that they owed it $13,138.50, and requested a settlement. On April 11, 1892, the defendants wrote the plaintiff to sell all their cotton, and that they would make some satisfactory arrangement with it. On May 27, 1892, the plaintiff wrote to the defendants that, if they desired to keep its money, it wanted a clear understanding, such as it had the preceding year, that they would ship it 100 bales of cotton for every $1,000 carried over during the spring and summer, or would pay it $1.25 per bale for any deficit up to that amount; and the defendants answered that as soon as the plaintiff had sold all their cotton they would have a settlement, and make their account satisfactory. On June 24, 1892, the plaintiff wrote to the defendants that it charged them commissions as agreed between Smith and it at the rate of 100 bales of cotton for every $1,000 carried over the spring and summer; that they and G. W. Smith & Bro. owed it on September 1, $15,219; that they should have shipped 1,522 bales; that they did ship only 702 bales; and that the plaintiff was entitled under the agreement to commissions on 820 bales at $1.25 per bale, or $1,025, which it had charged to them. On July 1, 1892, it sent them a statement of account which contained this charge. On the next day the defendants wrote to the plaintiff a letter in which they remitted $5,000, and made no objection to the charge. On November 12, 1892, they wrote that they had been trying to get some cars to ship some cotton, and as soon as they could get them they would ship. On March 29, 1893, the defendants wrote to the plaintiff: "We write to know if we pay you, say $5,000, about the middle of April, how would it suit you to carry the balance over another year." The plaintiff answered on April 1, 1893: "If you pay us the $5,000 in the middle of April and guarantee to ship us 100 bales of cotton for every $1,000 carried over, or advanced in the spring and summer (which are the very best terms we can give anybody) of course we will carry the balance over for you, and if you fail to ship us cotton pay us commissions." The defendants replied: "You will please find $4,500 for our credit in account. Will write you again soon." On June 19, 1893, and again on November 11, 1893, the defendants wrote that, if they could get some money, they would pay the plaintiff all they owed to it. On December 15, 1893, the plaintiff sent the account which contained the second item of commissions upon cotton not shipped, and on February 15, 1894, the defendants wrote to it, apparently for the first time, that they never expected to pay it any money upon cotton not shipped, unless the courts decided otherwise.

It is assigned as error that in this state of the case the court charged the jury that there was no evidence to show that any objections were ever made to the two accounts within a reasonable time, and that it refused to instruct them that they should consider

and determine whether or not G. W. Smith objected to the commissions on cotton not shipped in the latter part of the summer of 1892, and whether or not this was an objection to the accounts within a reasonable time. But when the evidence upon a question of fact is so clearly preponderant, or of such a conclusive character, that the court would be bound, in the exercise of a sound judicial discretion, to set aside a finding in opposition to it, it is its duty to withdraw the question from the jury and direct its finding. Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434; Delaware, Lackawanna, etc., Railroad v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. Ed. 213. The testimony of Smith upon this question, in view of the denial of Exall, and of the writings which have been recited, and which so clearly portray the attitude of the parties during the two years when this account was current and during which the two itemized statements were rendered, is too incredible to sustain a finding that he made the complaint or objection to which he testified. The court rightly withdrew the question of timely objection to the accounts from the jury.

It is assigned as error that the court refused to instruct the jury that if they found that there was fraud or mistake in entering any of the items in the account they should deduct these items from the amount claimed by the plaintiff, and that it charged them that there was no evidence of any fraud or mistake that would justify a reexamination of the accounts, save in regard to two small items, which it specified, and directed the jury to disallow. A careful examination of the record, however, discloses no evidence sufficient to sustain a finding of fraud or mistake in the entry of any other item in these accounts. Our attention has been especially called to the testimony relative to $300 of the item of $1,025 charged in the account of July 1, 1892. This $300 consisted of a commission of $1.25 per bale on 240 bales of cotton not shipped, and it was based on a charge to the defendants on December 18, 1891, of $2,406.26, a balance of the account of the plaintiff against G. W. Smith & Bro. This $2,406.26 was the amount which G. W. Smith & Bro. owed to the plaintiff on September 1, 1891. It was the balance of the plaintiff's spring and summer advances to Smith & Bro., and this balance was charged to the defendants, who were their successors, on December 18, 1891. There was no agreement between G. W. Smith & Bro. and the plaintiff that the former should pay commissions on cotton not shipped. The plaintiff asserted and the defendants denied that this $2,406.26 advanced to Smith & Bro. in the spring and summer of 1891 fell within the disputed agreement between plaintiff and defendants. The evidence in the record discloses the fact that the right to charge every dollar of the commissions was in dispute at the trial as well as the right to charge that portion of the commissions which was based upon the $2,406.26. There was, however, no evidence that the charge of the $300 commissions based upon this balance was fraudulently or unintentionally made in the itemized account delivered to the defendants, or

that the latter did not receive the same notice of this charge, and did not become bound to pay it by their failure to object to it as firmly as they were to every other portion of the $1,025 of which it formed a part. Indeed, the evidence that this charge was not mistaken is full and clear. The plaintiff not only sent to the defendants the account which contained it on July 1, 1892, but on June 24th preceding they wrote them that "Smith, Patillo & Company and G. W. Smith & Brother owed us on the 1st of September, without interest, $15,219.00, so they should have shipped us 1,522 bales of cotton. They only shipped us 702 bales, so we are entitled to commissions on 820 bales, at the rate of $1.25 per bale, which was the agreement between Mr. Smith and ourselves. You probably saved money by not shipping the cotton as the market during cotton shipping time was declining, so we charge you with $1,025.00 commissions on cotton not shipped, as per agreement, which we hope you will find correct and satisfactory." There was surely no fraud, deceit, or concealment in this charge. It certainly was not made by mistake or inadvertence, for this letter shows that the amount of it was carefully computed upon the indebtedness of both Smith & Bro. and the defendants. The latter had complete notice of the charge, of the amount, and of the basis of it, and there is no evidence that it was through any mistake that they failed to object to it. There was no error in the charge of the court upon the subjects of fraud and mistake.

The question whether or not any agreement was made in 1891 to the effect that the defendants should pay commissions on cotton not shipped, the question whether or not the contracts of the parties were usurious, and the question whether or not the defendants were liable for the two items of $1,025 and $1,198.75 on an account stated were submitted to the jury for their determination. The court charged that, if there was a contract in 1891 to pay these two items, the plaintiff might recover upon that ground; and that, if the two accounts of July 1, 1892, and December 20, 1893, contained charges of these two items, and those accounts were received and retained by the defendants without making any objection to them within a reasonable time, then the plaintiff was entitled to recover these amounts whether there was any previous express contract to pay them or not. The latter portion of this instruction is assigned as error. But it is not indispensable to a cause of action for the balance of an account stated that the defendants should have been legally liable for every item in it upon some other ground before the itemized account is delivered. Such a rule would nullify the effect of the stated account, and destroy the cause of action upon it. The only legal effect and virtue of an account stated is that it estops its recipient from denying his liability for the charges it contains, whether he was actually liable for them or not, and that it raises a legal presumption that he promised to pay the balance of the account. It is the law of this case, under the decision of this court in Allen-West Commission Co. v. Patillo, 90 Fed. 631, 632, 33 C. C. A. 197, 198, as well as the general and salutary rule upon this subject, that one may become bound by virtue of an account stated

to pay charges contained therein for which he was not previously legally liable. "The balance is a debt as a matter of contract implied by law. It is to be considered as one debt, and a recovery may be had upon it without regard to the items which compose it." 90 Fed. 632, 33 C. C. A. 198; Marye v. Strouse (C. C.) 5 Fed. 483, 496; Porter v. Price, 80 Fed. 655, 658, 659, 660, 26 C. C. A. 70, 73, 74, 75; Backus v. Minor, 3 Cal. 231; Young v. Hill, 6 Hun, 613; Bainbridge v. Wilcocks, Baldw. 536, Fed. Cas. No. 755; Freeland v. Heron, 7 Cranch, 147, 3 L. Ed. 297. There was no error in the instruction of the court upon this subject, or in its refusal to charge to the contrary.

For the same reason the challenge of the instructions of the court and of its refusals to instruct with reference to the liability of the defendants outside of the stated account to pay the items of $1,198.75 and $300, and with reference to the right of the defendants to a credit for 230 bales of cotton not credited to them in the account, cannot be sustained. The criticism of the charge and of the refusals to instruct might be worthy of consideration if the question to be considered now was whether or not there was error in the trial of the issue whether or not the charges and credits in the itemized accounts were correct. That is not the question we are now considering. The stated account estopped the defendants to deny its correctness. Counsel for the defendants concede—nay, more, they insist—that this record demonstrates the fact that the jury found that there was no agreement between the parties to the effect that the defendants should pay any commissions on cotton not shipped prior to the rendition of the itemized accounts. The evidence and the verdict of the jury sustain this contention. If there were any errors in the charge of the court or in its refusals to instruct the jury relative to the question of the defendants' liability under the alleged agreement of 1891, those errors were not prejudicial to the defendants, because the verdict was in their favor upon that issue. It is therefore useless to consider them, because error without prejudice is no ground for reversal.

The only question remaining is whether or not there was any error in the charge or the refusals to instruct as requested relative to the issue whether or not there was a stated account. Upon this issue the correctness of the items in the account was not open to dispute. The question was, in the absence of mistake and fraud, whether the accounts were received and retained for an unreasonable time without objection. Upon this issue there was no error in the instruction of the court, and, so far as the refused instructions related to this question, and were not embodied in the charge, they were either immaterial or incorrect. The answer to all the contentions of the defendants with reference to the items of the account is that upon the issue of stated account or not, where an account current of many items, some of which represent a just indebtedness, is delivered to the debtor, its receipt and retention without objection estops the recipient from denying liability for the items which it contains and the balance it discloses. It was not fatal to the cause of action upon the account that one or more of the items

in it were without consideration, provided there was a good or valuable consideration for other items which were merged in the balance. If there is a valuable consideration for the single debt evidenced by the balance, the promise to pay it implied by the law from the silent acceptance of the statement will sustain the action.

A careful examination of the various assignments of error to which reference has not been separately made, and of the record, satisfies us that there was no prejudicial error in the trial of this case, and the judgment below is affirmed.

LOCKARD et al. v. ASHER LUMBER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1904.)

No. 1,304.

1. FEDERAL COURTS—STATE STATUTES—STATE DECISIONS.
Where an action in the federal court depends on the construction of a state statute providing for the sale of state lands, the federal court is required to adopt the construction placed on the statute by the highest court of such state.

2. SAME—PUBLIC LANDS—SALE—PATENTS—STATUTES—CONSTRUCTION.
Rev. St. Ky. c. 102, § 3, provides that any person who wishes to appropriate any vacant and unappropriated lands, on application to the county court of the county in which the same lies, paying at such price as the court may allow, not less than $5 per 100 acres therefor, may obtain an order of court authorizing him to enter and survey any number of acres of such land in the county, not less than 25 nor more than 200. *Held*, following the decisions of the Kentucky Court of Appeals, that such act did not preclude the survey of several tracts of 200 acres each by the same person, and that a patent for lands so surveyed was not void on its face because it conveyed more than 200 acres.

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

For opinion below, see 123 Fed. 480.

Morris & Newberger, A. E. Wilson, and Holt & Alexander, for appellants.

W. B. Dixon and Beckner & Jouett, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit in equity to quiet the title to a tract of land in Harlan county, Ky., containing 40,400 acres. Some of the defendants demurred and others answered. To portions of the answers the plaintiffs filed exceptions. The plaintiffs claimed under a patent issued by the state of Kentucky to C. O. Lockard, their devisor, on November 4, 1873. The patent was issued under chapter 102 of the Revised Statutes of Kentucky, which took effect July 1, 1852. The question raised by the demurrers and exceptions was

¶ 1. State laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

See Courts, vol. 13, Cent. Dig. §§ 957, 959.

whether a patent issued under that act for a greater quantity of land than 200 acres was or was not void on its face. The defendants below claimed it was. The court below, in an able opinion, upheld this claim, sustaining the demurrers and overruling the exceptions. From this an appeal has been taken.

Section 3 of the act in question, under which the patent was issued, provided as follows:

"Any person who wishes to appropriate any vacant and unappropriated lands, may, on application to the county court of the county in which the same lies, and paying at such price as the court may allow, not less than five dollars per hundred acres, therefor, obtain an order of court authorizing him to enter and survey any number of acres of such land in the county, not less than twenty-five nor more than two hundred.

"1. The party obtaining such order may, by an entry in the surveyor's book of the county, describing the same, appropriate the quantity of land it calls for in one or more parcels, as he may think proper.

"2. The surveyor shall survey the entries in the succession in which the same are made, bounding the same by plainly marked trees, stones, or stakes, noting where it binds on a watercourse, or the marked line of another survey, giving names. It shall be made in the presence of two disinterested housekeepers as chainmen, whose names must be placed at the bottom of the plat and certificate.

"3. Such survey must be made within two months from and after the date of the entry.

"4. A plat and certificate of the survey must be made out by the surveyor and recorded in his books, and the original thereof, and a copy of the order of the court under which it is made, must be deposited in the register's office within four months after the survey is made.

"5. A patent may issue on the survey within three months after a plat and certificate thereof, and a copy of the order are filed in the register's office.

"6. When a survey has been carried into grant, the register shall write across the face of the order on which the survey was made, 'satisfied,' and sign his name thereto.

"7. The legal title of the land shall bear date from the time of making the survey.

"8. None but vacant land shall be subject to appropriation under this chapter. Every entry, survey, or patent, made or issued under this chapter, shall be void so far as it embraces lands previously entered, surveyed or patented.

"9. A plat and certificate of survey shall be assignable, and the assignment thereof shall authorize a patent to issue thereon to the assignee.

"10. The register may receive plats and certificates of survey after the expiration of the time herein allowed for returning the same; but, in such case, the legal title shall take effect only from the date of the patent.

"11. No land shall be subject to appropriation under this chapter that has reverted to the commonwealth by escheat, or has been forfeited for an omission to list the same for taxation, or for failing to pay the taxes thereon, or which has been once patented and the title of the same has in any way become again vested in the commonwealth."

The construction of this statute—the ascertainment whether it does or does not prohibit the issue of a patent for more than 200 acres—is obviously a Kentucky question. The federal courts follow the rule laid down by Chief Justice Marshall in Polk's Lessee v. Wendal, 9 Cranch, 87, 97, 3 L. Ed. 665:

"In the cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construction of the states, where that construction is settled and can be ascertained."

The statute has been before the highest court of Kentucky in six cases. Register v. Reid, 72 Ky. 103, decided October 21, 1872; Breathitt Coal, Iron & Lumber Company v. Strong, 51 S. W. 189, 21 Ky. Law Rep.

302, decided in 1899; West v. Chamberlain, 58 S. W. 584, 22 Ky. Law Rep. 687, decided in 1900; American Association, Limited, v. Innis, 60 S. W. 388, 22 Ky. Law Rep. 1196, decided in January, 1901; and Uhl v. Reynolds, Register, 64 S. W. 498, 23 Ky. Law Rep. 759, and Nickels v. Commonwealth, 64 S. W. 448, 23 Ky. Law Rep. 778, both decided in September, 1901.

The patent demanded in Register v. Reid appeared to be for an additional tract of 200 acres only, but, as developed in Breathitt, etc., Co. v. Strong, was ultimately issued for 154,800 acres, the patent in the latter case being the identical one issued because of the decision in the former. The patent in American Association, Limited, v. Innis covered 12,400 acres, that in Uhl v. Reynolds, 200,000 acres, and that in Nickels v. Commonwealth 34,800 acres. The patent before us was issued after the decision in Register v. Reid, and it is claimed, upon the faith of it, in accordance with the resultant practice of the register's office. Up to the time of the decision it was a doubtful question whether a person could purchase and obtain by patent more than 200 acres. Orders had been obtained and surveys made by the same person for more than 200 acres, and pending the decision acts had been passed in March, 1872, authorizing the issue in certain counties of patents upon such orders and surveys. This was, in effect, a legislative decision or declaration with respect to the question pending in Register v. Reid. The statute itself contains no inhibition against the obtaining by one person of several orders and surveys, nor any against the inclusion in one patent of several orders and surveys thus obtained. The inhibitions contended for are implied from other provisions and what is asserted to be the policy of the law. Obviously, the fundamental question was whether several orders and surveys could be obtained by the same person, for, if one person could obtain several orders and surveys, there would seem to be no reason why the state should not grant a patent covering them. What the state had a right to sell, it would seem to have the right to convey, and in one instrument. Polk's Lessee v. Wendal, 9 Cranch, 87, 95, 3 L. Ed. 665; Smelting Co. v. Kemp, 104 U. S. 636, 653, 26 L. Ed. 875. The statute authorizes any person who wishes to appropriate any vacant land to apply to and obtain from the county court an order authorizing him to enter and survey not more than 200 acres. This limits the order to 200 acres, but that is the extent of it. A subsequent paragraph provides that "a plat and certificate of survey shall be assignable, and the assignment thereof shall authorize a patent to issue thereon to the assignee." In view of the presence of this provision, the lack of any express inhibition, and the supposed policy of the act, the court held in Register v. Reid that there was no limitation on the number of orders the same person might obtain; in other words, no limitation on the number of acres a person might purchase from the state under this act. Respecting the policy of the law, the court said:

"This court knows judicially, moreover, that before the adoption of the Revised Statutes nearly or quite all of the lands of the state of much value for farming purposes had been appropriated, and that the chief value of the residue consisted in the timber and minerals they contained; and it is not certain that the prohibition contended for might not operate to prevent their appropriation

for those purposes, and tend to deprive the commonwealth of the revenue which they would yield in the hands of private owners." 72 Ky. 105.

And regarding the practice of the land officers, it is said:

"If, however, the meaning of the statute, so far as it involves the question under consideration, is so obscure or doubtful as to require a resort to other tests than those already mentioned for a solution of the difficulty, much weight is due to the fact that from the adoption of the Revised Statutes, over twenty years ago, until this controversy arose, the same construction which we adopt has, as we believe, been acquiesced in by the people, and acted upon by that department of the government having official duties to discharge under the law in relation to the appropriation of public lands." 72 Ky. 106.

But it may be and is urged that Register v. Reid only held that more than one patent for 200 acres might be issued to the same person, and not that a patent for more than 200 acres might be so issued. This is true unless the second proposition follows from the first. And, indeed, it is hard to understand why, in the absence of an express prohibition, one patent for 400 acres might not be issued if two patents for 200 each could. If the state could sell and grant to Lockard 40,400 acres, there would seem to be no reason why this grant should not be clearly expressed in a single instrument. Why require 202 patents, with all the accompanying trouble, expense, and confusion? As Judge Pryor pointed out in his dissenting opinion in Register v. Reid, the more patents and the more descriptions, the greater the liability to interference and confusion. Accordingly, what Register v. Reid practically decided was that a person may obtain as many orders, not exceeding 200 acres each, as he cares to buy, and unite them in one patent by proper surveys. Evidently, Judge Pryor knew this would be the effect of the holding, for he says:

"While this case now before us only involves the right to enter an additional 200 acres of land, I am well aware from the argument and agreed facts that it is but a test case, and that there are those who have surveyed thousands of acres now clamoring at the register's door for patents."

The case of Breathitt Coal, Iron & Lumber Company v. Strong, supra, decided 26 years after Register v. Reid, shows plainly what the effect of the holding was. This case involved the validity of a patent to Stephen G. Reid, issued June 15, 1872, for 154,800 acres, which excluded 25,000 acres "of patented and otherwise appropriated land, which is deducted from the calculation." The outer boundary was described by courses and distances, but the excluded land was not. Counsel presented the objection urged in this case that the patent was for more than 200 acres, but the court, in an opinion by Judge Paynter, sustained the validity of the patent, stating that the only question which merited consideration was whether the patent was void by reason of the failure to describe the excluded boundaries, and, commenting on certain cases, held it was not. The court below explained the neglect to discuss the question before us by saying that the patent involved was the very patent which the register had been directed to issue in Register v. Reid, and that, therefore, the question as to the invalidity of the patent on the ground that it covered more than 200 acres was treated as res adjudicata. But obviously the question was not res adjudicata, for the additional patent demanded in that case was for only 200

acres, and, if the court treated it as not meriting consideration, it was because the court had in view not only the technical, but the real and practical, holding in Register v. Reid. The court knew that, as a result of that decision, patents had properly issued not only to Reid, but to many others, for tens of thousands of acres in Kentucky, each covering more than 200 acres.

Following the Breathitt Case came the case of West v. Chamberlain, supra, decided in October, 1900. The patent in this case covered many thousands of acres. It was claimed it was void for uncertainty, because there were in fact no surveys on which the patent was based. The court below overruled these objections, and was sustained by the Court of Appeals. It does not appear that the question in the case before us was either presented or considered, but the court must have been aware that the patent was for many times 200 acres. It is said, however, there was an act passed in 1868, which made this patent, granted in 1855, good. But if, under the general law, the patent was palpably bad, and a special act alone saved it, certainly the court would have referred, in its opinion, to the special act.

The next case is that of the American Association, Limited, v. Innis, supra, decided in 1901. The land involved was situate in Bell county, and was patented in October, 1871. Sixty-two patents, each for 200 acres, were issued to Innis. The court below sustained these patents. It was sought in the Court of Appeals to have them held void on the ground they had been obtained fraudulently because the entries of the orders and surveys were in the names of fictitious persons, and the assignments to Innis forged; also, because the tract covered by the 62 patents was surveyed by laying out a base line and platting the patented tracts on this line. Both these contentions were overruled, the court saying that Bell county was not complaining of any fraud in the transaction, and the appellants were in no position to complain. The decision in Register v. Reid was referred to as controlling, the court saying:

"However much we might be inclined to dissent from the views expressed in that opinion as an original proposition, it must be regarded as settled law, as vast pecuniary transactions have been made on the faith of it, and any departure therefrom would involve in ruin many innocent purchasers of vacant land taken up exactly as it was in that case and this one." 60 S. W. 391, 22 Ky. Law Rep. 1201.

In the case of Uhl v. Reynolds, Register, supra, the validity of the Cheever patent, issued June 14, 1872, for land in Clay county, was sustained. This patent, as appears in the dissenting opinion of Judge O'Rear, was for 200,000 acres. In sustaining it, the court said:

"In the brief filed by the very able counsel for appellee it is first contended that under the statute as it existed at the time this survey was made not more than 200 acres of land could be appropriated by a single individual, referring to section 3 of chapter 102 of the Revised Statutes, which was in force at the time this survey was made; and that for this reason the patent was against the public policy of the state and consequently void. In response to this contention it may be said that it was held in the case of the Register v. Reid, 9 Bush, 103, by this court, in construing this identical statute, that the same person could purchase and patent several orders of the county court, each for 200 acres or any less number; and, whilst this opinion has been more or less criticised by the profession, it has been uniformly followed by this court in

numerous subsequent decisions, and vast property rights have been acquired on the faith of it, and any departure therefrom at this late day would involve in ruin many innocent purchasers of vacant land taken up as it was in this case." 64 S. W. 499, 23 Ky. Law Rep. 761.

The court goes on to point out that the validity of the Cheever patent does not rest alone upon the construction of the statute in Register v. Reid, but is sustained by the acts approved March 9, 1872 (1 Acts 1871–72, p. 562, c. 487), and March 27, 1872 (1 Acts 1871–72, p. 74, c. 827), which we have referred to. There is a dissenting opinion in this case by Judge O'Rear, who begins by saying:

"It may be noted at the outset that the majority opinion finds no merit in the acts in question to uphold appellant's claim to 320 square miles and more of the public lands of this state. It rests solely on the fact that it is supposed previous decisions of this court have already settled the law involved in the case, and therefore it is but following the path heretofore made by the court that the result is reached."

He then examines the case of Register v. Reid, and points out that all that case authorized was the issue of more than one patent for 200 acres to the same person, and, taking up the acts of March 9 and 27, 1872, calls attention to the fact that they were passed while the case of Register v. Reid was pending, and before it was decided, and only authorized what Register v. Reid subsequently held, namely, that the same person might obtain more than one order for 200 acres, and have the same surveyed and patented. Neither authorized a warrant to be granted, nor a survey made, nor a patent issued for more than 200 acres. We are disposed to agree with Judge O'Rear's construction of these two acts. If the holding in Register v. Reid did not warrant a patent for more than 200 acres, these acts did not. Judge O'Rear concedes that under Register v. Reid and these acts Cheever was entitled to 1,000 patents of 200 acres each, provided he had entered and surveyed 1,000 separate tracts under his 1,000 orders; but he points out that what happened was this:

"In the first place, the land was never actually surveyed before the patent issued. One assuming to be a county surveyor (but who was not, and was not even a de facto officer), sitting in his office, by protraction upon a private map of the county, without marking a tree (merely adopting one marked for another line), platted one thousand 200-acre tracts upon an imaginary base line. Upon this proceeding Cheever obtained one patent for 200,000 acres." 64 S. W. 503, 23 Ky. Law Rep. 767.

Towards the close of his opinion the judge says:

"The majority opinion stakes its warrant upon the suggestion that it is the fixed law of this state since the date of Register v. Reid, supra, that patents such as the one herein upheld are valid." Page 769, 23 Ky. Law Rep., page 504, 64 S. W.

And he concludes with a strong assault upon the premises and the policy of the decision, ending by saying he is in favor of overruling it.

It is clear from a reading of the opinion and the dissenting opinion in this case that the question before us was considered and passed upon, and that the highest court of Kentucky held, following Register v. Reid and other cases, that a patent for 200,000 acres could be issued to a person holding orders covering that number of acres, although no actual surveys of the separate and distinct tracts were made. It will

not do to say that the decision turns upon the acts of March, 1872, and that the references to Register v. Reid were dicta. It is obvious that it was the holding of the court in Register v. Reid which was controlling. The dissenting judge showed his appreciation of this when he ended his opinion by asserting his readiness to join in overruling that case.

In Nickels v. Commonwealth, supra, a patent for 34,800 acres in Letcher county, issued May 16, 1873, was upheld. The patent was based on 174 warrants for 200 acres each. It was insisted there were no separate surveys of the several tracts, that only the entire boundary was surveyed, and a plat was made by running a base line and platting the land in blocks of 200 acres. The court, sustaining the patent, said:

"The arguments that are so earnestly pressed upon us by appellee's distinguished counsel and elaborated in the dissenting opinion of Judge O'Rear in the case of Uhl v. Reynolds were forcibly stated by Judge Pryor in his dissenting opinion in Register v. Reid, 72 Ky. 103, and for us now to take this view, and hold a patent issuing for more than two hundred acres to be void, would be for us now substantially to adopt the rule urged by Judge Pryor in that dissenting opinion, notwithstanding the fact that this court has sustained numbers of patents under this statute, similar to the one before us, on the authority of the majority opinion in that case. There is no provision of law inhibiting the inclusion of several surveys in one patent. It being settled that one person might at the same time make two surveys, each of two hundred acres or more, at his election, the land office issued patents upon these surveys including in one grant as many surveys as were desired at the request of the patentee. When there was no statute forbidding this, and such patents have time and again been recognized by this court, after large sums of money have been invested on the faith of this practice of the land office and these decisions of this court, it would be, in our judgment, a departure from well-settled legal principles for us now to declare such patents invalid." 64 S. W. 449, 23 Ky. Law Rep. 780.

Judge O'Rear dissented on the grounds given in Uhl v. Reynolds, Register, and, in addition, called attention to the fact that there never was an actual survey of the land embraced in the patent, and never an entry of the respective warrants for 200 acres.

It is stated that counsel for the appellees in the case before us filed a petition in the Court of Appeals of Kentucky for a modification of the opinions in the Uhl and Nickels Cases, calling attention to the case at bar, then pending in the lower court, stating the validity of the Lockard patent depended solely upon the meaning of the Revised Statutes, there being no special act applying to Harlan county, and asked the modification on the ground that, if the opinions were adhered to, they would conclude the questions raised in the Lockard case. But the court adhered to its statement that there was no provision of law inhibiting the inclusion of several surveys in one patent, and that in issuing a patent covering as many surveys as were obtained the land office but followed a practice supported by the rulings of the Supreme Court of the United States in Polk's Lessee v. Wendal, 9 Cranch, 87, 3 L. Ed. 665, and Smelting Co. v. Kemp, 104 U. S. 648, 26 L. Ed. 875. Whatever view we might be disposed to take of the proper interpretation of this act, with respect to the matter involved in this case, if it were before us as an original question, our examination of the foregoing cases decided by the Court of Appeals of Kentucky constrains us to the conclusion that that court, in the exercise of its rightful authority, has

settled its construction, and settled it in favor of the validity of the patent before us.

The judgment of the lower court is therefore reversed, and the case remanded for further proceedings not inconsistent with this opinion.

TENNESSEE OIL, GAS & MINERAL CO. v. BROWN et al.

(Circuit Court of Appeals, Sixth Circuit. July 15, 1904.)

No. 1,295.

1. MINES AND MINING — CONTRACT—CONSTRUCTION—TERMINATION—ABANDONMENT.

A landowner, in consideration of one dollar, "as well as the agreements hereinafter mentioned," bargained, sold, and conveyed to plaintiff's assignor, his heirs and assigns, all the mineral, coal, iron ore, ore and potter's clay, and other minerals, etc., and all timber suitable for lumber on a certain farm described. The agreement required the grantee "to enter upon the land and make search for coal and other minerals," and, if they were found in such quantities as to justify him to work the same, then he was to pay $10 per annum after the completion of a certain railroad, and on request, until mining was commenced or during the continuance of the agreement, "to apply on the payment of rent of coal, iron ore, or other minerals, or oil first mined thereafter." There was no provision as to how long the agreement should continue, nor any stipulation as to when the grantee should commence to mine, or how long he should continue. *Held*, that such agreement did not constitute a conveyance of the minerals, timber, etc., to the grantee in fee, but constituted a mining lease, requiring the grantee to search for ores, etc., within a reasonable time.

2. SAME—EXPLORATION FOR MINERALS—EXTENT.

Where a mining lease required the grantee to make a search for minerals on the land within a reasonable time as a condition precedent to the right to take minerals discovered on the terms of payment specified, the duty of exploration included a search for all of the minerals named in the lease which might reasonably be expected to be found in the land, considering known geological conditions, to such an extent as would not only determine the presence or absence of minerals, but their commercial value, considering their abundance and accessibility.

3. SAME—ABANDONMENT.

Where a mining lease required the grantee to search for minerals within a reasonable time as a condition precedent to his right to take minerals from the land under the lease, his failure to make any search or examination, except a mere superficial one, of which the grantor had no notice, for a period of 15 years, entitled the lessor to treat the lease as abandoned.

4. SAME—TERMINATION—ELECTION.

Where a mining lease provided that the grantee might terminate the same at his election, the lease was terminable at the will of either party.

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

This is a bill to remove a cloud from the title to a tract of mineral land situated in Scott county, Tenn. The land in question is wild mountain land, situated in the Cumberland Mountains, and has little or no value, save for its timber and minerals. The plaintiffs are in possession and claim title in fee through conveyance made by one Richard Slaven, under whom the defendants also claim the mineral interest in said lands. The alleged cloud consists in a

prior conveyance or agreement of lease or license made by said Richard Slaven to one Geo. W. Colbert under whom defendants claim the mineral and timber interests in said land. This instrument is in these words:

"The said party of the first part, for the consideration of one dollar, to him in hand paid, the receipt of which is hereby acknowledged, as well as the agreements hereinafter mentioned does hereby bargain, sell, and convey unto the party of the second part, his heirs and assigns, all the mineral, coal, iron ore, ore and potter's clay, and other minerals, and all rock or petroleum oil and salines, and all timber suitable for lumber, in, upon, or under the farm or tract of land in the district of No. 1st, in the county of Scott, in the said state of Tennessee, bounded and described as follows: * * * Granting to the party of the second part, or his assigns, the exclusive right to enter upon said lands at any time hereafter, and search for coal, iron ore, and all other minerals, oils, and salines, and, when found, to remove the same from said lands, together with all rights and privileges incident to the mining and securing said coal, iron ore, clay, and other minerals, oils, and salines, including the right of ingress and egress. And the party of the second part agrees to enter upon and make search for coal and other minerals in said lands above described; and should he find coal, iron ore, or other minerals, or oils, or salines, in said lands and adjoining lands, of sufficient thickness, quantity, and quality to justify him, the party of the second part, to open and work said mines, or oils, or salines, then he, or his representatives or assigns, shall pay to the party of the first part, his heirs or assigns, within five years after the completion of a railroad, built in connection with any leading railroad by which said minerals or oil can be taken to any large markets, the sum of ten (10) dollars a year, until mining is commenced upon said premises, or during the continuance of this agreement; and the failure to make these advance payments yearly upon request, shall be deemed an abandonment of this agreement, but not to the injury of the party of the second part, or his assigns. And the party of the second part shall have the right to abandon said lands and mining at any time and remove all his buildings and fixtures from said lands. And the said party of the second part, by himself or assigns, agrees to pay to the party of the first part, his legal representatives or assigns, the sum of ten (10) cents for each ton of (2,240 pounds) of screened coal, iron ore, or other minerals mined and removed from said lands herein described; and the price shall be ten (10) cents per 1,000 feet of sawed lumber; and the price or rent for rock or petroleum oil and salines shall be one-twentieth of the net proceeds. But it is understood and agreed that any advance payments of ten (10) dollars as before mentioned to be paid yearly, that shall be made to the party of the first part, are to apply on the payment of rent of coal, iron ore, or other minerals or oil first mined thereafter. The payment of rent per ton on coal, iron ore, other minerals, clays, oils, and salines, mined and removed, shall be made half-yearly, and all payments required by this agreement shall be made and accepted in bankable funds of the state of Tennessee. It is mutually understood by the parties that the coal, clay, and ore under any dwelling house or other permanent buildings upon the premises shall not be mined out, and as little injury to the surface of said land shall be done as possible, in the mining, removal, and transportation of said coal, clay, and ore, as herein contemplated. It is also mutually understood that the stipulations herein contained shall apply to and bind the heirs, executors, administrators, and assigns of the parties, respectively. In witness whereof, the parties hereunto set their hands and seals the day and year first above written."

Upon the pleadings and evidence, the prayer of the bill was granted, and a cancellation of the instrument above set out decreed.

H. H. Ingersoll and Wm. Wisner White, for appellant.

E. G. Foster, C. E. Lucky, Edward T. Sanford, and J. A. Fowler, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

The contention of the appellant company is that the agreement be-

tween Richard Slaven and Geo. W. Colbert, set out in the statement of the case, is a deed of conveyance of the minerals in the land and of the timber thereon, which operated to vest a fee in the minerals and timber, subject to defeasance only upon breach of the agreement to pay $10, upon request, annually, after the completion of the railroad referred to. This construction is based upon the insistence that the terms "bargain, sell, and convey," found in the first clause of the instrument, necessarily characterize it as a conveyance of the timber upon and the minerals under the surface of the land of Slaven. Prima facie this may be true. But before we give these words this construction we must look into the four corners of the agreement and give effect to the whole of the contract. The Cincinnati Southern Railroad was in prospect when this contract was made, and was constructed to a point within nine miles of this property within five years after this contract. But no railroad has been built connecting that railway with this property, and appellants say that they are not under covenant, implied or express, to construct such connecting road. Without such road they say the coal under this land cannot be profitably mined or the timber converted into lumber, and that, having the title to the coal and timber, and the title to any other minerals which may yet be found, they are under no obligation to mine the coal or other minerals, or cut down the timber, until it can be done to their advantage, and that they may hold this estate until such time as it suits them to remove the minerals or oil or timber, and that neither Slaven nor his subsequent lessees can complain because the instrument contains no agreement, express or implied, obligating them to begin or continue mining, if they should choose to begin. Though they have done nothing, and paid only the nominal consideration of $1 under this deed, they justify this nonaction for 25 years by the insistence that one may do as he will with his own, in the absence of a contract to do a particular thing, and that, not having agreed to mine the minerals upon said land, they are within their right in biding their time, and that, if they shall deem it advantageous to ever commence mining, they are under no covenant, implied or express, to mine any definite quantity, or continually, or until the mineral is exhausted, but may, if they see fit, "abandon said lands and mining at any time, and remove all buildings and fixtures," having reserved the right to terminate the estate vested at will.

The logic of the situation compels the learned solicitor for the appellants to take up this extreme ground, for otherwise their utter failure to do any valuable thing in pursuance of the agreement after the lapse of 25 years would be unaccountable. If in all the time past they have had the right to stand upon their claim to be the owners absolutely of the mineral interests thus severed, in law, from the land, and to refuse to develop and operate that interest, because that is the right of an owner of the fee, the same right to hold onto this estate for the next century is undeniable. That they may be required to pay $10 annually if a railroad shall ever be constructed from the Cincinnati Southern to this land they concede. But this concession is possibly inadvertent; for, although one clause of the agreement does provide for such a payment until mining commences, and that the failure to make these advance payments yearly upon request shall be deemed an abandonment

of this agreement, it is added, "but not to the injury of the party of the second part or his assigns." If it is true that the appellants have for $1 acquired the right to prevent Slaven or his assigns from using, exploiting, or mining the mineral interests upon or under his own land, and can at no time be required to convert the timber into lumber, or to open and operate the very valuable vein of coal now known to underlie its surface, to say nothing of the possibilities of iron ore, coal oil, and other minerals, the contract is one of the most unreasonable and one-sided which any court has ever been called upon to uphold. But this $1 was not the real consideration moving to Slaven, for the recital of the contract is that the consideration is one dollar in hand paid, "as well as the agreements hereinafter mentioned." Now, what are these agreements referred to? for before we may conclude that this is an out and out conveyance in præsenti of the timber and mineral interests owned by Slaven, we must scrutinize the agreements which constitute the real consideration, for in the "agreements" we are most likely to find the purpose, intent, and meaning of the instrument regarded as a whole.

First. We find that Colbert agrees "to enter upon said land and make search for coal and other minerals." Why shall he agree to do this, if already he is the fee-simple owner of the minerals that may be hidden there? Second. If he finds such minerals, what then? The agreement provides that, if they are found in such quantity and quality as to "justify him, * * * to open and work same, * * * then" he shall pay $10 per annum, after the completion of the railroad mentioned, and upon request, "until mining is commenced, or during the continuance of this agreement." But how long is this "agreement" to continue? There is no stipulation that he shall ever commence to mine, or, if he does, that he shall continue for one day, one year, or until the minerals developed by the "search" he agreed to make shall be exhausted. Upon the contrary, it is expressly provided that "he shall have the right to abandon said lands and mining at any time, and remove all his buildings from said lands." If we should concede that the technical effect of the words of bargain, sale, and conveyance found in the document was to vest in Colbert title to the mineral and timber interests referred to, without regard to the requirement that he should "enter upon and search for minerals" and should pay the stipulated rent of $10 only when his search shall satisfy him that the interests referred to existed in quantity and quality sufficient to "justify him * * * to open and work them," we could not reconcile the claim that this was a deed of conveyance passing the title, with this clause giving to him the right to abandon a fee in this "nether estate" at his will.

The divestiture of a vested legal title by "abandonment" is unknown at the common law, unless it result from some estoppel or adverse possession under a statute of limitations. 1 Cyc. Law, 6; East Tenn. Iron & Coal Co. v. Wiggin, 68 Fed. 446, 15 C. C. A. 510; Calloway v. Sanford (Tenn. Ch. App.) 35 S. W. 778. Manifestly this agreement obligated Colbert "to enter upon and make search for coal and other minerals." In the absence of a stipulation, he was bound to do this within a reasonable time. If this search developed nothing, the agreement was at an end. The payment of the stipulated sum of $10 per annum is

"to apply on the payment of rent of coal, iron ore, or other minerals or oil, first mined thereafter." Thus the parties regarded this annual payment as an advance rent payment, to continue "until mining is commenced, * * * or during the continuance of this agreement." This payment of rent is also contingent upon another matter, and that is the construction of a railroad. The payment of rent is to be made on request, "within five years after the completion of a railroad in connection with any leading railroad by which said minerals or oils can be taken to any large market." The annual payments provided for after mining should begin are called or described as "rents," a term characterizing the agreement as a lease or license, rather than as conveyance of the mineral interests.

These considerations lead us to the conclusion that the presence of words of conveyance are not sufficient to require us to hold that the effect of the instrument was to vest in Colbert the title to the timber or mineral interests in this land. The ruling intention, as ascertained from all parts of the agreement, should be given effect. It is difficult to believe that it was intended that title should pass until these minerals had been removed and as they were removed. The consideration to be paid could not be ascertained until that contingency arrived, for no price in solido is mentioned. Whether any mining should ever be done or any price ever paid were both dependent upon future events. The contract was, therefore, for a lease dependent upon conditions. That the exploration for minerals should be made within a reasonable time is of the very essence of the agreement, and a condition precedent to the accruing of the right to take the minerals discovered upon the terms of payment indicated. The failure to make such exploration within a reasonable time, and to make it with such thoroughness and certainty as to determine the existence of mineral or oil, would be fatal to the continuance of the agreement. Upon this, we think, this lease depended as a condition precedent. The case falls within the principles applied by this court in the cases of Allegheny Coal Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604, and Logan Gas Co. v. Grt. Southern Gas Co. (C. C. A.) 126 Fed. 623, and by the Supreme Court of Tennessee in Petroleum Co. v. Coal & Coke Co., 89 Tenn. 381, 18 S. W. 65. To the same effect are the cases of Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Conrad v. Moorehead, 89 N. C. 31; Knight v. Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

This duty of exploring for minerals meant for all of the minerals named which might reasonably be expected to be found, considering known geological conditions. The search actually made was not made until 1888 or later, a period of 15 years after the date of the agreement, a delay beyond all reason. When made, it was extremely superficial and valueless from any reasonable view. Coal exposed by washes on side of the mountain was observed, but the depth of the vein, the surface underlain, and character of the coal are as unknown today as upon the day of the lease. No effort seems to have been made to discover iron or coal oil. This kind of an investigation was delusive. The search was a purely nominal one, and not a faithful effort to comply with the

agreement. The Supreme Court of Tennessee, in the case cited above, said of such a requirement in a mining lease:

"The 'testing' should be so thoroughly done as to determine, not only the presence of such minerals, but their commercial value, considering their abundance and accessibility. The information resulting should be such as a prudent and experienced investor would desire to know before expending his capital in the digging of shafts or the erection of machinery proper for the profitable working of such a mine."

Slaven was never notified of even the superficial search made, nor that the lessee proposed to hold on and comply with the terms of the lease. No rent was paid or demanded. No taxes were paid. Not $1 was ever expended in endeavoring to make the lease productive to the lessor. In this situation of things Slaven clearly expressed his intention to avoid the agreement by making a new lease in 1890 to the appellees. Logan Gas Co. v. Grt. Southern Gas Co. (C. C. A.) 126 Fed. 623, 626; Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. 901; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

But, independently of any other ground, the general provision of this lease, authorizing the lessee to abandon whenever he should see fit, makes it a lease at the will of the lessee. An estate terminable at the will of one of the parties is determinable at the will of either, though it purports to be terminable at the will of one only. 1 Washburn, Real Property, 371 (side paging); Taylor's Landlord & Tenant, § 14; 18 Am. & Eng. Ency. of Law (2d Ed.) 182.

The decree of the court below is accordingly affirmed.

Following will be found the opinion of the court below:

CLARK, District Judge. For the purpose of determining the questions raised in this case, it is not regarded as important to characterize the instrument, the construction of which is involved, as either a lease or conveyance. It might be called either, and it would not substantially change the rights of these parties. It hardly is to be doubted that the paper operates as a severance of the mineral and surface rights in the tract of land embraced in the lease upon certain conditions, expressed and implied, and it certainly had the effect to vest in the party of the second part, to use the very language of the paper:

"The exclusive right to enter upon said lands at any time hereafter, and search for coal, iron ore, and all other minerals, oils, and salines, and, when found, to remove the same from said lands, together with all rights and privileges incident to the mining and securing said coal, iron ore, clay, and other minerals, oils, and salines, including the right of ingress and egress."

And it at the same time imposed upon that party the obligation:

"To enter upon and make search for coal and other minerals in said lands above described, and, should he find coal, iron ore, or other minerals, or oil, or salines, in said lands and adjoining lands, of sufficient thickness, quantity, and quality to justify him, the party of the second part, to open and work said mines, or oils, or salines, then he, or his representatives or assigns, shall pay to the party of the first part, his heirs or assigns, within five (5) years after the completion of a railroad built in connection with any leading railroad by which said minerals or oils can be taken to any large markets, the sum of ten (10) dollars a year, until mining is commenced upon said premises, or during the continuance of this agreement; and the failure to make these

advanced payments yearly upon request shall be deemed an abandonment of this agreement, but not to the injury of the party of the second part or his assigns."

An instrument like this, as is true of all instruments, must receive a reasonable interpretation, which would give effect to the plain intention of the parties, and not one which would defeat the intention of the parties. The instrument should be so construed as to confer substantial rights on the bargainee, and to furnish a substantial and valuable consideration to the bargainor. It should not be given such an interpretation as would render the paper wanting in mutual obligation, or such as would reduce it to a mere nudum pactum, as declared by Judge Lurton in the case of Petroleum Company v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S. W. 65. The construction must be given in the light of the surrounding circumstances which constituted the situation in which the parties were standing at the time the agreement was made, and such an interpretation must be given as will make the instrument consistent with the view that it is one which a reasonably sensible and intelligent man would have entered into, under the circumstances, and in the light of the situation in which the agreement was made and executed. According to the contention of the defendant, now, at the expiration of 30 years, the instrument is still in full force and effect, conferring upon the bargainee the right, indefinite as to time, which was vested by the agreement when first executed. As the bargainee's contention is, the bargainee now, at the end of 30 years, is vested with the same rights which it possessed when this contract was executed in February, 1873. If at any time in the indefinite future a railroad shall be built sufficiently close by the property to meet the views of the bargainee as to the conditions under which the property can be economically and profitably tested and operated, then for the first time an obligation will rest on it, under the contract, to proceed to test and to operate, or to give notice and abandon. All the right which the bargainors, or their assignees, possess, is to wait and to see whether, during the lifetime of this or any succeeding generation, conditions may arise which will cause the contract to commence yielding to the bargainors, or to the plaintiffs as assignees, a substantial consideration, or a royalty on mining operations, as contemplated when the contract was first entered into.

It is perfectly plain that, if this view can be sustained, it will be equally sound after the lapse of another period of 30 years, or 60 or 90 years. Under such a view clearly the bargainors, or assignees, could receive no benefit during their natural life, and it would be very probable, certainly very possible, that no benefit would accrue within a period of 100 years. It seems to me too plainly evident to admit of serious denial that an interpretation which makes such results possible cannot be sound. It is a construction which in all practical effect, for all practical purposes, implies no legal obligations upon the bargainee, or lessee, to explore, or discover, and to work the mines. It furnishes no substantial consideration to the bargainors, as contemplated by the contract, in the way of royalty on mining operations, and such a construction would convert the instrument into a mere voluntary option on the part of the bargainee to take advantage of this contract, if at

any indefinite time in the future the conditions of that locality make it to its interest to do so. There would, under such a view, be manifestly a gross want of mutuality in the agreement. On the contrary, if the agreement is to be construed as requiring the bargainee within a reasonable time to explore the land, and in the event minerals are found to diligently work the same, and in that way bring to the bargainors a share in the profits of mining operations, the agreement may be regarded as imposing mutual obligations, and as furnishing mutual considerations to support it, but otherwise not. This is the clear doctrine of the case just referred to, which in this respect is in full harmony with the cases of Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220, and Barnsdall v. Boley (C. C.) 119 Fed. 191.

Now it is in evidence that, at the time the original contract or agreement was made in 1873, the construction of what is now known as the Cincinnati Southern Railway, between Cincinnati, in the state of Ohio, and Chattanooga, in the state of Tennessee, was proposed, and it has in fact since been constructed. There is no doubt that this is one of the circumstances or conditions under which this contract was made, and that under a fair construction of the contract it must be held that this is the railroad referred to in the contract, after the completion of which, and within five years, the full obligations of the contract on the part of the bargainee were in force, and required action on the part of the bargainee, as contemplated by the contract taken as a whole, and such action as would in good faith carry out the clearly implied obligation to proceed; for as was said in Huggins v. Daley:

"There is always an implied, if not an expressed, covenant, for diligent search and operation."

If this be not the true construction, when will there ever be a railroad completed that will put into active operation the obligations resting on the bargainee under such an agreement? It is not to be doubted that leases similar to this have been taken upon bodies of land on either side of the great railway then proposed, and that the number of such leases and tracts of land may run into the hundreds. In the very nature of things, it is certain that there is no probability, or possibility, that third parties constructing railways will ever build them across, or so close to, these tracts of land as to relieve the bargainees of any expenditure or effort on their part to secure lateral or switch tracts reaching mineral property. If the output in mining operations would probably be so great as to induce a railway to build a branch line to any particular tract or tracts of land, this would only result after adequate exploration and development on the part of the bargainee under such a contract, and a showing to some through line of railway that the additional transportation business to be obtained in that way would justify the construction of a branch or spur track to the property thus explored, and which could be profitably operated; but according to the contention of the bargainee the bargainee has at no time been under any obligation to do anything of this kind, but is allowed to stand by and wait until the improbable condition shall arise when a railroad shall be built either on or so close to the tract of land as to require no effort and no expenditure on the part of the bargainee, and in this way the bargainee

is left to take all the speculative chances of the future, with the certainty that the bargainor has completely deprived himself of the power to render his property valuable for productive purposes. It is only necessary to state such a case, with adequate reflection on the grossly inequitable result, to force fair acknowledgment that such an interpretation is utterly unsound. Under this contract both parties took the chance that a railway connecting with the markets of the country would be constructed in the neighborhood of this property, and that when this was done the property would be diligently explored, and if found to justify mining operations, in view of the railroad thus built, whether five or ten miles from the property, or nearer, such mining operations were required to be commenced, and if diligent search for mineral deposits, with the proper test, disclosed that mining operations could not then be conducted profitably, it was an obligation on the part of the bargainee to abandon the enterprise under the contract, surrendering his rights under this agreement, and to notify the bargainor accordingly, and a clearly implied obligation or covenant required it to do this within a reasonable time, in all respects, where the time is not fixed by the written agreement.

In determining whether the property could be profitably developed and mining operations carried on, it was a part of the obligation and the concern of the bargainee to determine in that connection, and as a part of that question, whether such operations could be carried on by procuring or by building a lateral or branch railroad, or, failing in that, by wagon or animal transportation, from this property to the railroad thus completed. But it is clearly not a permissible construction of the contract to say that the bargainee may stand idle, and take no step whatever, and insist that it is not required to take any such step, until and when, if ever that shall happen, a railroad shall by chance be built upon, through, or on a line adjoining the property. What is thus said seems to indicate sufficiently the course of reasoning which I regard as applicable to this case, and by which it is apparent that I reach the conclusion that there has been here a forfeiture and abandonment of the rights conferred upon the bargainee by the agreement in question, by nonuser and by a total failure to comply with the clearly implied covenant requiring diligent exploration and operation on the part of the bargainee; and upon the authority of the cases before referred to I conclude that the bargainor is entitled to the relief sought, and it is so decreed.

This view seems to render it unnecessary that I should consider or decide other points raised in the pleadings and discussed in the arguments at bar.

SOUTHERN RY. CO. v. SIMPSON.

(Circuit Court of Appeals, Sixth Circuit. June 22, 1904.)

No. 1,292.

1. FEDERAL COURTS—STATE STATUTES—CONSTRUCTION—STATE DECISIONS—CONCLUSIVENESS.

The opinion of a state court of last resort, construing a state statute, is conclusive on the federal courts sitting in such state to the extent only of the precise question decided.

2. RAILROADS—INJURIES AT CROSSINGS—STATUTES—CONSTRUCTION.

Shannon's Code, §§ 1574–1576, requires every railroad company to keep some person on its locomotive always on the lookout ahead, and, when any person, animal, or other obstruction appears on the road, to sound the alarm whistle, put down brakes, and exercise every possible means to stop the train and prevent an accident, and renders a railroad company absolutely liable for an accident caused by a failure to comply therewith. *Held*, that such sections did not render the railroad company absolutely liable for a collision occurring in the daytime, while the engine was being operated backwards with the tender in front, and that the refusal of the court to charge that if the engineer was actually on the lookout ahead of his engine, and saw plaintiff's vehicle as soon as it could have been seen, as it approached and entered on the crossing, and the engineer immediately blew the alarm whistle, put down the brakes, and used every possible means to stop the train and prevent the accident, plaintiff could not recover, though the engine was being operated backwards, was error.

3. STATUTORY OBLIGATION—PLEADING—AMENDMENT—DEPARTURE.

Where a declaration in an action for injuries at a railroad crossing alleged that defendant wrongfully and negligently ran its engine and cars against plaintiff, when crossing its track in a lawful and prudent manner, it stated a cause of action at common law and under Shannon's Code, §§ 1574–1576, requiring every railroad company to maintain a lookout ahead on the locomotive, etc., and rendering the company absolutely liable for damages occasioned by failure to comply with the act, though such act was not referred to in the declaration; and hence the amendment thereof, by adding a count specially declaring liability under the statute, did not constitute a departure.

4. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for injuries at a crossing, under Shannon's Code, §§ 1574–1576, requiring every railroad company to keep some person on its locomotive on the lookout ahead, and certain other precautions, and rendering such company absolutely liable for injuries occasioned by a failure to comply with such sections, contributory negligence is no defense.

5. SAME—EVIDENCE.

Where a railroad company was not required by Shannon's Code, § 1574, to blow the whistle or ring the bell at a crossing at which plaintiff was injured, evidence tending to show a custom of the company, subsequent to the collision, to blow the whistle at such crossing, was inadmissible.

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

¶ 1. State laws as rules of decision in federal courts, see notes to Griffin v. Overman Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

See Courts, vol. 13, Cent. Dig. § 957.

The following is the opinion of Clark, District Judge, in the court below, on motion for new trial:

It is not deemed necessary to go over the facts of this case in detail. It will be sufficient to say that I have no doubt, on the facts of this case, that the plaintiff was guilty in law of contributory negligence. The doctrine which exempts him from imputed negligence of the hack driver is not to be understood as exonerating him from the consequences of his own personal negligence, and a man of full years and intelligent judgment is not permitted to get in the conveyance of another person, and approach and attempt to go over a dangerous crossing like this, without saying one word or doing one thing for the safety of himself. It is in his power either to suggest to the driver of the conveyance to stop, or to look, or to listen, or to take some other precaution reasonably suggested by the dangerous situation. If the driver should fail to do so, the passenger has the right to insist that the conveyance shall be stopped, and that the passenger be allowed to get out and discharge the duty of reasonable care for the protection of his own life, and it would be a startling announcement to say that the fact that imputed negligence is not recognized would, in its consequences, authorize a man to omit any precaution whatever to take care of himself. The decisions of the state Supreme Court, as I read and understand them (though the point is not free from doubt), so construe the statute of the state as to render the railroad company absolutely liable for an accident which occurs while a train is being moved by an engine coupled to that train with the tender in front, or when the engine is running backward. The Supreme Court seems not to have thought or considered whether, indeed, in many cases, the duty required by the statute might not be better discharged in this way than by having the engine headed forward. It would be difficult to find any substantial reason on which to base such a decision, but nevertheless it seems to be the established rule of that court, and such ruling is binding on this court. This being so, the right to recover could not be questioned, and it was the duty of the jury to assess the damages. The damages allowed should have been reduced by the plaintiff's contributory negligence.

There was one weak point in respect of the evidence introduced by the plaintiff, and that was the omission to sustain the plaintiff's own testimony by the surgeon or physician who had previously had charge of his surgical difficulties. It is not satisfactory, in fixing a serious responsibility on the defendant, to do so on the unsupported testimony of the plaintiff himself, who is without medical education or training, and a very interested party, it is needless to say. There is no doubt that whatever is in the plaintiff's case is the mere aggravation of previously existing injuries, and it is very doubtful if he has really suffered anything new, as distinguished from the mere aggravation of old injuries. I would have been much better satisfied with a verdict of $2,000 to $2,500 in this case, and, as the jury should have reduced the amount by contributory negligence, I think the verdict is excessive, and that the jury did not make such reduction. Conceding to the jury, however, the latitude which properly belongs to their discretion, I have concluded that the verdict may stand for the sum of $3,500, and that the plaintiff must agree to remit $1,000 of the recovery, or otherwise the verdict will be set aside and a new trial awarded. If the plaintiff shall voluntarily remit $1,000 of the damages, the motion for a new trial will be overruled. The plaintiff is allowed 10 days within which to signify to the clerk the course intended to be taken in this regard. If there is error in my reading and understanding of the Tennessee cases in relation to the statute, this is readily subject to review by the Circuit Court of Appeals, and the question is one which it may be very desirable and of practical importance to have reviewed.

Ordered accordingly.

Jourolmon, Welcker & Hudson, for plaintiff in error.

X. Z. Hicks, D. A. Wood, and Lucky, Sanford & Fowler, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The plaintiff below sustained an injury by collision with a railway engine while crossing the railway track at a road crossing. Upon the conclusion of all the evidence the court instructed the jury to return a verdict for the plaintiff, and submitted to them the question of amount of damages only. This instruction was predicated upon an interpretation of a provision of the Tennessee Code requiring railroad companies to exercise certain precautions in the operation of their trains to prevent collision with persons or objects on the track. That requirement is in these words:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

"Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur."

"No railroad company that observes, or causes to be observed these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company."

Shannon's Code Tenn. §§ 1574–1576.

The engine at the time of the collision was being operated backwards, the tender being in front. The court denied a request by the railroad company to instruct the jury as follows:

"If the engineer was actually upon the lookout ahead of his engine, and saw the vehicle in which plaintiff was riding as soon as it could have been seen as it approached and entered upon the railroad crossing, and immediately blew the alarm whistle, put down the brakes, and used every possible means to stop the train and prevent the accident, then plaintiff cannot recover, notwithstanding the engine was at the time being operated backwards, because this would be a full compliance with the Tennessee statute."

Touching the meaning of section 1574, Shannon's Code Tenn., set out above, District Judge Clark said to the jury:

"The statute does not, according to any just import of the language, require that the engine and tender shall be run headforemost, or that it shall not be run with the tender in front, as was being done in this case; and as an original proposition it is difficult to find any ground upon which to put an interpretation on the statute which would make it mean that it prohibits the railroad company from running its engine with the tender in front, if it chooses to do so, or that it requires any more than, if the engine is so run, that some one shall be kept on the lookout ahead, and be in a position to see ahead."

The learned judge, however, deemed himself precluded from the right to exercise an independent judgment as to the meaning of the statute, because he was under obligation to follow the interpretation of the statute by the Supreme Court of Tennessee in the case of Railroad v. Dies, 98 Tenn. 655, 41 S. W. 860, and accordingly instructed the jury that the running of an engine backwards was a violation of the statute, and the company liable for any collision, without regard to whether the "engineer was in a position to see, and did see, and did comply with all the requirements of the statute."

Neither the case of Railroad v. Dies, nor any other Tennessee case, has ever involved the precise question presented by the instruction de-

nied, or required the Tennessee court to decide that the statute was violated whenever an engine was run backwards, without regard to the circumstances. Confessedly the statute does not in terms require the engine to run either backwards or forwards. A literal compliance with the statute would not under all circumstances be a compliance with its requirements. Thus the statute prescribes, among other things, that some person upon the locomotive shall always be upon the lookout ahead; but if the locomotive be at the rear of the train, or in the middle thereof, the spirit of the statute would not be obeyed, although some person upon the locomotive so situated should be always upon the lookout ahead. In such a situation the lookout upon the locomotive could not be upon the lookout ahead of the train, and the plain purpose of the statute would be evaded. Upon this consideration the Tennessee court held that the statute was not complied with by the operation of a train through the streets of a city by an engine in the rear. Railway Co. v. Wilson, 90 Tenn. 271, 16 S. W. 613, 13 L. R. A. 364, 25 Am. St. Rep. 693.

Neither does the statute in terms require an engine to be equipped with a headlight. But the effectiveness of a lookout would be practically destroyed by the neglect of a company to employ the ordinary means employed by railroad companies to make a lookout effective, and upon this consideration the Tennessee court construed the statute as having been violated by the operation of an engine upon a dark night without a headlight. Railroad v. Smith, 6 Heisk. 174. But this construction of the statute, by which it was read as requiring a locomotive to be equipped with a headlight when running at night, would not justify the requirement of a headlight when running in the daytime; for such an equipment would not add to the effectiveness of the lookout, and cannot by implication be added to the requirement of the statute under such conditions. In pursuance of the same considerations in respect of the implied requirement to make the lookout upon the locomotive effective as a lookout ahead, the Tennessee court in Railroad v. Dies, 98 Tenn. 655, 41 S. W. 860, held the statute had not been complied with by running a road engine backwards, without a headlight on the tender, through and across the streets of a city, at night. In the case last cited the effectiveness of the lookout upon the engine being run backwards was destroyed by the existence of conditions not found in the case now before us.

Under the facts of the Dies Case compliance with the statute in respect to a lookout ahead was impossible, and, as stated by Justice Wilkes, the railway company could not "absolve itself from all duty to comply with the requirements, because, forsooth, they had made it impossible to do so." But in the case under consideration the locomotive was being operated in daylight, and the absence of a headlight, which was the pregnant circumstance destroying the effectiveness of the lookout in the Dies Case, can cut no figure whatever. There was evidence in the case on hearing tending to show that the effectiveness of the lookout was not in fact impeded or lessened by the fact of the backward operation of the locomotive, and the request for an instruction submitted to the jury the question as to whether the lookout actually "saw the vehicle in which the plaintiff was riding as soon as it

could have been seen as it approached and entered upon the railroad crossing," and whether, when the object did appear upon the track, or within striking distance, all of the requirements of the statute were complied with, so far as was possible.

In every one of the cases cited above, and relied upon by defendant in error to establish the contention that the Tennessee court has authoritatively construed the statute as requiring the locomotive to be at all times run forwards, under penalty of absolute liability, without regard to circumstances, it plainly appeared that under the facts of the case the company had, to again quote from Railroad v. Dies, "placed itself in such condition as to be unable to comply with the statute" in respect to keeping an effective lookout ahead. If the facts in this case should establish that the company, in operating its locomotive backwards, did not "place itself in such a condition as to be unable to comply with the statute," but, upon the contrary, was in a condition to comply with the statute, and did in fact comply, it would be evident that this case is not necessarily governed by the case cited, but is plainly distinguishable.

We recognize the duty of following the construction placed upon a state statute by the highest court of the state. Western & Atlantic R. Co. v. Roberson, 61 Fed. 592, 604, 9 C. C. A. 646; Byrne v. K. C., Ft. S. & M. R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. That there are general expressions in the opinion of Judge Wilkes in Railroad v. Dies tending to support the contention that the statute is violated when an engine is run backwards, without regard to whether the company was thereby disabled from maintaining an effective lookout or not, must be conceded. But no such broad question was involved, and the actual decision was put upon the ground that the company had, by running its engine backwards at night, without a headlight, disabled itself from complying with that part of the statute requiring an effective lookout ahead. The opinion as a construction of the statute is authoritative to the extent of the precise question decided, and no farther. Nothing more was necessary to the determination of the rights of the parties to that controversy.

Concerning the authority of an opinion, Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat. 399, 5 L. Ed. 257, said:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This is the rule applied by the Tennessee court to its own decisions. In L. & N. R. R. Co. v. County Court, 1 Sneed, 639, 696, 62 Am. Dec. 424, it is said that:

"The reasoning, illustrations, or references contained in a judicial opinion are not authority, but only the points in judgment, arising in the particular case before the court. The generality of the language used in an opinion is, therefore, always to be restricted to the case before the court, and is only authority to that extent."

There is nothing in the statute itself which forbids its construction and interpretation according to the well-settled principles applicable to the interpretation of statutes generally, and there is nothing in the Tennessee decisions which forbids the application of the ordinary principles of interpretation, where the duty of applying and construing the statute is required. Thus the statute has been construed as not requiring impossibilities, and, if everything is done which it was possible to do to stop the train or prevent a collision after an object appears on the track, liability is escaped, although everything required by the statute had not been done. Railroad v. Scales, 2 Lea, 688; Railroad v. Swaney, 5 Lea, 119, 121. So, if to reverse the engine under the circumstances would seriously endanger the safety of the train, that requirement has been excused. Routon v. Railroad Co., 1 Tenn. Cas. 528; Railroad v. Troxlee, 1 Lea, 520.

The statute has been held not to apply at all in the yards of the company, or when engaged in switching operations. Cox v. Railroad, 2 Leg. Rep. 168; L. & N. R. Co. v. Conner, 2 Baxt. 385; Railroad v. Pugh, 95 Tenn. 419, 32 S. W. 311. Neither does the statute apply to the rear section of a freight train broken in two by accident, when the broken section is following by gravity. Patton v. Railroad, 89 Tenn. 372, 15 S. W. 919, 12 L. R. A. 184. We therefore reach the conclusion that the question of construction and application presented by the request of the defendant company was not authoritatively controlled by any decision of the Tennessee court, and that the request embodied a sound and reasonable view of the statute and should have been given, and that it was error to deny same and to instruct the jury to find for the plaintiff.

The plaintiff amended his declaration by the addition of a count which declared specially upon the liability of the company under sections 1574–1576 of Shannon's Tennessee Code, being the provisions heretofore set out, imposing liability upon railroad companies not observing certain precautions in the operation of their trains. The defendant pleaded the Tennessee statute of limitations of one year to this additional count, upon the theory that this amendment introduced a new cause of action against which the statute had run before action brought. This plea was stricken out, and this ruling is now assigned as error.

The statute prescribes the precautions to be observed to avoid collision with objects and persons upon a railway track, and imposes liability for all damages resulting to the person or object directly resulting from a collision when the precautions are not observed, and absolves the company from all liability when the requirements have been complied with. The original declaration stated as a cause of action that the defendant company had wrongfully and negligently run its engine and cars upon and against the plaintiff when crossing its track in a lawful and prudent manner. It did not refer to the statute. But this was unnecessary. The case stated, if made out, was a case against the company under the local statute, as well as at common law, and the plaintiff, without declaring upon the statute, was entitled to proceed against the company for negligent nonobservance of the requirements of the local statute, without especially declaring upon it. The statute was a public law of the state in which the injury had been inflicted, and

in which the suit was pending, and the court below was bound to take notice of such a statute, as well as of the principles of the common law. Stephens on Pleading, 347. The declaration was, before amendment, one under which, by the pleading and practice in the Tennessee courts, the plaintiff was entitled to rely upon the provisions of the statute. Railroad v. Pratt, 85 Tenn. 9, 1 S. W. 618. The amendment, by adding a count specially declaring under the statute, was not, therefore, a departure in law or fact from the cause of action stated in the declaration as originally filed, because the plaintiff could have relied upon statutory negligence, as well before as after the amendment. The case is clearly distinguishable from Union Pacific R. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, for this reason, as well as for other reasons which need not be alluded to.

The crossing where this collision occurred was not designated by a signboard, as required by the first paragraph of section 1574, Shannon's Code Tenn. Unless so designated, the company is not obliged to blow the whistle or ring the bell. Railroad v. McDonough, 97 Tenn. 255, 37 S. W. 15; Southern Ry. Co. v. Elder, 81 Fed. 791, 26 C. C. A. 615. The plaintiff below was permitted, over objection, to prove that the defendant nevertheless customarily blew for this crossing, and "that they now blow all the time." He had before testified that upon this particular occasion the whistle was not blown or the bell rung. At the time that this evidence was offered the plaintiff admitted that he did not rely upon the failure of the defendant to whistle as a ground for recovery, but desired to prove that it customarily did whistle, for its bearing upon the matter of his own conduct in going upon the crossing at the time and under the conditions shown by the evidence. The evidence was thereupon admitted. The court was asked to exclude any evidence of the habit of the company to whistle since the accident, but this was denied.

The negligence of the plaintiff is not a bar to a recovery of damages for an injury, where the requirements of the Tennessee statute, heretofore cited, have been disobeyed. In such cases negligence of the plaintiff must operate to mitigate the damages, but does not defeat the action. Western & Atlantic R. Co. v. Roberson, 61 Fed. 592, 9 C. C. A. 646. The evidence admitted tending to show a settled custom to blow at this crossing, if known to the plaintiff, would have some bearing upon the degree of plaintiff's negligence if he undertook to cross without stopping or looking before crossing the track at grade, and under proper instruction guarding against other use was admissible. But it was clearly not competent to show the custom of the company after the collision, for that could have had no influence upon plaintiff's conduct.

For the errors indicated, the judgment must be reversed, and remanded for a new trial.

CHICAGO GREAT WESTERN RY. CO. v. RODDY.

(Circuit Court of Appeals, Eighth Circuit. July 18, 1904.)

No. 2,000.

1. TRIAL—DIRECTION OF VERDICT.

When the evidence leaves the material facts admitted or undisputed, and when the evidence leaves the material facts and the deductions from them of such a conclusive character that the exercise of a sound judicial discretion would permit the court to give effect to but one verdict, it is its duty to instruct the jury to return it.

When there is a substantial conflict in the evidence relating to the material facts, and when fair and rational minds may well draw different conclusions from established facts, the court should submit the issues to the jury.

2. INJURY TO RAILROAD EMPLOYÉ—DIRECTING VERDICT.

A rainstorm of extraordinary severity prevailed at Elma from 6 to 7 in the evening, and washed out the roadbed three-quarters of a mile south of that station. The sectionmen in charge of the section south from Elma and a telegraph operator were there. The heaviest portion of the storm ceased about 7, but lighter rain followed. The plaintiff, an engineer, was running north from Oelwein to Elma. He left Oelwein at 5. There was no storm south of New Hampton 15 miles from Elma. He passed that station at 7:30. Culverts and creeks were full of water, and low grounds were flooded at New Hampton and Alta Vista, a station four miles south of Elma. About 800 feet south of the washout a band of Italian trackmen attempted to warn the plaintiff of his danger, which they had discovered. But he did not observe their signals, or did not understand them. Neither the sectionmen nor the telegraph operator took any steps to patrol the track to discover its condition or to warn the enginemen of their danger before the plaintiff ran into the washout a few minutes past 8 in the evening, although they were at Elma, an hour had passed after the heaviest rain had ceased, and the washout was within a mile of the station.

Held, neither the absence of negligence of the sectionmen and telegraph operator, nor the contributory negligence of the plaintiff, was so clear that it was the duty of the court to give a peremptory instruction for the defendant.

3. CHARGE—REFUSAL OF REQUEST EMBODIED IN CHARGE.

Where a rule or principle of law is clearly declared by the court in its general charge, it is not error to refuse to repeat it in the words of counsel.

4. CHARGE—REFUSAL OF REQUEST CONTAINING SOUND AND UNSOUND PROPOSITIONS.

Where a request for an instruction contains several propositions of law, any one of which is unsound, it is not error to refuse it.

(Syllabus by the Court.)

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

John L. Erdall (A. G. Briggs and F. B. Kellogg, on the brief), for plaintiff in error.

Daniel W. Lawler (Frank Arnold, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

¶ 1. See Trial, vol. 46, Cent. Dig. § 377.

SANBORN, Circuit Judge. This is an action for damages for a personal injury which the plaintiff below, John J. Roddy, alleged was inflicted upon him by the negligent failure of the Chicago Great Western Railway Company to give him timely warning of a washout of the roadbed, which was caused by an unusual storm of rain. The railway company denied the alleged negligence, and averred that the plaintiff was guilty of negligence which contributed to his injury. At the close of the evidence a motion was made by the defendant, and denied by the court, to instruct the jury to return a verdict for the railway company, and a judgment for the plaintiff followed. The denial of this motion is the alleged error in which counsel for the company seem to place the most confidence, and it presents the usual question whether the evidence so conclusively failed to show causal negligence on the part of the railway company, or so clearly disclosed negligence on the part of the plaintiff which contributed to the injury, that it was the duty of the court, in the exercise of a sound judicial discretion, to withdraw the issues in the case from the jury.

There is always a preliminary question for the judge before a case can be properly submitted to the jury, and it is, not whether or not there is any evidence, but whether or not there is any substantial evidence, upon which a jury may properly render a verdict in favor of one of the parties to the action. If there is no such evidence to sustain a verdict in favor of one of the parties, it is the duty of the court to direct the jury to return a verdict against him. This duty is imposed upon the court in every case where the evidence and the rational deductions from it are undisputed, or of such a conclusive character that the exercise of a sound judicial discretion would compel a refusal to give effect to a contrary verdict. Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361, and cases there cited. The exercise of this judicial discretion requires the direction of a verdict in every case in which the substantial evidence leaves the material facts and the just deductions from them admitted, undisputed, or so conclusively established that all reasonable men, in the exercise of an honest and impartial judgment, may fairly draw but one conclusion from them. On the other hand, if the facts are in dispute, and there is a conflict in the substantial evidence relative to their existence, or if from the established facts the minds of rational men might well draw different conclusions, it is the duty of the court to submit the disputed issues to the jury. Chicago Great Western Ry. Co. v. Price, 38 C. C. A. 239, 243, 97 Fed. 423, 427, 428, and cases there cited.

At the close of the trial of this case there was evidence tending to establish these facts and circumstances: Roddy was the engineer on a freight train of the defendant which was running north from Oelwein, in the state of Iowa, toward St. Paul, in the state of Minnesota. He left Oelwein at about 5 in the afternoon of May 19, 1902. He stopped at New Hampton, a station 15 miles south of Elma. He left New Hampton about 7:30 in the afternoon. He passed through Alta Vista, a station four miles south of Elma, about 8 in the

evening, without stopping, and he ran into a washout, which derailed his engine and seriously injured him, a few minutes after 8 o'clock, at a place about three-quarters of a mile south of the station of Elma. An unusually heavy rain storm prevailed at Elma and for a distance of 15 miles south of that station from 6 until 7 that afternoon, and lighter rain followed between 7 and 8. This storm was so extraordinary that one of the witnesses testified that he never saw it rain harder, so unusual that the telegraph operator at Elma remained at the station for an hour before he ventured forth for his supper, and all men seem to have taken shelter until 7 o'clock in the evening. Roddy was traveling south of the storm when it passed, and the only notice he received of its character was from the flooded condition of the country from New Hampton to Elma, and from the acts of the pedestrians he passed. At New Hampton there was so much water that it would not pass through a large culvert, and it backed up against the roadbed and covered several acres of land. At Alta Vista it carried away sidewalks, rose from 8 to 10 feet higher than usual, and within 2 or 3 feet of the railroad bridge which spanned a creek, overflowed the banks of the creek, and covered the surrounding fields. It did not, however, reach the ties of the railroad or interfere with the operation of the train at this point. At Alta Vista one of the witnesses motioned to the plaintiff as he passed over the bridge and pointed to the high water, but he did not attempt to stop the train. When Roddy came within a few hundred feet of the washout, he met and passed a band of Italian laborers who had been engaged in repairing the roadbed and track at Elma, and who were returning to Alta Vista, where they boarded and spent the nights. He had met and passed these men on other days. They were not the sectionmen in charge of this part of the railroad, and Roddy was aware of this fact. They had discovered three washouts in the roadbed on their way south from Elma at about 8 in the evening, and their foreman had instructed Mascolene, one of their number, to go south and stop Roddy's train, while he went back to Elma to notify the telegraph operator. Mascolene was carrying two lighted lanterns. He testified that he saw Roddy's train coming and "went to flag it, but it was so windy the lanterns went out"; that he was then on the ends of the ties; that he motioned to Roddy to stop the train with his arm, and called to him to the same effect, but that the train went on and he jumped into the ditch. Several of the Italians corroborated this evidence, and testified that they also signaled and called to the engineer to stop his train. Roddy and his fireman testified that they saw the Italians, but that they did not see or hear any signal to stop; that they did not recognize in the calls and gesticulations of the Italians anything different from their usual outcries and motions when they passed the train. At this time it was not so dark that the engineer could not see these trackmen and their movements, it was between daylight and dark, the headlight of the engine was burning, and the signal lights at Elma were lighted.

The storm struck Elma at 6 in the afternoon. Several of the sectionmen whose duty it was to care for the condition of a section of five miles of this railroad extending south from Elma were at

the station there between 6 and 7:45 that evening. The rules of the company required that all hands should be detailed during heavy storms to watch the road, that every precaution should be taken to prevent accident, and that agents, telegraph operators, and bridge and section men should telegraph the train dispatcher information as to severity of storms and extent of damage done, and that they should impart information to train and engine men. There was no evidence that the telegraph operator or sectionmen at Elma detailed any one to examine or watch the track south of that station, or that they took any steps to ascertain its condition or to warn the crew on Roddy's train of any defects in it during the two hours between the time when this storm struck that station and the derailment of the train three-quarters of a mile south of it. There was ample time between 7 in the evening, when the heaviest of the rain had passed, and the accident, more than an hour later, for the sectionmen to have patrolled this track, found the defects, sent a telegram to Alta Vista, and covered the track south of the washout with flagmen, torpedoes, and other danger signals. Under the statutes of Iowa railroad companies are liable for injuries inflicted by the negligence of the fellow servants of the victims, and the evidence in this case fails to lead our minds to the conclusion that all reasonable men in the exercise of an impartial judgment would be compelled, or would be likely, to conclude, in the light of the rules of the company, of the unusual virulence of the storm, and of the responsible nature of the duties intrusted to them, that the telegraph operator and the sectionmen at Elma exercised ordinary care to patrol this track, to ascertain and to warn the enginemen who were operating trains upon it of the danger from it, when, without making any effort to do either, they permitted Roddy to run into the pit in the roadbed within a mile of their station an hour after the heavier part of the storm had ceased.

Did the evidence conclusively establish the contributory negligence of the plaintiff? It was his duty to operate his engine with care, and to keep a constant and vigilant lookout upon the track to detect and avoid danger. The rules of the company required him to watch track, bridge, and watchmen to see the signals they were required to give, and, when circumstances rendered it necessary, to reduce speed to avoid unnecessary risk. In case of an extraordinary rainstorm or high water they imposed upon him the duty to stop his train and send a man ahead to examine embankments, bridges, trestles, culverts, and other portions of the road liable to damage, before passing over, to make careful inquiry at all stopping places to ascertain the extent and severity of the storm, and, in case of doubt as to safety in proceeding, to place his train on a siding and to remain there until it was safe to go on. Roddy did not reduce, but he probably increased, the speed of his train. He did not stop and send a man ahead to examine any embankment or bridge. He did not inquire as to the severity of the storm. He either did not observe or he did not understand the signals of the Italians for him to stop, if these signals were given. Was this course of action conclusive evidence of his failure to exercise ordinary care? In the determination of this question the alleged warning of the Italians

must be laid out of consideration. They testified that they gave the signals to stop by word and by gesture. The engineer and fireman testified that they were looking at them as they passed, but that they saw no such signals. There is here substantial evidence sufficient to sustain a finding by a jury either way upon the issue of the plaintiff's negligence in disregarding this disputed warning, and that issue was properly submitted to their determination. It may, however, be remarked in passing that it is not very probable that Roddy would have run on into the pit in the roadbed if he had seen and had understood the signals of the Italians for him to stop. The lights in Mascolene's lanterns went out, so that the engineer probably never saw them. Mascolene did not stand between the rails of the track to give his signals as he should have done, but upon the side of the track. Few, if any, of the Italians could speak English, so that it may be that the engineer did not understand what they said. These facts go far to explain their failure to convey their warning of danger to the mind of the engineer as he gazed at them from the window of his cab. What more is there in the evidence to sustain the demonstration that a reasonable man in the situation of the plaintiff would have perceived the danger, and would have stopped or inquired or sent a man forward to examine the roadbed? The filled culverts, the flooded fields and streets at New Hampton and at Alta Vista, and the gesticulating citizen at the latter place who gave no signal to Roddy to stop his train. But the care of the roadbed and of the track was intrusted primarily to the sectionmen at Elma, the operation and care of the engine and of the train to the plaintiff, Roddy. The primary duty of inspection, of watchfulness, and of preparation of the track for the passage of Roddy's train was upon the sectionmen at Elma. The duty of discovery and of warning of defects was in the first instance upon them and upon the telegraph operator, both on account of the nature of their employment, and on account of the fact that they had seen and had experienced the storm, while Roddy had not. Roddy's primary duty was to operate his engine and draw his train with reasonable care. The sectionmen and the telegraph operator had been in the midst of the storm. They knew its violence; they had the best opportunity to judge of its natural and probable effects. He had come from a region beyond that traversed by the heavy rain, and had not experienced it. It had passed over Elma an hour before he arrived in its vicinity and half an hour before he stopped at New Hampton, and he had received no warning of danger from the station at Elma, where the men in charge of the five miles of roadbed and track south of that station and the telegraph operator were located. The presumption of law and of fact, in the absence of countervailing evidence, always is that servants as well as masters have done their duty. And, while the negligence of the operator and of the sectionmen is no excuse for any negligence of Roddy, the fact that it was their duty to watch this roadbed and to give notice of any defects in it, together with the fact that when Roddy was within two miles of Elma they had given no notice of danger to him, might well be considered by the jury in determining whether or not a reasonable man in his situation

might not have justly inferred from the silence of the men in charge of this section of track which he was using, either that the storm had not been so violent as to endanger it, or that, if it had been so, the sectionmen had already patroled it and found it free from damage, so that he could safely drive his engine over it without special inquiry, and without stopping and sending a man forward to patrol it. It is not clear to our minds that such an inference and such a course of action would indicate to all reasonable men any lack of ordinary care, much less that it would compel their minds to that conclusion, and for that reason the evidence in this case fails to convince that the contributory negligence of the plaintiff was conclusively established.

In the consideration and determination of the questions which have been discussed, all the evidence in this case has been carefully read and considered, but no attempt has been made to do more in this opinion than to present its salient points. Many of the material facts were the subjects of contradictory testimony. Fair and rational minds might well draw different conclusions from the facts that were established. The evidence left the issues of negligence and of contributory negligence in doubt, and the court below was guilty of no abuse of judicial discretion in denying the motion for a peremptory instruction and submitting the issues to the jury for decision.

No exception to the charge of the court was taken. Thirteen separate requests for instructions, which cover four closely printed pages of the record before us, were presented to the court below, and were denied "save as the same may be given in the general charge." Five of these refusals are assigned as error. The requests to which they relate have been critically compared with the charge of the court, without the discovery of any prejudicial error in the refusal to submit them to the jury. The rules of law embodied in them, so far as they were applicable to the case, and so far as it was the duty of the court to communicate them to the jury, are found in the charge in terms as concise, clear, and expressive as those in which they are stated in the requests of counsel. Where a rule or principle of law is clearly declared by the court in its general charge, it is not error for it to refuse to repeat it in the words of the attorney who requests it. Southern Pac. Co. v. Schoer, 52 C. C. A. 268, 275, 114 Fed. 466, 473, and cases there cited.

One of the most serious complaints of the railway company regarding these requests is that the court refused to charge that the plaintiff must either establish by a preponderance of evidence that the servants of the defendant had actual knowledge of the washout so long before the derailment that by the exercise of reasonable care they could have repaired the track or warned the plaintiff before the derailment, or that he must establish by a preponderance of evidence that the washout occurred so long before the derailment that the defendant or its servants, in the exercise of reasonable care, ought to have discovered it, and that after such discovery there was sufficient time for the defendant or its servants, in the exercise of such reasonable care, to have repaired said track, or to have given the plaintiff the necessary warning of its condition. The statement

contained in this request is altogether too involved, refined, and technical, and it is not the law. If the storm was so violent and the rains so copious before 7 in the evening of the day of this derailment that great damage to the roadbed and track was to be reasonably anticipated from it, the duty was immediately imposed upon the sectionmen to patrol that track and to ascertain its condition. If they had done this, and had discovered a large volume of water flowing over or under the roadbed at the place of the accident which had not then undermined the track, but which constantly threatened to carry out a section of it, it would have been as much their duty to go forward and warn the plaintiff of the danger of driving his engine upon it as it would have been if the washout had actually occurred when they first discovered the danger. And if after they would, by the exercise of reasonable diligence, have discovered and have warned the plaintiff of the imminent danger that the track would be undermined, and before he arrived at the place of the accident the track had washed out, their care would have saved him from injury; while if, in the exercise of reasonable care, they could in this way have accomplished this result, their failure to exercise this care inflicted his injury. The time of the occurrence or of the discovery of the washout was not the sole condition or evidence of the negligence of the servants of the defendant. The violence of the storm, the copiousness of the rain, and the probable effect to be anticipated from them, conditioned the duty of the sectionmen and of the telegraph operator and the question of their negligence, whether the washout occurred long enough before the accident for them to have discovered it and to have given the warning or not, because the storm and the rain which caused the defect in the roadbed gave them warning of the natural results which would follow from them so long before the derailment that they might have discovered the actual condition of the roadbed and have given warning of the danger whether the track was then actually undermined or was only in imminent danger of it.

Error is also alleged because the court did not deliver to the jury the charge upon the preponderance of evidence which is embodied in the long request we have been considering. As, however, the proposed instruction contained two propositions of law, one of which has been found to be unsound, there was no error in the court's refusal to communicate the other. Where a request for an instruction contains two or more propositions of law, one of which is unsound, there is no error in a refusal to grant it. United States v. Hough, 103 U. S. 71, 72, 73, 26 L. Ed. 305; Monarch Cycle Co. v. Royer Wheel Co., 44 C. C. A. 523, 526, 105 Fed. 324, 328.

One of the rules of the railway company in evidence requires the engineer to keep a constant and vigilant lookout, and counsel for the company requested the court to charge the jury that "it was the plaintiff's first and paramount duty while his train was in motion to keep a constant and vigilant lookout along the track, and to take all precautions for the safety of himself and his train that a reasonably prudent man would take under the same circumstances." The court charged the jury that the plaintiff was required to use

due care not only for his own protection, but for the protection of the property intrusted to his charge; that he had to a very large extent the charge of the running of his train; that it was his duty to observe the condition of the road he was passing over, to determine as far as things came under his observation as to his safety; that he had the opportunity to observe the condition and extent of the flood, the condition in which it left the streams and the country, and the roadbed; and that the rules which he was required to observe referred to cases of the kind under consideration, and declared what his duties in such cases were. It then instructed the jury that it was for them to determine from the evidence whether the plaintiff performed the duties which a reasonable man in the performance of his employment, and under the rules which he was required to observe, would have performed, or whether he should have stopped his train and sent out persons ahead at any place for the purpose of ascertaining whether there was danger in the condition of the track resulting from the effect of the storm. The charge of the court here embodies the principle of law referred to in the request, and expresses it in more felicitous language than that used by counsel for the railway company. It called the attention of the jury to the rule which required the engineer to keep a constant and vigilant lookout, and it left the counsel of the company without any tenable ground for the exception to the refusal to grant their request.

The differences between the other requests which were refused and the charge of the court are less striking and important than those which have been noticed. There was no substantial error in the trial of this case, and the judgment below is affirmed.

KUNTZ v. YOUNG.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1904.)

No. 2,029.

1. BANKRUPTCY—DISCHARGE—FAILURE TO APPLY FOR DISCHARGE IN SUBSEQUENT PROCEEDING.

   A failure of the bankrupt to apply in due time for, or a refusal by the court to grant, a discharge from debts provable in proceedings under one petition in bankruptcy, renders the question of the right of the bankrupt to a discharge from those debts in a proceeding under a subsequent petition res adjudicata.

2. SAME.

   A subsequent proceeding in bankruptcy for the sole purpose of obtaining a discharge which a prior proceeding has conclusively determined that the bankrupt is not entitled to presents no ground for relief, is vexatious and futile, and cannot be lawfully maintained.

3. SAME—COURT HAS POWER TO DISMISS AFTER ADJUDICATION.

   The District Court has power to dismiss such a proceeding, as soon as it learns its real purpose, under section 2, subd. 15, Bankr. Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], although this is after an adjudication in bankruptcy.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 690.

4. SAME—FACTS—DECISION.

An involuntary proceeding in bankruptcy was commenced. The bankrupt made no application for a discharge within 12 months after the adjudication, and failed to comply with an order to pay over to the trustee $6,185.37. While this proceeding was pending the bankrupt commenced a voluntary proceeding in another division of the same court, and applied for a discharge from the same debts scheduled and provable in the first proceeding. *Held*, the District Court rightly denied the application for the discharge and dismissed the voluntary proceeding.

(Syllabus by the Court.)

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

William P. Murphy, Halvor Steenerson, and Charles Loring, for appellant.

Frank H. Ewing, E. H. Morphy, and John M. Bradford, for appellee.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. May a bankrupt who has failed to apply for a discharge within the 12 months after his adjudication of bankruptcy upon a petition of creditors lawfully maintain a voluntary proceeding in bankruptcy and obtain a discharge from the very debts scheduled and provable in the involuntary proceeding while the latter is still pending? The record in this case is meager, and it discloses nothing relative to many of the motions and adjournments which are referred to by counsel for the respective parties in the briefs. The case must be determined upon the presumption that the rulings of the court below were made after due notice, and were right, unless the record discloses some error. The burden is always on him who challenges the rulings or decree of a trial court, not only to specify errors, but to prove them by the record which he presents to the reviewing court. The error here alleged is the rendition of a decree of dismissal of a voluntary proceeding in bankruptcy and a denial of a petition for the discharge of the bankrupt in this state of the facts: In January, 1899, Oscar Kuntz was adjudged a bankrupt in one of the divisions of the District Court of Minnesota upon the petition of certain of his creditors. In the progress of this proceeding the referee found that in the year 1898 Kuntz was a general merchant in a small village in Minnesota, and that he so conducted his business that between September 18, 1898, and December 27, 1898, a deficit of $8,185.37 arose, for which he failed to account. Thereupon the referee made an order that he should pay over to the trustee of his estate $6,260.37. He paid $75, and no more. The order was never reversed, modified, or obeyed. The bankrupt made no application for a discharge within 12 months of his adjudication, and the involuntary proceeding is still pending awaiting his compliance with the order of the referee. In April, 1903, Kuntz filed a voluntary petition in bankruptcy in another division of the District Court for Minnesota, secured another adjudication of bankruptcy, scheduled the same debts and creditors that appeared in the invol-

untary proceeding, and on July 7, 1903, filed a petition in the voluntary proceeding for a discharge from these debts. The court appointed August 3, 1903, for a hearing of this petition. On August 5, 1903, a petition of the trustee of the estate of the bankrupt in the involuntary proceeding, which set forth its course and condition, was presented to the court in the voluntary proceeding, and it issued an order that the bankrupt should show cause why the voluntary should not be consolidated with the involuntary proceeding, and why all proceedings relating to the closing of the estate and to the application for the discharge should not be conducted in the latter. Upon the return day of this order the application of the bankrupt for his discharge and the petition of the trustee came on to be heard. Counsel for the respective parties appeared, and a decree was rendered, which denied the application for the discharge and dismissed the voluntary proceeding without prejudice to the right of the bankrupt to commence another after the involuntary proceeding should be closed.

The salient facts which condition the determination of the chief question in the case are, therefore, that there was an involuntary proceeding in bankruptcy pending, in which the bankrupt had disobeyed the order of the referee, and had failed to apply for a discharge within 12 months after his adjudication, and that he had instituted a voluntary proceeding, and had there applied for a discharge from the same debts scheduled and provable in the involuntary proceeding. The failure of the bankrupt to apply for a discharge from his debts in the involuntary proceeding within 12 months after the adjudication foreclosed his right to such a discharge. It is only within that time that he may, under the bankruptcy law, make a lawful application to be relieved from his debts. The record of his failure to make the application in that proceeding was, in effect, a judgment by default in favor of his creditors to the effect that he was not entitled to a discharge from their claims. A judgment by default renders the issue as conclusively res adjudicata as a judgment upon a trial. The result is that the question whether or not the bankrupt was entitled to be discharged from the claims of the creditors scheduled and provable in the involuntary proceeding was conclusively determined in an action between them and the bankrupt by the record of his failure to apply for a discharge in that proceeding. But the parties to the voluntary were the same as to the involuntary proceeding, for Kuntz scheduled the same claims and creditors, and the trustee who objected to his discharge was the legal representative of the latter. The bankrupt's application for a discharge in the voluntary proceeding presented the same issue which had been conclusively determined against him in the involuntary proceeding, and there was no error in the refusal of the court below to reverse the former judgment and grant the application.

The denial of an application for a discharge from debts provable in proceedings under one petition in bankruptcy under the act of 1898 renders the issue of a right to a discharge from those debts in a proceeding under a subsequent petition res adjudicata. A failure to apply for a discharge within 12 months after the adjudication in

the earlier proceeding has the same effect. Gilbert v. Hebard, 8 Metc. (Mass.) 129; In re Drisko, Fed. Cas. No. 4,090; In re Herrman (D. C.) 102 Fed. 753, 754; Id., 46 C. C. A. 77, 106 Fed. 987, 988.

It is said, however, that the dismissal of the voluntary proceeding was, in any event, erroneous, and unauthorized. Why was it so? The record does not disclose that the bankrupt brought any property to the court to be distributed among his creditors when he presented his petition for a second adjudication in bankruptcy. The sole purpose of that proceeding, so far as we may learn it from the record presented here, was to enable the bankrupt to raise the very issue which the record in the involuntary proceeding had conclusively determined—the issue whether or not he was entitled to a discharge from the debts there scheduled and provable. The voluntary proceeding was in fact nothing but a suit in equity to obtain a discharge. The second adjudication in bankruptcy, the appointment of the trustee, his report, and every other act in that proceeding were nothing but steps in the progress of the suit for the discharge. For any other purpose they were both farcical and futile. As there was no equity in the suit for the discharge, and the bankrupt was entitled to no relief in it, it was properly dismissed. A voluntary proceeding in bankruptcy for the sole purpose of obtaining a discharge which a prior involuntary proceeding has conclusively determined that the bankrupt is not lawfully entitled to presents no ground for relief, is vexatious and futile, and should be dismissed. In re Fiegenbaum, 121 Fed. 69, 57 C. C. A. 409.

Other objections to the decree are that the application for the discharge was improperly denied because no specifications of objections to the discharge were ever made, that the order to show cause was an irregular proceeding, that it was not properly served on the bankrupt, and that the court was without power to dismiss the voluntary proceeding. But the disclosure by the petition of the trustee that the issue of the discharge of the bankrupt was conclusively determined was a sufficient and fatal objection to the application for it, and any other would have been useless. An order to show cause why a certain act should not be done or a certain course pursued is the regular and approved method of giving notice of contemplated action to parties to suits and proceedings in equity and bankruptcy, and the terms of this order were sufficiently broad and general to suggest notice of, or to warrant a dismissal of, the proceeding and a denial of the discharge. It is true that the record fails to disclose that the order to show cause was ever served upon the bankrupt, but his counsel made a general appearance for him at the hearing upon it, and this was a waiver of any defect or failure in its service.

Nor was the court without power to dismiss the voluntary proceeding. That proceeding was a mere device to evade the order of the referee and to secure indirectly what the bankrupt evidently despaired of obtaining otherwise. It entailed unnecessary expense and vexation upon the creditors and upon the court. Its continuance was a constant menace and annoyance to the creditors, and there was no sound reason for its existence. Ample power to dismiss it, even after the adjudication in bankruptcy, was vested in the

District Court under section 2 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420].

The decree below is affirmed.

BROWN v. ARNOLD.

(Circuit Court of Appeals, Eighth Circuit. July 18, 1904.)

No. 2,049.

1. ATTORNEYS AT LAW—AUTHORITY PRESUMED.

The assumption by an attorney at law of authority within the scope of the ordinary power of a practicing lawyer to act for a party to an action or suit is presumptive proof of actual authority to so act. The power assumed by an attorney at law in the conduct of an action is valid until disproved, not void until proved.

2. SAME—AUTHORITY AFTER JUDGMENT—GENERAL RULE—EXCEPTIONS.

While the general rule is said to be that the authority conferred upon a lawyer by his retainer in an action or suit ceases when the judgment or decree is rendered, there are many exceptions to this rule, and in the actual practice of the law it is frequently disregarded. Some of the established exceptions are that after judgment or decree the authority of the attorney for the prevailing party to collect or enforce it, his authority to receipt for its proceeds and to discharge it, his authority to admit service of a citation to review it, and his authority to oppose any steps that may be taken within a reasonable time to reverse it, continue.

3. SAME—AUTHORITY TO STIPULATE AFTER JUDGMENT.

The retainer of an attorney at law to conduct an action confers upon him authority to stipulate with opposing counsel after the rendition of judgment in favor of his client, and after the expiration of the term of court, but within the time for procuring a writ of error, that the case shall abide the final decision of another action which involves the same question, and is conducted by the same attorneys.

4. EQUITY—ADEQUATE REMEDY AT LAW.

The remedy at law which prohibits relief in equity must be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." An action for damages for the breach of a stipulation that an action at law which has passed to judgment shall abide the final decision of another action is not as practical and efficient to attain the ends of justice as a suit in equity for specific performance of the contract, where the final decision of the other action requires a reversal of the judgment. The action for damages does not furnish a remedy so adequate that it precludes relief in equity.

5. LACHES—NOT ORDINARILY APPLICABLE WITHIN LIMITATION OF ANALOGOUS ACTION AT LAW.

Laches is of the nature of estoppel. In the absence of extraordinary circumstances, such as many innocent purchasers, radical changes in condition or value, or loss of evidence, it is inapplicable to suits in equity within the time limited for the commencement of analogous actions at law.

(Syllabus by the Court.)

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

For opinion below, see 127 Fed. 387.

This appeal challenges a decree which sustained a demurrer and dismissed a bill exhibited by Edwin F. Brown, receiver of the First National Bank of Se-

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¶ 2. See Attorney and Client, vol. 5, Cent. Dig. §§ 129, 130, 176, 204.

dalia, against John S. Arnold, for the purpose of enforcing specific performance of a stipulation made between Parry L. Deweese, the former receiver of this bank, and James T. Montgomery and William M. Williams, the attorneys for Arnold, to the effect that the case of Deweese, receiver, against Arnold should abide the result of the final decision of the case of Deweese, receiver, against Martha E. Smith and Sarah E. Cotton. The bill set forth these facts: In 1889 Martha E. Smith and Sarah E. Cotton were the owners of 100 shares of the capital stock of the First National Bank of Sedalia, and the defendant, Arnold, was the owner of 20 shares of that stock. Deweese, the receiver of the bank, brought separate actions against Smith and Cotton, Arnold, and about 35 other stockholders of that bank to recover a second assessment upon their stock, which had been levied by the Comptroller of the Currency. Montgomery and Williams had been retained by all these stockholders, and had made the same answer to the petition in each of the cases. The receiver made a motion for judgment in each of the cases, that motion was denied, the receiver declined to plead farther, and the court rendered a judgment that the plaintiff should take nothing by his action, and that the defendant in each case should recover his costs of the plaintiff. These judgments were rendered in 1899, and after the term of court at which they were entered had expired the attorney for Deweese and Montgomery and Williams as attorneys and solicitors for each of the defendants in all the cases made a written stipulation that the receiver should sue out a writ of error from the judgment rendered in the case against Smith and Cotton, and that all the other cases against the other stockholders in which the judgments had been rendered in favor of the defendants should abide the result of the final decision in the case of Deweese, receiver, against Smith and Cotton. Thereupon such a writ of error was procured, and that judgment was reviewed and reversed by the Circuit Court of Appeals (106 Fed. 438, 45 C. C. A. 408), and its judgment was affirmed by the Supreme Court (23 Sup. Ct. 845, 47 L. Ed. 344). This affirmance was made on March 17, 1903. The attorney for the receiver lost the stipulation, and in March, 1903, he set forth the fact that the stipulation was made and had been lost, and moved the Circuit Court to redocket the case against Arnold, and allow it to stand according to the terms of the stipulation until the final decision in Deweese against Smith and Cotton, and this motion was denied. On August 15, 1903, the receiver exhibited the bill here in question, wherein he prays upon the facts which have been recited that the defendant be compelled to specifically perform the stipulation to the effect that the case against him should abide the final decision of the case against Smith and Cotton.

Wm. S. Shirk, for appellant.

P. H. Sangree, Henry Lamm, John Montgomery, Jr., and Lee Montgomery, for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

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

Specific performance of the stipulation between the receiver and the appellee that the latter's case should abide the final decision of the action between the receiver and Smith and Cotton was denied by the Circuit Court upon three grounds: (1) Because the attorneys for Arnold had no authority to make the agreement evidenced by the stipulation on his behalf; (2) because the receiver had an adequate remedy at law; and (3) because his attorney had been guilty of laches. The case of Arnold, the case of Smith and Cotton, and the cases of 35 other stockholders whom the receiver had sued involved the same issue of law, which had been framed and tried by the same attorneys. Judgments had been entered in these cases in favor of the defendants. The term of court at which

they were rendered had expired. Several months yet remained within which the receiver might lawfully procure writs of error to reverse these judgments. Then it was that the stipulation which lies at the basis of this suit was made and signed by the attorneys for all the parties to the litigation. It was a rational and salutary agreement. It saved to the litigants the expenses of the prosecution of 36 writs of error, and if it is performed it will produce without that unnecessary expense the same result that a review of all the cases and that additional expense would have effected. Obviously the performance of the agreement ought to be enforced unless some rule of law or of equity presents an insuperable obstacle.

It is said that the attorneys for Arnold were without authority to make the stipulation, because judgment had been rendered in his favor, and the term of court at which it was entered had expired; that when the judgment was recorded and the term closed the power of Arnold's attorneys to act for him, derived from their original retainer, ceased, and a new warrant of attorney was indispensable to their authority to sign the stipulation. There are two answers to this contention. In the first place, if a new warrant of attorney was requisite after the judgment was rendered, the legal presumption is that the attorneys had obtained it. The bill contains an averment that they agreed to and signed the stipulation as the solicitor and counsel of Arnold. The presumption is that they did not represent themselves to be that which they were not. The stipulation was within the scope of the general power of attorneys who are conducting several cases of a single class which involve the same issue. Stone v. Bank of Commerce, 174 U. S. 412, 422, 19 Sup. Ct. 747, 43 L. Ed. 1028; Scarritt Furniture Co. v. Moser, 48 Mo. App. 543, 548; Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277; Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507. They were officers of the court. Their signatures to the stipulation constituted prima facie evidence of their authority to execute it. The assumption by an attorney at law of authority within the scope of the general power of a practicing lawyer to act for a party to an action or suit is always presumptive proof of his actual authority to do so. The authority assumed by an attorney at law to act for a party in court is valid until disproved, not void until proved. The burden was upon the defendant to establish by answer and evidence that his attorneys were without the authority which they assumed. In the second place, while the general rule is said to be that the authority derived by an attorney at law from a general retainer to conduct a litigation on behalf of his client ceases when the judgment is rendered, there are many exceptions to this rule, and in the actual practice of the law it is at least doubtful whether it is not more honored in the breach than in the observance. Among the acknowledged exceptions to it are the authority of the attorney for the party who prevails in the judgment to collect it, his authority to receipt for its proceeds and to discharge it, his authority to admit service of a citation issued upon a writ of error or appeal to review it, and his authority to oppose any steps that may be taken within a reasonable time by the defeated party to reverse it. Berthold v.

Fox, 21 Minn. 51, 53; Grames v. Hawley (C. C.) 50 Fed. 319, 321; Lusk v. Hastings, 1 Hill, 659, 662; Graves v. Graham (City Ct. N. Y.) 43 N. Y. Supp. 508; Beach v. Beach (S. D.) 43 N. W. 701; Barfield v. McCombs (Ga.) 15 S. E. 666. The case at bar falls fairly within the exceptions. Arnold was the prevailing party in the judgment in the action against him. He secured a judgment against the receiver for his costs. Thereupon his attorneys had authority, by virtue of their general retainer, to collect the amount of this judgment, to accept service of a citation upon the issuance of a writ of error to review it, and to take any requisite steps to oppose the attempt of the defeated party, made within a reasonable time after the entry of the judgment, to reverse it. The attorneys of Arnold were also the attorneys of about 36 other defendants who had secured similar judgments. The receiver was about to apply for writs of error to reverse them. The 37 cases involved a single question. In order to prevent the reversal of the judgments, the attorneys for these 37 parties agreed with the attorney for the receiver that he should select one case and sue out but a single writ of error, and that all the other cases should abide the final decision of that in which the writ was to be issued. The receiver relied upon the agreement, and performed it. The attorneys for the defendant followed the test case through the Court of Appeals (106 Fed. 438, 45 C. C. A. 408) and the Supreme Court (23 Sup. Ct. 845, 47 L. Ed. 344), until the reversal of the judgment therein was finally affirmed. All the rights and interests of the defendant, Arnold, were completely protected by this course of proceeding. The question in his case was argued in the higher courts by the attorneys whom he had retained to try it for him in the court below, by the attorneys who had authority to accept, and who undoubtedly would have accepted, service of a citation in error, and who would have argued his case in the higher courts if they had not made the stipulation and a writ of error had been issued, as it certainly would have been, to review it. Their stipulation prevented the issue of that writ, protected all the rights of their client, saved him the unnecessary expenditure of money, and was as completely within the authority granted to them by their retainer as the acceptance of service of a citation or the resistance of a motion for a new trial. Our conclusion is that the retainer of an attorney at law to conduct an action confers upon him authority to stipulate with opposing counsel after the rendition of a judgment in favor of his client and after the close of the term of court at which it was rendered, but within the time for procuring a writ of error, that the case shall abide the final decision of another action which involves the same question and is conducted by the same attorneys.

It is next insisted that this suit in equity cannot be maintained because the complainant has an adequate remedy at law. He has no remedy at law in his original action, because the term at which the judgment was entered has long since expired, and the court which rendered it no longer has jurisdiction to vacate or modify it for the reasons which the complainant presents. City of Manning v. German Ins. Co., 46 C. C. A. 144, 147, 107 Fed. 52, 55, and cases

cited. His only remedy at law is an action for damages for the breach of the stipulation. That action, however, may involve the trial of the issue whether or not a judgment against the appellee, Arnold, pursuant to the stipulation, would have been collectible if rendered; for, if Arnold had no property liable to execution, the receiver's failure to recover a judgment against him would have inflicted no damages upon him. There is no such issue of fact or of law to be tried in this suit in equity. All the averments of the bill are admitted, and the receiver is entitled to a decree. His remedy at law by an action for damages is therefore not as prompt and efficient to attain the ends of justice as is this suit in equity. Moreover, it is not adequate. It will leave the judgment which the defendant has recovered in full force and of record, while a court of equity may enjoin its enforcement, and may require the defendant to discharge it. The remedy at law which precludes relief in equity must be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 265, 26 C. C. A. 389, 393. The action for damages does not meet the test of an adequate remedy at law which precludes relief in equity.

The third reason assigned for the dismissal of the bill is that the receiver's attorney was guilty of laches, because he did not bring to the attention of the court the stipulation, its loss, and his motion to docket the case again at an earlier date. The stipulation was not made until November, 1899. The final decision in the case of Smith and Cotton was not rendered until November 17, 1902. Then for the first time a cause of action accrued upon the stipulation. The attorney for the receiver disclosed the execution and loss of the stipulation, and moved to redocket the action at law, and for leave to have it stand upon the docket to abide the final decision in the test case, as early as March, 1902. Laches is of the nature of estoppel. Courts apply it to suits in equity by analogy to the statute of limitations to protect innocent parties and to avoid inequitable results. There are no innocent parties who will suffer here by the enforcement of the plain agreement of the defendant, Arnold. No injury was inflicted upon him by the delay of the attorney for the receiver in making his motion, because the court was as completely without jurisdiction to grant it when the stipulation was made as it was when the motion was denied. The stipulation first became actionable on November 17, 1902. This suit was brought on August 15, 1903. The time limit by the statutes of Missouri for commencing the analogous action at law was five years. Rev. St. Mo. 1899, § 4273. In the absence of extraordinary circumstances, such as the destruction of muniments of title, the death or removal of parties, many innocent purchasers, radical changes in the condition or value of property or its speculative character, courts of equity never apply the doctrine of laches earlier than at the expiration of the time limited for the commencement of analogous actions at law. Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, 21. There were no such circumstances in the case in hand, and neither the receiver

nor his counsel have been guilty of any delay which precludes them from successfully seeking the equitable relief to which they are entitled.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to overrule the demurrer, to permit the defendant, Arnold, to answer the bill in accordance with the provisions of the thirty-fourth rule in equity, in case he fails to answer to take the bill pro confesso, and to render a decree to the effect that the defendant, Arnold, his executors, administrators, and assigns, are perpetually enjoined from collecting or in any way enforcing the judgment he has obtained against the receiver; that he be directed to satisfy and discharge that judgment from the record; that the receiver recover from him $500, the amount of the second assessment upon his stock, with interest at 6 per cent. per annum from March 7, 1899, and costs; and that the receiver have execution to enforce the collection thereof; and, in case the defendant shall answer, to take proceedings not inconsistent with the views expressed in this opinion.

JAMESON v. LEWIS.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1904.)

No. 524.

1. COLLISION—APPEAL—DECISION—REVIEW.

Where, in an action for damages for collision at sea, the trial judge had the opportunity of seeing the witnesses and determining their credibility from their manner and appearance, his decision will not be reversed on appeal unless it clearly appears to be contrary to the evidence.

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

La Roy S. Gove (James J. Macklin, on the brief), for appellant.
Robert H. Smith, for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

BRAWLEY, District Judge. The libel is to recover damages for injuries received by two barges through collision with a pier while in tow of steam tug Irene, about midnight of July 30, 1902, at the entrance of the harbor of Baltimore. The learned judge below, who heard all of the testimony except that of one witness, found that the disaster occurred from the steering of the barges, the men on board of them not being capable, and not steering them properly. He found further that the entrance to the harbor was narrow, and crowded with small vessels, and that the tug took her usual course, and did all that could reasonably be expected in the circumstances, and was without fault.

¶ 1. See Admiralty, vol. 1, Cent. Dig. § 770.

There is no dispute between the contending parties as to the legal principles which govern the case, and the rule being well settled that this court will not reverse the decision of a district judge who has had the opportunity of seeing the witnesses and determining their credibility from their manner and appearance, unless it clearly appears that the decision is against the evidence, and as the examination of the testimony leads us to concur in his view of it, the decree of the court below is affirmed.

Affirmed.

ROBERTS v. SHELBY STEEL TUBE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 9, 1904.)

No. 1,298.

1. MASTER AND SERVANT—INJURIES TO SERVANT—FEDERAL COURTS—JURISDICTION—CITIZENSHIP—SEPARABLE CONTROVERSY.

Where a petition in a state court in an action for injuries to a servant against the master and a servant alleged concurring acts of negligence of the master and the servant, and the servant was of the same citizenship as plaintiff, the case did not present a separable controversy between plaintiff and the master, and was not, therefore, removable to the federal court.

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

Charles A. Thatcher, for plaintiff in error.

Doyle & Lewis and J. W. Schaufelberger, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. Reversed and remanded, with directions to remand to the state court. Petition charged concurring acts of negligence of master and servant, and was therefore not a removable case, as presenting a separable controversy between plaintiff and the corporation, and is therefore governed by Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, and Hunt v. American Bridge Co. (decided by this court at the May session) 130 Fed. 302.

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

RUPP & WITTGENFELD CO. v. ELLIOTT et al.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1904.)

No. 1,254.

1. PATENTS—CONDITIONAL LICENSE TO USERS—CONTRIBUTORY INFRINGEMENT.
It is within the right of the owner of patents for machines used by retail dealers to fasten buttons on shoes for customers to furnish such machines to users, without charge, under a license which permits their use only with wire purchased from such owner; and one who, with knowledge of such restriction, manufactures and sells to such users wire put up on spools in the exact form required for use on such machines, and which is suitable for no other use, with the intention that it shall be used on such machines, is liable as a contributory infringer.

2. SAME—SUIT FOR INFRINGEMENT—JURISDICTION.
A suit which raises a question of infringement is one arising under the patent law, and the fact that the patentee may also have a remedy by action for breach of contract does not defeat the jurisdiction.

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

Frederick E. Niederhelman (Lewis M. Hosea, of counsel), for appellant.

Taggart, Dennison & Wilson, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill to restrain contributory infringement of patents Nos. 408,700, 526,012, and 552,869, issued to the complainant W. E. Elliott for improvement in machines for attaching buttons to shoes. The Elliott button fastening machines are intended for use by retail shoe dealers in setting or resetting buttons upon shoes sold to customers. The bill avers that these machines are "adapted and intended to take a coil of continuous wire, feed the same to a convenient point in the machine, sever a section of the wire therefrom, construct and form a staple through the eye of a shoe button, and drive the staple, or the prongs thereof, through the leather of the shoe, and clinch the same in position, * * * all by one stroke or operation of the machine. * * * That it was necessary to use wire of a certain size, and a certain temper or color, and coiled or put up in packages so shaped as to be received into the appropriate part of the machine." Machines according to these patents are made by the complainant the Elliott Machine Company, but are never sold, but placed in the hands of users under a license to use only in connection with staple wire purchased from the patentee. Every machine carries a metal inscription indicating that the patentees retain the title, and consent only to this restricted use. It is averred that the owners of the patent thus limit their own compensation to the profit upon the wire used in forming staples. It is averred that more than 6,000 machines have been thus placed in the hands of retail shoe dealers within the United States, and all of them conditioned in use as stated above. The

¶ 1. See Patents, vol. 38, Cent. Dig. § 402.

bill charges that the defendants, with knowledge of this method of business, and that the mechanism embodying the Elliott inventions could only be lawfully used with the wire procured from the Elliott Company, "have continuously been engaged for several years past, and are now engaged, in selling, from time to time, to the said users of the Elliott machines, and for the purpose and with the express intent that the same shall be used upon the said Elliott machines, wire put up in spools or coils, and not furnished by the Elliott Company; that the wire so sold by the defendants to the users of the Elliott machines has been and is put up on spools or coils of the exact form, size, and shape suitable for use upon the Elliott machines, *and suitable for no other use," etc.* To this bill the defendants filed a demurrer for want of equity. District Judge Thompson, upon the authority of the opinion of this court in Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, overruled the demurrer, with leave to answer. An answer was filed, but, by leave of the court, withdrawn; the defendants preferring to stand upon their demurrer. Thereupon a decree by default was entered, and the defendants perpetually enjoined from selling wire to the users of such machines, intended and adapted to be used in the manner described in the bill of complaint.

That the complainants were entirely within the boundary of their patent rights in permitting the use of their invention only in connection with wire sold by themselves is not an open question in this court. The conditions imposed upon users of the Elliott machines are substantially those sustained in Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728. The nature and limits of the monopoly acquired by a patentee were there thrashed out, and every aspect of the subject presented by the briefs of counsel for the appellants is dealt with in that opinion. That aspect of the question has since been before the Supreme Court, and the general view of this court, as expressed in that opinion, approved, in Bement v. National Harrow Co., 186 U. S. 70, 91, 22 Sup. Ct. 747, 46 L. Ed. 1058. After referring to certain limitations upon the rights of a patentee growing out of the police power of the state, referred to in the opinion of this court, Justice Peckham, speaking for the Supreme Court, concludes a discussion of the right of the patentee to impose such conditions as he may elect by saying:

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their nature illegal, with regard to this kind of property, imposed by the patentee, and agreed to by the licensee, for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. has also been approved by the Circuit Courts of Appeals of the Second and Seventh Circuits (Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671; Victor Talking Machine Co. v. The Fair [C. C. A.] 123 Fed. 424, 426), and by Judge Lowell in Tubular Rivet & Stud Co. v. O'Brien (C. C.) 93 Fed. 200, and Edison Phonograph Co. v. Pike (C. C.) 116 Fed. 863, 867.

It is equally clear that the averments of the present bill bring the case fully within the authority of Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., in respect to the contributory infringement by the defendants. The insistence that the opinion of this court in respect to the doctrine of contributory infringements, as applied to cases of the type of that before us, is in conflict with Morgan Envelope Co. v. Albany Perforated Paper Co., 152 U. S. 430, 14 Sup. Ct. 627, 38 L. Ed. 500, presents no new aspect of that case for consideration. The broad difference between the effect of licensing a machine to be used only with a certain article, or for a special purpose, or in a particular place, and the sale outright of a machine with an "understanding" that an article made an element of the patent, which it was the object of the mechanism to deliver and destroy in delivering, should be supplied only by the patentee, is emphasized not only in that opinion, but again in Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107, where the opinion was by Judge Taft. The use of an invention in violation of the restrictions and conditions imposed by the patentee upon his licensee is a use prohibited, and a defiance of the monopoly reserved by the patentee. It is necessarily an unlawful and prohibited use of the invention, and an invasion of the patentee's rights, in every sense of the term. An action which raises a question of infringement is an action arising under the patent law. That the patentee may have a remedy for breach of contract, also, does not defeat the jurisdiction. This, too, we decided in Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. The same question arose in the Seventh Circuit Court of Appeals in Victor Talking Machine Co. v. The Fair (C. C. A.) 123 Fed. 424. In that case the talking machines were sold to jobbers subject to the conditions that they should not be resold at less than a price named, and an inscription was placed upon each instrument giving notice that the patentee licensed the sale or use "only when sold at a price not less," etc. The court held that a sale in violation of this condition was an infringement. No question of contributory infringement arose in the case.

The mere sale of wire which might be used in the Elliott machines, or for some other noninfringing use, would by no means constitute the appellants infringers. It is the sale of wire adapted to the infringing use, with the intent and purpose that it shall be so used, which constitutes contributory infringement. It is the intent and purpose to aid and assist in bringing about an infringement which is the essence of the tort. In Loew Filter Co. v. German-American Filter Co., 107 Fed. 949, 950, 47 C. C. A. 94, this court, speaking through Judge Severens, said that the making and selling of certain filters "adapted to and intended, as they were, for no other use than filtering beer or similar fluids, should be held as contributing to such use by brewers, and as standing in the same liability as the parties actually using them." In Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 721, 26 C. C. A. 107, 116, Judge Taft, speaking for this court, said:

"It is well settled that, when one makes and sells one element of a combination patent with the intention and for the purpose of bringing about its use in such a combination, he is guilty of contributory infringement, and is equally liable to the patentee with him who in fact organizes the complete combination."

The intent that the article sold shall be used in an infringing way must be made out. In the case last cited it was said that an infringing intent "is a matter of certain inference from the circumstances that the parts sold can only be used in the combinations patented." It was added:

"Of course, such an inference could not be drawn, had the articles, the sale or offering of which was the subject of complaint, been adapted to other uses than in the patented combination. In the latter case the intention to assist in infringement must be otherwise shown affirmatively, and cannot be inferred from the mere fact that the articles are in fact used in the patented combination, or may be so used."

This case was followed and approved in Bullock Co. v. Westinghouse Co. (decided by this court March 8, 1904, and not yet officially reported) 129 Fed. 105. The averment of the bill that the defendants, "with full knowledge of the exclusive rights of the complainants as aforesaid," refers very obviously to complainant's "exclusive rights" to supply coils of staple wire to be used in connection with their invention. An exclusive right to so supply wire was the subject of the preceding paragraph. It is then averred and charged that the defendants have been engaged "in selling, from time to time, *to the said users* of the Elliott machines, and for the purpose *and with the express intent that the same shall be used* upon the Elliott machines, wire put up in spools or coils, and not furnished by the Elliott Machine Company," and that said wire so furnished and sold to the users of such machines "is put up on spools or coils of the exact form, shape, size, color, and appearance of the spools or coils furnished by the Elliott Company, and of the exact form, shape, and size suitable for use upon the Elliott machines, *and suitable for no other use.*" (The italics throughout the opinion are ours.) Thus the averments are that the wire sold by defendants is, in the manner in which it is put up, in its size, color, and temper, especially adapted to use in the Elliott machines, and that *"it is suitable for no other use."* If this is true—and, for the purposes of a hearing upon the bill and demurrer, an averment of fact must be taken to be true—then the intent that the spools of wire sold by defendants shall be used in an infringing way is made out. But the bill goes further, and affirmatively charges that the sales so made to users have been made with "the purpose and with the express intent that the same shall be used upon the said machines," etc. The necessary averments to make out a selling and offering for sale of an article for use in connection with the Elliott machines, which is a prohibited and infringing use, could hardly be stated more distinctly. No other inference is reasonable than that if the defendants, as alleged, have for years been engaged in selling wire suitable only for use in Elliott machines, and with the intent that it should be used upon such machines, it has been so used as intended. But to still further strengthen this certain inference, the bill adds that some users of the machines "have purchased wire from the defendants, supposing and believing it to be the genuine wire furnished by the Elliott Machine Company." But it is not essential that there shall have been any actual infringement, in order to entitle a complainant to an injunction. The selling and offering for sale with the intent and purpose to bring about an infringement are enough to entitle com-

plainant to an injunction to prevent the threatened injury. Thomson-Houston Electric Co. v. Kelsey Electric Ry. Co., 75 Fed. 1005, 1008, 22 C. C. A. 1; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 722, 26 C. C. A. 107; Wallace v. Holmes, 29 Fed. Cas. 79. Every offer to sell, to the users of such machines, coils or spools of wire suitable only for use in such machines, with knowledge of the limited license of the users, and with the intent that the article shall be used in such a way as to defy the terms of the license, is a proposal for a concert of action in bringing about an infringement. The conclusion we reach is that the averments of the bill make a case so closely identical with that presented in Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. as to require identical judgments.

The decree is accordingly affirmed.

DREWSON v. HARTJE PAPER MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1904.)

No. 1,280.

1. PATENTS—EVIDENCE OF DATE OF INVENTION—PRINTED COPY OF PATENT.
   The statement, in a printed copy of a patent issued and sold by the Patent Office, of the date when the application was filed, will be taken as prima facie evidence of such date, in the absence of objection, and the date of invention will be presumed to have been the same.
2. SAME—PATENTABLE NOVELTY—APPARATUS TO SEPARATE GASES FROM LIQUIDS.
   The Drewson patent, No. 565,263, for an apparatus for separating gases from liquids under pressure, intended for use in the paper-pulp making art, to free the sulphurous acid gas blown off from the pulp digester from the cooking liquor escaping with it, is void for lack of patentable novelty.

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

This is a bill to enjoin infringement of the claims of patent No. 565,263, issued to the complainant, Viggo Drewson, "for certain improvements in apparatus for separating gases from liquids under pressure." The claims of the patent are as follows:

"(1) The combination of a separator for separating a gas and a liquid, a U-shaped pressure-tube, one leg of which is connected with said separator, said pressure-tube being adapted to contain a column of liquid for maintaining the pressure in said separator, and a cooler for said separator for maintaining the liquid in a liquid state.

"(2) The combination of a pulp-digester, a separator for separating a gas and a liquid, a pipe connecting said digester with said separator, means for carrying off the gas from said separator, a U-shaped pressure-tube, one leg of which is connected to said separator for containing a column of liquid, and a cooler for said separator for maintaining the liquid in liquid form."

The patentee, in his specifications, thus describes the object of his invention:

"In the making of paper-pulp from wood by the sulphite process, the wood, in the form of chips, is cooked to disintegration and decomposition in a digester containing sulphite liquor under steam pressure and heat. During the cooking process a valve is opened at frequent intervals, and sulphurous acid gas blown off from the digester, which is afterward used in cooking a subsequent charge. In the blowing off, particles of the cooking liquid are carried off with the gas, and it is desirable to separate such particles of the liquor from the gas, as such liquor is impregnated with the impurities resulting from the decomposition

of the wood in the digester, and these impurities have a damaging effect upon the subsequent charge. The object of this invention is to provide a simple and convenient means for separating impure particles of cooking liquor from a sulphuric acid gas blown off during the cooking operation, so as to prevent the impurities thereof from being returned to the digester, and damaging the product of the subsequent cooking operation."

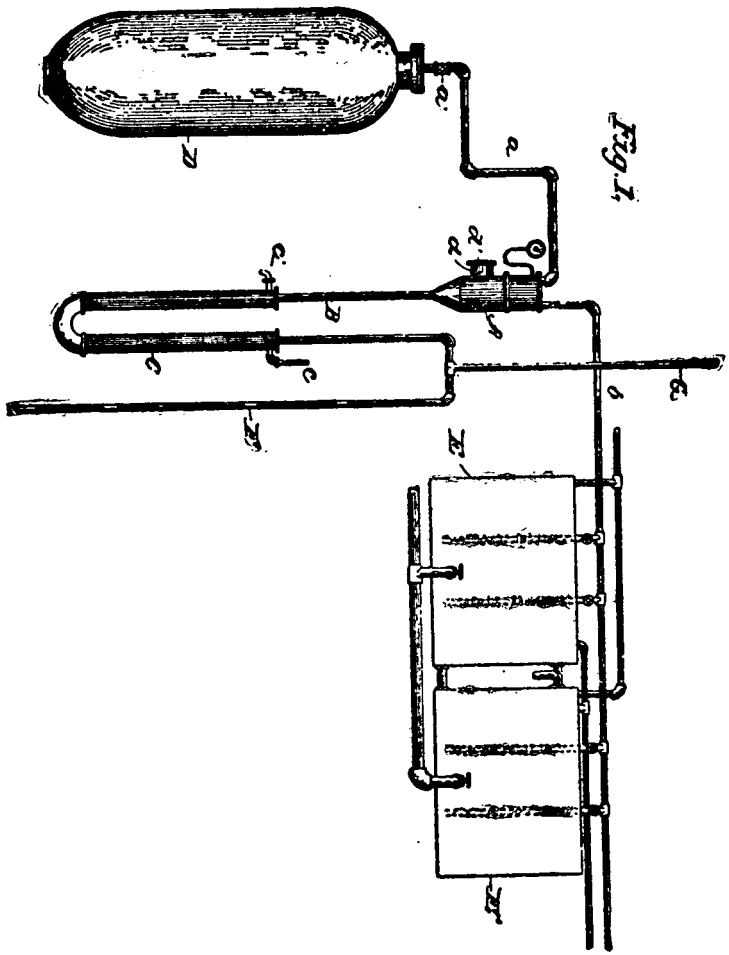


Fig. 1 of the drawing shows a side elevation of a pulp digester and reclaiming tanks provided with Drewson's apparatus. D represents a digester, provided with a pipe, a, leading out from the top thereof, through which gas is blown off, being regulated by a stopcock, a'. A represents the separator connected at its top with the outer end of pipe, a, and the sulphuric acid gas blown off from the digester, together with the cooking liquor carried as vapor or otherwise with the gas, is discharged into the top of this vessel. An outlet pipe, b, for the escape of the gases from the separator, leads out from the top to the reclaiming tanks, E and E'. A U-shaped pressure-tube, B, is connected at one end to the lower end of the separator, A, and at the other end with a discharge

pipe, F, provided with an upwardly extending vent pipe, G. This U-shaped pressure pipe is of sufficient height—say about 30 feet—and is filled with a suitable liquid, preferably water, so as to maintain a proper pressure in the separator, A. This U-shaped tube, B, is provided with a cooler, C, to prevent the liquid contained therein from being converted into steam and being blown off. This cooler, the inventor states, "is preferably in the form of a water jacket surrounding the lower portion of the said tube," etc.

The answer denied in general terms that Drewson was "the true, original, and first inventor of the apparatus for separating gases from liquids under pressure," and "denies that said apparatus was not known or used by others, and was not patented nor described in any printed publication before his alleged invention thereof." The answer also avers that, in view of the prior state of the art, the apparatus of the complainant did not involve patentable novelty, etc., and cites a large number of prior patents as anticipations; including among them, patent No. 545,550, September 3, 1895, to G. Symons.

Upon all of the evidence, the Circuit Court held both claims void for want of patentable novelty, and dismissed the bill.

J. E. Hindon Hyde, for appellant.
Wm. L. Pierce, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

The first claim is broadly for an apparatus for separating a hot gas from a hot liquid. The second is limited to an apparatus for separating a specific hot gas from a specific hot liquid, and includes one additional element—a "pulp digester." It was not new in the pulpmaking art to utilize the hot sulphurous acid gases generated in a pulp digester to assist in cooking a fresh charge. The patentee, in his recital of the state of the art, admits this, but says that this valuable gas was blown off, mixed with cooking liquor impregnated with impurities resulting from decomposition of the wood in the digester. The object of his invention was simply to separate the valuable gas from the impure particles of cooking liquor which had theretofore been carried with the gas into the reclaiming tanks. As early as February 21, 1893, the patentee himself had obtained a patent for a method of utilizing this gas by forcing the hot gas into a new charge of cooking liquor at or near the bottom of a reclaiming tank, and causing the gases "to percolate through said liquor in direct contact therewith." That patent shows a pipe leading from the digester to the bottom of the reclaiming tanks. Of this pipe the specifications say:

"The gases are conducted from the digester through the supply pipe, a, into the lower part of the tank, A, in which the liquor for cooking the next charge of wood is placed."

The defect in this was that the apparatus described by him for using his process did not provide a means for separating the sulphurous acid gas blown off from the digester, and carried by his pipe, a, to the bottom of the reclaiming tank, from the particles of impure cooking liquor likely to be mixed with it. But it is a mistake to say that Drewson's first patent did not show an apparatus for forcing this hot gas into the new charge of cooking liquor. That it did not show an apparatus for effectually separating the desirable gas from the undesirable contaminated cooking liquor may be conceded. But Drewson was not the

first to discover the economical advantages in utilizing this waste sulphurous acid gas. See the patent to Tilghman, No. 70,485, and to Mitschenlich, No. 263,797, as well as others in evidence in this case, all prior to both of Drewson's patents. The case therefore narrows itself to the question as to whether it was invention to make an apparatus which will separate this hot sulphurous acid gas from an undesirable hot liquid likely to be blown off with the gas from the pulp digester. But it was not new to separate a gas from a liquid by means substantially identical with those shown by Drewson's patent. Separators with both air-cooled and water-cooled U-shaped pressure-tubes are found in connection with apparatus for the distillation of turpentine, glycerine, petroleum, and other articles. We need only call attention to the patent to Hawes for a turpentine still, to Laist for a glycerine still, and to Marrin for apparatus for refining petroleum and tar, and to Culmer for apparatus for a "separator condenser." The separating chamber of the Marrin patent is a vessel which receives a mixture of gas and liquid. Pipes running from the bottom convey the liquid to receiving tanks. "These pipes," says Prof. Wagner, the defendant's patent expert, "at the end next to the separator, are bent into U-shape, and form pressure-tubes which balance the difference in the pressure between the separators and the outlet end of the pipes." These U-shaped pipes and the separator itself are immersed in cooling water contained in a tank, which answers to the element "a cooler" in the claim of the patent. So in the patent to Laist of October 9, 1883, for an apparatus for the manufacture of glycerine shows a water-cooled U-shaped pressure-tube in connection with a worm from distilling apparatus. An apparatus even more closely identical is that shown in the patent to G. Symons for an apparatus for separating liquid from gas, automatic in its operation. This latter shows no cooler, and in that respect only differs from the device of Drewson. But it is said that for the purpose of the Drewson patent—the separation and reclamation of a hot gas from a hot liquid—the Symons patent would be inoperative. This failure, says Prof. Hutton, the complainant's expert, would be due to the continuous vaporization of the hot liquid standing at the top of the open arm of the U-shaped tube, which he says would be a vaporization explosive in character, which would carry out through the free end of the tube its entire contents if this liquid was at a temperature above the boiling point of the liquid contents. Conceding this, the problem presented would be to devise a cooler which should prevent such vaporization. But this was not a problem involving the exercise of invention. The cooling devices in use in condensing and distilling apparatus shown in the old patents to Howe, Laist, Marrin, Culver, and others, shown in evidence, make it plain that to apply a cooler to a column of hot liquid to prevent vaporization, or to a column of vapor to induce condensation, would involve nothing more than mechanical skill in one desirous of using the Symons device to separate a hot gas from a hot liquid. The utilization of some of the devices of the distilling art to the separation of a hot gas from a hot liquid might require an increased length of the legs of the U-shaped pressure-tubes shown therein, but this would be an obvious matter

to one skilled in the art as the proper means for dealing with the difference of pressure between the outlet pipe of a pulp digester and the atmosphere.

But it is said that the Symons patent is pleaded in the answer as an anticipation, and that it is not, in fact, such a patent. The Drewson patent in suit was issued August 4, 1896. The Symons patent was issued Sept. 3, 1895. But counsel for Drewson say that this patent was applied for June 12, 1895—a date antecedent to the issuance of the patent to Symons. The Drewson application is shown by a certified copy of the file wrapper and contents. The defendants offered in evidence a Patent Office printed copy of the letters patent No. 545,550, issued to George Symons. This contains the usual recital, "Application filed Jan. 17, 1895, serial No. 535,191." Section 892, Rev. St. [U. S. Comp. St. 1901, p. 673], reads as follows:

"Written or printed copies of any records, books, papers or drawings belonging to the Patent Office, and of letters patent, authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof."

This copy is not certified. But no objection was made on this or any other account, and the copy filed was received without any objection of record. The practice of waiving the certificate when a printed copy from the Patent Office is presented is probably universal. Walker on Patents, § 506. If the complainant had wished to object to the printed copy either because it had not been certified, or because it included the statement of the date of the filing of the application, or of the serial number of the application, he should have seasonably pointed out his objection, so that the complainant might have an opportunity to supply the defect. It may be that the date of the application, now universally found upon the Patent Office copies of letters patent, is not the best evidence of the filing date, inasmuch as such date is not technically a part of such letters, and that the date of filing the application should be shown by a certified copy of the application itself. Walker on Patents, § 129. It is unnecessary to decide this. The practice in this circuit has been to regard the date of filing an application as prima facie shown by the date stated in the printed copies of patents supplied by the Patent Office. In this case no objection to using the printed copy as evidence of the date of application is shown by the record, and no error has been assigned because the court below carried the date of the Symons patent back to the date of the filing of the application, as shown by the copy of the patent. The objection should have been made in season to have enabled the complainant to file a certified copy of the Symons application. Not having been made below, or if made not made upon the record, it is too late to make it here. The date of letters patent is prima facie the date of the application, in the absence of other evidence of a different date. Worley v. Tobacco Co., 104 U. S. 340, 342, 26 L. Ed. 821. The statement in a printed copy of letters patent issued and sold by the Patent Office is, in the absence of specific objection, prima facie evidence of the date

when the application was filed. The omission to object to evidence of prior invention at the proper time, because not set out in the answer as required by statute, is fatal, and the objection cannot be made on appeal. Roemer v. Simon, 95 U. S. 214, 220, 24 L. Ed. 384; Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177. In the absence of other evidence, the invention of the patent is presumed to be identical with that disclosed by the application. Loom Co. v. Higgins, 105 U. S. 580, 594, 26 L. Ed. 1177. Symons applied for his patent January 17, 1895—several months before the date of the filing of the Drewson application. The date of the first application, in the absence of any other evidence of the date of an invention, must be taken as establishing the date of the first invention. It follows, therefore, that the patent to Symons not only has the earlier issue date, but prima facie covers the earlier invention, and was therefore entitled to be regarded as an anticipating patent. The apparatus covered by the latter patent to Drewson is the apparatus of the earlier Symons patent, with a cooler added. The addition of a water jacket to the U-shaped tube of Symons was not invention. It was, at most, the application of an old device to the same use in a different industry.

The contention that the apparatus of Drewson is in some way peculiarly adapted to accomplish the saving of sulphurous acid gas, thereby solving a problem of great and peculiar difficulty in the paper-pulp making art, has been given careful consideration. But we have been unable to sustain the contention. All of the advantages of utilizing this gas when blown off from a pulp digester were well known, and the simple problem presented to Drewson was the arrangement of a separator which would separate a hot gas from a hot liquid in order to prevent the contaminated liquor mingled with the gas from passing with the gas into the reclaiming tanks. He found in the old arts various kinds of separator apparatus, and in the patent to Symons he found the device best suited to his purpose, provided he could cool the liquor in the pressure tubes so as to prevent its vaporization. The old art supplied him with many forms of coolers. The best way of keeping the water in his U-shaped tube cool enough to prevent vaporization did not present so difficult a problem as that considered in Solvay Process Co. v. Michigan Alkali Co., 90 Fed. 818, 33 C. C. A. 285, where it was held that the adaptation of a well-known method of cooling a column of hot liquid to the same purpose in another art was not invention.

The decree of the court below is accordingly affirmed.

CLEVELAND FOUNDRY CO. et al. v. DETROIT VAPOR STOVE CO.

(Circuit Court, E. D. Michigan, S. D. April 20, 1903.)

No. 3,544.

1. PATENTS—PROCESS—CLAIM FOR FUNCTION OF MECHANICAL DEVICE.
A process claim in a patent which is nothing more than for the operative effect or function of a mechanical device described in another claim is invalid.

2. SAME—VALIDITY—OIL BURNER.
The Jeavons patent No. 475,401, for an oil burner, claim 1, is void because granted on an amendment of the application which was not within the scope of the original, or, if within such scope, for anticipation by patent No. 438,548 to the same inventor, and also for lack of invention in view of the prior art. Claim 5, for a process, is also void as covering only the functions of the mechanical devices described in the prior claims.

3. SAME—INFRINGEMENT—VAPOR BURNERS.
The Jeavons patent No. 438,548, and the Jeavons and Lannert patents Nos. 461,219 and 467,466, each for a vapor burner, construed, and *held* not infringed.

In Equity. On bill for infringement.

Thos. B. Hall and Jesse B. Fay, for complainants.
Parker & Burton, for defendant.

SWAN, District Judge. This is a bill in equity for infringement of four patents, the first granted for hydrocarbon burner to William R. Jeavons, assignor of one-half interest to John A. Lannert (No. 475,401); the second to William R. Jeavons, assignor of one-half interest to John A. Lannert (No. 438,548); the third and fourth patents to said Jeavons and Lannert jointly, and respectively numbered 461,219 and 467,466.

The proofs show that complainants Jeavons and Lannert have jointly retained ownership of said four patents in suit from the respective dates of their issue, and that complainant the Cleveland Foundry Company is the exclusive licensee under said several patents, and was such licensee prior to the beginning of this suit. The bill charges infringement of each of the four patents sued upon, and, collectively, of ten claims of these patents. Complainants designate patent No. 475,401 as their "main patent," although last issued, and the other three as "improvement patents." The defenses are: (1) That the patents are void because of want of invention when compared with pre-existing patents. (2) That the defendant does not use the combination claimed in the first patent. (3) That the defendant does not use the combination claimed in the second patent. (4) That the defendant does not use the combination claimed in the third patent. (5) That the invention characterized by the claim of the second patent is not shown and described with sufficient clearness therein to warrant the claims of that patent. (6) That the fourth patent is void, not only because of pre-existing patents to other persons, but is especially open to objection in that

¶ 1. See Patents, vol. 38, Cent. Dig. § 6.

its claims are drawn to inventions shown and described in earlier patents to the same applicant; also that some of them are drawn to inventions shown and described and claimed in earlier patents to the same applicants. (7) That the fourth patent was so completely and substantially changed by so-called "amendment" during its progress through the Patent Office as to characterize an entirely different invention from that which applicant sought to obtain in the first instance, and is therefore void. Especially it is open to this objection because the rights of other persons became established in the meantime.

The "Main Patent," as the complainants style it (No. 475,401), was issued May 24, 1892, on an application filed December 20, 1888, and is for an "oil burner." The first patent chronologically is No. 438,548, bearing date October 14, 1890, and is for a "vapor burner." The application therefor was filed January 6, 1890. Complainants style this the "first improvement patent." The next in date is letters patent No. 461,219, issued October 13, 1891, for a "vapor burner," on an application filed December 19, 1890. This complainants term the "Second Improvement Patent." Next came letters patent No. 467,466, dated January 19, 1892, for a "vapor burner," on an application filed November 4, 1891. This complainants term the "third improvement patent."

In 1888 the art of burning a liquid fuel had been well advanced. The burning or combustion of fuel means the production of a rapid chemical union of oxygen and either hydrogen or carbon, or the two together. The liquid fuel most commonly used is a hydrocarbon. None of the hydrocarbons in common use (ranging from light gasoline to heavy kerosene) will burn as a liquid in its pure state. The liquid must be finely divided, sprayed or vaporized, and so mingled with the air that the air very greatly exceeds the liquid in mass. The liquid is very easily vaporized. Gasoline will give off vapor at a very low temperature, and will be vaporized in a very short time at a temperature of about 60 degrees. Its expansive pressure when vaporizing is such, even at ordinary temperature, that if the gasoline be poured onto water in a vessel which is closed except for a standpipe, the lower end of which dips into the water, the pressure produced by the vaporizing liquid will lift from 40 to 50 inches of water through the pipe (at 60 or 70 degrees F.). The liquid expands to a vapor which occupies about 200 times the space of the liquid, and this must be mixed with 50 or more times its volume of air to burn.

In the specifications of the so-called "main patent," Jeavons states that he has "invented certain new and useful improvements in oil burners. My invention relates to hydrocarbon burners, and it consists in the method and construction substantially as shown and described and particularly pointed out in the claims." After reciting the different ways of obtaining a distribution of hydrocarbon oils or vapors or combustible air, "previously in use," viz.: (1) The distribution of oil by capillary attraction, as by a wick, as in an ordinary lamp; (2) by spraying the oil by means of a jet of air or steam, under pressure; (3) by generating the vapor in a retort

in which the vapor is subjected to a head or pressure, and depending on the artificial pressure in the retort to feed the vapor; (4) by evaporating or vaporizing gasoline or other light hydrocarbon on an exposed surface by passing a current of air over the same and then feeding the carbureted air to the burner, the old and well-known carbureting devices being of this class.

Jeavons declares that his invention differs wholly from these, and involves (1) the conversion of the oil into vapor by exposing the oil to a heated surface, and (2) then distributing or conveying the vapor by its gravity to the place or places where or about which the vapor is supplied to the burner and maintains combustion. "In carrying out the method, I rely," he says, "on the superior density or gravity of the hydrocarbon vapor, as compared with air, to distribute or move the vapor, in the presence of air, to the point where it is to be utilized in support of combustion." He provides "a channel, holder, or space which is so inclosed or guarded as will provide a suitable path for the vapor and prevent disturbance by air, and also prevent such open and free exposure to air as will permit the vapor to be consumed before it is distributed, and thus defeat the uniform and constant supply thereof evenly to all parts of the burner."

After describing the operation of his oil burner, Jeavons says:

"It will be seen by the foregoing description that my invention comprises a construction in which vapor is received and distributed in a channel or chamber by gravity, in such quantity as to prevent admission of air through the supply opening provided for vapor, and to cause a steady and uninterrupted flow of vapor to the combustion chamber. By the words 'free opening,' as used herein [in the specifications], I mean an opening of sufficient area to supply the vapor freely to the burner, and in which no artificial or outside pressure is employed to cause the vapor to flow into the combustion chamber —such, for example, as a head of oil or other equivalent means commonly used in gasoline stoves to force the vapor through a jet orifice."

The bill charges infringement of claims 1 and 5 of this patent. These are:

Claim 1: "A hydrocarbon vapor burner, consisting of a vapor holder constructed for the free and uniform distribution of the vapor therein by gravity, and having a free opening for the escape of the vapor, in combination with perforated combustion walls having a flame space between them in communication with the said holder, substantially as described."

Claim 5: "The process herein described of converting liquid hydrocarbon into vapor and conveying and burning the vapor, which consists, first, in vaporizing the oil by exposure to a heated surface, then conveying the vapor by gravity to the points where it is to be burned, and then supplying air to the vapor in limited quantities to meet the demands of combustion, substantially as described."

The specifications, exclusive of the fifth claim, do not otherwise mention a process than by describing the operation of the oil burner The invention claimed is, "Certain new and useful improvements in oil burners," and the patent was granted for an "oil burner."

It has been held that there cannot be in the same patent a claim for a machine and a claim for the process of using that machine. Gage v. Kellogg (C. C.) 23 Fed. 891–894, and cases cited. This would make the fifth claim of doubtful validity. The "process" it

describes is nothing more than a claim for the operative effect or function of a vapor burner. This is not patentable. Risdon Iron & Locomotive Works v. Medart, 158 U. S. 77–79, 15 Sup. Ct. 745, 39 L. Ed. 899; Westinghouse Co. v. Boyden Power Co., 170 U. S. 555–557, 18 Sup. Ct. 707, 42 L. Ed. 1136.

There is another substantial objection to this claim. The means claimed for conveying the vapor to the combustion chamber, which is immediately above the vapor holder, are, "conveying the vapor by gravity to the points where it is to be burned." As the vapor is confessedly of greater specific gravity than air, the process claimed is obviously irreconcilable with the law of physics. When the vapor has expelled the atmosphere from the vapor holder by reason of its greater weight, the force which carries that vapor to the higher plane of the combustion chamber must be one exerted in the contrary direction to that of gravity. The specifications state:

"This clear vapor fills the holder to the exclusion of air, so that combustion cannot occur therein, but occurs outside the holder between the perforated tubes or walls, where the air can combine with it," etc.

This, Jeavons states (lines 109 to 112 inclusive, page 2 of specifications), is the space within the perforated tubes or walls shown in the figures, and that between the concentric walls. The expansive force of the liquid when vaporizing—increasing 200 times the space occupied by a drop of the liquid—is the true uplifting conveyance of the vapor. When the vapor has filled the channel space or vapor holder, the only agency operating to uplift it must come from the vaporization of the liquid fed into the vapor holder and there vaporized. Its expansive pressure acts on the superincumbent vapor and raises it to the combustion chamber. Each successive drop of the liquid when vaporized crowds out a bulk of vapor equal to itself. Complainants' witness Morley so testifies:

"XQ. 36. In this particular case the supply [of the liquid] consists of a body of gas or vapor that is generated from a mass of liquid that enters the trough [or vapor holder] at or very near its bottom or lowest part, and the vapor must rise from the point at which the liquid is substantially to the top level of the trough, in order to keep the trough full. Is not that so? A. Yes. XQ. 37. Now, what force is it that lifts the vapor from the place at which the liquid is located to the top of the trough? A. The expansive force of the vapor produced by heating the liquid."

An interpretation of this clause has been suggested to reconcile it with the operation of the law of gravity, that the words "by gravity" mean that the liquid hydrocarbon is fed through the inclined supply pipe by gravity, and thus the vapor is conveyed "by gravity" to the points where it is to be burned. This recondite construction suggests a high degree of invention in the use of language to conceal thought, but is too farfetched and artificial to be useful. It is the "nose of wax * * * to make the claim include something more than or something different from what its words express. * * * The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public, as well as an evasion of the law, to construct it in a manner different from the plain import

of its terms." White v. Dunbar, 119 U. S. 47–52, 7 Sup. Ct. 72, 30 L. Ed. 303.

For still another reason the fifth claim must be denied validity. The original application and its amendments prior to April 25, 1892, laid no claim to a process, but defined mechanisms only. If the process it describes is anything more than for the use of the particular machine patented, it is for a different invention (James v. Campbell, 104 U. S. 356, 26 L. Ed. 786; Wing v. Anthony, 106 U. S. 142, 1 Sup. Ct. 93, 27 L. Ed. 110), and cannot be sustained on the original application and its amendments, under the authorities cited infra in the examination of the first claim. The fifth claim must therefore be eliminated from the case.

The sixth and seventh grounds of defense present the fundamental objections to the main patent, that, while the original application therefor was pending in the Patent Office, Jeavons enlarged his claims by amending to include a different invention from that set forth in the application and its amendments prior to April 25, 1892. Each of these, if true, avoids the patent. Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121. For that reason they will be first considered.

The history of the application and its vicissitudes in the Patent Office is as follows: It was filed December 20, 1888, and emphasizes the open generator as distinguishing his burner from prior constructions. He describes his invention substantially as follows:

"The object of this invention is to produce an oil burner (1) that will not smell, either when starting or stopping it, (2) that will produce perfect combustion with blue flame, (3) and will be under perfect control by the operator to produce more or less heat or put it out altogether. The generator is open, in contradistinction to a closed generator, as is used in gasoline vapor burners, * * * and the gases produced cannot be under pressure. It has a regulating valve between itself and the source of supply, not between itself and the flame. * * * Its purpose is to vaporize oil as fast as it flows through the valves. * * * It is essential to have some little wicking to start the generator. The generator can be of any form. All that is necessary is that the flame should rise in an inclosed space, and admit the air to mix within a divided form."

Fig. 1 shows a vertical section of a burner open around its upper edges. Fig. 2 is a vertical section of a pan-shaped burner. Fig. 3 shows the burner attached to a common form of gasoline burner. Fig. 4 is a plain view of the burner. Fig. 5 is a detail of a dial plate to denote the degree or opening of the regulating valve. A represents the burner proper having an opening, a, at the top of a wick, a', laid in the channel. B represents the walls perforated to admit air; these are removable like a lamp chimney. C is the outlet valve for the oil. In Fig. 2 the burner has a cap, E, to which the commingling pipes are attached, and the opening, a, is within this cover.

Then followed five claims: (1) A regulating valve between the generator and the source of supply. (2) An open generator in combination with perforated walls and a regulating valve. (3) An open generator with absorbent material, a regulating valve, and a

source of supply. (4) Open supplemental generator, main generator, controlling valve, perforated walls, and source of supply. (5) An index valve for the purpose above stated, in combination with the regulating valve.

On examination it was found that no one of these claims could be allowed, because found in patents that had been previously issued. The applicant directed the cancellation of all the claims, and substituted six others. These involved: (1) A generating chamber constructed to diffuse gases throughout the chamber, with an opening for their escape. (2) A generator open at top, and in combination with perforated side walls above the generator. (3) A generating chamber with an inclined feed pipe, a delivery pipe, also inclined, and valves in said pipes. (4) A generating chamber, inclined feed, and valve. (5) A generator, perforated concentric tubes, closure for top of inner tube, outer tube open. (6) A generator with a top opening, perforated tubes, feed pipe, and valve in combination.

These claims were all rejected on reference to existing patents. Applicant directed that the first and second claims be canceled, and filed three substituted claims. An amendment to the fifth (which became the sixth) was directed, and then all the claims except substituted claims 1, 2, and 3, and the amended sixth, were canceled.

The claims then stood, after the necessary change of ordinals: (1) A vaporizing oil burner, having a generating chamber provided with a contracted neck, and an opening through said neck for the escape of vapor, substantially as specified. (2) In a vaporizing oil burner, a metallic generator provided with an opening along its top narrower than the chamber of the generator, in combination with a wall above said opening having parallel sides, said wall provided with perforations to admit air, substantially as set forth. (3) A vaporizing oil burner, having a continuous chamber and a continuous opening over the chamber, said opening contracted to less width than the chamber, in combination with perforated parallel walls extending upward from about the opening, and having a clear, open space between them at their top, substantially as set forth. (4) In an oil burner, a generator having an opening along its top portion, with two perforated tubes, one within the other, forming walls extending vertically from about said opening, the inner tube being closed at its top and open at its bottom, and the outer tube open at its top, substantially as set forth.

The fourth was allowed by the examiner; the other three were rejected August 17, 1889. On appeal the board of examiners affirmed the decision of the primary examiner, December 9, 1889. No further step was taken in this application until November 6, 1890, when applicant filed his reasons for appeal from the decision of the board of examiners to the Commissioner, who, on January 29, 1891, reversed the decision of the examiners in chief, and sustained claims 1, 2, and 3. These, with the fourth claim allowed by the examiner, constituted, with the specifications, Jeavons' application in its completed form. The case was remanded by the Commissioner to the primary examiner. That officer, on February 25, 1891, the case

having been reopened by the Commissioner, held that the invention claimed is anticipated by applicant's former patent No. 438,548, granted October 14, 1890, "vapor stoves," and rejected the application. To this ruling Jeavons submitted, and on April 25, 1892, directed the cancellation of the drawing and of the specifications, and claims which had been sustained by the Commissioner, and substituted another drawing. His acquiescence in that ruling and in the rejections preceding it conclude Jeavons from denying the lack of invention in those claims and the identity of the invention set forth in his original application of December 20, 1888, and all its amendments made prior to April 25, 1892, with that covered by the patent of October 14, 1890, which was applied for and granted pending the patentee's application of December 20, 1888. Notwithstanding the fact that Jeavons had thus obtained a patent for all that was patentable in his application of December 20, 1888, as it stood prior to April 25, 1892, and it had thus become functus officio, on April 25, 1892—one year and two months after the examiner had so decided, and over three years and four months after the filing of the original application of December 20, 1888—he resurrected (for amendment only) the application which the examiner had ruled was anticipated by his patent of October 14, 1890, so far as to direct the cancellation of the drawing, the substitution of a new drawing therefor, the cancellation of the specifications and claims, and the insertion of new specifications and claims. May 2, 1892, he instructed the Patent Office to "erase the entire description and claims submitted in amendment filed April 25, 1895," and substituted the following, i. e., those on which the "main patent" was granted. For comparison, the claims rejected and those held anticipated by the patent of October 14, 1890, those of April 25, 1892, and those of the patent in suit, are set forth in parallel columns:

Claims rejected or anticipated:

Having thus described my invention, what I claim as new and desire to secure by letters patent is:

(1) In an oil burner, a regulating valve between the generator and the source of supply, substantially as set forth.

(2) In an oil burner, an open generator in combination with perforated walls and a generating valve, substantially as set forth.

(3) In an oil burner, an open generator in combination with absorbent material, a regulating valve, and a source of supply, substantially as set forth.

(4) In an oil burner, the open supplemental generator, main generator, controlling valve, perforated walls, and source of supply, substantially as set forth.

(5) In an oil burner, a regulating valve between the generator and source of supply, in combination with an index finger and an index plate to denote the degree of opening of the valve, whereby the amount of oil flowing through the valve is accurately determined, substantially as set forth.

Witnesses: William R. Jeavons.

I. T. Corey.

H. T. Fisher.

Claims of April 25, 1892, and those of "Main Patent," erase claims, and insert:

(1) In an oil burner, a generating chamber constructed to diffuse the gases throughout the chamber, and an opening for the escape of the gases, substantially as set forth.

(2) In an oil burner, a generator provided with an opening along its top, in combination with perforated walls extending from either side of the said opening and serving to conduct the vapor and admit air thereto, substantially as set forth.

(3) In an oil burner, a generating chamber, a delivery pipe set at an inclination to the chamber, a supply pipe at an angle to the delivery pipe, and a valve in the angle of said pipes, substantially as set forth.

(4) In an oil burner, a generating chamber, a delivery pipe set at an inclination to said chamber, and a valve to close the delivery pipe, said pipe having a channel beneath the said valve open to the generating chamber, whereby the oil in said pipe will be discharged and consumed after the valve is closed, substantially as set forth.

(5) In an oil burner, a generator having an opening along its top portion, with two perforated tubes, one within the other, forming walls extending vertically from above said opening, the inner tube being closed at its top and the outer tube open, substantially as set forth.

(6) In an oil burner, a generator provided with an opening in its top to allow a free escape of the vapor and perforated walls about said openings, in combination with an inclined delivery pipe for feeding oil to the generator and a valve to control the flow of oil, substantially as set forth.

Erase claims 1 and 2, and insert:

(1) A vaporizing oil burner, having a generating chamber provided with a contracted neck and an opening through said neck for the escape of vapor, substantially as set forth.

(2) In a vaporizing oil burner, a generator provided with an opening along its top narrower than the chamber of the generator, in combination with a wall above said opening having parallel sides, said wall provided with a series of perforations to admit air, substantially as set forth.

(3) A vaporizing oil burner, having a continuous chamber and a continuous opening over the chamber, said opening contracted to less width than the chamber in combination with parallel perforated walls extending upward from about the opening and having a clear open space between them at their top, substantially as set forth.

Amendment August 6, 1889.

The Commissioner of Patents:

In the matter of the application of William R. Jeavons, oil burners, filed December 20, 1888, No. 249,151, claim 1, line 1, erase "a" and insert "an unventilated."

In claim 2, line 1, insert "metallic" before "generator," and erase "a series of" in line 4.

Erase claim 3, and substitute:

(3) A burner for diffusing and burning hydrocarbon gases, consisting of a nonventilating continuous chamber, having an opening above contracted to less width than the chamber, in combination with parallel perforated walls extending upward from about the opening, substantially as set forth.

Erase claims 4 and 5.

Change ordinal of claim 6 to "4," and amend said claim 6 by erasing in last line "and the outer tube open," and inserting "and open at its bottom and the outer tube open at its top."

Erase claim 7.

Appeal taken September 27, 1890; decision affirmed December 9, 1889.

Appeal to Commissioner, November 6, 1890; decision reversed January 29, 1891.

Reopened and rejected February 19, 1891.

Amended by filing substitute specification April 25, 1892.

Having thus described our invention, what we claim as new, and desire to secure by letters patent, is:

(1) A hydrocarbon vapor burner, consisting of a vapor holder constructed for the free and uniform distribution of the vapor therein, and having an opening for the escape of vapor, in combination with perforated combustion walls

having a flame space between them in communication with the said opening, substantially as described.

(2) A vapor burner provided with a vapor chamber having walls to confine the vapor, whereby the vapor is caused to travel uniformly to all parts of the chamber, and an opening in said chamber for the escape of vapor, in combination with perforated tubes having a flame space between them open to said chamber, substantially as described.

(3) The process of producing and distributing clear hydrocarbon vapor, consisting in feeding the oil in suitable quantity to a heated surface and thereby converting the oil to a vapor, and then conducting the vapor, unmixed with air, by gravity to the point where it is to be burned, substantially as described.

(4) The process herein described of converting liquid hydrocarbon into vapor and distributing and burning the vapor, which consists, first, in admitting the oil to a metallic surface heated to a degree which will vaporize the oil, then distributing the clean vapor thus produced to the points where the vapor is burned, and then supplying air to the vapor at successive elevation and in limited quantity, and burning the mixture, substantially as described.

(5) In an oil burner, a generator having an opening along its top portion, with two perforated tubes, one within the other, forming walls extending vertically from about said opening, the inner tube being closed at its upper portion and open at its bottom, and the outer tube open at its top, substantially as described.

H. T. Fisher, Atty.

Having thus described my invention, what I claim is:

(1) A hydrocarbon vapor burner, consisting of a vapor holder constructed for the free and uniform distribution of vapor therein by gravity, and having a free opening for the escape of vapor, in combination with perforated combustion walls having a flame space between them in communication with said holder, substantially as described.

(2) A vapor burner having a channel in which the vapor is distributed or conveyed by gravity, substantially as described.

(3) A vapor burner having a vapor receiving and conveying channel or chamber provided with a free opening of relatively small area communicating with the combustion chamber, in combination with a combustion chamber having openings for the admission of air to support combustion, substantially as described.

(4) The process herein described, consisting, first, of converting the oil into vapor, and then conveying the vapor by gravity to the place where it is oxygenized, substantially as described.

(5) The process herein described of converting liquid hydrocarbon into vapor, and conveying and burning the vapor, which consists, first, in vaporizing the oil by exposure to a heated surface, then conveying the vapor by gravity to the points where it is to be burned, and then supplying air to the vapor in limited quantities to meet the demands of combustion, substantially as described.

It is evident that the purpose of ingrafting the "amendments" of April 25 and May 2, 1892, upon the original application of December 20, 1888, was to give continuity to that application, and thereby enable the applicant to assert anticipation of all improvements or devices which had gone into use or been made in the three years and four months between December 20, 1888, and May 2, 1892. In Railway Company v. Sayles, 97 U. S. 563, 24 L. Ed. 1053, where an amended application and model, upon which a patent was issued, was filed five years after the original application, the court said:

"If the amended application and model filed by Tanner five years later embodied any material addition to or variance from the original—anything new that was not comprised in that—such addition or variance can not be sustained on the original application. The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the meantime, any more than it does with the

case of reissues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has in the meantime gone into public use."

In Michigan Central R. R. Co. v. Consolidated Car Heating Co., the Circuit Court of Appeals, in an elaborate opinion by Judge Severens (67 Fed. 125–130, 14 C. C. A. 232), applied the same doctrine. In that case the patentee of a car-heating device filed specifications and drawings in which he made no claim for an arrangement of steam pipes, without which his application was valueless. Seven months thereafter he amended his specifications. Of the new feature introduced by the amendment Judge Severens says (page 129, 67 Fed., page 240, 14 C. C. A.):

"The combination is useless without that feature, and the bringing it in would be the last step in reaching success. If it was invention, it was an invention not hinted at in the original application; and, if the patent is to be restricted to the substance of the application, the claim is invalid because the invention was not useful. * * * We are of the opinion that the second claim cannot be supported in view of the history of that element of the combination without which the invention is not useful, and that the patent as to that claim is therefore void."

In the American Bell Telephone Co. v. National Telephone Co. (C. C.) 109 Fed. 1005, Judge Addison Brown cites the foregoing authorities, and the opinion of Mr. Justice Bradley in Consolidated Electric Light Co. v. McKeesport Co. (C. C.) 40 Fed. 21, 26 et seq., for his conclusion that the Berliner patent—

"Is invalid for the reasons that the power to amend an application does not include the power to change the nature of the invention; that the right to amend or the right to complete an application under section 4894, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3384], does not give the right to transform completely; that the only remedy for a radical mistake in substance so serious as to require a transformation so complete as is here shown is a new application."

See, also, Consolidated Fruit Jar Co. v. Bellaire Co. (C. C.) 27 Fed. 381.

The rule of decision that a reissued patent cannot be expanded to embrace a new invention is as stated by Mr. Justice Bradley in Railway Co. v. Sayles, supra, equally apposite to the enlargement of an application or specifications by amendment. The enforcement of this rule in the case of reissues is not conditioned upon the fact that other patents have been applied for or granted before the reissue was taken out. It is absolute and positive. In White v. Dunbar, 119 U. S. 47–52, 7 Sup. Ct. 72, 30 L. Ed. 303, Mr. Justice Bradley states its reason thus:

"We attach no importance to the fact that, between the date of the original patent and the application for the reissue, the patent to Pecor [one of appellants] and Bartlett was granted. * * * The circumstance that other improvements and inventions, made after the issue of a patent, are often sought to be suppressed or appropriated by an unauthorized reissue, has sometimes been referred to for the purpose of illustrating the evil consequences of granting such reissues, but it adds nothing to their illegality. That is deducted from general principles of law as applied to the statutes authorizing reissues and affecting the rights of the government and the public."

The reasons which prohibit and penalize the abuse of the privilege of amending a defective patent equally condemn and invalidate the perversion by amendment of an application for one invention into an application for another.

Comparison of the original application of December 20, 1888, and its amendments with that of May 2, 1892, is demonstrative that the first had not a feature in common with the latter—except in its references to the prior art—which was not rejected on reference, or anticipated by Jeavons' patent of October 14, 1890. The latter patent embraced all that he could rightfully claim prior to April 25, 1892, under the application of December 20, 1888. After the issue of the patent of October 14, 1890, any amendment of the application which that patent necessitated must be for a new invention not patentable under the application and its amendments before that date. These facts are decisive that the additions to and departures from the original application and its amendments prior to April 25, 1892, found in the "amendment" of May 2, 1892, evidence new matter not comprised in the application or anticipation by the patent of October 14, 1890; that "such" additions or variations cannot be sustained on the original application, as is said in Sayles v. Railway Co., supra, and that if the substituted specifications of May 2, 1892, contain any invention, "it was an invention not hinted at in the original application." Whether the "main" patent, as complainant claims, displays invention of a primary character or not, if the combination in claim 1 was described in the original application and its amendments prior to April 25, 1892, it was anticipated by the patent of October 14, 1890, or, if it was not within their scope, it was for a new invention and cannot be upheld. Of course, Jeavons can have no benefit of any claims rejected by the Patent Office in the rejection of which he acquiesced. For these reasons, the first and fifth claims must be held invalid.

While the history of this patent is held fatal to its validity, the importance of the controversy and the exhaustive discussion by counsel of the other vital points in the case forbid that the disposition of interests of such moment involving expensive litigation should be rested on a single ground.

The defenses that claims 1 and 5 are drawn to invention shown and described in the earlier patent of Jeavons, and are also void for want of invention, have been fully argued, and may be briefly considered together. They lead to the same result. There are verbal differences between the descriptions of the "vapor holder" of claim 1 on the main patent and the "generator," "generating chamber," "continuous chamber," "channel," "space," "holder," etc., as this element is variously termed in rejected claims 1, 2, 5, and 6 of the first amended application, and anticipated claims 2, 3, and 4, the first 2 of which are allowed on appeal by the Commissioner and the last by the examiner, but these differences are only verbal. If they present variations of name and form, they do not suggest invention. As the claims made in the amended application as it stood prior to April 25, 1892, were anticipated by the patent of October 14, 1890, claim 1 of the main patent is equally defeated if its equivalent was

avoided by that patent or included in substance in any rejected claim made prior to April 25, 1892. The fact that in each and all of the claims mentioned, including claim 1 of the patent sued upon, the generator or vapor holder is claimed only in combination, is conclusive that it was old in the art. The same is, of course, true of every element of the claim. Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; Miller v. Brass Co., 104 U. S. 352, 26 L. Ed. 783.

The vapor chamber or holder was quite as clearly described in claims 1, 2, 5, and 6 of the first amendment, and 2, 3, and 4 of the second and third amendments above mentioned, as in claim 1 of the patent, unless the words "constructed for the free and uniform distribution of vapor therein by gravity" define construction, which differs, for example, from claim 1 of the first amendment, which is "for * * * a generating chamber constructed to diffuse the gases throughout the chamber and for an opening for the escape of the gases." This cannot be claimed unless the words "by gravity" have that effect. This is hereafter considered. Claims 1, 2, 5, and 6 of the first amendment were characterized by the examiner as "vague and indefinite," as defining "the generator by its function, and not by its construction." This objection equally obtains to the vapor chamber of claim 1 of the main patent. It is not differentiated in structure or description from its rejected predecessors in the application by the words "by gravity." These serve only to state the means by which distribution of the vapor is effected, viz., the greater specific gravity of the vapor as compared with air. The operation of that law in the distribution of hydrocarbon vapors was not Jeavons' discovery, nor is it claimed that it was first secured by any thing in form or construction peculiar to his vapor chamber. It is present and operative in every generator. In the anticipated patent (specifications, p. 1, lines 73 to 78, inclusive) he says:

"It is, of course, understood by persons skilled in the art, that the vapors of petroleum are heavier than the atmosphere, and in a burner of this character the vapor travels around and fills the walled and covered chamber before it will voluntarily escape therefrom."

To utilize the vapor accumulated in the generator there must be, what Jeavons calls in claim 1, "a free opening for the escape of vapor, * * * of sufficient area to supply the vapor freely to the burner, * * * or combustion cannot be effected." The necessity of such an opening is a truism in all generators. The last element in this combination, "the perforated combustion walls having a flame space between them in communication with said holder," are the familiar "concentric perforated combustion tubes" in use before 1864, as shown in Morrill's patent of that year. United Blue Flame Oil Stove Co. v. Glazier, 119 Fed. 160, 55 C. C. A. 553.

This analysis of the claim, if correct, establishes that each element of its combination was old and well known. The history of the art shows that most of them, if not all, had been associated in earlier constructions. Each performs the same function in the same way as the corresponding element in earlier devices—possibly with a greater degree of efficiency—and aside from the verbal disguises employed to conceal

its age and its identity with its predecessors in the art, and its attempt to appropriate the law of gravity as a novel element, the combination presents nothing new, and claim 1 defines nothing by construction to distinguish it from the claims rejected by the examiner and renounced by the patentee's acquiescence, or from those anticipated by the patent of October 14, 1890. The argument based upon the utility and salability of the vapor burner is answered in Grant v. Walter, 148 U. S. 547–556, 13 Sup. Ct. 699, 37 L. Ed. 552, where the court held that a useful and popular article lacking in novelty was not patentable, adding:

"The advantages claimed for it, and which it no doubt possesses to a considerable degree, cannot be held to change this result, it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent laws to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that, and still less of its patentable novelty. McClain v. Ortmayer, 141 U. S. 419–425 [12 Sup. Ct. 76, 35 L. Ed. 800], and authorities there cited."

Complainant has planted its case upon the proposition that patent No. 475,401 is the "main patent"—"fundamental patent"—is for a generic invention, and was first applied for, while the earlier patents were for subordinate specific inventions. If this be correct, the conclusions reached as to the former should be decisive of the subsidiary devices. Each of the improvement patents, however, is made the basis of an attack upon the defendant's construction, and must be separately considered.

The bill charges defendants with the manufacture, use, and sale of vapor burners, each "embodying and conjointly using all the inventions described and claimed" in the patents sued upon, "and that defendants threaten to continue the manufacture and sale in this country of such vapor burners, in which are embodied and conjointly used in one unitary structure all the inventions severally described and claimed in said letters patent." The proofs fail to support this allegation. It would be impossible to incorporate in one operative construction the various types of "vapor distributing chambers" in the four patents sued upon, and, if so incorporated, the resultant mechanism would be an aggregation of inharmonious parts. Unfortunately complainant has failed to designate upon which of the 10 claims of the 3 earlier patents charges of infringement are predicated. The labor of their examination seriatim in the search for supposed resemblances between these and defendants' construction has thus been greatly increased.

First Improvement Patent, No. 438,548.

The claims of this patent rest in combination only. Defendants' burner has not the closed distributing chamber, nor the narrow opening along one edge thereof, which are elements of claim 1. Claim 2 is not infringed—defendants have not the closely fitting cover of this claim. Claim 3—defendants' construction does not show a cover narrower than the base. Claim 4—"Complainant's Experimental Exhibit"—defendants' burner reveals nothing which can be identified as "a detachable cover forming a vapor cover," resting its edges in different planes. Claim 5—the proofs in the case do not point to infringement of this claim.

Second Improvement Patent, No. 461,219.

The burner described in the specifications and claims of this patent is a pronounced departure in form and appearance of some of their elements from those shown in complainant's other patents. The prominent elements are:

"A bowl or cup * * * having a substantially vertical flange, a, about it outside, of such depth as will afford a vapor distributing chamber. * * * The bottom of the bowl is studded with a number of hollow tubular projections having a limited space between them, as seen in Fig. 1, and rising substantially to the level of flange a. These projections are open throughout so as to take in air from the bottom, and each one is provided with a perforated tube or chimney, C, fixed firmly therein, all the said tubes rising to a common level."

The verbiage of this description, as in those of the other patents in suit, does not prevent recognition of the "perforated combustion tubes" familiar to the art, seated in the metallic bands which are attached to the bottom of the vaporizing chamber, and are of such height as to exclude the air from the tubes below their perforations, and thus prevent combustion in the vaporizing chamber. The hollow tubular projections in which the combustion tubes are fixed serve, therefore, the same purpose by practically the same means used in the prior art, viz., the elevation of the lowest perforations of the combustion tubes or chimneys above the vapor chamber. There is nothing in defendants' burner corresponding to the combination of any claim of this patent. The drawing portrays a vapor burner so entirely dissimilar in structure from defendants' as to discourage search for a combination characteristic of the former which the latter has appropriated. If the "burner bowl" of the former is a patentable, new, and distinct element in the terminology of mechanics from the polynominal part of claim 1 of the "main" patent which figures in successive stages of the application as a "generator," "vapor chamber," "holder," "channel," "space," etc., defendants' burner does not possess it. If it is the same element under a new name, varied only in form but identical in function, it is the heritage of all inventors, and is shown in the "first improvement" patent of October 14, 1890, under one of its many aliases, and in the claims rejected on references, notably in amended claim 1. The claims are so narrowed by their terms and the earlier constructions that if any patentable merit can be found in them it is restricted to its specific construction.

Third Improvement Patent, No. 467,466.

The single claim of this patent is for "a vapor burner bowl constructed with closed walls upon its sides, one of which is higher than the other in respect to the bottom of the bowl, and the two lower walls forming a vapor diffusing channel between them and perforated tubes forming the combustion chamber of the burner, substantially as described." This is also a merely structural patent for a combination of old elements, and therefore, because of the almost exact similitude of its leading element—the vapor bowl—to that of the last preceding patent, is not entitled to any liberality of construction, and is not infringed if patentable. Its patentability need not be discussed at length. In the

specifications (page 1, lines 24 to 32, inclusive) the patent of October 14, 1890, is sought to be distinguished, and it is stated that:

"In the original patent referred to, the vapor diffusing or distributing chamber was wholly outside of the combustion tubes, and the vapor fed therefrom into the space between the tubes. In the present invention the outside chamber is dispensed with, and the burner bowl between the combustion tubes is utilized as a diffusing or distributing portion or space for the vapor."

This change of the relative positions of the tubes and the vapor chamber or "burner bowls" scarcely rises to the dignity of invention. It is a merely structural variation which places the combustion tubes in the burner bowl or vapor chamber instead of above it, and like changes are made in other elements to limit combustion of the vapor to the space below the perforations of the tubes. All the parts sustain the same mutual relations and perform the same functions in the same way and by the same means in their new locations as in former mechanisms. The "second improvement patent," with its numerous perforated tubes, "dispenses with the outside [vapor] chamber," and the burner bowl between these metallic seats (or perforations) is also "utilized as a diffusing or distributing chamber" equally with the construction shown in the "third improvement patent."

The claim of invention, in the light of the history of the art and of the "main patent," including its rejected and anticipated claims, is of such doubtful merit that, upon the question of mechanical equivalency of defendants' burner, "that doubt should be resolved against the patentee," when, as here, the claims contain the words "substantially as described or set forth." Hobbs v. Beach, 180 U. S. 399–400, 21 Sup. Ct. 409, 45 L. Ed. 586. In Westinghouse v. Boyden Power Co., 170 U. S. 537–558, 18 Sup. Ct. 707, 42 L. Ed. 1136, it is said that the words " 'substantially as described' have been uniformly held by us to import into the claim the particulars of the specifications." The application of the rule is fatal to the charge of infringement. The claim vigorously limits the relative height of "* * * sides, one of which is higher than the other," by the language of the specifications (page 1, lines 45 and 46)—"say three times as high, or in that neighborhood"—and the drawing emphasizes this limitation. In defendants' burner the height of the sides is as 1 to 1¼ instead of 1 to 3. Defendants' burner has no vapor bowl, but a vapor chamber of radically different construction. This patent is not infringed.

The number of exhibits, the volume of the record, including the proceedings in the Patent Office, and the history of the art, and the numerous claims involved, have necessitated long and laborious examination of the matters in issue. Many points presented in argument and arising upon the patents sued upon, but unnoticed in the opinion, have received attention, but their determination is not called for in the view taken of the case.

The bill is dismissed, with costs.

S. A. COOK & CO. et al. v. HEYWOOD BROS. & WAKEFIELD CO. et al.

(Circuit Court, E. D. Pennsylvania. August 1, 1904.)

No. 43.

1. PATENTS—INVENTIONS IN SAME ART.
   A patent for an improvement in chairs having an adjustable back, and one for a similar device as an improvement in articles of furniture having a swinging member, are in the same art; only mechanical skill being required to adapt the device to the different articles.
2. SAME—INFRINGEMENT—IMPROVEMENT PATENTS.
   Where an invention is for an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by the use of a different form or combination performing the same function.
3. SAME—IMPROVEMENT IN FURNITURE.
   The Bowen patents, No. 667,162, for an improvement in chairs, and No. 678,219, for an improvement in furniture, both relating to a ratchet device for use on articles of furniture having a swinging member, are not infringed by the device of the Luppino reissued patent, No. 11,919.

In Equity. On final hearing.

J. S. Barker and H. H. Bliss, for complainants.
Southgate & Southgate, for respondents.

HOLLAND, District Judge. The complainants allege and set forth in their bill for a preliminary injunction that the defendants have infringed claims 1 and 4 of letters patent granted to G. A. Bowen, No. 667,162, January 29, 1901, for improvements in chairs, and claims 5 and 6 of letters patent granted to said Bowen, No. 678,219, July 9, 1901, for improvements in furniture, which patents are assigned to and owned by them. Defendants claim they are using a device shown in patent to Joseph Luppino, No. 11,919, reissued July 2, 1901. The defense set up and relied upon by the defendants is (1) that the claims in suit are invalid and void by reason of anticipation by the prior art; and (2) that defendants' patented device does not infringe any claims of the patents in suit. The bill of complaint alleges that the improvements in question are of great utility, and that complainants have manufactured and supplied to the trade articles of furniture, and particularly chairs, made according to the aforesaid letters patent, and have uniformly securely affixed to such articles of furniture plates bearing the word "Patented," together with the dates of issue of such patents, respectively. The answer denies the utility of the said improvements, and any manufacture thereof for the trade by the complainants. Mr. Melville E. Dayton, the only witness called by the complainants as a mechanical expert, himself an inventor of an adjustable chair, who is acquainted with the sale and kind of chairs in the market for the last five years, failed to find any Morris chairs employing the back-adjusting device of the Bowen patents in suit prior to his connection with this case, so that as the complainants, in their case thus presented, are

¶ 2. See Patents, vol. 38, Cent. Dig. § 38.

standing on their naked rights, there simply is involved the construction of the patents in suit.

In the first patent, claims 1 and 4, alleged to be infringed, are as follows:

"(1) The combination with the seat-frame and the hinged back, of a pivoted pawl carried by one of said parts, a catch or ratchet plate carried by the other, and provided with two tracks separated by a dividing rib or projection, which is provided with projections to be engaged by the pawl upon one side, the two tracks being connected, whereby the pawl may pass from one to the other, substantially as set forth."

"(4) The combination with a seat-frame and swinging back, of a pawl, D, having a pin, d, projecting therefrom at its free end, a ratchet-plate carried by the seat-frame in rear of the hinge connection of the swinging back, the said ratchet-plate being provided with a circumferential flange and a separating-strip or central rib, 4, which is provided with projections or ratchet-teeth upon its upper and rearmost face, the said circumferential flange and central rib being constructed substantially as shown, whereby there are formed two curved ways, 5 and 6, connected at their ends, in which the pin, d, of the pawl travels as the back is swung from one position to another."

In order that the device defined in these claims may be understood, it is only necessary to quote from the description, where the device, its manner of construction, and mode of application are fully explained:

"My invention relates to chairs of the type having swinging and adjustable backs, and has for its object to improve the means whereby the back is held in a more or less inclined position. In drawings, A represents the seat-frame of the chair; B represents the swinging back, hinged at its lower edge to the seat-frame, the back being supported between the rear portions of the arms. Each side bar, C, of the back is provided with a swinging pawl, D, which is provided with a projection or pin, d, adapted to engage with a catch-plate or retaining device carried by the frame of the chair on either side of the said frame. The plate is surrounded by a circumferential flange, 3, within which flange and projecting from the plate is a stationary rib or parting-strip, 4, in figure 5, substantially parallel with the opposite sides of the flange, 3, so that there are formed two tracks or ways, 5 and 6, between the circumferential flange and the central rib, one way on either side of the latter. The circumferential flange and central parting rib or piece, 4, are so shaped that the ways, 5 and 6, are curved, the concave or inner sides of the curves being toward the base or hinged end of the back. The lower or rear side of the rib, 4, is plain and concentric with the portion of the flange, 3, which is opposite thereto, while the opposite outer or upper edge of the rib is serrated or provided with a series of projections, 7, with which the pin or projection, d, may engage. The pawl, D, is pivoted to the side bar of the swinging back at such a point that this pivot is always above the projection or pin, d, when the device is in operation; and the construction of the catch or ratchet device is such that when the back is swung forward and into an upright position, carrying the pin, d, to the upper forward end of the ratchet device, the hinge of the pawl is forward of the pin or projection, d, and, when the back is swung to the other extreme of its movement, then the hinge connection of the pawls, D, is in rear of the pins, d, as they lie at the lower rearward end of the catch or ratchet-plate. The reason for this construction and arrangement is to cause the pawls to readily swing by gravity at the end of each movement of the back, so as to freely clear the central ribs or projections, 4. To secure the action of the pawl just described, it is necessary that the arc through which the pivoted end of the pawl moves as the back is being swung from one extreme of position to the other should be different from that through which the free ratchet-plate-engaging end moves, and this is secured by constructing the ratchet-plate so that the part which unites the two ways at one end (the lower end in the form of invention shown) is nearer to the hinge or fulcrum of the swinging back than are the opposite connected ends of the ways. It will be seen by referring to Fig. 3 that when the chair-back is swung forward into a sub-

stantial upright position the pins, d, are drawn forward and out of engagement with the ratcheted sides of the ribs, 4, and then fall therefrom into the upper forward ends of the ways, 5. As the chair-back is moved rearward the pins on the pawls travel without obstruction down and backward along the ways, 5, until they pass the lower ends of the ribs, 4, at which time the hinge-line of the pawls, D, will be rearward of the projections or pins, d, so that as soon as the pins or projections on the pawls escape the lower ends of the ribs the pawls will swing rearward by gravity, and opposite the lower ends of the ways, 6. If now the chair-back be lifted, the pins, d, will be carried upward into the ways, 6, and, by the time the first projections or ratchet-teeth upon the upper faces of the ribs are reached, the hinge-line of the pawls will have passed forward of the pins, so that the latter will freely engage with the said projections, and, as the chair-back is moved further forward and upward, the pawls will engage with the ratchet-teeth one after another, holding the chair-back in the angular position to which it may be adjusted."

The claims of the second Bowen patent alleged to be infringed are 5 and 6, as follows:

"(5) The combination with the frame of an article of furniture, a swinging member thereof, and hinging parts uniting them, of a ratchet and pawl engaging with the said relatively movable parts for holding the swinging member in different positions, the said ratchet comprising an attaching plate, a rack with which the pawl engages, and a circumferential flange surrounding the rack, and spaced therefrom, whereby a way is formed entirely around the rack, in which way the pawl is arranged to move, the said flange being slotted at one point to permit the separation of the pawl, substantially as set forth.

"(6) The combination with the frame of an article of furniture, a swinging member thereof, and hinging parts uniting them, of a swinging pawl having a laterally projecting pin, and a ratchet with which the pin engages, these parts being arranged to hold the swinging member in different positions, and the ratchet being inclined downward, and comprising an attaching-plate, a rack with which the pin of the pawl engages, and a circumferential flange surrounding the rack, and spaced therefrom, and arranged to inclose a way in which the pin of the pawl moves, the flange being slotted on its upper side at 12 to permit the passage of the pin of the pawl into the way of the ratchet, substantially as set forth."

This patent relates to the same device described in connection with the first patent to Bowen, with the addition of a slot in the upper flange of the two-track ratchet-plate, for the purpose of separating the pawl pin from the ratchet-plate, thereby enabling the parts of the article of furniture to which it may be adjusted to be separated for transportation or packing, and for the purpose of easy and ready adjustment when the article of furniture is to be put together for use.

In order that it may be fully understood just what Bowen has patented, and whether the defendants have infringed, it will be necessary to take a review of the prior state of the art at the time the two patents were issued to Bowen, and the Luppino patent, under which the device of the defendants is made; and, before doing so, we might observe that while the complainants' first patent is for an improvement in chairs, and the second patent is an improvement in furniture, as set forth in the respective descriptions, yet, in the construction of these patents, we shall hold that they are a patent for chairs or furniture, and can be used for either one or the other, because it is a patent for use on a general class of articles of merchandise, and, of course, only requiring mere mechanical skill to adjust it for use upon the different articles of furniture of a similar kind.

In the case of Antisdel v. Bent (C. C.) 122 Fed. 811, it was urged

by complainant that the patent was applied only to the construction of chairs, and not to the construction of beds, the specifications, however, claiming, that it was applicable to other articles of like character; and it was held that folding beds were of like character to folding chairs. We think the converse of this proposition is true, and is important in considering the defendants' device; and we have no doubt a device applicable to folding beds, couches, barber chairs, dental chairs, car seats, foot rests, surgeons' chairs, are all of a similar kind, and, in an invention for the raising or lowering a swinging member of one, would require only mechanical skill for the purpose of adapting the device to the use of the others.

In the description of these inventions, it is stated that the invention of the first patent is applied to chairs, "but it will be apparent that it is equally applicable to certain other pieces of furniture having parts, one of which is to be swung and maintained in an inclined position relative to the other—as, for instance, to a couch having a head portion which is adapted to be swung and inclined." And as to the second patent, the description sets forth that "my invention relates to the furniture of the kind in which one part, such as a back, is hinged to another portion, and swings relatively thereto, and is adjustable from one position to the other. I have illustrated my invention as applied to a chair, though I do not intend thereby to be understood as limiting my invention in its useful application to that particular article of furniture."

In the examination of the prior art, it will be found that some of the inventions were applied to beds, others to couches, chairs, and articles of furniture having parts, one of which is to be swung and maintained in an inclined position relative to the other. The ratchet-plate in both the complainants' and defendants' patents are double track, around which the pin of the pawl travels, whereas, in the prior art, beginning with the most crude construction of this sort of a device, there was but a single track; and the first device of this kind was applied to a Morris chair with a single-track catch or ratchet-plate arranged under the arm of the chair forward of the swinging member, so that the supporting rod or pivoted pawl could ratchet from one notch up to the other, whereby the hinged back could be brought from its lowest position, step by step, up to its highest position. The Gross patent, No. 137,069, granted March 25, 1873, illustrates this construction. In his description he states, "in raising the back, no pressure on the rods is required; the weight of the rods causing their pins to drop into the successive notches in the racks." In the Allen patent, No. 514,403, a single-track ratchet-plate was used, carried by the seat-frame in the rear of the hinged connection of the swinging back. The notches of the ratchet in this patent are on the bottom or lower part of the ratchet-plate, and so arranged that, as the swinging back is raised from its lowest to its highest position, the point of the pawl drops by gravity into the notches. In these old devices, the swinging member of the article of furniture to which they were applied could be pulled from its lowest position by steps to its highest position, and no manipulation of the catch device was necessary, except the power to pull the swinging member. But when it was necessary to lower the

swinging member, the pawls had to be raised with the hand and lifted back over the ratchet-teeth, and the double-track device was introduced for the purpose of avoiding that annoyance, so that the swinging member, when raised from the lowest point, step by step, as the pin of the pawl would ratchet from one notch to the other, and the swinging member raised to its highest position, the pin of the pawl could be switched off into another track, by which it could be returned over a free and smooth surface, allowing the swinging member to be adjusted to its lowest position.

The first patent with the two-track device was that issued to Poolman & Marks in 1884. This patent is for an improvement on adjustable chairs, and applied to a hinged foot rest of the chair. It is a two-track ratchet-plate, in which the pin on a pivoted pawl works; the two tracks being formed by a dividing rib and a surrounding flange. The lower track is provided with the ratchet-teeth facing toward the left so that the pawl pin can be drawn forward, step by step, to the left, to get any adjusted angular position of the hinged member determined by the number of notches ratcheted. When the pawl pin reaches the extreme of its forward motion, the force applied thereto raises the switch, and the continued movement allows the switch to drop behind the pawl pin; the tracks being thus normally discontinued. The pawl can now be pushed to the right, and, as it moves in this direction, the applied force will lift or switch the pawl pin up into the upper track formed by the dividing rib or projection, so that the pin can be moved to the rear through this track, clear of the ratchet-teeth in the lower track. When the pawl pin reaches the extreme right-hand position, it will drop by gravity around the right-hand end of the dividing rib or projection, so that when it is drawn forward again it will pass through the lower notched track. This patent also shows that this end of the ratchet-plate is open, so that the pawl pin can be taken out of the tracks entirely, although there is nothing claimed in the specification as to this opening. It will be noted that this is a two-track ratchet-plate, in which the pawl pin is switched from a notched track into a smooth track by the action of a pivoted switch, separating the two tracks so that on the forcible rearward movement of the pawl pin the same will be raised into the upper clear track, and pass freely backward, and so that, at the end of its movement to the rear, the pin will drop down from the upper end around the dividing rib in position to pass forward again through the notched track.

Next in order of time was the Cleaveland patent, issued in 1888. It is a two-track ratchet-plate, to be applied to bed bottoms, known as "invalid beds," to render them more efficient, and capable of handling with greater care, in which the head portion can be set at various angles. It consists of a ratchet-plate of a circumferential flange, which is provided with ratchet-teeth on its inner lower face, and a switch pivoted inside of the circumferential flange, with its free end resting upon the left-hand tooth of the ratchet-teeth. This switch is a dividing partition, and separates the ratchet device into two disconnected tracks; the lower track being provided with the ratchet-teeth, and the upper track being smooth and unobstructed. For the purpose of returning the pin of the pawl, after the swinging member has been

raised, step by step, from its lowest to its highest position, as it passes out of the last notch of the ratchet it opens the switch, which falls behind the pin by gravity, and then forms the track whereby the pin is returned again to the lowest position assumed by the swinging member. This device is like the one used by the defendants in the Luppino patent, with the exception that in the Cleaveland patent the ratchet-teeth are placed upon the lower part of the circumferential flange, and the switch forming the dividing rib is smooth, and in the Luppino patent the lower part of the circumferential flange is smooth, and the upper part of the switch or dividing rib is notched.

The next is the Heather patent, issued in 1900, as a certain new and useful improvement in adjustable spring cot and frames, and consists of a pivoted pawl carried by the hinged head section of the cot, and a two-track catch or ratchet-plate carried by the other section; the said two-track ratchet-plate being provided with two tracks defined by a surrounding flange and a dividing rib, which is provided with projections to be engaged by the pawl upon its upper side; the two tracks being connected so that the pawl can pass from one track to the other at one end, and disconnected by a switch at the other end. The pawl passes from the upper track to the lower track in such manner as to drop to the lower portion of the way below said notched bar, and is switched up into the upper way by being caused to ride over the switch into the upper way of the notched bar. The fact that there is a loop for the purpose of manipulating the pawl does not modify its effect upon the prior art. The mechanism of this device is similar to the one used by the defendants, with the exception that the switch is a very short one, pivoted to the right-hand end of the notched dividing rib, and would be almost identical if the entire notched dividing rib were used as a switch pivoted at the left-hand end of the notched dividing rib.

The next in order is a patent to Mr. Bowen, issued June 5, 1900, for a new and useful improvement in furniture, and consists of a two-track ratchet-plate arranged to lie horizontally, instead of vertically, as in the prior devices. It has the usual circumferential flange, and separated by dividing rib or projection. One track is provided with ratchet-teeth, and the other track is smooth. The tracks are connected at their ends by curved passageways, and no switch is used, but the pawl is changed from one to the other passageway by gravity, and a lateral movement of the pawl caused by the curve arrangement of the flange. This device, however, is more in the line of the one employed by the complainants in their patent, and is not important in considering the prior art with reference to the defendants' patent, excepting as to the flange that may be cut away at one end, as represented in their specifications, to permit free engagement of the pawl with the ratchet or catch plate, if this be found desirable. This slot for engaging and disengaging the pawl with the ratchet is important, as bearing upon the question of the second Bowen patent.

The defendants' device is a patent issued to Joseph Luppino July 2, 1901, for a new improvement in adjustable supports for chair backs. It is a two-track ratchet-plate, which is supported by the frame of the chair, in which the pin of the pawl is operated for the purpose of rais-

ing and lowering the back of the chair. The ratchet-plate consists of a circumferential flange with a slot in the upper left-hand part of the flange, and two ways are formed by a dividing rib, which is notched on the upper face, and is hinged at the left-hand end for the purpose of forming a switch. In operation, as the swinging back of the chair is raised from its lowest to its highest position, the pawl pin ratchets up over the teeth on the switch forming the central rib. When the hinged section reaches its highest extreme, the pin drops down around the left-hand end of the moving switch. Then, as the swinging member is moved from its highest to its lowest position, the pawl pin passes through the lower smooth track until it reaches the switch, when it will elevate the same, and so that, when the pawl pin passes the end of the switch, the switch will drop behind the pawl pin and close the smooth track then behind it. As the swinging section of the chair is then lifted toward its highest position, the pawl pin will travel up the switch, the end of which is tapered so that the application of force to the hinged section lifts the pawl pin into the first notch on the switch, and so on as it is desired to raise the back of the chair. It is plain that the defendants are justified by the use of similar devices in the prior art and their patent under which they claim the right to manufacture this improvement upon furniture.

The complainants' patents can only be sustained by restricting them properly within the lines set forth in their claims 1 and 4, wherein it is found that the improvement to which they are entitled to a patent is the two tracks being connected, whereby the pawl may pass from one to the other, as in the first claim, and, as in the fourth, wherein it is stated that the two tracks are connected at their ends, and with the peculiar method of adjustment and relation of one part of the device to the other. The ratchet-plate may be so positioned with reference to the pivoted pawl that the device will work as set forth in the specifications, the distinguishing feature being the passage from one track to the other without a switch; and, as to the slot in the circumferential flange, which is the substance of the second patent, it can be sustained in connection with this particular device, as its utility and novelty is in the method by which the connection of the parts is made after they have been disconnected by being so adjusted as to enable the connection to result automatically; otherwise this patent, if broadened in construction to include any slot in a device of this kind, would be anticipated by at least two other patents.

The court is therefore of the opinion that in this case the patents of the complainants are not infringed. They are simply improvements, and they cannot exclude others from making improvements for the purpose of effecting the same object, so long as their invention is not copied. Where an invention is an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer, who has improved the original machine by the use of a different form or combination performing the same function. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not colorable invasions of the first. All others have an equal right to make improved machines, provided they do not copy the same, or sub-

stantially the same, devices or combination of devices which constitute the peculiar characteristic of the previous invention. Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650; McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930; Bragg v. Fitch, 121 U. S. 478, 7 Sup. Ct. 978, 30 L. Ed. 1008; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; Kokomo Fence Machine Company v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689.

Let a decree be drawn dismissing the bill, with costs.

WILKIN v. HILL.

(Circuit Court, W. D. Michigan. January 19, 1904.)

1. PATENTS—INFRINGEMENT—LOG TURNER.

The Wilkin patent, No. 583,560, for a log turning and loading device, for turning logs on the saw carriage in steam sawmills, was not anticipated, and discloses invention. Also *held* infringed.

In Equity. Suit for infringement of letters patent No. 583,560, for a log turner, granted to Theodore C. Wilkin June 1, 1897. On final hearing.

Benedict & Morsell, for complainant.

Parker & Burton, for defendant.

WANTY, District Judge. This is a bill brought alleging infringement of patent No. 583,560, issued to the complainant June 1, 1897, for improvements in log turning and loading devices. On the hearing the complainant made a motion to strike out the defendant's exhibit Giddings & Lewis-Lange contract, and defendant's exhibit of Lange's assignment to the defendant, and also to strike out all of the testimony relating to the changes made in the alleged infringing device at the Deward Mill after the commencement of this litigation. The complainant was not a party to the contract made on March 4, 1898, between the Giddings & Lewis Manufacturing Company and Herman O. Lange, and could not be affected by its terms; and, if he had been, the stipulations in that contract were so drawn that they could have no effect in determining the validity or infringement of the complainant's patent, and the assignment of that contract by Lange to the defendant could in no wise affect the rights of the complainant, and the motion to strike out all evidence relating to this contract and the assignment of it is therefore granted. The balance of the motion to strike out the testimony taken by the complainant relates to the changes made in the alleged infringing device after the litigation was commenced. It is true, as contended by complainant's counsel, that, if the device infringed before the changes were made, it could be no defense to a suit for an injunction against the infringement and for an accounting for damages to show that since the litigation began the infringing structure had been changed; but I take it the testimony was not offered for that purpose, but to show that a change could be made, making the device different from the complainant's device, which would still

perform the function claimed for the structure described in the complainant's patent. This proof would stand on the same basis as a model made for the same purpose, and would be admissible, and for that purpose it may be considered in the testimony, and for no other. The motion relating to the striking out of the testimony of the various witnesses in regard to these changes must therefore be overruled.

The patent covers an improved mechanism for use in steam sawmills, called a "log-turner" or "nigger," which is made to turn a log on the saw carriage, and force it against the knees of the carriage. These "niggers" have been in use for many years. The first patent, according to this record, involving the principle of an upright toothed bar through the floor of the sawmill, in relation to the log deck and carriage, and turning the logs, was granted to Esau Tarrant, August 25, 1868, and improvements have been made from time to time since. The claims which are alleged to be infringed in this suit are as follows:

"(1) In a log turning or loading device, the combination of two cylinders, one occupying a vertical position and the other an oblique position; a piston in each cylinder; a toothed bar connected to the rod of one of said pistons; and a link or brace connected to the rod of the other of said pistons, and permanently connected to the upper portion of the toothed bar. (2) In combination with an upright cylinder, E, provided with a piston, a toothed bar, G, pivotally connected with the rod of said piston; a cylinder, F, having its upper end somewhat nearer cylinder E than its lower end; a piston within the cylinder F; and a link or brace pivotally connected with the rod of said piston, and permanently connected with the upper end of bar, G. (3) In combination with a toothed bar and means for moving the same vertically, a link or brace pivotally connected with the upper part of said bar, and means for moving said link or brace longitudinally in a line oblique to and intersecting that in which the toothed bar moves. (4) In a log turning or loading device, the combination of two cylinders, both occupying generally upright positions, but nearer together at their upper than at their lower ends; pistons carried by said cylinders; a toothed bar and a link or brace pivotally connected one to one piston and the other to the other piston, and a flexible joint or connection between the upper portions of the bar and the link or brace, in a plane passing between the two cylinders. (5) The herein-described log turning apparatus, comprising, in combination, cylinder E, provided with a piston, a sliding block as c, and a guide as a; bar, G, jointed to said block; cylinder F, provided with a piston, a sliding block as g, and a guide as e; and link or brace, H, permanently connecting the block, g, and the upper end of bar, G." "(7) In combination with the upright bar of a log turning or loading device, and with means for moving the same longitudinally, a brace or link permanently connected with said bar at or near the upper extremity of the bar, and means for moving said link or brace longitudinally, substantially as set forth, whereby the bar is firmly supported in all positions."

The defenses insisted upon at the hearing are invalidity of the patent and noninfringement.

The prominent feature of these claims, in the words of the patent, "aims to render the pressure practically constant and uniform, or to enable the operator to control its variation at will. This result is accomplished by placing one actuating or controlling cylinder and piston in a vertical position and the other in an inclined position, and connecting the toothed bar to the piston rod of one cylinder, and the supporting links or braces to the other piston rod, and also to the upper part of the toothed bar"; and "a prominent feature

of construction is the attachment or connection of the link or brace and the toothed bar at or near the upper end of the bar, and the consequent bracing and staying of the bar at all points in its stroke. This effectually overcomes the liability to breakage incident to the employment of a bar supported only at its lower end." In all the prior patents introduced in evidence or referred to by counsel the toothed bar is either swung against and from the log by power applied to the toothed bar at or near its lower end, or by a substantially horizontal cylinder applying the power at or near the upper end of the toothed bar. Those swung laterally by power applied at or near the lower extremity of the toothed bar force the log against the knees of the carriage by a blow or punch which produces a severe strain on the bar that often results in breaking it. Without taking the defendant's exhibits and analyzing them one by one, it is sufficient to say that this objection is present in each patent referred to, where the power is applied at the lower end of the toothed bar. This objection is obviated in the log turners described in those patents where the toothed bar is lifted by a steam cylinder attached to its lower end, and is forced laterally by a horizontal cylinder whose piston is connected to the toothed bar at or near its upper end, but in that construction the friction is great when the horizontal cylinder is pushing the log laterally at the same time that the lower cylinder is raising or lowering the toothed bar. The leading feature of the complainant's patent is the use of two cylinders, one applying the power at the lower end of the toothed bar and the other to a back link connected with the toothed bar at or near the top, thus getting all the advantages of the construction, where the same power raises and lowers the toothed bar and gives it its side thrust without the disadvantage of the blow which produces a severe strain on the bar; and it has all the advantage of applying the power at the point of resistance as in the horizontal cylinder without the disadvantage of the great friction produced when the log is being pushed laterally at the same time the toothed bar is being raised or lowered. The defendant's experts and counsel change the point of contact of an arm of the triangle which forms the lower part of the toothed bar in several of the patents introduced in evidence showing the prior art, and place its contact at the upper, instead of the lower, part of the toothed bar. In that way they get the same result the complainant gets with his back link connecting at the same point. It is sufficient to say that, although such a change seems now very simple, and the result obvious, no one thought of it until the complainant took out his patent. However, this is not the carrying forward of an old mode of operation, but is a radical change of operation, and attains the beneficial results of the horizontal cylinder without its friction, and all the beneficial results of the patents illustrating the prior art, where the lateral motion is produced by power applied to the lower part of the toothed bar, without the strain and pounding present in each of those devices. The steam "niggers" which it is admitted the defendant made for the mill at Deward resemble the device described in the patent so closely that it is apparent the defendant did not even try to disguise the infringe-

ment, and must have relied on the idea that complainant's patent was void.

In my opinion, the claims above quoted are valid, and infringed, and a decree will be entered for an injunction and accounting in the usual form.

FRIES et al. v. LEEMING et al.

(Circuit Court, E. D. New York. August 12, 1904.)

1. PATENTS—INFRINGEMENT—VESSELS FOR ADMINISTERING VOLATILE LIQUIDS.

The Monnet patent, No. 604,191, for improved vessels for containing and administering volatile liquids, consisting of a glass body adapted to be held in the hand, whereby the heat of the hand can volatilize the liquid and generate an internal pressure, and having two or more integral necks, each with a capillary orifice for discharging the liquid in a jet or spray, and each neck surrounded by a collar and inclosed by a cap, was not anticipated, and discloses patentable invention. Claim 6 also *held* infringed.

In Equity. This cause comes here upon pleadings and proofs. It is the usual suit in equity for infringement of letters patent No. 604,191, May 17, 1898, to P. P. Monnet, for improvements in vessels for containing and administering volatile liquids.

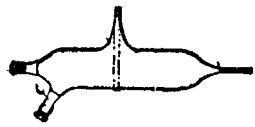
Arthur C. Fraser and Joseph A. Stetson, for complainants.
Dickerson, Brown & Raegener, for defendants.

LACOMBE, Circuit Judge. The application was filed August 8, 1896, but it took the place of a similar application then abandoned, which carries the date back to March 6, 1895, when the earlier application was filed. The specification states that the invention—

"has reference to vessels for containing and administering volatile liquids, and particularly chloride of ethyl, chloride of methyl, and other liquids of a very volatile nature; and its objects are to manufacture vessels in which such liquids can be conveniently carried, which will preserve them without alteration, which can be conveniently handled, and which will allow of their liquid contents being projected therefrom in the form of vapor or spray, or in the form of a liquid jet, and administered in a safe, practical, and simple manner, in fractional or measured quantities. The means employed for delivering the liquids is the heat of the human hand holding the vessel, or the heat of the atmosphere when the temperature is sufficient. Vessels as hitherto constructed for containing volatile liquids, and for delivering therefrom by the heat of the hand or of the atmosphere, have had a single neck or nozzle, with a capillary or very fine outlet-orifice, hermetically closed either by being sealed off, or by means of a stretched rubber band, or of a cap or other device by which the orifice can be opened and closed at will, and allow any desired portion of the contents to be used at one time. Because these vessels have only one outlet-orifice, it is not practicable to refill them. Again, the delivery from their orifice must always be practically the same in a given time, and always in the same direction relatively to the body of the vessel. Now, with vessels constructed according to my invention, refilling can be readily effected; the delivery can be varied in amount during a given time, and can take place in a variety of directions, relatively to the body of the vessel. A single vessel will thus serve the purpose of a set of vessels, such as dentists or others now provide themselves with. The invention consists in the combination, with the body of a vessel for containing and administering volatile liquids, and adapted to be grasped by the hand, of two or more necks projecting from said body in differ-

ent directions, and each of them provided with a capillary outlet-orifice, which is normally closed by suitable closing device."

Some other features of the invention which have no relevancy to this case are recited, and the specification then refers to the drawings, of which one only need be reproduced. Others show the outlet orifices arranged so as to point in different directions—some axially; some at an angle with the body of the vessel.



The specification proceeds:

"Referring to Fig. 1, the vessel there shown for containing volatile liquid is in the form of a glass tube, A, terminating at its two ends in tubular necks, a, a', formed with capillary passages, b, b'. Each of these passages is hermetically closed by a removable metallic cap, B, fitting by means of a bayonet-joint on a metallic collar, C, mounted on the corresponding neck, a, or a'. The cap, B, is provided with an elastic packing, c—such for instance, as a rubber ring or washer—adapted to bear against the orifice of the passage in the tubular neck. It will be readily understood that a vessel of this kind may be refilled with volatile liquid as many times as desired, the arrangement being such that, when it is immersed in the liquid in such a manner as to cause the liquid to enter through one of the passages, b, or b', the orifice of the other passage may be held out of the liquid, so as to allow the air contained in the vessel to escape. * * * In the modification shown in Fig. 2, the tubular neck, a', instead of being in line with the neck, a, as is the case with the neck, a' in Fig. 1, is bent or curved to one side; the orifices of these necks being, however, closed by metallic caps with an internal elastic packing, in the same manner as is the case in Fig. 1."

The defendants' device is, in form, a reproduction of Fig. 2. Infringement is charged of the following claims:

"(1) The improved vessel for containing, vaporizing, and administering volatile liquids under internal pressure, consisting of a vessel-body of such size and form that it may be grasped by and inclosed in the hand, having a plurality of necks projecting from said body in different directions, and having a plurality of capillary outlet-orifices, one in each of said necks, and closing devices for said orifices, whereby either of said orifices can be opened for ejecting the liquid, and said vessel can be refilled when both said orifices are open, substantially as set forth."

"(4) The improved vessel for containing, volatizing, and administering volatile liquids under internal pressure, consisting of a thin glass body adapted to be grasped by and inclosed in the hand, whereby the heat of the hand can volatilize the contents of the vessel for generating an internal pressure therein, such vessel having an integral neck having a capillary orifice, opening at its outer end, an external metal collar fixed on and surrounding said neck, and a cap closing said orifice, embracing the end of said neck, and held thereon by said collar."

"(6) The improved vessel for containing, volatilizing, and administering volatile liquids under internal pressure, consisting of a glass body adapted to be held in the hand, whereby the heat of the hand can volatilize the liquid and generate an internal pressure in the vessel, having two integral necks, having capillary orifices traversing and opening at the end of each neck, an outer metal collar surrounding and fixed to each neck, and a cap for each neck closing the orifice therethrough, inclosing the end of the neck, and engaging the collar thereon.

"(7) In vessels for containing, volatilizing, and administering volatile liquids, a vessel-body for containing the liquid, adapted to be grasped by and inclosed in the hand, whereby the heat of the hand can volatilize the liquid to generate an internal pressure, said body having two independent outwardly-projecting necks, the one angular in its projection relatively to the other, capillary orifices traversing and opening through said necks, respectively, fastenings on the exteriors of said necks, and caps for closing said orifices, enveloping the ends of said necks, respectively, and held thereon by said fastenings, whereby the liquid can be discharged in different directions relatively to the longitudinal axis of said body."

"(8) The improved vessel for containing, volatilizing, and administering volatile liquids under internal pressure, consisting of a vessel-body of suitable size and form to be grasped by and inclosed in the hand, whereby the heat of the hand can be used to volatilize the liquid for generating an internal pressure in the vessel, having two necks, the one axial and the other angular in extension, relatively to the longitudinal axis of the body, a capillary orifice traversing and opening through each of said necks, fastenings on the exteriors of said necks, respectively, and caps for closing said orifices, and enveloping the ends of said necks, respectively, and held thereon by said fastenings."

From the above excerpts it will be perceived that improvements principally relied on by the patentee were the plurality of necks, and the arrangement of one of them at an angle to the axis of the vessel. It may fairly be questioned whether invention can be found in the mere duplication of an existing neck, or in merely changing its direction so as to facilitate the administering of its contents. There is, however, another feature of the device which is very plainly pointed out in the specification, and embodied in some of the claims. Where the history of the art indicates that such feature is novel and useful, was not found, though improvements were long sought for, and has commended itself to those who use such devices, the patent may be sustained, although the patentee did not enumerate it in his statement of invention.

The vessels which the patentee sought to improve are used in operations of minor surgery, including dental operations, for applying a highly volatile liquid to freeze the flesh, and thereby anæsthetize it. The liquid is administered in the form of a jet directed against the surface to be frozen. Ethyl chloride is the liquid usually administered. The vessel is of a shape and size convenient to be held in the hand, the heat thus applied volatilizes the contents, which boils at 50° F., and generates sufficient pressure within the tube to expel a portion of the liquid in a minute jet through any orifice which may be provided. It is, of course, essential that when not in use the orifice shall be hermetically sealed. For several years prior to the patent, ethyl chloride was administered from so-called sealed tubes; that is, tubes of glass drawn to a slender neck, which is sealed to contain safely the liquid while stored prior to use, and, when needed for an operation, requiring to be broken off at a file mark to permit the liquid to escape in a hairlike jet from the minute capillary orifice of the slender neck. After breaking the neck and using the liquid for one operation, there usually remained sufficient liquid to perform several additional operations, and efforts were made to save this residue of liquid for future use. One means employed was by placing a stretched rubber band around the tube, end for end; but it was found that the

sharp edges of the broken glass neck would usually cut the rubber, and in any case its closure was not sufficiently tight to prevent evaporation. Another plan was to put a rubber cap over the neck, but this did not have strength enough to resist the internal pressure, and sometimes the rubber was dissolved by the fluid. Another serious difficulty arose from the fact that the slender neck had to be broken or snapped off at a particular place, indicated by a file mark. This was not always feasible, and often a breakage of the entire tube resulted; and, even when it was effective, small splinters of glass were scattered about the patient to be operated upon. Coincident with this breakage there was often a great and unnecessary leakage of fluid before the stream could be directed on the surface to be anæsthetized, because a sharp, cutting edge of glass would prevent the occlusion of the capillary opening by the finger. Again, if the tube were not broken precisely level with the file mark, the spray did not issue in the desired form.

The record shows that attempts to improve on these old sealed tubes were made by a Frenchman—one Bengué—who apparently manufactures the alleged infringing devices which defendants sell here, and who took out patents in France and in this country, which have been put in evidence, but apparently are not much relied upon in argument. In one of Bengué's devices the arrangements for opening and closing resemble those of the patent in suit. It is not necessary to break the neck. The orifice is closed by a cap, which swings off when a spring which holds it in place is drawn back. There is nothing in the record to show whether or not this device of Bengué's was practical and efficient. The details of its structure are not very clearly indicated, but the experts for both sides concur in the statement that in the patent in suit the capillary opening is made by contracting the neck, while in the Bengué French patent it is produced by securing a piece of capillary glass tube in the neck. This apparently would be fitted into place by grinding, and afterwards secured by some suitable cement. Such a two-part neck would be more expensive to manufacture, and is easily differentiated from the integral neck of the patent in suit. No one testifies to the operation of a tube so constructed, but it is suggested that the inserted plug would be liable to become uncemented, and to be blown out by internal pressure when the cap is unscrewed. Another patent to Bengué (558,762) shows a tube with caps substantially Monnet's, but with a neck which had to be broken before the cap is applied. The patent is subsequent in date of application to Monnet's, and need not be discussed. The prior art discloses no closer anticipations than these various tubes of Bengué. Defendant has introduced some statements as to ethyl chloride tubes contained in different numbers of a publication called the "Dental Cosmos," but they are too vague and indefinite to make out an anticipation of the integral neck pierced with capillary outlet of the patent in suit, which seems to be an improvement not worked out by any one before Monnet, and which has superseded earlier forms.

Defendants' main reliance appears to be on certain instruments known as "pycnometers." They are laboratory devices for determining the specific gravity of highly volatile liquids. They are instruments of a different art. It is, no doubt, true, as held by this court in Briggs v. Duell, 93 Fed. 974, 36 C. C. A. 38, following many other decisions on the subject of "double use," that, when a particular device is used in one art to accomplish a specific purpose, it is not invention to transfer the same device to another art, and there employ it to accomplish a similar purpose. But in the pycnometers there is no such adaptation of means to ends. When they are filled and are held too long in the hand, a jet of the liquid will be discharged from a capillary orifice, but that is a defect of the instrument. Its various parts were combined for no such purpose. An ether pipette, which is also relied upon, is adapted for ejecting volatile liquid when heated by the hand, but is not equipped for storing the liquid. The specification points out the difference between the device of the patent and the various forms of dropping bottles which operate by gravity.

There is no complete anticipation, and although, in view of the prior devices of the art, the improvement is not a great one, it exhibits patentable novelty. Of the claims declared upon, the first, seventh, and eighth do not enumerate the integral neck as an element. The fourth is somewhat ambiguous. It includes an integral neck, but defendants contend that its language is not broad enough to cover a vessel with two necks. That question need not now be decided, since the sixth claim covers two integral necks, and the defendants' device is clearly within its terms.

Complainants may take the usual decree under the sixth claim.

In re DOUGLAS COAL & COKE CO.

(District Court, E. D. Tennessee, S. D. July 6, 1904.)

No. 546.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER.

Under Bankr. Act July 1, 1898, c. 541, § 3, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410], in order that the appointment of a receiver at the instance of another shall constitute an act of bankruptcy, the appointment must have been made "because of insolvency," and the appointment of a receiver for the property of a corporation in a suit to foreclose a mortgage, in which the bill does not allege insolvency, but a breach of the covenants of the mortgage, does not authorize an adjudication of bankruptcy against the corporation, although it may in fact have been insolvent, and such insolvency may have caused its default.

2. SAME—PAYMENTS WITH INTENT TO PREFER CREDITORS.

Payments of comparatively small sums of money by an insolvent corporation to each of a number of its creditors, made in the usual course of business, do not raise a presumption of an intent to prefer such creditors over its other creditors, so as to establish an act of bankruptcy by a transfer of property with intent to prefer, within Bankr. Act July 1, 1898, c. 541, § 3, subd. 2, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

In Bankruptcy. On petition in involuntary bankruptcy.

The following is the report of D. L. Grayson, special master:

Pursuant to the general order of reference, referring all issues in involuntary bankruptcy cases to the undersigned, as master, to report upon the facts as well as the conclusions of law raised by the issues presented in such cases, the undersigned would respectfully report with regard to the above case as follows:

Original Petition.

The original petition in this matter, which was filed on January 6, 1904, charges a single act of bankruptcy as committed by the defendant company, namely, that on January 2, 1904, and "because of insolvency," a receiver was appointed for, and had been placed in charge of, its property; said act of bankruptcy being predicated upon section 3, subd. 4, of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410], which reads as follows: "Made a general assignment for the benefit of his creditors, or being insolvent applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee had been put in charge of his property under the laws of a state, or of a territory, or of the United States."

Original Answer.

The answer to this petition contents itself with a simple denial of the above act of bankruptcy, but it does not deny the charge of insolvency. Before a hearing was had upon this petition and answer, an amended petition was subsequently filed, which set up the following facts:

Amended Petition.

This amendment, after reciting the filing of the original petition, and repeating the charge of the foregoing act of bankruptcy, charges a further act of bankruptcy, predicated upon section 3, subd. 2 of the act of July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], which reads as follows: "Transfer while insolvent any portion of his property to one or more of his creditors with intent to prefer said creditor over his other creditors." Following this general charge, it is alleged specifically that certain payments were made by the alleged bankrupt to the C. D. Kenny Company and A. Muxen & Co., two of its local creditors, within four months preceding the filing of the petition, and with intent to prefer said creditors over its other creditors. It is averred that on the 18th of September, 1903, and while insolvent, the defendant paid to the C. D. Kenny Company a pre-existing debt to the amount of $53.40 in full for goods and merchandise sold to the former by the latter during the month of August, 1903, and that on the 23d day of November, 1903, a further payment was likewise made, and while insolvent, on a pre-existing debt, to wit, $100 upon an indebtedness of $160 owing by the defendant to the C. D. Kenny Company. It is further charged that under exactly similar conditions, and while likewise insolvent, the defendant in September, 1903, paid to A. Muxen & Co. a portion of a pre-existing debt, to wit, the sum of $200, upon an account of $416, and likewise on the 23d day of November, 1903, the sum of $250 upon a pre-existing debt of $299.42. Each and all of the above payments are specifically charged to have been made by the defendant to said creditors while insolvent, and within four months prior to the filing of said amended petition, and with intent on the part of the defendant to prefer such creditors over its other creditors.

Amended Answer.

The amended answer admits the filing of the original petition, and the charge therein of the commission of the first act of bankruptcy, to wit, the appointment of a receiver, and sets up a denial of the fact that said receiver was appointed because of the insolvency of the company, but avers, on the other hand, that the appointment was due to the sole fact that the company had failed to comply with certain stipulations and covenants in a certain mortgage or deed of trust which it had executed to the North American Trust Company, and that the appointment was made by the Circuit Court of the

United States for the Southern Division of the Eastern District of Tennessee in a suit in equity of the North American Trust Company against the defendant in this cause brought to foreclose said mortgage.

In response to the charge of the commission of the act of bankruptcy set forth in the amended petition, the answer thereto, for the first time, denies the insolvency of the defendant, but avers that the property owned by it, taken at a fair and reasonable valuation, is in excess of its liabilities, and that it is not insolvent, within the meaning of the law. It admits the specific payments to the C. D. Kenny Company and to Muxen & Co. in the amounts and at the times alleged in the amended petition, but sets up, by way of defense to the charge that said payments constitute an act of bankruptcy under clause 2 of section 3, Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], the insistence that all of said payments were made in good faith, not only in ignorance of the fact that defendant was insolvent, but in the bona fide belief that it was solvent, and would be able to continue its business as it had been running before said payments were made. It denies that there was any intent whatever to create a preference in favor of said creditors, but, on the contrary, avers that the payments were made in the regular course of business of the defendant company. It further sets up by way of defense other payments made to the Wilcox-Carter Furniture Company in the sum of $509.49, and to Montague & Co. in the sum of $572 (said parties being two of the three petitioning creditors in this case), likewise alleged to have been made within four months prior to the filing of the petition, and in the regular course of business, and insists that said amended petition ought not to be maintained on account of the alleged preferences to the C. D. Kenny Company and Muxen & Co., because of the fact that said petitioners, Wilcox-Carter Furniture Company and Montague & Co., had likewise received payments, just as had the Kenny Company and Muxen & Co., under similar conditions, and within said four-months period; and these facts are set up in estoppel against the petitioners' maintaining the amended petition.

Proof.

The above is, in substance, the state of the record with respect to the condition of the pleadings. The only proof introduced on the part of the complainants consists of the depositions of James Sloan, D. P. Montague, E. Gill, and F. V. Brown, and of the original record in the foreclosure suit of the North American Trust Company, heretofore alluded to, which was introduced by consent. The defendant company introduces no proof, except two books purporting to be its ledger and journal, and a memorandum statement filed by its attorney, showing the indebtedness of the company (unsecured), so far as said attorney was advised thereof. This statement, however, is limited to unsecured debts, amounting to a total of something over $27,000, but makes no mention of the mortgage indebtedness. In addition to the production of said ledger and journal, and of the filing of said statement, the only remaining evidence produced by the defendant consists of the depositions of Chas. L. Carter, of the Wilcox-Carter Furniture Company, of L. S. Greenwood, of the C. D. Kenny Company, and of A. Muxen, of A. Muxen & Co., who were examined by the defendant relative to the payments made by it to them, and for the purpose of establishing the proposition insisted upon by the defendant in its answer, that the same were made in the usual and ordinary course of business. This is, in substance, the entire record of the cause.

Insolvency.

At the outset it is necessary for us to consider whether or not the defendant company was insolvent at the time of the commission of the specific acts of bankruptcy charged in both the original and amended petition, the fact of insolvency being a necessary prerequisite to the commission of an act of bankruptcy. By section 1, subd. 15, Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], a person shall be deemed insolvent, within the purview of the law, when the aggregate value of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to hinder, defraud, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his

debts. By section 3, subd. "d," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3422], it is provided "that whenever a person against whom a petition has been filed as herein provided under the second and third subdivisions of this section [which second subdivision referred to defines the act of bankruptcy charged in the petition] takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers, and accounts, and submit to an examination and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failing to so attend and submit to examination the burden of proving his solvency shall rest on him." In this case the defendant company did not attend the hearing before the master, through its officers or agents, nor submit to an examination, nor give testimony upon the issue of solvency or insolvency; nor did it produce any papers, books, or accounts, save the ledger or journal and the memorandum statement of unsecured indebtedness, both of which the master finds are incomplete and unsatisfactory—the books, because it appears from the entries therein that references were made to other books of original entries, which were not produced, and because it further appears that no reference is had in said ledger or journal to the indebtedness of $250,000 due to the North American Trust Company, and said memorandum of account is also insufficient because it makes no reference to the secured indebtedness.

It is insisted by counsel for the complainants that the necessary effect of the failure of the defendant to attend as required by this section, and to produce his books, papers, and accounts, and submit to an examination, is not only to throw the burden of proving his solvency upon him, as the law provides, but, having so failed, and in the absence of evidence to the contrary, the court is justified, per se, in assuming that the defendant is insolvent; and there is, in the opinion of the master, some ground for this contention. A presumption of insolvency is raised against a debtor who refuses to produce his books and papers and submit to an examination. In re Rome Planing Mill (D. C.) 96 Fed. 812. A simple denial of the fact of insolvency in the answer, unaccompanied by any affidavits, schedules, or other evidence, does not raise such an issue of solvency as is contemplated by the act, nor sustain the burden of proof. Bray v. Cobb (D. C.) 91 Fed. 102. It has also been held that, when the burden of proof is cast upon the defendant, that means that, in the absence of any proof, the issue shall be found against him. The true test to determine upon whom the burden rests is, against whom would the verdict be given if no evidence was offered on either side? Anderson's Law Dictionary, p. 135; Best's Evidence, p. 268; Millis v. Barber, 1 Mees. 425.

As above stated, what little proof was introduced by the defendant in the effort to sustain the burden of proving its solvency was only partial, and unsatisfactory because unreliable. On the other hand, the complainants, notwithstanding that, in this condition of the record, they were not called upon to go further, nevertheless established by the witness Montague, who is shown to have been engaged in a similar line of business to the defendant, and acquainted with the values of mining properties, that its total indebtedness, including its outstanding bonds, was something over $400,000, and that he ascertained this fact from admissions made to him by officers of the defendant company. He also shows that the aggregate value of the assets of the defendant company at the date of the filing of the petition was $150,000. The master therefore reports that on this issue it sufficiently appears that the defendant company was insolvent at the time of the commission of the respective acts of bankruptcy charged.

Appointment of Receiver Because of Insolvency.

Was a receiver appointed for the defendant company because of insolvency, within the meaning of the phrase as used in subdivision 4 of section 3 of the amended act of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410], heretofore set out? It is a part of the history leading up to the enactment of this amendment that prior thereto, and under the operation of the original law, receivers were appointed in many cases in state courts for insolvents, that method being adopted in certain states in which general assignments are unknown; and, under the rulings of the federal courts of bankruptcy—notably, among others, in the case of the Harper Bros. Publishing Co.

—it was held that such appointments were not tantamount to the making of a general assignment under this clause, and could not be so construed. Hence the appointment of a receiver for an insolvent was, per se, held not to be an act of bankruptcy. To cure this defect in the act, an amendment was ingrafted upon said subdivision 4 of section 3 by the act of February 5, 1903. As the amended bill passed the house, subdivision 4 of said section read as follows: "Made a general assignment for the benefit of his creditors or being insolvent applied for or had been put in charge of a receiver or trustee under the laws of a state or territory or of the United States." If the law as it passed the Senate had been left in this condition, it would have been necessary only to allege that a receiver had either been applied for or had been placed in charge of an alleged bankrupt's property while such bankrupt was in an insolvent condition. That is to say, only two issues could possibly arise—insolvency and receivership resulting therefrom. When the amended bill reached the Senate, the language of the House measure was changed as follows: After the word "for" the clause "or had been put in charge of a receiver or trustee" was stricken out, and the words "a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property" were inserted, and before the word "territory" the word "or" was likewise stricken out, and the words "of a" were inserted in its place, the effect of which was to make said amendment read as it now is in the law as finally passed. See page 1101 of the Congressional Record, 57th Cong., 2d Sess. It does not appear in the Senate debates why this change was made, or at whose instigation it was done. Presumably, it was made in the Senate judiciary committee. But that committee made no written report, and, there being no general debate on the measure, no benefit can be derived upon the question of the proper elucidation of the meaning of this clause from the proceedings prior to its enactment. The defendant insists in this case that a receiver was not appointed for it because of insolvency, but, on the other hand, that such appointment was made because of the violation of certain mortgage covenants contained in a certain mortgage given by it some time before this bankruptcy to the North American Trust Company to secure an issue of $250,000 of first mortgage bonds. On the other hand, complainants insist that while this was the apparent, or, rather, ostensible, reason advanced for the receiver's appointment, the underlying cause was insolvency, in fact, which insolvency set in motion the other grounds set up. It will be seen from the bill under which said receiver was appointed, and the purpose of which is to foreclose said mortgage, that the insolvency of the defendant does not appear from any specific allegations therein made, but the alleged grounds for the appointment, as stated by the bill, are the defendant's default in the payment of interest on said bonds for a year—likewise, its default in the creation of a sinking fund for the ultimate redemption of said bonds—and that defendant has, by reason of said defaults, allowed said mortgage to mature and become payable many years before the bonds were due on their face. Does this showing of said bill justify the logical deduction that this receiver was appointed "because of insolvency"?

It is insisted by the complainants that the consequent change of the language of this clause in the Senate from that contained in the House bill has in no sense altered its meaning, and that, in legal effect, the expression "because of insolvency" is equivalent to the former phrase, "being insolvent," as defined in the House measure. I cannot agree with this contention. The expression "being insolvent," as I consider it, refers alone to the status or condition, in point of fact, while the phrase "because of insolvency" is meant to refer to the result which flows from that status or condition, and not to the status or condition itself. The intent of the change was to limit the act of bankruptcy, where the appointment of the receiver was made at the instance of parties other than the bankrupt, to cases alone in which such appointment was predicated upon insolvency, and to exclude thereby appointments of receivers for solvent corporations—as, for example, in cases where stockholders or directors could not agree as to the conduct of the business, and it became necessary to wind it up, regardless of the insolvency, or to protect minority stockholders in certain cases against undue encroachments upon their rights by the majority, or to wind up solvent partnerships, whose partners could not agree, and various

other cases which might be named, which were evidently intended to be excluded from the operation of the bankrupt law. This character of cases would, of course, be excluded, just as well under the House measure, since they are cases of solvent, and not insolvent, corporations or partnerships; but it was the evident intent by the change of language in the Senate to make the act of bankruptcy dependent upon the state of facts disclosed upon the record in the case before the court making the appointment. To my mind, therefore, in determining the question whether or not the receiver was appointed because of insolvency, it was the intent to preclude the bankruptcy court, in determining the question whether or not an act of bankruptcy had been committed under this amended clause, from looking beyond what appeared upon the face of the record in the case before the court making the appointment, and to prohibit any indulgence in inferences or intendments where the reasons actuating the appointment are not plainly self-evident. This might lead, if tolerated, to results too speculative and imaginary in the extreme.

It is insisted by counsel for the complainants that such an interpretation of this clause clearly results in many cases in a partial failure of the law to accomplish its evident purpose, since ingenious counsel, as may have been the case here, can so frame their bill as to avoid the allegation of insolvency, and obtain the appointment of a receiver on other grounds. It is a sufficient reply to this contention, in my judgment, to state that it is the duty of the courts to construe the law as they find it, and not to attempt by interpretation to supply the defects which it is the manifest duty of the legislative branch of the government, not of the judicial, to remedy.

Furthermore, it may be said that there are, perhaps, but few instances in which receivers could be appointed for corporations or individuals insolvent in point of fact, without such insolvency being relied upon as a ground to secure the same; and these instances are so rare as to be worthy of but little notice. I think the plain purpose and effect of the change in said language from the expression "being insolvent" to the phrase "because of insolvency" was to save the necessity in the bankruptcy case of the petitioning creditors being required to litigate again over the question of solvency or insolvency of the alleged bankrupt, and that it was the intent to preclude the necessity of doing this by the necessary admission or adjudication of such insolvency to be derived from the record in the case in which the appointment was made.

It is insisted by counsel for complainants that the word "insolvency," as used in this section, cannot be limited to the technical definition of insolvency as set out in section 1, subsec. 15, Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], heretofore quoted, but that such latter definition applies only to the adjudication of bankruptcy when insolvency is a prerequisite therefor, and that the federal courts of equity and the state courts act upon quite a different definition, in that, when they appoint a receiver because of insolvency, it is insolvency according to their own definition. I think it undoubtedly true that, inasmuch as receivers are appointed by both state and federal equity courts in cases other than bankruptcy for insolvent concerns, the term "insolvency," as regarded by them, cannot, perhaps, be limited to the definition given by the act of 1898; but, when we come to consider the making of such appointment as a specific act of bankruptcy, it is certainly essential the case should be brought within the scope of the definition given by the act; and unless, therefore, the property of an alleged bankrupt is less, taken at a fair valuation, than the aggregate of his indebtedness, I do not think he is insolvent in such sense as to make him guilty of an act of bankruptcy by the appointment of a receiver for his estate, although he might be insolvent in the sense that he could not pay his debts in the ordinary course of business. This conclusion is emphasized by the fact that the definition insisted upon by complainants is exactly that used in the former bankruptcy act of March 2, 1867, c. 176, 14 Stat. 517, but which has been changed by the present law. In other words, the court is limited in construing the meaning of the term "insolvency" to the specific definition given by the act, and certainly has no right to adopt any other meaning unless the act itself is silent upon the subject. An expressed definition excludes all inferences. **I therefore find that this act of bankruptcy is not made out.**

Payments with Intent to Prefer.

Section 3, subd. 2, Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], provides that it shall be an act of bankruptcy "if a person has transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer said creditors over his other creditors." In order to establish an act of bankruptcy under this section, it is necessary to prove, first, a transfer of property to a creditor; second, the debtor's intent to prefer such creditor; third, the insolvency of the debtor at the date of the transfer; the burden of proof being on the petitioners, except as provided in paragraph "d," where the alleged bankrupt fails to appear for examination and to submit his books and papers. In re Rome Planing Mill (D. C.) 96 Fed. 812. Since it has been held that a payment of money is a "transfer of property," and since the master has already found that the defendant company was insolvent at the date of such payments, the only remaining facts necessary to establish this act of bankruptcy are the intent of the debtor to prefer, and the necessary effect of the payment to give a particular creditor or creditors receiving the same a greater percentage of their debts than other creditors of the same class; the latter essential being for some reason omitted by the judge deciding the above case, but it being expressly necessary to show this in order to create a preference as shown by section 60a, Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

We will deal first with the question of intent. It is insisted by counsel for the complainants that the law upon this is that when the debtor is insolvent in point of fact, and the necessary effect of the particular payment or payments is to create a preference, then the debtor's intent so to do will be presumed; such intent being the necessary and logical consequence of his act. On the other hand, it is contended by counsel for the defendant that such intent cannot be presumed from transactions like the ones we are now dealing with, where the payments were made by the defendant, although insolvent, but in the usual and ordinary course of business. In order to arrive at a correct solution of the meaning of these respective contentions, it is well for us to note the status of the law upon this subject. Under the bankruptcy act of March 2, 1867, c. 176, 14 Stat. 517, there are many cases to the effect that a debtor, knowing his insolvency, who has paid one creditor to the exclusion of others, cannot be heard to say that he did not intend to give such creditor a preference. Martin v. Toof, Fed. Cas. No. 9,167; In re Oregon Bulletin Printing & Pub. Co., Fed. Cas. No. 10,559; In re Drummond, Fed. Cas. No. 4,093; In re Dibblee, Fed. Cas. No. 3,884.

Under the present act it has likewise been held that the intent to prefer will be presumed in the following cases:

(1) From a transfer of a large portion of property by an insolvent to a single creditor. In re Rome Planing Mill (D. C.) 96 Fed. 812.

(2) Where a transfer has been made by an insolvent merchant of his entire stock in trade to a single creditor. Goldman v. Smith (D. C.) 93 Fed. 183.

(3) From a transfer by an insolvent debtor to one of his creditors, in payment of his debt, of sufficient personal property to satisfy the debt in full; the debtor receiving surplus difference in cash. In this case the debt was $2,000, the value of the property conveyed about $2,500, and the balance of $480 was paid to the debtor in cash. Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522.

(4) In the payment of rent by an insolvent debtor on a leasehold interest in a bakery, to continue the business, with intent to defraud creditors by hoarding and secreting the proceeds of the business so continued. In re Lange (D. C.) 97 Fed. 197.

(5) By a sale by an insolvent debtor of all his property to one not a creditor, and the application of the proceeds to the full payment of a part of his creditors, leaving others unpaid. Boyd v. Lemon & Gale Co., 114 Fed. 647, 52 C. C. A. 343.

(6) By the execution by an insolvent of a deed of trust to a single creditor to secure a pre-existing debt. In this case the mortgage secured a debt of $2,885, out of $14,000 of indebtedness. In re Wright Lumber Co. (D. C.) 114 Fed. 1011.

(7) By a transfer to a bank of a large amount of accounts to secure a debt, leaving other creditors unpaid. Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.) 125 Fed. 974.

It will be noticed that in each of the above seven cases the transfer was either of a large portion of the debtor's property, as compared with the total value thereof, or it was made for the exclusive benefit of one creditor, or it was a sale of the entire assets of the debtor, with an exclusive appropriation of the proceeds of such sale to the benefit and payment of a few creditors to the exclusion of others, or it was a security by way of mortgage or deed of trust covering a large amount of property, and securing a large debt for the exclusive benefit of one creditor, to the detriment of others; and, so far as I have been able to ascertain by an investigation of the cases under the act of 1867, in which the doctrine ("that insolvency being shown, and the effect of the payment or transfer being to create a preference, that intent will be presumed so to do") is laid down, they are cases analogous to those above cited; and it is apparent from the most casual examination of these cases that what the courts mean by the holding that where the insolvency is shown, and the effect of the transfer as well, the intent of the debtor will be presumed in such cases, is that such is the only logical or reasonable deduction that can be drawn from the act of the debtor with respect to the particular transaction, and that a mere denial on his part of any intent in the particular case to create the preference complained of is wholly inconsistent with his conduct in relation thereto. In other words, in each and all of the above cases it must have been well recognized by the bankrupt himself that in making the particular transfer or payment involving so large a proportion of his assets, and appropriating the same to the exclusive benefit of a single creditor, he must necessarily have known that such creditor was obtaining an undue advantage thereby over the rights of others, and that, in the face of such a condition as this, he cannot be heard to say that he did not undertake such a result. Is the contention of "necessary effect" analogous to the case at bar, and should the same inference of intent be drawn? The payments here in question were, in so far as the proof shows, of maturing debts in the ordinary course of business and in one instance—that of the C. D. Kenny Company—the payment in full of one account was followed by a subsequent sale; and this may have also been true in the case of Muxen & Co., although the proof does not make this clear. Both the witness Greenwood and the witness Muxen testified that these bills were paid in the ordinary course of business, and there is nothing in the record to show that they were paid before maturity, or out of the usual course of business, or that these two creditors were singled out in any way as special recipients of the bankrupt's favor. If it had been intended to make it an act of bankruptcy for a merchant, although insolvent, to make payments to his creditors in the ordinary course of business, nothing else appearing to show an intent to prefer, it seems to me that the law would have so provided. It is true that the answer of the defendant, in so far as it sets up the defense that "all of said payments were made in good faith, in ignorance of the fact that defendant was insolvent, but in the bona fide belief that it was solvent and would be able to continue its business," is not specifically made out, because, as before stated, the defendant has made no proof whatever in this case to sustain this issue, except the depositions of the creditors, or their agents, who were the recipients of the preferences complained of, but I think it does sufficiently appear from their testimony, nothing else appearing to the contrary, that each and all of said payments were made in the usual course of business; and the complainants have, with respect to this issue, rested their case solely upon the proof of the fact that the company was insolvent at the time of the payment, and the insistence that the payment in question operated as a preference, and, having failed to prove any specific intent on the part of the defendant to prefer, I do not think the law authorizes, in a case like this, the presumptive evidence of such intent essential to make it an act of bankruptcy.

It has been held by the Court of Appeals in the case of Clark v. Henne & Meyer et al. (C. C. A.) 127 Fed. 288, that evidence that a debtor, who was a merchant, while insolvent, and within four months prior to the filing of the petition in bankruptcy against him, made various payments of bills maturing,

is insufficient to establish an act of bankruptcy, where there was no evidence that he intended thereby to give a preference or contemplated bankruptcy, nor that the creditors receiving such payments did not thereafter extend credit to him for larger amounts. It is true that the court really decided this case upon another specific act of bankruptcy charged in the petition, and held that the particular act of bankruptcy alleging preferences by way of payments to certain creditors could not be maintained, because the petition failed to set out the names of the creditors or the amounts paid; but they, however, stated that, if the petition had been specific on this point, it could not, nevertheless, have been maintained, because of the lack of proof of any intent to prefer, and also because of their failure to show that subsequent credit was not extended by the alleged preferred creditors on the faith of said payments. There is no proof here in this case that subsequent credit was not extended on the faith of the payments complained of, but the inference, if not the direct proof, is to the contrary.

In the case of In re Bloch et al. (Circuit Court of Appeals of the Second Circuit) 109 Fed. 790, 48 C. C. A. 650, an involuntary petition alleging this ground of bankruptcy was filed, and denied by the answer when the case was tried by a jury. The lower court charged that "if at the date of actual insolvency the alleged bankrupt paid a considerable debt [in this case, a debt of $2,000 out of a total liability of $20,356.79] by a transfer of accounts of the amount of $2,431, which in fact constituted a preference, he must be held to have intended the consequence of his act, and the intent to prefer was conclusively established." This was held to be error, since, though the fact of a payment by an insolvent which operates as a preference is prima facie evidence of an intent to prefer, such evidence may be overcome by proof of ignorance of insolvency, and that the debtor's affairs were such that he could reasonably expect to pay all his debts. While in this case there is no affirmative proof by defendant to rebut the presumption of intent, upon which presumption alone complainants can rely to establish the act of bankruptcy, and while the defendants do not show their ignorance of their insolvency, or that their affairs were such that they could reasonably expect to pay all their debts, I nevertheless do not think that a presumption of intent to prefer should be indulged against an insolvent debtor by the mere act of paying certain creditors small sums in the usual course of business, and apparently in the effort to keep its business going, unless there is other and further evidence showing a specific intent to thereby give such creditors an undue preference over others, although such might be the effect of the payment. But however this might be, the complainants, in my judgment, have failed to establish this act of bankruptcy, because there is no affirmative proof of a competent character by them showing that the necessary effect of the payments complained of was to give such creditors, receiving same, a greater percentage of their debts than other creditors of the same class, but, on the other hand, the defendant proves payments of a similar character made to complainants themselves, and likewise in the usual course of business. From this evidence the master can only conclude that it was the effort of the defendant to treat all of its creditors alike, and to make no discrimination between them, and that, if such discriminations were made, it was merely incidental to the attempt to keep the business going, and not in pursuance of any expressed design. It was essential, in order to maintain this act of bankruptcy, to show that the necessary effect of the payments in question was to give the creditors receiving them a greater percentage of their debts than other creditors in their class. The proof failing to show that similar payments have not likewise been made to all creditors, but the evidence being rather to the contrary, the complainants cannot rely upon this ground of bankruptcy.

Estoppel.

It is insisted by counsel for defendant that complainants cannot maintain their petitions, either original or amended, because they have received preferences, and have not offered to surrender the same, and that, there being only three creditors before the court, there is a want of the jurisdictional number necessary to maintain the petition, and that, having received similar payments as the creditors Kenny and Muxen, they are estopped to allege this as an act of bankruptcy. Before the amended act of 1903, it was almost universally

ruled, with possibly one exception, that an involuntary petition could not be maintained by creditors who had received preferences within four months, at least, without the surrender thereof, whether such preferences existed by way of payments, deeds of trust, attachments, or other liens. See In re Rogers Milling Co. (D. C.) 102 Fed. 687; In re Miller (D. C.) 104 Fed. 764; In re Burlington Malting Co. (D. C.) 109 Fed. 777; In re Schenkein (D. C.) 113 Fed. 421; First Nat. Bank of New Kensington v. Pennsylvania Trust Co., 124 Fed. 968, 60 C. C. A. 100.

With respect to preferences obtained by way of "attachments or other legal proceedings" instituted within four months, this is still the law, since such preferences so obtained are especially made void by section 67f of the act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]. But the amended act of February 5, 1903, c. 487, § 12, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 415], repeals so much of the provisions of section 57g of the original law (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), as required a creditor to surrender an innocent payment as a condition precedent to the right to file his claim. The payments in question received by these petitioners are presumptively innocent payments of the character which it is not now necessary to refund, under the amended law, since the defendant itself avers that they were made in the ordinary course of business, and there is no evidence that petitioners had a reasonable cause to believe the defendant to be insolvent at the date of their receipt, in which event alone could they be made to refund the same at the suit of the trustee under section 60b, Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

Section 59b, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445], which provides for the filing of involuntary petitions by creditors, only requires that they shall have provable claims, and, as well stated by District Judge Ray in the case of In re Hornstein (D. C.) 122 Fed. 266, the proof of the claim, and the allowance thereof, are separate and distinct matters, and a creditor's claim is provable, and he may join in an involuntary petition, notwithstanding the fact that he has received a preference. Although it appears that this case arose since the passage of the amended law, and the judge required the petitioning creditors to surrender their preferences before their claims were allowed, I am nevertheless of the opinion that since their claims are undoubtedly provable, and since, furthermore, their allowance could not be objected to on the sole ground that they had received innocent preferences, they are not required to even surrender them as a condition precedent to maintaining an involuntary petition. If the contrary be the law, it works a manifest injustice between creditors, since it is quite apparent that the C. D. Kenny Company and A. Muxen & Co. could not be required to surrender their innocent payments, and the necessary effect of the insistence that complainants should refund, or have their petition dismissed, would be to give Kenny & Co. and Muxen & Co. an undue advantage, by the retention of their preferential payments received under exactly similar circumstances.

I therefore think that not only have the creditors filing this petition provable claims, in the sense of section 59b, but they likewise have allowable claims, within the meaning of that term as used in other sections of the law, and that, nothing else appearing, they have a right to maintain this petition.

If it is attempted to rest the doctrine of estoppel upon the proposition that, having received preferences of a like character to the Kenny Company and Muxen & Co., they should be debarred from complaining of the preference to Kenny and Muxen as acts of bankruptcy, it is sufficient to say that, in so far as I have been able to investigate, an estoppel of this character only arises as against a person participating or conniving in the alleged act of bankruptcy complained of. In other words, the creditor cannot take advantage of the preferences made to himself; the law being as well settled in bankruptcy as in equity that a person who has become a party to, and taken benefit from a fraudulent conveyance, is estopped thereby to claim the same as an act of bankruptcy. In re Williams, Fed. Cas. No. 17,706. And the same doctrine has been applied in the case of creditors who have assented to the making of a general assignment. They cannot thereafter allege it as an act of bankruptcy. But I do not think the mere fact that a party has received a preference precludes him from complaining of another and distinct preference to another

person. They are separate and distinct transactions and acts of bankruptcy, and the acceptance of the payment to himself cannot be an estoppel on his right to complain of a payment to others, unless involved in the same transaction.

For the reasons stated, it is respectfully recommended that the petition be dismissed.

Wheeler & Trimble and Sidney B. Wright, for petitioning creditors.
Brown & Spurlock, for defendant Douglas Coal & Coke Co.

CLARK, District Judge. In regard to this case, it is only necessary to say shortly that in view of the language of the act of Congress, and the changes which were deliberately made in the provisions of the act while it was before the Senate judiciary committee, I am constrained to affirm the ruling of the referee, and for the reasons which he states. There is no doubt in this case about insolvency being established, in the legal sense; but Congress has used such language as makes it necessary that a receivership in a state court, in order to constitute an act of bankruptcy, must have been established, or the receiver appointed, on the ground of the corporation's insolvency. It is very much open to doubt whether Congress has not here used language which makes necessary a result which Congress itself intended to avoid. Looking to the practical bearing of the question, there is much reason to believe that Congress intended to make the appointment of a receiver in a state court conclusive as a ground of bankruptcy, without requiring this court to inquire into the grounds on which the receivership was created; but the language of the amendatory act is perfectly plain, in requiring that the existence of a receivership in a state court, in order to be a ground of bankruptcy, must have been on account of the insolvency of the corporation, and this leaves open in any case to inquiry by this court the grounds on which the appointment of a receiver was made, and, if the appointment was made on any other ground than that of insolvency, it does not constitute an act of bankruptcy. Now, in the case here considered, the appointment was on account of breaches of covenants—covenants like the covenant to keep down taxes, and the like—and, although these particular acts or defaults strongly tend to show insolvency, they justify the appointment of a receiver, regardless of insolvency; and it seems that, in form, at least, the receivership was established on the ground of breaches of these covenants. I do not think the payments which were made, and which are here called in question, constitute a preference or an act of bankruptcy.

The ruling of the referee is accordingly affirmed, in view of the natural and necessary construction which must be placed upon the language used in the act of Congress. It is accordingly so ordered.

NOTE. Since the decision in the principal case of In re Douglas Coal & Coke Company the opinion of the Circuit Court of Appeals for the Fourth Circuit in the Case of Blue Mountain Iron & Steel Co., 131 Fed. 57, has been published, and the doctrine of the opinion in this case appears to be in substantial accord with the ruling in Re Douglas Coal & Coke Company.

MARRA v. SAN JACINTO & P. V. IRR. DIST. et al. (two cases).

(Circuit Court, S. D. California, S. D. April 27, 1904.)

Nos. 1,086, 1,087.

1. IRRIGATION DISTRICTS—BONDS—PAYMENT—REMEDIES—MANDAMUS—RECEIVER.
Act Cal. March 7, 1887, p. 29, c. 34, as amended by Act March 20, 1891, p. 142, c. 127, providing for the organization of irrigation districts, authorizes such districts to issue bonds for the construction of necessary works; and section 17 (page 37) provides that the bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district, and that all real property therein shall be and remain liable to be assessed for such payment as provided in the act. *Held*, that where an irrigation district, duly organized, issued and sold bonds under such act, the remedy of a holder thereof, after having recovered judgment and securing a return of an execution against the property of the district unsatisfied, was to compel the officers of the district by mandamus to levy an assessment against the property of the district, and not by a suit in equity for the appointment of a receiver.

The following is the opinion of Circuit Judge ROSS on an application for leave to intervene in the suit in equity, as hereinafter referred to:

The oral application made on behalf of the California Cattle Company to intervene in this suit in equity is denied, without prejudice to another application of a similar nature based upon a proper showing. The bill, I think, presents a proper cause for the appointment of a receiver of the property of the defendant corporation. If it be true that the complainant is a bona fide owner of valid bonds issued by the defendant irrigation district, while acting as such under the laws of the state, and that property acquired and owned by it is in the hands of strangers, holding and claiming the same adversely, a failure to appoint a receiver may result in depriving the complainant of rights to which he may be entitled; whereas, if it shall be hereafter found, upon proper judicial inquiry, that the alleged rights of the complainant are not well founded, the parties in the possession of such property may very readily be protected.

A receiver will therefore be appointed in case No. 1,087, upon the execution of a bond by the complainant, with sufficient sureties, to be approved by the court, in the sum of $10,000, as security for the costs of the receivership. The parties in interest may suggest for the consideration of the court some proper person for the position.

John G. North and John W. Lane, for complainant.
Geo. J. Denis and Frank W. Burnett, for defendants.

ROSS, Circuit Judge. A consideration of the objections made to the proposed order of appointment of a receiver and a further consideration of the bill of complaint in this cause satisfies me that the court was in error in its ruling made and entered on the 28th day of March, 1904, providing for such an appointment.

On the 7th of March, 1887, the Legislature of California passed an act entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes" (St. Cal. 1887, p. 29, c. 34), which was amended and supple-

¶ 1. Mandamus to enforce payment of judgment against municipality, see note to Holt County v. National Life Ins. Co. of Montpelier, Vt., 25 C. C. A. 475.

mented by subsequent acts (St. 1889, pp. 15, 18, 212, 213, cc. 19, 20, 178; St. 1891, pp. 53, 142, 145, 147, 244, cc. 57, 127, 128, 171).

The first section of the act of 1887, as amended by that of March 20, 1891, provides that whenever 50 or a majority of the holders of title or evidence of title to land susceptible of one mode of irrigation from a common source, and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of a district under the provisions of the act, and when so organized such district shall have the powers conferred or that may thereafter be conferred by law upon such irrigation districts. The equalized county assessment roll next preceding the presentation of the petition for the organization of the irrigation district under the provisions of the act, it is declared, shall be sufficient evidence of title for the purposes of the act.

Its second section, as amended by the act of March 20, 1891, is as follows:

"A petition shall first be presented to the board of supervisors of the county in which the lands, or the greatest portion thereof, is situated, signed by the required number of holders of title, or evidence of title, of such proposed district, evidenced as above provided, which petition shall set forth and particularly describe the proposed boundaries of the district, and shall pray that the same may be organized under the provisions of this act. The petitioners must accompany the petition with a good and sufficient bond, to be approved by the said board of supervisors, in double the amount of the probable cost of organizing such district, conditioned that the bondsmen will pay all the said costs in case said organization shall not be effected. Such petition shall be presented at a regular meeting of the said board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented; and if any portion of such proposed district lie within another county, or counties, then said petition and notice shall be published in a newspaper published in each of said counties. When such petition is presented, the said board of supervisors shall hear the same and may adjourn such hearing from time to time, not exceeding four weeks in all; and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries: provided, that said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any lands which will not, in the judgment of said board, be benefited by irrigation by said system be included within such district: provided, that any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board, upon application of the owner to said board, have such lands included in said district. Said board shall also make an order dividing said district into five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth, and fifth, and one director, who shall be a free-holder in the division, and an elector and resident of the district, shall be elected by each division: provided, that if a majority of the holders of title or evidence of title, evidenced as above provided, petition for the formation of a district, the board of supervisors may, if so requested in the petition, order that there may be either three or five directors, as said board may order, for such district, and that they may be elected by the district at large. Said board of supervisors shall then give notice of an election to be held in such proposed district, for the purpose of determining whether or not the same shall be organized under the provisions of this act. Such notice shall describe the boundaries so established, and shall designate a name for such proposed district, and said notice shall be published for at least three weeks prior to such election

in a newspaper published within said county; and if any portion of such proposed district lie within another county or counties, then said notice shall be published in a newspaper published within each of said counties. Such notice shall require the electors to cast ballots, which shall contain the words 'Irrigation District—Yes,' or 'Irrigation District—No,' or words equivalent thereto, and also the names of persons to be voted for to fill the various elective offices hereinafter prescribed. No person shall be entitled to vote at any election held under the provisions of this act, unless he shall possess all the qualifications required of electors under the general election laws of this state."

The third section provides how such election shall be conducted, and for the canvass of the vote, and that if, upon such canvass, it appear that at least two-thirds of all the votes cast are "Irrigation District—Yes," the board of supervisors shall, by an order entered upon its minutes, declare such territory duly organized as an irrigation district under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for the several offices to be duly elected thereto, and shall cause a certified copy of such order to be immediately filed for record in the office of the county recorder of each county in which any portion of such land is situated, and shall also immediately forward a copy thereof to the clerk of the board of supervisors of each of the counties in which any portion of the district may lie; and from and after the date of such filing the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices upon qualifying according to law, and shall hold such offices, respectively, until their successors are elected and qualified. The third section of the act, as amended by that of March 20, 1891, also provides that "no action shall be commenced or maintained, or defense made, affecting the validity of the organization unless the same shall have been commenced or made within two years from the making of said order" of the board of supervisors declaring the territory duly organized as an irrigation district. Section 4 et seq. provide for subsequent elections, at which an assessor, a collector, a treasurer, and a board of directors for the district shall be elected. Section 11, as amended March 20, 1891, provides for the organization of the board of directors after their election; and by section 12, as so amended, it is provided that the board shall, among other things, have the right to enter upon any of the land to make surveys, and may locate the necessary irrigation works and the line for any canal or canals, and the necessary branches for the same, on any of the lands which may be deemed best for such location; and shall also have the right to acquire, either by purchase, condemnation, or other legal means, lands, waters, water rights, and other property necessary for the construction, use, supply, maintenance, repair, and improvements of said canal or canals and works, including canals and works constructed by private owners, land for reservoirs for the storage of needful waters, and all necessary appurtenances, and may also construct the necessary dams, reservoirs, and works for the collection of water for the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to each landowner in the district for irrigation purposes. And it is declared by the twelfth section of the act, as so amended, that the use of all water required for the irrigation of the

lands of any district formed under the provisions of the act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of the act, is a public use, subject to the regulation and control of the state in the manner prescribed by law. By section 13 it is provided that the legal title to all property acquired under the provisions of the act shall vest in such irrigation district, and shall be held by such district in trust for the uses and purposes therein set forth; and the board of directors is authorized to hold, use, acquire, manage, occupy, and possess the property as provided in the act. By section 15 of the amendatory act of March 20, 1891, it is provided that for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the act, the board of directors of such district must, as soon after such district has been organized as may be practicable, and whenever thereafter the construction fund has been exhausted by expenditures authorized therefrom, and the board deem it necessary or expedient to raise additional money for such purposes, estimate and determine the amount of money necessary to be raised, and shall immediately thereafter call a special election at which shall be submitted to the electors of the district possessing the qualifications prescribed by the act, the question whether or not the bonds of the district shall be issued in the amount so determined. Notice of such election is required to be given, and such notices are required to specify the time of holding the election and the amount of bonds proposed to be issued; and, in the event a majority of the votes cast at the election are favorable to the issuance of the bonds, the board of directors are required to immediately cause them to be issued, such bonds to be payable in gold coin of the United States, in 10 series, as follows, to wit: At the expiration of 11 years, 5 per cent. of the whole number of said bonds; at the expiration of 12 years, 6 per cent.; at the expiration of 13 years, 7 per cent.; at the expiration of 14 years, 8 per cent.; at the expiration of 15 years, 9 per cent.; at the expiration of 16 years, 10 per cent.; at the expiration of 17 years, 11 per cent.; at the expiration of 18 years, 13 per cent.; at the expiration of 19 years, 15 per cent.; at the expiration of 20 years, 16 per cent.—all of which bonds shall bear interest at the rate of 6 per cent. per annum, payable semiannually on the 1st days of January and July of each year. Section 16 provides for the sale of the bonds by the board of directors from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of the canals and works, the acquisition of property and rights, and otherwise to fully carry out the objects and purposes of the act. Notice of such sale is required to be given, and bids therefor received, but with the provision that in no event shall the board sell the bonds for less than 90 per cent. of the face value thereof. By section 17 it is provided that the bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district, it is declared, shall be and remain liable to be assessed for such payment, as provided in the act. Provision is made for the assessment of all such real property annually by the assessor. By section 20 it is

provided that on or before the first Monday in August of each year the assessor must complete his assessment book, and deliver it to the secretary of the board of directors, who must immediately give notice thereof and of the time the board of directors, acting as a board of equalization will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district. The time fixed for the meeting shall not be less than 20 nor more than 30 days from the first publication of the notice, and in the meantime the assessment book is required to remain in the office of the secretary for the inspection of all persons interested. Section 21 is as follows:

"Upon the day specified in the notice required by the preceding section for the meeting, the board of directors, which is hereby constituted a board of equalization for that purpose, shall meet and continue in session from day to day, as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine such objections to the valuation and assessment as may come before them; and the board may change the valuation as may be just. The secretary of the board shall be present during its sessions and note all changes made in the valuation of property, and in the names of the persons whose property is assessed; and within ten days after the close of the session he shall have the total values, as finally equalized by the board, extended into columns and added."

Section 22, as amended by the act of March 20, 1891, is as follows:

"The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of bonds of any issue must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called the 'Bond Fund of ——— Irrigation District.' In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessments for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

By section 23 of the act, as amended by the act of March 20, 1891, the assessment upon real property is made a lien against the property assessed from and after the first Monday in March for any year, and such lien is not removed until the assessments are paid, or the property sold for the payment thereof. Subsequent sections of the act provide that, in the event the assessments become delinquent, the property shall be sold to pay such assessments, and in the event the property so sold is not redeemed within 12 months from the sale the collector or his successor in office is required to make to the purchaser or his assignee a deed to the property, which deed, duly acknowledged or proved, is (except as against actual fraud) made conclusive evidence

of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed, which deed, the statute declares, conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned by the United States or this state, in which case it is prima facie evidence of the right of possession.

The act of March 16, 1889, provides for a special proceeding in the superior court of the county in which the lands of the district, or some portion thereof, are situated by the board of directors of the irrigation district organized under the act of March 7, 1887, "in and by which the proceedings of said board and of said district, providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold, may be judicially examined, approved, and confirmed." Sections 3 and 4 of the act of March 16, 1889, provide for notice of the proceedings, and for the hearing of any person interested in the district, or in the issue or sale of the bonds, and section 5 of the act declares:

"Upon the hearing of such special proceedings, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district under the provisions of the said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof. The court, in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceeding; and it may approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other and subsequent parts of the proceedings. The court shall find and determine whether the notice of the filing of said petition has been duly given and published, for the time and in the manner in this act prescribed. The costs of the special proceedings may be allowed and apportioned between all the parties, in the discretion of the court."

The bill in the present suit alleges, among other things: That the defendant San Jacinto & Pleasant Valley Irrigation District is, and ever since the 3d day of April, 1891, has been, a corporation duly organized and existing under and in accordance with the provisions of the act of March 7, 1887, and of the acts amendatory thereof. That the defendants McEuen and Haslam are, and for more than four years last past have been, duly elected and qualified members of the board of directors of said corporation; and that the defendant Johnson is, and for the same period has been, the duly qualified and acting secretary thereof. That at the time of the election of the defendants McEuen and Haslam as such directors there were also elected as directors of the corporation C. M. Diedrich, J. G. Gingery, and A. A. Lord, who also duly qualified as such directors, and entered upon the duties of their office, and that thereupon the defendants McEuen and Haslam, together with the said Diedrich and Gingery and Lord, constituted the duly elected, qualified, and acting board of directors of the district. That no other persons have been elected or appointed as such directors, and that the said Diedrich, Gingery, and Lord have removed out of the district, and their office thereafter became vacant, which vacancies have not been filled by appointment or otherwise. That on or about July 1, 1892, the defendant corporation was duly authorized

by vote of the qualified voters of the district, at an election duly called and held, to issue certain bonds of the district; and that thereafter, and before the issuance of the bonds, to wit, on the 6th day of May, 1892, the board of directors of the defendant corporation instituted proceedings under the act of March 16, 1889, in the superior court of the county of San Diego, state of California (that being the county in which the district was at that time situated), for the purpose of obtaining a judicial examination, approval, and confirmation of the proceedings providing for and authorizing the issue and sale of the bonds; and that such proceedings resulted in a decree of the superior court of San Diego county, entered on the 22d day of June, 1892, adjudging "that said San Jacinto & Pleasant Valley Irrigation District was duly organized by and under the direction of the board of supervisors of the said county of San Diego; that the first board of directors of said irrigation district, consisting of the said petitioners, was duly elected and duly qualified as such, and that all of the proceedings of said board of supervisors of said county under and by virtue of which the said irrigation district was organized and the said first board of directors of said irrigation district was elected be, and the same is hereby, approved and confirmed"; and further decreeing "that all the proceedings had by or under the authority of the said board of directors for the issuance of the bonds of said irrigation district to the amount of three hundred and fifty thousand dollars ($350,000.00), including in said proceedings the estimate made by the said board of directors mentioned in said petition of the amount of money necessary to be raised for the purpose of constructing the necessary irrigation canals and works and the acquisition of the necessary rights and property therefor, and otherwise carrying out the provisions of the act of the Legislature under which said irrigation district is organized; and also including in said proceedings the election mentioned in said petition, which was called and held upon the question whether the bonds of said irrigation district in the amount aforesaid should be issued by said irrigation district; and also including in said proceedings the order of the board of directors that the bonds of said irrigation district in the amount aforesaid be issued by the said board of directors in the manner and form as in said order provided and as prescribed by law be, and the same are hereby, approved and confirmed"; and further adjudging "that the San Jacinto & Pleasant Valley Irrigation District ever since its organization as aforesaid has been, and now is, a duly and legally organized irrigation district, and that it has and possesses full power and authority to issue and sell from time to time the bonds of said irrigation district to the aforesaid amount of $350,000." The bill alleges that that decree has never been appealed from, vacated, or set aside, and is in full force and effect.

It is next alleged that certain of the bonds were sold by the irrigation district, and that the money derived therefrom was by the board of directors of the district used in the construction of canals, ditches, rights of way, and other necessary and proper works within the boundaries of the district, in order that the lands therein might be irrigated, and also for the purchase of water rights, lands, rights of way, water-bearing lands, flumes, pipe lines, and interests in other corporations

owning and possessing water rights, water-bearing lands, flumes, pipe lines, and ditches, without the boundaries of the district; all of which were necessary and essential to the proper carrying out of the purposes for which the district was organized. It is alleged that the complainant is a creditor of the defendant district, being the owner of a certain judgment rendered against it in this court for the sum of $2,937.14, which judgment remains wholly unpaid, and upon which execution was duly issued and returned by the marshal wholly unsatisfied; that the judgment was obtained upon unpaid and past-due coupons upon certain of the said bonds held and owned by the complainant. It is alleged upon information and belief that the defendant corporation is the owner of a large amount of real and personal property, canals, ditches, rights of way, water-bearing lands, and other lands, canals, pipe lines, interests in other corporations owning and possessing water-bearing lands, flumes, pipe lines, and ditches outside of the boundaries of the district, the exact description of which the complainant is unable to give for reasons afterward set out. It is alleged that from the date of its organization until the early part of the year 1899 the defendant corporation carried on its business of acquiring water and water rights, and supplying the same to lands within the district, on which last-mentioned date it became, and has since been, insolvent; that for several years prior to 1899 the defendant corporation failed and neglected to raise by assessment upon the lands of the district the full amount of money required for the purposes of paying interest upon the bonds and for the general and operating expenses of the district, and prior to that year it issued a large number of warrants, and promises to pay on demand, which warrants were issued for the purpose of paying the running and operating expenses of the district, salaries of officers, and other debts contracted by the district, and which it authorized and directed to be used and received by the district in payment for the use of water furnished by it to irrigators therein, for which reason, it is averred, the corporation defendant did not receive money for the use of the water, "and because thereof, and because of the failure of the said corporation to levy the assessments aforesaid, the said corporation defendant and the officers thereof, failed to pay the interest on said bonds, and failed to pay the coupons attached to the bond owned and held by your orator aforesaid." It is alleged that the amount of land embraced within the boundaries of the district is 18,000 acres, the assessed value of which upon the last assessment roll of the county of Riverside, Cal., does not exceed the total sum of $100,000, and that the market value of such lands does not exceed $125,000; that the bonded indebtedness of the district for bonds issued and outstanding amounts to $225,750; that the accrued interest thereon, represented by the coupons, amounts to about $60,000; that there is further and other outstanding indebtedness of the defendant corporation amounting to the sum of $10,000; and that, if all the lands embraced within the district were sold at their full market value, there would be realized therefrom a sum wholly insufficient to pay the indebtedness of the defendant corporation. It is next averred that in July, 1899, the board of directors, the treasurer, assessor, and collector of the defendant district, abandoned their duties

and responsibilities as such officers, and permitted adverse parties to seize, take hold of, and appropriate to their own use, fraudulently, and without any consideration, all the lands, water rights, ditches, flumes, and other property of the district lying without its boundaries, and to hold the same adversely, and to convert the same to their own use, to the detriment of the residents of the district, and to the irreparable injury of the complainant and other bondholders similarly situated; that all of said land, water rights, ditches, flumes, and other property owned and possessed by the district, and lying without the boundaries thereof, have been and now are wrongfully appropriated and held adversely by strangers who have wrongfully and unlawfully seized and appropriated the same to their own use, and are selling the waters to consumers thereof outside of the boundaries of the district, and wrongfully appropriating and converting to their own use all the moneys collected as tolls therefrom; that such parties so wrongfully appropriating and converting the assets of the defendant district without its boundaries have so collected in excess of $50,000, and that the board of directors of the district have never at any time since July, 1899, demanded the payment of the same, or made any attempt to collect it; that ever since July, 1899, the board of directors of the district have failed in the performance of all of their duties, have held no meetings, have failed to levy or cause to be levied any assessments for the purpose of paying the interest on the bonds issued by the district, or any part thereof; that they have failed to collect and keep any assets of the district, and have permitted and do still permit strangers and hostile interests to wrongfully appropriate and convert the property of the district, and to collect the tolls from the sale of water belonging thereto, and to destroy and render valueless its ditches and flumes; that a majority of the board of directors of the defendant district have removed their residences therefrom; that the secretary, treasurer, assessor, and collector, have removed their residences and that the board of directors ever since July, 1899, have failed to keep any office or place for the transaction of business in the district, and have allowed and do now allow all the papers, files, books, maps, stock, deeds, evidences of title, and other memoranda and records pertaining to the district to remain in the hands of strangers and parties having no interest in the same, and have taken no steps to take possession thereof, or preserve the same from loss; that the books, maps, papers, and contracts necessary to enable the complainant to ascertain what real and personal property belongs to the defendant corporation, to give a description thereof, are locked in the safe of the defendant corporation, which safe is in the hands of strangers, and the complainant is unable to obtain access thereto; that he has demanded of the president of the board of directors of the defendant corporation that the vacancies upon the board of directors be filled, and meetings be held, and that steps be taken to recover possession of the real and personal property of the district, and that an assessment upon the real property of the district to pay the coupons of the complainant be levied —all of which demands have been refused; that the last assessment levied was paid only by a small portion of the landowners of the

district, and that a considerable portion of the land assessed was sold for nonpayment thereof, and, there being no bidders therefor, was bid in and sold to said district, and that the assessment and sale thereof failed to bring money into the treasury sufficient to pay the indebtedness thereof; that, if an assessment should be levied upon the real property within said district, the same would not be paid, and would not bring any money into the treasury of the said corporation, and would not result in the raising of any money to pay the said indebtedness of the district, or any part thereof.

It was shown in opposition to the application for the appointment of a receiver, among other things, that subsequent to the aforesaid confirmatory decree of the superior court of San Diego county, the superior court of Riverside county (then embracing the lands covered by the irrigation district in question), in an action brought by the state of California upon the relation of a taxpayer, entered a judgment declaring that the defendant district was never legally organized, and adjudging each and all of the bonds issued by it illegal and of no effect. It is not necessary at this time to consider the effect of these contrary judgments. It will be seen from the provisions of the statute under which the bonds upon which the complainant's judgment was obtained were issued, as well as from the averments of the bill itself, that assessments upon the lands embraced by the district was the mode provided by law for the payment of both principal and interest of the bonds. The complainant acquired his bonds with that knowledge, for it was a matter of public law. If, as claimed on his behalf, the bonds held by him are valid, they were payable in the mode provided by the law under which they were issued, and, if the proper officers refused or neglected to levy the proper and necessary assessments, the remedy provided by law was mandamus to compel them to do so. In Heine v. The Levee Commissioners, 19 Wall. 655, 657, 22 L. Ed. 223, the Supreme Court said:

"It has been decided in numerous cases founded on the refusal to pay corporation bonds that the appropriate proceeding was to sue at law, and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt. Unless, then, there is some difficulty or obstruction in the way of this common-law remedy, chancery can have no jurisdiction."

But neither the fact that the remedy at law by mandamus for levying and collecting taxes, if resorted to, has proved ineffectual, nor the fact that no officers can be found to perform the duty of levying and collecting them, can justify a court of equity in undertaking to do so by means of a receiver. Thompson v. Allen County, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472, and cases there cited. Nor does the mere fact that a party finds himself unable to collect his debt by proceedings at law make it the duty of a court of equity to devise some mode by which it can be done. The case of Heine v. The Levee Commissioners, supra, was a bill in equity to enforce collection of taxes where no officers could be found whose duty could be enforced by mandamus.

"There does not," said the court, "appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all, it must be on the very broad ground that, because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune, which, in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must, in common with other men, submit to this calamity, when the law affords no relief."

The court added that the exercise of the power of taxation belonged to the Legislature, and not to the judiciary. There the Legislature had delegated the power to the levee commissioners, and the court said:

"If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. * * * It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government." Page 661, 19 Wall., 22 L. Ed. 223.

In Barkley v. Levee Commissioners, 93 U. S. 258, 23 L. Ed. 893, in speaking of the power to compel by mandamus municipal officers to perform the ministerial duty of levying proper taxes, where there were no such officers, it was said:

"The truth is that a party situated like the present petitioner is forced to rely on the public faith of the Legislature to supply him a proper remedy. The ordinary means of legal redress having failed by lapse of time, and the operation of unavoidable contingencies, it is to be presumed that the Legislature will do what is equitable and just; and in this case legislative action seems to be absolutely requisite."

In the case of Walkley v. City of Muscatine, 6 Wall. 481, 18 L. Ed. 930, the complainant, Walkley, had procured judgment against the city of Muscatine for interest on bonds of the city, execution had been returned nulla bona, the mayor and aldermen had refused to levy a tax for the payment of the judgments, and had used the annual tax for other purposes, and paid nothing to the plaintiff. Walkley then filed his bill in equity praying a decree that the mayor and aldermen be compelled to levy a tax and appropriate so much of the proceeds as might be necessary to pay his judgments. The Supreme Court held that the remedy was by mandamus at law, and said, among other things: "We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus;" and added that "a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgments in cases only where the latter is inadequate to afford the proper remedy." 6 Wall. 483, 484, 18 L. Ed. 930. By such inadequacy of the remedy at law, the same court said in the subsequent case of Thompson v. Allen County, 115 U. S. 554, 6 Sup. Ct. 142, 29 L. Ed. 472, is meant "not that it fails to produce the money—that is a very usual result in the use of all remedies—but that in its nature or character it is not fitted or adapted to the end in view."

In the present case the appropriate remedy for the end in view was mandamus; for it was the remedy afforded by law to compel the officers to levy the assessments provided for by statute for the payment of the principal and interest of the bonds in question. And no other mode or manner of payment was provided by the statute for that purpose. In the case of Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197, the Legislature of Tennessee had repealed the charter of the city of Memphis and abolished the city organization at a time when there were taxes assessed and uncollected amounting to several millions of dollars, and debts of the city to a much larger amount. Some of these taxes had been levied under compulsion of writs of mandamus from the Circuit Court of the United States. A bill in chancery was filed in that court by some of these creditors, praying the appointment of a receiver, who should take charge of all the assets of the city of Memphis, collect these taxes, and pay them over to the creditors, and generally administer the finances of the extinct city as a court of equity might administer the insolvent estate of a dead man. The decree of the Circuit Court granting relief according to the prayer of the bill was reversed by the Supreme Court, and the bill directed to be dismissed.

Upon careful consideration, I am of the opinion that the principle running through the cases cited forbids the appointment of a receiver in the present case. An order will be entered vacating that entered herein March 28, 1904, and denying the application for the appointment of a receiver.

HATFIELD et al. v. KING.

(Circuit Court, N. D. West Virginia. May 17, 1904.)

1. CONTEMPT—ATTORNEYS—PRESENTING FICTITIOUS CASE.
   Evidence *held* insufficient to sustain charges of contempt of court against attorneys, in that they acted in collusion as representing the respective parties to a suit, to impose upon the court a feigned and fictitious case, in the sole interest of the complainant therein.

On Motion for a Rule for Contempt against Henry C. Flesher and Maynard F. Stiles.

Campbell, Holt & Campbell, W. P. Hubbard, and Holmes Conrad, for complainants.

Maynard F. Stiles, for defendant.

JACKSON, District Judge. In this case the Supreme Court of the United States entered its order at the October term, 1901, to set aside the decree of the Circuit Court of the United States for the District of West Virginia, which was entered by the judge of this court who at that time presided in that district, and also in its decree directed that the case be referred to the judge of this court "to make a full investigation in such manner as shall seem to it best, of the various charges

¶ 1. Liability of attorneys for contempt, see note to Anderson v. Comptois, 48 C. C. A. 7.

of misconduct presented with the motions filed in that court, and to take such other action thereon as justice may require," as appears from the mandate of the Supreme Court, filed in this court on the 2d day of January, 1903. 22 Sup. Ct. 477, 46 L. Ed. 481. On the 3d day of September, 1903, the case was submitted to this court upon the petitions and affidavits filed before the Supreme Court, and there being no additional evidence offered by either party, the only inquiry that this court has to deal with under the decree of the Supreme Court, is to determine whether or not the court, at the time of the hearing and submission of the case of King v. Hatfield and Rutherford (C. C.) 130 Fed. 564, was imposed upon by counsel in the submission of a feigned or fictitious case. When I read the order I felt greatly surprised; for, in the course of a long judicial life, I do not recall a single instance in which any of the members of my bar ever attempted to impose upon the court a feigned or fictitious case. I could not well conceive how such a charge could have been preferred against two gentlemen of the bar, both of whom I have known as practitioners in my court. Mr. Stiles I have known for nearly a period of 10 years, and Mr. Flesher for over 20 years. Mr. Flesher was a practicing lawyer before the war, and lived in Jackson county, at which time the judge of this court practiced in that county, and formed the acquaintance of Mr. Flesher, which acquaintance has continued from that time to this day. Mr. Flesher was appointed by this court, many years ago, a United States Commissioner. In his relations to this court, either in its presence or in his official character as commissioner, I have never at any time heard his reputation and character questioned as a member of the bar, or in any other respect. As to Mr. Stiles, I became acquainted with him after the suits were instituted in the United States court, in the name of Henry C. King, for the recovery of certain lands that he had purchased of John V. De Moyne, grantee of the estate of James Swann. At the time of the purchase of this property, and up to that time, it has been, in various shapes and forms, the subject of litigation in the courts of the United States for the District of West Virginia; the cases having been transferred in 1871 from the circuit court of Kanawha county, where they were pending, to the United States court, involving what were then known as the "Swann Lands" in which portions of the 500,000-acre grant now claimed by King was the subject of litigation. Since that time these cases have been pending in that court, and I have frequently made orders in the cases affecting these lands. In the case of Dumas et al. v. Monsignon et al., the court appointed William E. Chilton, who made an affidavit in this case, as special commissioner to make conveyance of some portion of the 500,000-acre grant under which King claims. It will be observed that this court was more or less familiar with the history of these lands since the litigation was transferred to this court. In fact, the court was more or less familiar with them before that time. I refer to these facts merely to show that, when the case was called upon the docket to be heard upon the bill so much complained of, the court was not altogether unfamiliar with the history of these lands.

It was and is now the custom and habit of the court to notify the bar to be present at the time of the calling of the docket, and

of the bar to be in attendance upon the court at such times. It appears from the records of the court that when this case was called a demurrer to the bill was filed on the 8th day of June, 1899, at which times Mr. Stiles, representing the plaintiff, and Mr. Flesher, speaking for the defendant, asked that a time be fixed for the hearing of the case, as both sides were anxious to have the case heard and disposed of. It was heard during the term upon an oral argument, with leave to file briefs. I particularly remember that Mr. Flesher relied upon the briefs filed in the case of King v. Mullins, 18 Sup. Ct. 925, 43 L. Ed. 214, pending in this court, in support of the rights of his clients, which were furnished to the court. Upon an examination of this case submitted to the court, and the case of King v. Mullins, it will be perceived that the questions in the two cases are somewhat different. At the time of the submission of the cases, I remarked to counsel that the question involved in this case was a very grave and important one, and, while it was one upon which I had very strong convictions, still I would take the case under consideration, and decide it as soon as I conveniently could. I held the case under consideration for nearly a year, and finally, at the May term of the court, I entered an order on the 16th day of May overruling the demurrer, at which time, when I announced my opinion overruling the demurrer, there were quite a number of the members of the bar present, when some member of the bar, whom I do not now recall, addressed the court in regard to the effect of its decision; and the court stated at the time that it had a very decided opinion upon the case, and, if there was any disposition to appeal the case, that it would reserve the right to file a written opinion, which I subsequently did. My recollection of what occurred at that time is sustained by the affidavit of Mr. E. L. Buttrick.

This is the history of the case as it appeared before the court, and I certainly never supposed that there was any effort upon the part of counsel to foist upon the court a fictitious case. This much of the history of the case, I think proper to state, is due to the court before I consider the affidavits upon which the order of the Supreme Court is founded.

The only question that this court has to deal with is whether Stiles and Flesher have been guilty of a contempt of the court, in attempting to impose upon the court the hearing and trial of a feigned or fictitious case. To support this contention, affidavits of John A. Sheppard, William E. Chilton, W. R. Thompson, Nancy E. Browning (née Hatfield), Sarah D. Hatfield, A. M. Toler, J. M. Toler, Ferrell Hatfield, Claude L. Gaujot, and Amanda Claypool, and several exhibits, are filed. In reply to these affidavits, the respondents, Stiles and Flesher, file their affidavits, the affidavits of Henry C. King, H. K. Shumate, V. A. Wilder, and E. L. Buttrick, and, in connection therewith, various exhibits—especially a letter of Sarah D. Hatfield, signed "S. D. Hatfield," dated February 27, 1901 (one of the defendants in this case). While the evidence contained in the affidavits in support of the petitioners is not of a specific, but of a general, character, as to the acts which, it is claimed, constitute the contempt upon which the rules are predicated in this case, the affidavits of both Stiles and Flesher deny the charge of any understanding, agreement, or conspiracy between them to make

a case for the consideration of the court, which was to be considered as a feigned or moot case, merely for the extraction of the opinion of this court and the Supreme Court. When the bill of the plaintiff is read in this case, it must be obvious to the most casual observer that it raises a grave and serious question of law, which was frankly stated at the time in the argument of counsel, based upon facts some of which were known to the court, and others which were claimed by the plaintiff's counsel to exist at the time of the submission of the case. The court was led to believe that they were anxious to dispose of the question of law raised by the demurrer as to the forfeiture of the lands described in the bill. The counsel for the defendant, relying upon the demurrer, at no time waived any of the rights of the parties he represented; stating that he was anxious to have the question of the forfeiture of the lands settled, for, if it was settled in his favor, it would end the litigation.

The argument in this case took place in the presence of quite a number of the bar, and was at the time, as I subsequently learned, the subject of a good deal of earnest discussion.

I do not at this time recall whether the attention of the court was called to the fact that there had been no service of process on the defendant, but, if it had been called to the attention of the court, it would have merely remarked that, if counsel who claimed to represent the defendant chose to appear in the case and waive process, he had a right to do so. And such is the universal rule in equity courts, where amended and cross bills have been filed. Recognizing this rule of practice, I did not hesitate to recognize Mr. Flesher when he stated to the court that he represented the defendant, and would waive process and appear. The only object of the process is to get the parties before the court, and, if a party appears by his attorney and waives process, the service of the process would accomplish nothing more. The fact is, as I have stated, that I do not recall what occurred in reference to the question of process; but, recognizing, as I always have done, Mr. Flesher as a lawyer of character and ability, I would not hesitate for a moment to recognize his right to appear. Such has been the uniform practice in the courts over which I preside. The practice of the courts in this country in regard to the appearance of attorneys is well stated in the case of Osborn v. Bank, 9 Wheat. 739, 6 L. Ed. 204. In that case Chief Justice Marshall uses the following language:

"Certain gentlemen, first licensed by the government, are admitted by the order of the court to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any of these gentlemen in a case has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required."

The rule stated by the Chief Justice has always governed the practice in my courts, acting upon the presumption that an attorney appearing in court to represent a party has authority to do so. A multitude of authorities showing this to be the general practice both in federal and state courts could be cited, affirming the rule as laid down by Chief Justice Marshall, but it is not deemed necessary. In the very late case Bonnifield et al. v. Thorp (D. C.) 71 Fed. 924, this rule was the subject of

consideration, and the court cited a large number of authorities where the right of an attorney to appear for a party was questioned, and held that:

"The presumption is that an attorney appearing in court for a party has authority to do so, and, where the want of authority is questioned, the burden of proof is on the party attacking, and such want must be established by positive proof."

In this case it is to be observed that at the time Mr. Flesher appeared to the case no one questioned his authority, nor was there any intimation or suggestion to the court that he had not the right to appear for over a year after his appearance.

The court recalls the fact that in the case of King v. Altizer, Mullin et al., 18 Sup. Ct. 925, 43 L. Ed. 214, which was an action to recover a large tract of land, Mrs. Hatfield and Mrs. Rutherford were both defendants in the cause, and appeared in open court when the case was called for trial. My recollection is that Judge Ferguson, who also had been employed to represent them, got up and withdrew from the case, for the reason, as he stated, that he understood that Mr. Flesher had entered into a stipulation, as counsel for the defendants Sarah B. Hatfield and Nancy Rutherford, to sever from the other codefendants on the trial of the action. He stated that he had not been consulted by his clients, nor by Mr. Flesher, which was his reason for withdrawing from the case as counsel. Both Mrs. Hatfield and Mrs. Rutherford were present, and did not at that time repudiate Mr. Flesher as their counsel. This occurred on the 15th day of October, 1895, when the action of ejectment was called for trial. From that day up to the time that Mr. Flesher appeared and filed his demurrer to the bill in the case against Mrs. Hatfield and Mrs. Rutherford, the court always recognized Mr. Flesher as their counsel.

This much I have felt is due to the court to state its recollection of the history of the case, which is possibly the reason why the Supreme Court referred this matter to me, as being the proper person to consider the charges. In looking into the evidence in support of these charges, much of it that is filed I do not regard as throwing any light upon the question of what I shall call the contempt of the court in an effort of counsel to impose upon it. The first affidavit filed by the petitioners is that of Mr. John A. Sheppard, which throws little or no light upon the question of contempt. His affidavit does not disclose any matter of fact that would tend to throw any light upon that question. He does not speak from a personal knowledge, but only repeats in his affidavit what he claims that he got from Mrs. Hatfield. As Mrs. Hatfield's affidavit is filed in the case, which is primary evidence, then, so far as Mr. Sheppard's affidavit states what Mrs. Hatfield told him, it is hearsay. I shall consider only the statement of Mrs. Hatfield as stated in her affidavit, and not as repeated by Mr. Sheppard, who appears not to have been interested directly in the lands in controversy, but indirectly, as representing other parties whose interests might be affected by the decision in this case. Mr. Sheppard states that Mrs. Hatfield admitted that she knew of the existence of the case of King against herself, but contended that she had not lost her land. In this connection it is to be remarked that none of the parties who filed affidavits in

this case were counsel for Mrs. Hatfield. The court must therefore conclude that not being of counsel for Mrs. Hatfield was the reason why they paid no attention to the case until after they had heard of the decision of the court in her case. The court entertaining the belief that Mr. Flesher was their counsel, when he arose and addressed the court it did not hesitate to recognize him as counsel in the case. I have carefully considered the affidavits filed in support of the charges contained in the petition of Stewart Wood and others for rules against Henry C. Flesher and Maynard F. Stiles, upon which the rules for contempt were awarded, and which are relied on to show that there was a collusion between Flesher and Stiles to present to the court for its consideration a fictitious case, and to practice a fraud upon it. There is much in the affidavits which might tend to arouse some suspicion of irregularity, but there is an entire absence of any specific proof that tends to sustain the charge of a conspiracy upon the part of Flesher and Stiles to present to the court a moot case, in order to extract an opinion from the court upon the question raised by the pleadings. As we have said, the affidavit of Mr. Sheppard, which undertakes to give what occurred between him and Mrs. Hatfield, and which the court supposes is largely relied upon to sustain the charge of collusion and fraud between Flesher and Stiles, fails to state any fact from his personal knowledge, and this criticism applies with equal force to all of the affidavits in support of the alleged charges. At the time when the case was under consideration before the court, it was frankly and freely stated on both sides that it was the desire of counsel to get an early hearing of the case, without the delay which necessarily arises from long litigation in an action of ejectment. There was but one question before the court, and that was a constitutional one, and, if the court held with the defendant upon that question, then it was conceded that the trial of the action at law would be unnecessary; but, if the court held with the plaintiff, then the right of the defendant to set up any other defense that might be relied upon in the case was not in any wise abridged. There is no specific evidence to be found in any of the affidavits in this case which fixes the imputation of fraud and collusion between the counsel who appeared in the case. The facts stated in the affidavits of the petitioners, so far as they relate to this charge, are denied by both Stiles and Flesher in their affidavits, and, to my mind, successfully dispose of the question of fraud and collusion. I have to some extent relied upon my personal recollection of Mr. Flesher's connection with the case, which recollection is sustained by the records of the court, but it is unncessary for the court to rely upon its recollection. Mr. Flesher's affidavit disclosed his entire connection as counsel in the case, and he produced a letter from Mrs. Hatfield of the date of February 27, 1901, in which she recognized him as her counsel, and that, too, after it appears that certain interested parties had visited her and tried to induce her to employ other counsel. It is very apparent to my mind, from the evidence in this case, that the fears of Mrs. Hatfield had, to a great extent, been worked upon, and that, had she been left alone and not been interfered with, possibly the controversy that has now arisen would never have transpired. Be that as it may, in the letter just referred to she recognizes Mr. Flesher

as her counsel, and she is bound by his actions. Many courts have held that, after counsel have appeared in a case, every step taken in the case, so long as the relation of counsel and client exists, must be taken by counsel, and is binding upon the client. In looking over these affidavits, it does not appear that any improper motive could have been attributed to Mr. Flesher in taking the course he did. Both Flesher and Stiles have filed their affidavits denying in most positive terms the charge of collusion, or any attempt to impose upon the court. The statements of these gentlemen, both long known to the court, are entitled to full credit, and must be accepted by the court as conclusive of their innocence on the charge of contempt and collusion, unless their evidence is overthrown by evidence so conclusive that the court would feel constrained to sustain the charge. The burden of proof is upon the petitioners to make good the charge. Rutledge v. Waldo et al. (C. C.) 94 Fed. 265. The affidavits of both Stiles and Flesher show that controversy and issue as made by the pleadings to be real, and not fictitious, and that it was in no sense a legal fraud to seek, under the circumstances, an early decision as to the forfeiture of the land in controversy, especially when it might save the great expense incident to a trial in ejectment for the recovery of the land.

The case we have under consideration resembles very closely the similar one of Robinson v. Lee (C. C.) 122 Fed. 1012, in which Judge Simonton, of this circuit, held that where it appears "that the controversy is a real one, and when the defendant swore that it was, then it was not in any sense a legal fraud to form a purpose in order that there might be a judicial determination of the validity of the question at issue." This rule, as laid down by that eminent jurist, seems to apply with much force to this case. And the application of this principle to the case under consideration will exonerate both Mr. Stiles and Mr. Flesher from any improper professional conduct in the case.

I reach the conclusion that the evidence fails in every essential element to sustain the grave charge made against the respondents. For this reason, the court is of the opinion that the motion for rules for contempt against Flesher and Stiles should be dismissed.

McBRIDE et al. v. FARRINGTON.

(Circuit Court, W. D. New York. May 12, 1904.)

No. 22.

1. INDIAN TERRITORY—INDIAN LANDS—MINERAL LEASES—VALIDITY.

By treaty of 1855, 10 Stat. 1116, a certain district within the Indian Territory was set off to the Choctaw and Chickasaw Nations, to be held in common, under the control of the tribal organizations in the district of its own jurisdiction. By Act Chickasaw National Legislature, passed 1886 (Laws Chickasaw Nation, p. 188), any resident citizens (not less than three) were authorized to form a corporate company to engage in developing coal mines. This act was amended September 24, 1887 (Laws Chickasaw Nation, p. 190), so as to include petroleum, natural gas, and asphaltum. Reservation of all lands containing deposits of such minerals was made by Act Cong. June 28, 1898, c. 517, § 13, 30 Stat. 498, which required payment of royalties for the benefit of the Indians; and the Chickasaw

statute also provided that after the formation of the company, and on compliance with such statute, the corporation was authorized to contract with capitalists to develop and work the mines. *Held*, that such acts impliedly authorized the leasing of coal and oil lands allotted to such Indians for a limited period for the tribal or individual benefit of such Indians, and that such leases were not void on their face.

2. SAME—CORPORATIONS—STOCKHOLDERS—INDIVIDUAL LIABILITY—STATUTES.
Where a corporation was organized under the laws of Wisconsin to develop mining lands in Indian Territory, and its stock was used in payment for an assignment of leases of Chickasaw mineral lands, such leases not being void ab initio, the burden of proof was on the plaintiff to show actual fraud in the assignment of such leases to the corporation, in an action to enforce a stockholder's personal liability for corporate debts under the statutes of that state declaring that a stockholder shall be personally liable where stock has been issued, except for money or property estimated at its true value actually received by the corporation equal to the par value of the stock.

3. SAME—RIGHTS OF CREDITORS.
Where a creditor of a corporation rendered services sued for without investigating the corporation's financial condition, and did not rely on the fact that the stock of the corporation was fully paid, he was not entitled to enforce a statutory stockholder's liability for debts on the ground that the stockholder's subscription had been paid by a transfer of the property at an excessive valuation.

Roberts, Becker, Messer & Groat (Tracy C. Becker and Alfred F. Becker, of counsel), for plaintiffs.

Brundage & Dudley (Frank Brundage, of counsel), for defendant.

HAZEL, District Judge. This is an action at law, brought by judgment creditors of the Western Oil & Mining Company, a corporation, against the defendant, to enforce his liability as a stockholder therein, under chapter 86 of the Revised Statutes of the State of Wisconsin for 1878, and acts amendatory thereof and supplementary thereto, pursuant to which the company was incorporated. Such organization and incorporation were effected on September 26, 1896, with a capital of $1,500,000 divided into shares of the par value of $10 each. Its primary objects and purposes were to engage in mining for coal, iron ore, and other minerals, and drilling for petroleum, in the Indian Territory and elsewhere; to acquire lands and property by purchase; and to carry on mining, prospecting, refining, and manufacturing the products developed by the corporation. It appears from the proofs that one Frank Burke, Jr., for himself and as trustee for the defendant and others interested in the formation of the company, assigned to the corporation at the time of its organization three certain leases or charters of oil and mineral lands situated in Indian Territory. The charters were apparently purchased by Burke from the Oil Springs Mining Company in October, 1890, the Gold Mining Company in September, 1896, and the Anvil Rock Mining Company in June, 1896, respectively. These charters were concededly granted to the companies mentioned some time in the month of October, 1890, by the Chickasaw Nation. The original charters were not produced at the trial. The defendant claimed they were lost. The three assignments from Burke to the Western Oil & Mining Company purported to transfer and convey the exclusive right to prospect for and mine, coal, petroleum, and

in general all minerals to be found upon the land described therein. According to the plaintiffs' theory, the capital stock was not issued for property sold to the company, as contemplated by the Wisconsin statute, for the reason that the leases in question were void, and therefore no actual fraud need be proven. The Wisconsin statute in terms provides that a stockholder shall be personally liable where stock has been issued by the corporation, except for money or property estimated at its true value actually received by it equal to the par value thereof. Were the leases and assignments to the corporation invalid? It cannot be denied that the different tribes of Indians from the earliest period have been under the control and protection of the government of the United States. The lands ceded to them have been guarded by the United States from encroachment and acquisition by others without their consent. The Cherokee Trust Funds, 117 U. S. 288, 6 Sup. Ct. 718, 29 L. Ed. 880. By the treaty of 1830 (7 Stat. 333) the United States granted to the Choctaw Nation the right in fee simple to occupy certain lands west of the Mississippi river during their existence as a nation. By the terms of the treaty this grant became liable to transfer and alienation only with the consent of the United States. The treaty of 1855 (10 Stat. 1116) provides for a renewal of the earlier treaty, and that the land therein described be held in common by the Choctaw and Chickasaw tribes or bands of Indians. A certain district within the territory conveyed was set off or assigned to each nation. It was further provided that none of the lands embraced within the limits specified could be sold unless both tribes or bands consented thereto. In the event of race extinction, or abandonment by the Indians of their tribal relations, the territory ceded to them as a nation was to revert to the United States. It is shown by the proofs that the lands set aside for the use of the Choctaw and Chickasaw Nations is still held by them in common, and is under the control of each tribal organization in the district of its own jurisdiction. As we have seen, it is contended by the plaintiffs that the leases or charters, together with the assignments which are the subject of this action, are invalid ab initio, and on account thereof the title to lands, privileges, and immunities purporting to be conveyed failed, and that, accordingly, no valid consideration whatever passed for the issue of stock to Burke and to the defendant. The specific grounds upon which the invalidity of the documents mentioned are claimed to be absolutely void are tersely set forth in plaintiffs' brief, as follows:

"First. The three leases or charters had no legal validity at any time, because they were issued in part to noncitizens of the Chickasaw Nation, in violation of the United States statutes, the statute of that nation, and the treaties. Second. The rights acquired under such charters or leases, if any, were assigned to noncitizens of the tribe, in violation of said statutes and treaties. Third. The lease of these lands to noncitizens and the assignment of said leases to noncitizens constituted an abandonment of the land, forbidden by said treaties under penalty of forfeiture of the land by the Indians."

The point that the source of title is not derived from the owners in common is not pressed. That the charters or leases were granted to the companies heretofore named pursuant to an act of the Legislature of the Chickasaw Nation passed 1886 (Laws Chickasaw Nation, p. 188) is admitted. Such act in part reads as follows:

"That any resident citizens (not less than three) of the Chickasaw Nation who may wish to form a corporated company to engage in developing coal mines, and to transport, ship or sell all coal mined beyond the limits of this nation shall be authorized to do so," etc.

This provision was subsequently, on September 24, 1887 (Laws Chickasaw Nation, p. 190), amended so as to include petroleum, natural gas, and asphaltum. The amendment also contained a provision for the payment of royalties amounting to 2 per cent. on all gross sales of said products. The stipulation of facts shows that the leases or charters in question were granted by the national secretary of the Chickasaw Nation to a company composed of three or more citizens of the Chickasaw Nation and others. From the phrasing of the introductory clause describing the lessees, it is thought by counsel for plaintiffs that the grant and privileges specified are restricted to citizens of the Chickasaw Nation alone, and that, as such leases seem to run to citizens and noncitizens of the nation, they are in contravention of the Chickasaw statute and of the laws of the United States. No testimony is found in the record that the words "and others" meant to preclude white persons from joining in the charters, and such a presumption is not warranted. But assuming the leases and grants were to citizens of the nation and to white persons, must such enactment providing "that any resident citizens (not less than three), may form a corporate entity to engage in mining coal and other minerals in the Indian Territory," be strictly construed to preclude white persons from participation in such companies? Upon this question, according to plaintiffs' view, depends the title of the leases in controversy and any rights secured thereunder. A careful examination of decisions by the Supreme Court of the United States interpreting analogous treaties discloses that lands ceded to Indian tribes by the government of the United States are held for their separate benefit. Within the boundary of the ceded territory, the Indians mentioned secured control of their tribal lands by treaty obligations. The cession of these lands with the inalienable right of control secured thereby during tribal existence could be defeated only by the reservation to the United States contained in the grant. My attention is called to no statute or decision prior to the passage of the Curtis Act of June 28, 1898, c. 517, 30 Stat. 495, holding that the Chickasaw Nation had no authority under the then existing laws to lease their possessions for a limited period to white persons for their tribal or individual benefits. On the contrary, many adjudications are found expressly recognizing such right, and enforcing contracts arising thereunder. It is not necessary, it is thought, to go into the numberless ramifications of Indian statutes and decisions of the courts construing them. Much time has been expended by the court in attempting to trace the multitudinous and correlative acts of Congress, inhibitive and permissive, all tending towards a faithful conservation of our treaty stipulations. Although the Chickasaw Nation, as has been said, was allowed by the government of the United States to make laws for the protection of its members and property, it is nevertheless quite well settled that Congress has the undoubted right to supersede a prior treaty, and to exercise such paramount authority over the nation as, in effect, may curtail and diminish their tribal prerogative. U. S. v.

Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; Thomas v. Gay, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740. It was decided very early in the history of our jurisprudence that white persons may, with its consent, reside in a nation holding lands under treaty stipulation. Commercial intercourse between citizens of the United States and bands of Indians has been common from the earliest period of our history. The Dawes Commission Report, commenting upon the subject, says:

"It must be assumed, in considering this question, that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory; for it cannot be possible that they can intend to demand the removal of the white people, either by the government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time it was abandoned forever."

See Stephens v. Cherokee Nation, 174 U. S. 448, 19 Sup. Ct. 722, 43 L. Ed. 1041.

Such being the fact, how can it be successfully contended in the absence of an express prohibitive statute, that leases or charters for a specific purpose and for a limited term by the Chickasaw Nation to white persons are absolutely void? In no sense may such contracts be construed as acquiring the lands of the nation in violation of treaty restrictions. It will not, I think, be seriously controverted that these "wards of the nation" have in past years engaged in what seemed an interminable field of litigation directly owing to leases and charters granted by them to white people within the Indian Territory. The point in controversy, though argued with signal ability, is not new. The evils and abuses attributable to the manner in which the title to these lands was held by the tribal bands in question, and the disposition which they made of such lands to whites, aroused Congress to adopt measures leading to the betterment of then existing conditions. The appointment of the Dawes Commission followed. Their report resulted in the enactment of stringent statutes to obstruct future spoliation, and tending to preserve such lands to the Indians. By Act June 28, 1898, c. 517, 30 Stat. 495, provision was made, among other things, for the allotment of lands among the citizens of the respective tribes, with the reservation that "all oil, coal, asphalt and mineral deposits in the lands of any tribe, are reserved to such tribe, and no allotment of such land shall carry the title to such oil, coal, asphalt or mineral deposits." Rules and regulations regarding leases of lands for mining and prospecting were promulgated and provided by the Secretary of the Interior. It is specifically provided by section 13 of the act (30 Stat. 498) that royalties shall be paid for the privilege secured by lease or charter, and, further:

"That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt or mineral, which shall have been assented to by act of Congress, but all such interest shall continue unimpaired thereby," etc.

That section further provides:

"That, when, under the customs and laws heretofore existing and prevailing in the Indian Territory, leases have been made of different groups or parcels

of oil, coal, asphalt or other mineral deposits, and possession has been taken thereunder, and improvements made for the development of such oil, * * * then such parties in possession shall be given preference in the making of new leases. * * * The rate of royalty to be paid by all lessees shall be fixed by the Secretary of the Interior."

By section 16 of the act (30 Stat. 501) it is made unlawful for any person to pay royalties or rents on any mineral or timber lands to the nation or its citizens, except such payment be made pursuant to rules and regulations prescribed by the Secretary of the Interior. These provisions would certainly presuppose the fact that it was very common for the Chickasaw Nation of Indians to make charters for mining coal and other minerals in the Indian Territory to white persons. But it is insisted that a strict observance of the statutes of the Chickasaw Nation and of the United States prevented the formation of mining companies by white persons in the Indian Territory, and, further, that the later acts of Congress must be given retrospective operation. I am unable to so hold. The Chickasaw statute does not in terms forbid leasing mining lands to white persons, and I have yet to find a statute of the United States which prohibits such leasing. The act of the Chickasaw Nation merely authorizes three or more citizens to form a corporation for mining, and points out the way in which such companies may secure corporate rights and protection under the Chickasaw statute. This inference finds support in the very language of the act. It is further provided in the act, to which reference is made, that after the formation of the company, and when it has complied with the Chickasaw statute, then the corporation is authorized and empowered to contract with capitalists, to employ help, and do such other "means" as may be necessary to develop and work the mines. This clearly presupposes the right to assign leases to white persons, for it will not be contended that, when authority is in terms given to contract with capitalists for prospecting and developing the lands, it was intended to restrict such right to citizens of the nation. It would be difficult to find a large number of capitalists among the tribal bands inhabiting the Indian Territory. It is elementary that, whenever a Legislature wishes to give retrospective operation to its acts, the intent to do so must be clear. In Atoka Coal & Mining Co. v. Adams, 104 Fed. 472, 43 C. C. A. 651, it was held that persons in the lawful possession and entitled to the usufruct of lands in the Choctaw Nation could grant leases to mine the coal on such lands for such royalties as might be agreed upon. To the same effect, see Ellis v. Fitzpatrick, 118 Fed. 430, 55 C. C. A. 260. If, prior to the passage of the Curtis act, valid leases for mining coal in consideration of the payment of royalties might be made between citizens of the nation and white persons, it is difficult to perceive why a similar lease to drill oil is invalid. In the case last mentioned the provisions of the "Dawes agreement" were squarely held to operate prospectively, and not retrospectively, on royalties accruing under existing leases. It is not necessary to prolong discussion upon this point. I am reasonably satisfied that the primary contention of the plaintiffs that the leases and assignments were void ab initio is without sufficient merit to justify this court in holding that the commission of fraud by the defendant need not affirmatively ap-

pear. Assuming this conclusion not well founded, it, nevertheless, from the foregoing remarks, must be perfectly manifest that there is grave doubt regarding the invalidity of the leases which are the subject of this controversy. Under such circumstances, I am of opinion that the burden is upon the plaintiffs to show actual fraud; and, moreover, that in giving credit to the corporation they must have relied upon the payment of property actually received by the corporation. The complaint charges that the issues of stock were fictitious and fraudulent. Other allegations based upon fraud committed by the defendant and the directors of the company are found in the complaint. Nothing, however, was shown to substantiate such claims, and therefore they need not specially be noticed. In explanation, however, of these allegations of the complaint, it is practically conceded that plaintiffs did not part with their services expressly relying upon the payment of money or property actually received by the corporation for the stock issued; nor is it claimed that they placed any reliance upon the value of the leases. Upon this point it is ingeniously insisted by counsel for plaintiffs that it is wholly immaterial whether the creditor relied upon any actual fraud, or whether the stock subscribed for was actually paid in cash or in property. To maintain the liability of the defendant as a stockholder, it is asserted that such liability arises out of the contractual obligation to pay for the stock issued to him either in money or in property estimated at the true value actually received. This assertion is vigorously opposed by the defendant. He contends that the burden is upon the plaintiffs to show actual fraud and deception, and, further, that the plaintiffs, in giving credit to the corporation, must have in good faith relied upon the statutory requirements. It is further contended that the assignments mentioned were made and delivered in absolute good faith, and hence no recovery can be had unless actual fraud be shown. As has been indicated, I have reached the conclusion that the plaintiffs' principal contention upon which the liability of the defendant stockholder is based must fail. The leases were not void, and, therefore, presumptively, of value. If the leases were in fact null and void, and no property whatever was paid into the company—none which honestly could be regarded as a fair equivalent to cash—and the corporation had practically parted with its entire capital stock, then the rule announced in Coit v. Gold Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, and in Whitehill v. Jacobs & Ano., 75 Wis. 474, 44 N. W. 630, would not, in my judgment, apply, and fraud upon the creditors would necessarily follow by implication. Flour City National Bank v. Shire, 88 App. Div. 401, 84 N. Y. Supp. 810; The White Corbin & Co. v. Jones, 86 Hun, 57, 34 N. Y. Supp. 203; Boynton v. Hatch, 47 N. Y. 225. It may be that the full-paid stock was exchanged for property grossly overvalued, and, if it appeared from the evidence that the plaintiffs relied upon such obvious overvaluation in giving credit to the corporation, a different conclusion would follow. The proposition that whenever property is paid for the capital stock of a corporation it must be taken at its reasonable cash value, needs no citation of authorities. Of course, allowance must always be made for honest differences of opinion as to the value of property, as well as for mistakes and errors of judgment. If it appears

that the value was intentionally excessive or fraudulently overvalued, a creditor without knowledge of the facts should not be hindered in the collection of his debt. Under such circumstances it must appear affirmatively that the creditor believed and relied that the stock of the corporation was fully paid and that actual fraud was committed in the payment of the stock. The principle announced by the Supreme Court in Coit v. Gold Amalgamating Co., supra, and in Whitehill v. Jacobs, supra, are decisive and controling upon this question. The language of the court in the Coit Case, for the purpose of emphasizing this point, may be quoted:

"If it were proved that actual fraud was committed in the payment of stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties would have no ground of complaint. * * *" Again: "But 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. A gross and obvious overvaluation of property would be strong evidence of fraud."

No evidence has been offered by the plaintiffs of the actual value of these leases. They have proceeded upon the theory, as heretofore stated, that they were null and void. There is nothing before the court, assuming their invalidity, upon which to base a finding of overvaluation sufficient to warrant a judgment for the plaintiffs. It appears that the lands covered by the leases consisted of upwards of 200,000 acres, and that the incorporators believed said property rights were of greater value than the capital stock. It further appears that prior to the incorporation defendant was advised by counsel that such leases and charters were valid. Manifestly, some evidence, in view of these facts, should have been offered to rebut the presumption of good faith on the part of the defendant. The defendant is a stockholder in a Wisconsin corporation, and the plaintiffs' rights are governed by the statutes of that state. The interpretation placed upon that statute by the highest court of Wisconsin (Whitehill v. Jacobs, supra) must be followed here. Bucher v. Cheshire Railroad Company, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795. The plaintiffs, without inquiring into the financial standing of the company, and without making any investigations whatever, performed the services which were the subject of the judgment against the corporation. There were no misrepresentations made or claimed. Stress is placed by the plaintiffs upon the legal and complete failure, upon the grounds herein discussed, of the title of the leases and of the assignments to the corporation. This, as has been observed, is thought to be an erroneous assumption, and therefore the plaintiffs cannot recover.

Judgment may be entered for the defendant, with costs.

On Petition for Rehearing.

The foregoing opinion states that no statute enacted prior to the Curtis Act (Act June 28, 1898, c. 517, 30 Stat. 495), holding that the Chickasaw Nation had no authority under the then existing laws to grant leases to white persons, had been called to the court's attention.

This statement was not correct. Counsel for plaintiffs in their brief set out section 2116 of the Revised Statutes, which provides that:

"No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution," etc.

This broad and general provision has never in terms been repealed. The United States Attorney General, in an opinion reported in volume 18 of the Opinions of the Attorneys General, at page 238, construing this statute, held that such provision applied to the lands held in fee by the Five Nations, and that leases by such Indians to noncitizens were prohibited. Subsequent to this opinion, Congress, by Act March 1, 1889, c. 333, 25 Stat. 784, established a United States Court in the Indian Territory. Section 6 of that act provides that all laws theretofore enacted to prevent the Indian nation in question and other Indian nations from lawfully making leases for mining coal for a period not exceeding ten years were repealed. Jurisdiction over all controversies arising out of such leases or contracts was expressly vested in the United States Court established by the act. The language of section 6 might be held sufficiently broad to repeal the prohibitive statute under consideration, and not a mere revocation of such parts as prevent the Indian nations from leasing or contracting for mining coal for a period not exceeding ten years. Irrespective, however, of this suggestion, the later enactment of Congress of May 2, 1890 (26 Stat. 81, c. 182), enlarges the jurisdiction of the United States Court of the Indian Territory, and provides that such court shall have jurisdiction in all cases of contracts entered into by citizens of any tribe or nation with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of such tribe or nation, and such contracts shall be deemed valid and enforced by such courts. Defendant contends that these several acts of Congress nullified and invalidated section 2116. It would certainly seem that Congress intended to modify and repeal all laws which limited the right of tribal Indians located in the Indian Territory to execute contracts not expressly prohibited by the laws of the United States or of such tribe or nation. Whatever limitation previously existed, a fair construction of the language quoted from section 29 (26 Stat. 93) would seem to validate all contracts entered into by such Indians with citizens of the United States in good faith and for a good consideration, provided, as above mentioned, such contracts were entered into in accordance with the laws of the tribe or nations.

Stress is placed by counsel for plaintiffs upon the cases decided in the Indian Territory since the act of 1890, which show that noncitizens of the Chickasaw and Choctaw Nations could not hold Indian lands by conveyances or leases. The cases appear to make a distinction between conveyances and leases by Indians to white persons for town lots and improved farms. See Rogers v. Hill (Ind. T.) 64 S. W. 536; Kelly v. Johnson (Ind. T.) 39 S. W. 352. In Rogers v. Hill, supra, the court, without expressly deciding the question, doubted whether a lease of an improved farm for eight years was legal. In Kelly v. Johnson, supra, the court held that, even though no valid title by sale of property set apart for the use of Indians could be given by an Indian to a white

person, yet an action by a white person in possession under color of title might be maintained for forcible entry and detainer. These cases are not thought to be in point. Here, as has been stated, the Chickasaw Nation of Indians, pursuant to its laws, gave an incorporated company, presumably organized pursuant to their tribal laws, the right to mine for iron ore and other minerals and to drill for petroleum. At the time the charters were granted to the corporation and subsequently assigned by it, the provisions of the act of Congress above mentioned were in force. Although no authority is cited deciding the question whether the acts of Congress here thought to modify and repeal section 2116 validate contracts of the kind in controversy, it nevertheless is thought that the language employed is sufficiently clear to justify holding that all contracts relating to land, which do not transfer the title, entered into in good faith, for a good and sufficient consideration, and not specifically prohibited by the laws of the United States or of the Indian nation, are valid and may be enforced in the proper forum.

The motion for rehearing is denied.

UNITED STATES v. SEVEN BARRELS OF WHISKY.

(District Court, D. Nebraska. August 6, 1904.)

No. 384.

1. INTERNAL REVENUE—STAMPS ON PACKAGES OF LIQUOR—FORFEITURES.

Rev. St. § 3323, as amended by Act Cong. July 16, 1892, c. 196, 27 Stat. 200 [U. S. Comp. St. 1901, p. 2167], declares that every package of distilled spirits containing five wine gallons or more, filled on the premises of a local liquor dealer, shall be marked, branded, and stamped by such wholesale liquor dealer in such manner and under such rules and regulations as the commissioner of internal revenue, with the approval of the Secretary of the Treasury, may prescribe, etc., and declares that every rectifier or wholesale dealer who refuses or willfully neglects so to mark, brand, or stamp his liquors shall be fined, etc. *Held*, that such act only authorized the commissioner of internal revenue, with the approval of the Secretary of the Treasury, to designate the kind and character of the mark and stamp to be affixed to the packages, and hence the marks and stamps so prescribed were marks and stamps "required by law," within section 3289 [U. S. Comp. St. 1901, p. 2132], declaring that all distilled spirits found in any package containing five gallons or more, without having thereon each mark and stamp required by law, should be forfeited to the United States.

2. SAME—PENALTIES—EXCLUSIVENESS.

Rev. St. § 3323, as amended by Act Cong. July 16, 1892, c. 196, 27 Stat. 200 [U. S. Comp. St. 1901, p. 2167], declares that every rectifier or wholesale liquor dealer who refuses or willfully neglects to comply with the requirements of the act as to marking, branding, and stamping, in accordance with the rules and regulations made in pursuance thereof, the packages filled on his premises as aforesaid, shall for every offense be fined not less than $200 nor more than $1000, and section 3289 [U. S. Comp. St. 1901, p. 2132], declares that all distilled spirits found in any cask or package, containing five gallons or more, without having thereon each mark and stamp required by law, shall be forfeited to the United States. *Held*, that the penalty imposed by section 3323 was not exclusive, and did not prevent the United States from enforcing a forfeiture of the goods not properly stamped in a proceeding in rem against them.

3. SAME—DEFENSE.

In proceedings to forfeit liquors not properly stamped it was immaterial that the stamps on the barrels indicated that they contained a greater number of gallons than were actually placed therein, and that the government therefore was not actually defrauded.

Irving Baxter, U. S. Atty.
J. G. Dun and G. W. Cooper, for claimant.

MUNGER, District Judge. An information was filed in this case by the United States to forfeit seven barrels of whisky seized by the collector of internal revenue on the premises of the claimants, Walter Moise & Co., wholesale liquor dealers, said information charging that each of said barrels contained more than five gallons of whisky, and that each did not have thereon the mark and stamp required by law, in that they did not have the marks and stamps showing truly the number of wine gallons in each barrel at the time the wholesale liquor dealers' stamps were affixed thereto, in that each barrel was of less capacity than shown by the stamps so affixed thereto, and that each of said barrels held and contained at the time it was stamped and at the time it was seized a less number of wine gallons than indicated by the stamp thereon; for which reason it is claimed on the part of the government that said property is subject to forfeiture. To this information a demurrer has been interposed.

The two sections of the statute which it is claimed by the respective parties are applicable to the consideration of this case are sections 3289 and 3323 [U. S. Comp. St. 1901, pp. 2132, 2167]. Section 3289 is as follows:

"All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States."

Section 3323, as amended in 1892 (27 Stat. page 200), is as follows:

"Every package of distilled spirits containing five wine gallons or more, filled on the premises of a wholesale liquor dealer, who has paid the special tax required by law, shall be marked, branded and stamped by such wholesale liquor dealer in such manner and under such rules and regulations as the commissioner of internal revenue, with the approval of the Secretary of the Treasury, may prescribe; and on or before the tenth day of each month every wholesale liquor dealer shall make return, under oath, to the collector of internal revenue for the district of the various kinds and quantities of each kind and of the total quantities of distilled spirits received on his premises and of the various kinds and quantities of each kind and of the total quantity of distilled spirits sent out from his stock or possession during the preceding month, and of the quantity of each kind and the total quantity remaining on hand at the end of the month; and such return shall be made in such form and contain such other particulars as the commissioner of internal revenue, with the approval of the Secretary of the Treasury, may prescribe. And every rectifier or wholesale liquor dealer who refuses or wilfully neglects to comply with the requirements of this act as to giving the said notice or the said return, and as to marking, branding, and stamping, in accordance with the law and the regulations made in pursuance thereof, the packages of spirits filled on his premises as aforesaid, shall, for each such offense, be fined not less than two hundred dollars nor more than one thousand dollars."

On the part of claimant it is argued that, the object and purpose of the internal revenue act being to obtain revenue to the government, a forfeiture will not be imposed for an act which does not operate as a

fraud upon the government, and, as the information in this case charges that the stamps upon the barrels indicated a greater number of gallons than the barrels contained, such fact could in no respect defraud the government. Again, that the marks and stamps required by section 3323 are such as may be prescribed by the commissioner of internal revenue, with the approval of the Secretary of the Treasury, and hence are not stamps and marks required by law as provided in section 3289; and, further, that, inasmuch as section 3323 carries a penalty for willful neglect to comply with its provisions, such penalty is exclusive, and a forfeiture cannot be had.

Section 3289 is general in its provisions, and applies to any cask or package containing five gallons or more of distilled spirits, which has not thereon each mark and stamp required by law; and if the stamp and mark required or mentioned in section 3323 is a mark and stamp required by law, it would seem that section 3289 was applicable thereto, unless the penalty prescribed in section 3323 is exclusive. Pursuant to the provisions of section 3323, the commissioner of internal revenue, with the approval of the Secretary of the Treasury, has provided that each stamp shall, among other things, state the number of wine gallons contained in the package upon which the stamp is placed. While it is true that the commissioner of internal revenue, with the approval of the Secretary of the Treasury, may not prescribe regulations and provide a penalty for their violation (United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591), section 3323 expressly provides that the stamp and mark so prescribed by the commissioner of internal revenue, with the approval of the Secretary of the Treasury, shall be placed upon each package. The section only leaves it to the commissioner of internal revenue, with the approval of the Secretary of the Treasury, to designate the kind and character of mark and stamp to be affixed to the package. The requirement of a mark or stamp is not by regulation of the commissioner of internal revenue, but is a requirement which Congress has expressly named; and hence the mark and stamp is one required by law. The mere fact that Congress has left to the commissioner of internal revenue, with the approval of the Secretary of the Treasury, the authority to indicate the character and kind of mark and stamp, does not prevent the enforcement of penal provisions of the statute for its violation. In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813. I am, therefore, of the opinion that the marks and stamps prescribed by the commissioner of internal revenue, with the approval of the Secretary of the Treasury, to be placed on each package, under the provisions of section 3323, are marks and stamps required by law.

The section, however, it is to be observed, provides as follows:

"And every rectifier or wholesale liquor dealer who refuses or wilfully neglects to comply with the requirements of this act as to giving the said notice or the said return, and as to marking, branding and stamping, in accordance with the law and the regulations made in pursuance thereof, the packages of spirits filled on his premises as aforesaid, shall, for each such offense, be fined not less than two hundred dollars nor more than one thousand dollars."

This is a penalty imposed upon the wholesale dealer who refuses or willfully neglects to comply with its provisions, and does not affect the

property itself; while section 3289 is directed alone against the property, and is operative without reference to the fact whether or not the neglect to comply with the requirement of the law was willful. I cannot think that Congress, in imposing a penalty by fine upon the individual dealer who refuses or willfully neglects to place upon the package the mark and stamp required, intended to relieve the property from forfeiture, the one penalty being enforced by proceedings in rem against the property alone, the other in personam upon the violator of the statute. That forfeiture of the property and a fine imposed upon the offender may both exist, I have no doubt. While it is true that the single fact that the stamps upon the barrels indicated that the barrels contained a greater number of gallons than were actually placed therein would not constitute a fraud upon the government, and while it is further true that the purpose and object of the act in question was to obtain revenue, and not in any respect to protect purchasers of the property from deception, yet the marking and stamping must be regarded as a means adopted by the government to effectuate the object and purpose of the legislation, and as an aid in preventing frauds upon the revenue.

For these reasons the demurrer is overruled.

THOMPSON et al. v. STALMANN et al.

(Circuit Court, D. Nevada. August 1, 1904.)

No. 779.

1. FEDERAL COURTS — REMOVAL OF CAUSES — PETITION — CITIZENSHIP — AVERMENTS.

A petition for the removal of a cause from a state to a federal court on the ground of diverse citizenship should not only allege that the citizenship of the parties is diverse, but should also disclose the states of which the parties, respectively, are citizens.

2. SAME—AMENDMENT.

Where a removal petition averred that the controversy was between citizens of different states, and that the amount in controversy, exclusive of interest and costs, exceeded the sum of $2,000, the federal Circuit Court to which the cause was removed had jurisdiction to permit the petitioner to amend the petition so as to disclose the citizenship of the parties.

Motion to Remand.

M. S. Bonnifield and Torreyson & Summerfield, for plaintiffs.
H. Warren, for defendants.

HAWLEY, District Judge (orally). Plaintiffs move this court to remand this case to the state court upon the ground that this court is without jurisdiction to hear and determine the cause, in that it is not alleged by the petition for removal, nor does it appear by the record or otherwise, that at the time of the commencement of the action in the state court there was diverse citizenship of the parties. It is not al-

¶ 1. Averments of citizenship to show federal jurisdiction, see note to Shipp v. Williams, 10 C. C. A. 261.

leged by the said petition, nor does it appear in any manner by the record, that at the time of the commencement of the suit the defendants were residents and citizens of the state of Utah, or any other state than that of the state of Nevada, of which state it is alleged that the plaintiffs were residents and citizens at the time aforesaid. Defendants confess the insufficiency of the petition, but claim that the objection is one of mere form only, and does not reach the substance of the petition, and ask leave to amend their petition so that it would read that "the defendants were nonresidents of the state in which said suit was brought, to wit, the state of Nevada, at the time said action was brought, ever since have been and now are citizens of the state of Utah."

The sole question is whether this court has jurisdiction to allow the amendment. If so, it should be granted. The objection urged to the form of the petition for removal is well founded, and, if the case rested solely on the petition, it should be remanded. Crehore v. Railway Co., 131 U. S. 242, 9 Sup. Ct. 692, 33 L. Ed. 144; Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249; Craswell v. Belanger, 56 Fed. 529, 6 C. C. A. 1, and authorities there cited; De Loy v. Ins. Co. (C. C.) 59 Fed. 320; Railway Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237. The question of the right to amend the petition was not involved in those cases.

In Johnson v. F. C. Austin M. Co. (C. C.) 76 Fed. 616, and Stadlemann v. White Line Towing Co. (C. C.) 92 Fed. 209, the direct question of the right to amend was presented, and the amendment was allowed. The petition in this case is, in principle, identical with those cases. It contains the averments that the controversy is between citizens of different states, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $2,000. The court in the cases referred to held that "these are the facts upon which the jurisdiction of this court depends"; that the averment that the controversy is between citizens of different states is not sufficiently specific, but should be followed by the statement of the particular state of which each of the parties is a citizen; that the fact sought to be averred by the proposed amendment is simply a statement in detail of one of the facts necessary to complete with requisite certainty the statement of the ultimate and material fact that the controversy is between citizens of different states; that the proposed amendment does no more than set forth in proper form and sufficient fullness of detail what had originally been imperfectly stated in the petition. In addition to these cases, see Kinney v. Columbia S. & L. Association, 191 U. S. 78, 82, 24 Sup. Ct. 30, 48 L. Ed. 103, and 18 Ency. Pl. & Pr. 324, and authorities there cited.

In Glover v. Shepperd (C. C.) 15 Fed. 833, 837, Judge Bunn held, in a case where the citizenship of the parties was not stated in compliance with the statute, that it was within the power and discretion of the court to allow an amendment.

At first blush, there appears to be some difference of opinion as to whether or not the objection raised is jurisdictional in its character.

In Cameron v. Hodges, 127 U. S. 322, 326, 8 Sup. Ct. 1154, 32 L. Ed. 132, the court said:

"The case in this court must be tried upon the record made in the Circuit Court. In this instance there has been a removal from a tribunal of a state into a circuit court of the United States, and there is no precedent known to us which authorizes an amendment to be made, even in the Circuit Court, by which grounds of jurisdiction may be made to appear, which were not presented to the state court on the motion for removal."

But that case had not been properly removed on any ground.

In Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656, the court said:

"The record in the state court, which includes the petition for removal, should be in such a condition, when the removal takes place, as to show jurisdiction in the court to which it goes. If it is not, and the omission is not afterwards supplied, the suit must be remanded."

And in Grace v. American Central Ins. Co., 109 U. S. 278, 284, 3 Sup. Ct. 207, 27 L. Ed. 932, the court said:

"It is true that the petition for removal, after stating the residence of the plaintiffs, alleges 'that there is, and was at the time when this action was brought, a controversy therein between citizens of different states.' But that is to be deemed the unauthorized conclusion of law which the petitioner draws from the facts previously averred. * * * As the judgment must be reversed, and a new trial had, we have felt it to be our duty, notwithstanding the record, as presented to us, fails to disclose a case of which the court below could take cognizance, to indicate for the benefit of parties at another trial the conclusion reached by us on the merits. And we have called attention to the insufficient showing as to the jurisdiction of the Circuit Court so that upon the return of the cause the parties may take such further steps touching that matter as they may be advised."

The language, as used in these cases, implies that an amendment might be made after the removal to the Circuit Court. The inference to be drawn from the language in the decision in Carson v. Dunham, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 30 L. Ed. 992, is much stronger in favor of allowing the amendment. The court, after stating that an answer filed in the Circuit Court might be treated as an amendment to a petition for removal, said:

"The answer was germane to the petition, and did no more than set forth in proper form what had before been imperfectly stated. To that extent, we think, it was proper to amend a petition which, on its face, showed a right to the transfer."

See, also, Powers v. Chesapeake & Ohio Ry., 169 U. S. 93, 101, 18 Sup. Ct. 264, 42 L. Ed. 673.

Upon an extended examination of all the cases upon this subject, I am of opinion that the motion to amend should be allowed, and the motion to remand denied. It is so ordered.

MOWER-HOBART CO. v. R. G. DUN & CO.

(Circuit Court, N. D. Georgia. May 23, 1904.)

No. 1,782.

1. LIBEL—MERCANTILE REPORT—ALLEGATION OF EXPRESS MALICE.

A declaration in libel, based on a report made by defendant, as a mercantile agency, with respect to the financial standing of plaintiff, which stated, inter alia, that plaintiff's account with the bank was "not classed as an entirely desirable one," states a cause of action for the recovery of actual damages, without regard to the question of privilege, where it is further alleged that "the report as a whole was a false and malicious defamation of plaintiff, tended to injure it in its said business, * * * and was craftily and wickedly, falsely and maliciously, so intended and designed," which is a sufficient allegation of express malice.

At Law. Action for libel. On demurrer to declaration.

Hoke Smith and H. C. Peeples, for plaintiff.

Walter R. Brown and Ellis, Wimbish & Ellis, for defendant.

NEWMAN, District Judge. This suit is brought by the Mower-Hobart Company, a corporation doing business in Atlanta, in this district, against R. G. Dun & Co., a mercantile agency. The declaration alleges that R. G. Dun & Co. conduct what is known as a mercantile agency, with offices located at various points throughout the United States, and with an office at Atlanta, Ga., in said county of Fulton; that part of the business conducted by said R. G. Dun & Co. is to distribute for a consideration, to merchants, dealers, and others, information regarding the standing of persons engaged in trade, their financial worth, credit, character, trustworthiness, and the conduct and condition of their business; that such information is secured and given out by representatives stationed at commercial centers, who secure the same, and distribute it directly or through agents of said firm to its patrons in the form of written or printed slips called "reports"; that said partnership is known as Dun's Commercial Agency, it numbers among its patrons a large proportion of the leading wholesale mercantile establishments of America, and its reports are accepted, and largely influential, and to a great degree regulate and control, commercial transactions in the United States, especially as regards the financial credit and responsibility of merchants. It is then alleged that on or about July 11, 1902, the defendant gave out to its subscribers a written report upon plaintiff, as follows:

"Mower-Hobart Co. Office supplies etc. Atlanta, Ga., Fulton.
No. 1 Broad St.
"July 11, 1902.
"At present this company is located at 61 Peachtree St. That place has been leased and they have rented store house at above address, where they intend moving August 1st.
"When requested for statement Mower claimed that they had not inventoried since statement rendered during March to which he referred. Stated verbally that there had been practically no change, and affairs were in about the same shape as indicated in their last showing.
"The statement referred to was submitted under date of March 24th last, and showed total assets of $18,211.54, with debts of $7,491.9, indicating a sur-

¶ 1. See Libel and Slander, vol. 32, Cent. Dig. § 198.

plus or worth of the company of $10,719.55; result of investigation made at the time resulted in conceding the company a responsibility of something like $6,000.

"Just at present the expenses of the company are a little heavier than usual, inasmuch as they will have to pay store rent on two places until Sept. They have keen competition to contend with, and while they appear to be aggressive and attentive, their trade is hardly thought to average up as much as formerly. They carry a nice stock of merchandise, but some of this is consigned. At bank the company is very well known where they have been granted some accommodations, but settlements through this source said to have been slow and altogether the account is not classed as an entirely desirable one. However confidence seems to be manifested in Mower's ability, and a willingness is expressed to indulge him to a reasonable extent. No complaints from the trade at large have come to notice, and in an eastern market one firm states that dealings, including those with predecessors covers a period of about ten years, have with them goods on consignment aggregating $3,000 to $4,000, and say that the account on direct sales average about $300 on usual terms, remittances being made promptly. No extensions asked. Are owing now about $300 not due. One concern in the local market is found who have handled the account in a small way, and say dealings were satisfactory, though report no recent transactions. The location which they will occupy after August 1st is hardly considered as much desirable as their present quarters, and as a basis for credit the responsibility of the company is not placed at exceeding $5,000 to $6,000 and quoted in fair credit standing.

"7-11-02. Rate G. 3. to G. 3½."

This report is taken up in the declaration by paragraphs, and is charged as having been false and malicious. The present hearing is on a demurrer to the declaration. The demurrer and argument of counsel thereon raises the question as to how far the above report is libelous. In my judgment, the only part of the report made by the defendant as to the plaintiff which could in any way be classed as libelous, and intended to injure it, if untrue, is that language which stated that "the account"—referring to the plaintiff's bank account—"is not classed as an entirely desirable one." The remainder of the report does not seem to me to contain anything of which complaint can reasonably be made. The first part of the report states, on authority of a member of plaintiff's company, that its assets are $18,211.54, and its debts $7,491.09, indicating a surplus or worth of the company as $10,000. The Dun Company itself gives the plaintiff company a credit or responsibility of something like $6,000. Any one could judge for themselves from the amount of its assets and liabilities what credit it should have. The statement of the Dun Company as to $6,000 of responsibility is evidently merely an expression of its own opinion as to the extent of credit such an amount of assets and liabilities would justify. The statement in the report as to the change of place of business, the additional expense, and as to consigned goods, are not such as would seem to cause injury or damage to plaintiff. The statement to the effect that "they carry a nice stock of merchandise," and of Mr. "Mower's ability," and as to "remittances being made promptly" for consigned goods, and "no extensions asked," seem all to be complimentary, and such as should be helpful to plaintiff in its mercantile business, rather than otherwise.

The next question is as to how far a report made by a mercantile agency, such as R. G. Dun & Co., is privileged. The general rule with reference to the privilege of a mercantile agency, as gathered from the

authorities, seems to be that communications made by such an agency will be privileged when furnished to those having an interest in the matter, but that the communication will lose its privileged character when furnished to their subscribers generally, and to those having no interest in the standing of the person as to whom the report is made. Erber v. R. G. Dun & Co. (C. C.) 12 Fed. 526; Trussell v. Scarlett, (C. C.) 18 Fed. 214; 18 Am. & Eng. Ency. Law (2d Ed.) p. 1035. It is claimed by plaintiff's counsel, however, that this court should be controlled by the decision of the Supreme Court of Georgia in the case of Johnson v. Bradstreet, 77 Ga. 172, 4 Am. St. Rep. 77. The contention is that that decision is based upon the construction of a section of the Code of Georgia (3840, Code 1895; 2980, Code 1882); but this section, it is conceded, was a codification of the common law. Being so, it is urged by defendant's counsel that it is not controlling in this court. Clark v. Bever, 139 U. S. 96–117, 11 Sup. Ct. 468, 35 L. Ed. 88. In this connection it might be interesting to consider the effect on this question of the decision of the Supreme Court of Georgia in Central Railway v. State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518; and especially the language used in the opinion by Mr. Justice Cobb, on page 855, 104 Ga., page 540, 31 S. E., 42 L. R. A. 518, as to the statutory character of the present Code of the state. The decision, however, in Johnson v. Dun & Co., was rendered while the old Code was in effect, and before the adoption of the Code of 1895. The questions raised are interesting, but I do not think the effect to be given to this decision of the Supreme Court of the state is very important in the present case, because it is alleged in the declaration that this report was maliciously made. The language of the declaration is:

"The said report taken as a whole was a false and malicious defamation of plaintiff, tended to injure it in its said business, to injure its financial and moral standing and respectability in said business, and was craftily and wickedly, falsely and maliciously, so intended and designed."

The defendant contends that the foregoing is not a sufficient allegation of express malice. I should be unwilling to so hold, in view of the language used, and consequently the case stands with the allegations in the declaration that the defendant stated of the plaintiff that its bank account "is not classed as an entirely desirable one," that this statement was untrue, and that the same was made by the defendant with express malice, and with intention thereby to injure the plaintiff. This, in my judgment, states a cause of action.

It may be remarked here that the only party receiving this report mentioned in the declaration is the R. D. Cole Manufacturing Company, of Newnan, Ga. Whether this company had requested of the defendant a report as to the plaintiff's standing, or whether it was interested therein, does not appear. If that part of the report made by the defendant as to the plaintiff's commercial standing which refers to the bank account, therefore, was false, and was made with express malice, it would seem to justify a recovery of actual damages, whether the defendant has a qualified privilege or not.

With this expression of the views of the court, the demurrer will be overruled, and the case allowed to proceed as herein indicated.

THE WESTPORT.

(District Court, N. D. California. June 23, 1904.)

No. 13,114.

1. MASTER AND SERVANT—INJURY OF SEAMAN—UNSAFE PLACE TO WORK.
By order of the master of a steamer, libelant and other seamen removed from the bitts and carried to the capstan a hawser with which the vessel was being warped to a wharf. The hawser was then hove tight and tautened by backing the vessel, when the capstan gave way, and libelant was severely and permanently injured. The capstan was wholly insufficient to stand the strain put upon it in warping the steamer, and was known to be so by the master, but not by libelant; and the master claimed that before backing he directed the hawser to be taken from the capstan and made fast to the bitts; but, if such order was given, it was not understood by the men. *Held* that, even if given, it did not relieve the vessel from liability for the failure of the master to see that it was understood and obeyed before backing, through which libelant was placed in a dangerous position.

In Admiralty. Suit by seamen to recover for personal injuries.

F. R. Wall, for libelant.
C. H. Wilson, for claimants.

DE HAVEN, District Judge. This is an action to recover damages for personal injuries sustained by the libelant while serving as a seaman on board the steamer Westport. The libelant, when injured, was engaged in taking care of the slack of a hawser with which the Westport was being warped to the wharf in San Pedro Harbor. A few minutes before the accident the captain gave orders for this hawser to be taken from the bitts and carried to the capstan, which was done. The hawser was then hove tight, and a strain put upon it by the backing of the steamer which carried the capstan away, severely injuring the libelant in the chest and back, and also breaking both legs, one of which had to be amputated. It is conceded that the capstan was only fit for use in heaving in the slack of the hawser, and was entirely insufficient to sustain such a strain as was required in using it for the purpose of warping the steamer. It is also conceded that this weak and defective condition of the capstan was known to the master, but not to the libelant, or to the other seamen engaged in working it. The Westport had on at the time a deck load of lumber 12 or 13 feet in height, which prevented the master, in the position where he stood upon the bridge, from seeing the capstan or the men engaged in working there. The contention of claimants is that before any strain was put upon the hawser by backing the steamer the master gave a second order to take the hawser from the capstan, and make it fast to the bitts; and it is insisted that, if this order had been obeyed, the accident would not have occurred, and that, therefore, the proximate cause of the injury received by the libelant was the disobedience of this order by himself and his fellow servants. I am not satisfied from the evidence that such an order was given. The libelant testified that he understood the order to be to make the hawser good and fast, and take more turns; and this is, in substance, the evidence of two of the sailors who were assisting him. Capt. Seel, an intelligent and apparently disinterested witness, called in behalf of

the claimants, testified that the order actually given by the master was to heave tight and make fast to the bitts. This certainly was not an absolute command to take the hawser from the capstan and make it fast to the bitts. But, assuming that the last order given was to the effect that the hawser should be removed from the capstan and made fast to the bitts, still the libelant, under the particular facts of this case, is entitled to recover damages for the injuries sustained by him. The hawser had been taken to the capstan by direction of the master, who knew that the place where the libelant was working was thus rendered unsafe in the event that any strain should be placed upon the hawser while it was on the capstan. Under such circumstances it was the duty of the master, as the representative of the owners, to have ascertained, before he backed the steamer, that his orders had been conveyed to the men at the capstan and executed, thus making it safe for the libelant to remain in the place where he was working. The owners of the steamer owed to the libelant the positive duty of providing him a safe place in which to work, and they are responsible for the failure of the master to discharge this duty. For these reasons, and also because, upon consideration of all the evidence, I believe the allegations of the libel as to the manner and cause of the accident are sustained, a decree must be entered in favor of the libelant.

Upon the question of damages the evidence shows that at the time of the accident the libelant was in his twenty-second year, in good health, and earning $45 per month as an able seaman. The injuries received were attended with great suffering and pain, and have made him a cripple for life. In my judgment, the libelant is entitled to recover damages in the sum of $4,500 and costs.

THE CENTENNIAL.

(District Court, N. D California. June 29, 1904.)

No. 13,188.

1. SHIPPING—CARRIAGE OF PASSENGERS—INSUFFICIENCY OF ACCOMMODATIONS.
Allegations of a libel by steerage passengers on a voyage from Seattle to San Francisco to recover damages for breach of contract on the ground that the ship failed to furnish them with proper food, quarters, and bedding, *held* not sustained by the evidence.

In Admiralty.

Wm. P. Hubbard and Arthur H. Barendt, for libelants.
Frank & Mansfield, for claimant.

DE HAVEN, District Judge. This libel is brought against the steamer Centennial by a number of persons who were passengers on her on a voyage from Seattle to San Francisco. Each of the libelants demands damages in the sum of $500. The allegations of the libel are, in substance, that libelants were not furnished bedding and blankets; that during the whole voyage the food given them was of poor quality, not properly cooked, and wholly unfit for con-

sumption; that the steerage compartment had poor ventilation, and their berths were near the toilet, from which came disagreeable odors, by reason of not being kept in a clean and sanitary condition; and that four dogs were kept in the large steerage compartment assigned to the libelants for sleeping quarters. It appears from the evidence that the libelants were furnished with bunks and standees upon which to sleep, but no blankets or other covering. It also appears that libelants were steerage passengers, and the evidence shows that it is not usual or customary upon steamers plying between San Francisco and Seattle to furnish steerage passengers with blankets or other covering. The libelants Gilbert, Thompson, Rieman, and Sullivan, however, testified that when they purchased tickets representations were made to them by the ticket agent to the effect that their tickets would entitle them not only to a berth, but also a bed with blankets or other covering. The other libelants did not so testify, and the alleged fact that such representations were made is denied by the agent who sold the tickets. Upon consideration of all the evidence upon this point, I am not satisfied that such representations were made. So, also, the other allegations of the libel—those in relation to the unwholesomeness of the food, poor ventilation of the steerage cabin, and the stench arising from the toilet therein—are not, in my opinion, sustained by the evidence. The evidence does show that three or four dogs were kept in the steerage cabin. Assuming that the libelants have some cause to complain because dogs were carried in the steerage cabin, still this did not constitute such a breach of the libelants' contract for passage as to entitle them to substantial damages.

The libel is dismissed, with costs.

F. H. LEGGETT & CO. v. UNITED STATES.

MEYER & LANGE v. SAME.

(Circuit Court, S. D. New York. July 5, 1904.)

Nos. 3,414, 3,415.

1. CUSTOMS DUTIES—CLASSIFICATION—EDIBLE WAFERS.

Edible wafers, raised in the making by the use of baking powder or bicarbonate of soda, are "leavened," although such agents do not produce fermentation, and are dutiable under section 6, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], as nonenumerated manufactured articles, and not entitled to free entry under paragraph 696 in the free list, covering "wafers, unleavened or not edible" (Act July 24, 1897, c. 11, § 2, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1688]).

Appeals from a Decision (G. A. 5,393, T. D. 24,596) of the Board of United States General Appraisers.

Albert Comstock, for importers.

Charles Duane Baker, Asst. U. S. Atty., and Albert H. Washburn, counsel for the Treasury Department, for the United States.

TOWNSEND, Circuit Judge. The merchandise in question comprises wafers, edible, which were assessed for duty as a nonenumerated manufactured article, at 20 per cent. ad valorem, under the provisions of section 6 of Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], and are claimed as free under the provisions of paragraph 696, as "wafers, unleavened or not edible" (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1688]). It is conceded that baking powder or bicarbonate of soda was used in the manufacture of these wafers. The question is whether they are leavened.

The Board of General Appraisers found as follows:

"In order to produce a leaven, it is only necessary that an agent to set up fermentation be employed; and baking powder or bicarbonate of soda are such agents. The Standard Dictionary defines leaven as 'any substance that sets up or is intended to set up fermentation.' The Century and Webster's Dictionaries each defines leaven as 'to excite fermentation in; to raise and make light, as dough or paste.'"

The board concluded that these wafers were leavened, within the dictionary definitions, because they thought that baking powder and soda set up fermentation. It admitted that the board were mistaken in this conclusion, and that said substances do not set up fermentation.

In its most technical and limited sense leaven is sour dough, and in this sense the term was understood 2000 years ago. Later, yeast was substituted for sour dough as a leaven. Each of these substances leavened in the sense that it set up fermentation. The government contends that the term has now been extended so as to include in common speech anything which accomplishes the result of a leaven in its etymological sense—that is, which raises or makes light—and that the term "unleavened," as applied to wafers, is restricted to wafers such as are used as a vehicle for taking medicine, or as seals, or for religious purposes. There is a hopeless conflict of evidence as to the sense in which the term "leaven" is commonly used. The finding of the board states that "it conclusively appears from the evidence before us that there is no common, uniform, or general trade understanding which includes the words 'leavened' or 'unleavened.'" We are brought, therefore, to a consideration of the dictionary definitions. Here there is a substantial agreement that leaven means any substance that sets up fermentation in, or raises and makes light. There is considerable evidence tending to show that this broad definition corresponds with ordinary understanding and speech. The strongest argument for the importers is in the matzoths or Passover bread of the Hebrews, which, while raised or made light by the action of intense heat upon the water in the dough, is known as unleavened bread. But matzoths are not made light by any substance except the steam generated in the course of baking the dough. And it is thought that the limited application of this term in a biblical sense to a peculiar product used in the religious observances of a particular sect is insufficient to overcome the broader general understanding of the term.

The decision of the Board of the General Appraisers is affirmed.

In re BRANNOCK.

WICKHAM v. BARLOW et al.

(District Court, N. D. Iowa, Cedar Rapids Division. August 8, 1904.)

No. 426.

1. CHATTEL MORTGAGE—RECORDING—LAW GOVERNING.
The recording of a chattel mortgage, and the effect of such recording, are governed by the law of the state where the property is situated.

2. SAME—RESIDENCE OF MORTGAGOR—RECITAL IN MORTGAGE.
The recital in a chattel mortgage of the residence of the mortgagor is not evidence of his place of residence, to affect the question of where the mortgage should be recorded.

3. SAME—VALIDITY OF RECORD—PRESUMPTION.
Where a chattel mortgage was duly executed in Iowa, and recorded in the county where the property was actually situated, and in the possession of the mortgagor, the burden rests on one attacking the validity of the record to show by competent evidence that the mortgagor was not a resident of such county.

4. SAME—COUNTY OF RECORD—IOWA STATUTE.
Under Code Iowa, § 2906, which requires a chattel mortgage to be recorded in the county where the holder of the property resides, a mortgagor may be a resident of a county, within the meaning of the statute, although his legal domicile is elsewhere; and a mortgage given by a railroad contractor on property in his possession, in a county where he is at work, and in which he actually resides with his family, while engaged in performing his contract, is properly recorded in such county, although his residence there may be only temporary.

5. SAME—SUFFICIENCY OF DESCRIPTION.
A description of property in a chattel mortgage as "twelve head of work horses, twelve sets of harness, eight dump wagons, one New Era grading machine, all camp outfit, camp utensils, all scrapers (12) now in my camp outfit * * * now working on the electric line from Iowa City to Cedar Rapids, Iowa, * * * the said property being located on the right of way of above electric line, in Johnson County, Iowa," is sufficient to identify the property, under the Iowa authorities.

In Bankruptcy. On review of order of referee.

On petition of E. A. Wickham for review of order of referee denying claim of the petitioner to priority in the proceeds of property covered by a chattel mortgage of the bankrupt to him. James Brannock was adjudged an involuntary bankrupt by this court February 9, 1904, upon petition of certain of his creditors filed January 2d preceding. He was a railway contractor, and came to Johnson county, Iowa, in June, 1903, where he had a contract for grading upon the Cedar Rapids, Iowa City & Southern Railroad—an electric railway line then in process of construction through Johnson county. June 25, 1903, at Council Bluffs, Iowa, he made to the petitioner, Wickham, a chattel mortgage on his grading outfit, then in Johnson county, and used by him in such railroad work, which mortgage was duly acknowledged by the bankrupt as required by the laws of Iowa, and was filed by petitioner in the office of the recorder of deeds of Johnson county on June 29, 1903, and afterwards duly recorded in said county. The mortgage, so far as material to the questions presented for review in this proceeding, is as follows: "That I, James Brannock, Omaha, Nebraska, of the County of Douglas and State of Nebraska, in consideration of the sum of $1,067.25 to me in hand paid by E. A. Wickham of Council Bluffs, Iowa, party of the second part, do grant, bargain, and convey unto said second party the following goods and chattels, to wit: Twelve head

¶ 1. See Chattel Mortgages, vol. 9, Cent. Dig. § 151.

of work horses, twelve sets of harness, eight dump wagons, one New Era grading machine, all camp outfit, camp utensils, all scrapers (12) now in my camp outfit that has been working upon the G. W. railroad, in Shelby County, Iowa, and are now working on the electric line from Iowa City to Cedar Rapids, Iowa, under subcontract with Murray Bros., of Cedar Rapids, Iowa; the said property being located on the right of way of above electric line, in Johnson County, Iowa." This property was sold by order of the referee, free from the mortgage lien; the proceeds being held in lieu of such property. The petitioner made proof of his debt secured by the mortgage, and claimed priority upon the proceeds of the mortgaged property. Charles Barrow and other creditors of the bankrupt filed objections to its allowance as a prior claim upon the grounds (1) that the bankrupt at the time of making the mortgage was a resident of the state of Nebraska, and that the record of the mortgage in Johnson county, Iowa, was unauthorized; and (2) that the description of the property in the mortgage was void for uncertainty. The referee sustained the former of these objections, and denied the claim of the petitioner to priority. In his certificate, the referee says: "The legal residence of James Brannock is in dispute in this controversy. He worked on the line during the summer and fall, and left Johnson county some time in December, 1903. * * * Much of the evidence introduced in relation to the residence of James Brannock is incompetent and hearsay, and but little weight is to be given to the same. However, we think the statement in the mortgage, 'I, James Brannock, Omaha, Nebraska, of the County of Douglas and State of Nebraska,' raises a presumption that his residence is in Omaha. This presumption, taken with the evidence in the case, compels us to find that his legal residence was in Nebraska. Certain it is, he had no legal residence in Johnson county, Iowa. He was here only for a temporary purpose, and went away as soon as that was accomplished. The recording of this mortgage in Johnson county was not in accordance with the statute, and did not impart constructive notice of the mortgage. It is not necessary to pass upon the question of the sufficiency of the description in the mortgage, for the reason that the holding above disposes of the case." The petition for review challenges the correctness of this decision or order of the referee.

Remley & Ney, for petitioner.

Ranck & Bradley, Baldwin & Fairchild, and Baker & Ball, for contesting creditors.

REED, District Judge (after stating the facts). The questions for determination are: (1) Was the chattel mortgage of the petitioner, Wickham, properly recorded in Johnson county, Iowa? (2) If it was, is the property sufficiently described therein?

1. The property being situated in Iowa when the mortgage was made, record of it in the state of Nebraska, even though the mortgagor had then resided there, would have been wholly ineffective in Iowa, as constructive notice to creditors of, or purchasers from, the mortgagor. Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Hervey v. Locomotive Works, 93 U. S. 669, 23 L. Ed. 1003; Aultman & Taylor Co. v. Kennedy, 114 Iowa, 444, 87 N. W. 435, 89 Am. St. Rep. 373; Golden v. Cockrill, 1 Kan. 259, 81 Am. Dec. 510; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Ames Ironworks v. Warren, 76 Ind. 512, 40 Am. Rep. 258. Such a mortgage is governed by the law of the place where the chattels are situated at the time it is made, and the question of its priority, as between different lienholders, is to be determined by the law of such place. Ames Ironworks v. Warren, 76 Ind. 512, 40 Am. Rep. 258; Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104; Aultman & Taylor Co. v. Kennedy, 114 Iowa, 444, 87 N. W. 435, 89 Am. St. Rep. 373.

As the mortgagee had not taken possession of the property, the validity of the mortgage, as against creditors of the bankrupt, depends upon whether or not it was properly recorded in Johnson county, where the property was situated at the time the mortgage was made. This depends upon the meaning of the Code of Iowa, providing for the recording of chattel mortgages in that state. That Code provides:

"Sec. 2906. No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors, or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides."

It is contended by the contesting creditors that the evidence shows that the legal residence or domicile of the mortgagor at the time this mortgage was made was in Nebraska, and that therefore the mortgage could not be legally recorded in Iowa. The referee held that the evidence, aside from the recital in the mortgage, is insufficient to show such residence or domicile, and he bases his conclusion that the mortgage was not properly recorded in Iowa upon the ground that that recital presumptively shows that his legal residence or domicile was in Nebraska. Such recital is as follows: "I, James Brannock, Omaha, Nebraska, of the County of Douglas and State of Nebraska. * * *" This recital is not evidence of the residence of the mortgagor, and is in no way controlling as to the place where the mortgage should be recorded. Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816. This case arose under the recording laws of the state of New York, and therein it is said, at page 737, 101 U. S., 25 L. Ed. 816:

"Some stress is laid upon the fact that in each of the mortgages the mortgagor is described as 'of the City of New York.' The actual residence controls the place of filing the mortgage. * * * The recital of the residence in the mortgage seems to be of no importance, and might, for the matter of security, be omitted altogether."

From the evidence, it appears that the bankrupt was engaged in the work of grading upon railroads in process of construction, and had been for a number of years; that he had done such work in the states of Illinois, Mississippi, Missouri, Nebraska, and Iowa; that, in doing such work, he lived in a camp or tent upon or near the right of way of the railway upon which he was working until that job was completed, when he would move to another one; that prior to his coming to Johnson county, in June, 1903, he was working upon a railroad in Shelby county, Iowa, with the outfit described in the mortgage in controversy in this proceeding; that in such county he also lived in a tent or camp upon or near the right of way of the railroad. How long he had been at work and so lived there, is not definitely shown; but it would appear to have been for some months in 1903, and part of the year 1902. When he came to Johnson county, he located his tent upon or near the right of way of the railroad upon which he had the contract for grading; and here he remained with his family and this outfit until the latter part of December, 1903, when he absconded, leaving debts unpaid that he had

contracted while he was doing this work, among which are those of the creditors contesting the validity of petitioner's mortgage. At one time he lived in Nebraska, but whether or not he had a permanent place of abode there, to which he returned with his family after the completion of a particular job of work, or for a temporary purpose only, does not appear. The mortgage having been made in Iowa, properly acknowledged there, and placed of record in the county where the property was actually situated, and in the possession of the mortgagor, it is incumbent upon those attacking the validity of such record to establish its invalidity by competent evidence, and that they had no notice of the mortgage. Diemer v. Guernsey, 112 Iowa, 393, 83 N. W. 1047. The manifest purpose of section 2906 of the Code of Iowa is to impart notice to third parties of sales of, and mortgages or other liens upon, personal property situated in that state. Such purpose may be allowed some influence at least, in determining the proper meaning of the statute. The Supreme Court of Iowa has judicially determined the meaning of the words "actual resident of the county," as used in a section of the Code of Iowa conferring jurisdiction upon justices of the peace in that state; also the meaning of the word "nonresident," in a statute authorizing the issuance of attachments against nonresidents of the state. The former of these sections is:

"Sec. 4476. The jurisdiction of justices of the peace * * * is co-extensive with their respective counties, but does not embrace actions for the recovery of money against actual residents of any other county."

In Fitzgerald v. Arel, 63 Iowa, 104, 16 N. W. 712, 18 N. W. 713, 50 Am. Rep. 733, the defendant was sued for the recovery of money before a justice of the peace of Palo Alto county, and he moved to dismiss the action upon the ground that he was an actual resident of Des Moines county, in Iowa, when the action was brought, and that the justice of the peace therefore had no jurisdiction of the action. It was shown that the defendant was a contractor upon a railroad in process of construction in Palo Alto county; that he had resided for seven years in Des Moines county, and that he was absent from that county only for the purpose of working upon this railroad; that, while he had rented a house in Palo Alto county, in which his family lived during the time he was working upon the railroad, they would return with him to Des Moines county as soon as the contract was completed. Upon these facts, the Supreme Court of Iowa held that the action was rightly brought in the county where he was doing such work. It says:

"Whether the word 'resident,' as used in this statute, should have precisely the same meaning as in statutes providing for the exercise of the right of suffrage or for taxation, we need not determine. * * * It does not follow that defendant was an actual resident of Des Moines county because his domicile was there. Residence and domicile are not necessarily the same. * * * The distinction between the import of these terms is obvious. The first is used to indicate the place of dwelling, whether permanent or temporary; the second, to define the fixed and permanent residence to which, when absent, one has the intention of returning. This distinction is the same as is sometimes made between actual residence and legal residence or inhabitancy. The actual residence is not always the legal residence or inhabitancy of a man. The foreign minister actually resides and is personally present at the court to which he is

accredited, but his legal residence or inhabitancy or domicile are in his own country. * * * In our opinion, whenever a man buys or rents a house, and sets up housekeeping with his family, with the design of remaining there until he has completed a certain job of work, he becomes an actual resident of that county, within the meaning of the statute in question; and that, too, notwithstanding his domicile may be in another county, to which he intends to return upon the completion of the job."

The other section referred to is section 3878 of the Code of Iowa, and it provides that writs of attachment may issue against nonresidents of the state. In Mann v. Taylor, 78 Iowa, 355, 43 N. W. 220, the question arose as to who was a nonresident of the state within the meaning of this section; and at page 262, 78 Iowa, page 222, 43 N. W., it is said:

"A resident of the state is one who resides in the state. To reside is to have a settled abode, permanent or for a time. A resident of the state is one who resides permanently or for a time in the state. There is not necessarily the idea of permanence connected with the significance of the words 'reside' and 'residence.' A resident may have a settled abode for a time, to be determined by circumstances. His residence may be temporary, for temporary purposes. He may retain his citizenship and his domicile in another state, and still be subject to the laws of this state intended to protect the rights of residents, and to provide remedies against them."

See, also, Ludlow v. Szold, 90 Iowa, 179, 57 N. W. 676.

The same distinction is recognized in section 2 (1) of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420].

In view of the manifest purpose of this section 2906, it may well be held that the definition given to the words "resident" and "reside," as used in other sections of the Code of Iowa, by the Supreme Court of the state, should also be given to the word "reside" as used in this section. Certain it is that the actual residence of the bankrupt, and the location of the property covered by this mortgage, were in Johnson county at the time it was made, even if that were not his permanent abode or domicile.

Counsel for the contesting creditors cite and rely upon Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816, above. In that case the property was situated, and both parties to the mortgage resided, in the state of New York. The mortgage was not recorded in the county where the mortgagors resided, as required by the laws of that state, but in the city of New York, where the property was situated. It was held that such record was not notice to the creditors of the mortgagor. The court, in determining the matter, says:

"The question thus presented is within a very narrow compass, and is not free from difficulty. Its solution depends upon the meaning of the word 'reside,' employed in that statute. It is to be regretted that we are not guided by some direct, controlling adjudication in the courts of New York construing the statute under examination, but no such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage, executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside."

The members of this firm had never resided in the city of New York; hence the mortgage was not properly recorded there.

The Supreme Court of Iowa has judicially determined that the words "reside" and "resident," as used in the Code of Iowa, referring to nonresidents of the state and of a county therein, do not mean a permanent residence or domicile in the state or county; and there is no apparent reason why this definition should not apply to the word "reside" as used in section 2906. That being true, the definition so given to this word by the Supreme Court of Iowa is controlling. That the bankrupt was an actual resident of Johnson county, within such meaning, when this mortgage was made, and continued to reside there, with this property in his possession, until the last of December following the date of the mortgage, is clearly shown by the evidence. It follows, therefore, that the mortgage of the petitioner, Wickham, was properly and legally recorded in Johnson county.

2. Is the property sufficiently described in the mortgage? In Smith & Co. v. McLean, 24 Iowa, 322, the property there in controversy was described in the mortgage as follows: "Five freight wagons and twenty yoke of cattle, being the train now in my possession." That description was held to be sufficiently definite, and many illustrations are given of descriptions which have been held by different courts to be sufficiently certain; and the rule for determining the sufficiency of descriptions in mortgages of this character is stated to be "that a description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient"; citing many authorities. This rule has been many times reaffirmed in Iowa. The description of the property in the mortgage in question is stated above. That such description, aided by inquiries which the instrument itself indicates, would lead to an identification of the property, can hardly be doubted.

The order of the referee, therefore, is reversed, and he is directed to allow the claim of the petitioner as a preferred one upon the proceeds of this mortgaged property. It is so ordered.

In re ALPHIN & LAKE COTTON CO.

(District Court, E. D. Arkansas, W. D. August 4, 1904.)

1. BANKRUPTCY—TESTIMONY—ADMISSIBILITY IN SUBSEQUENT PROCEEDINGS.
   The testimony of the officers of a bankrupt corporation, taken either under section 7, cl. 9, or section 21a, Bankr. Act 1898, c. 541, 30 Stat. 548, 552 [U. S. Comp. St. 1901, pp. 3425, 3430], and reduced to writing, is admissible against them in a subsequent proceeding by the trustee to require them to surrender money or property of the estate alleged to be in their possession or under their control.

2. SAME.
   Testimony of a person other than the bankrupt, or, if a corporation, of a person not an officer or a stockholder of such corporation, taken generally under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], and not directed to any defined issue, is not admissible in subsequent proceedings against the bankrupt, or, in case of a corporation, against its officers, to compel a surrender of money or property of the estate, under penalty of punishment for contempt.

In Bankruptcy. On review of decision of referee.

J. M. Moore and W. B. Smith, for trustee.
Smead & Powell, W. D. Chew, and Campbell & Stevenson, for respondent.

TRIEBER, District Judge. This is a proceeding to review the findings and order of a referee in bankruptcy that E. H. Lake, president and general manager of the bankrupt corporation, which, for convenience, will be hereafter referred to as the cotton company, to pay to the trustee in bankruptcy of the cotton company the sum of $104,987.52 moneys found by the referee belonging to the cotton company, and in his possession or under his control, or, upon failure to comply with this order, that he be punished for contempt. The proceedings were had before the referee on a petition of the trustee in bankruptcy, alleging that the respondents, Lake, J. S. Alphin, and E. H. Smith (Alphin also being an officer in the cotton company, while Smith was in no way connected with the corporation as an officer or stockholder) had in their possession or under their control $250,000 of the moneys of the bankrupt estate, and that they be required to show cause why they should not be required to pay the same to the trustee. Notice of the petition and order to show cause in conformity with the prayer of the petition, specifying the time and place for the hearing, was issued by the referee, and duly served on Lake and Alphin, while the notice on Smith was served on him in the Western District of Arkansas, where he permanently resided and was found. At the beginning of the hearing, Smith entered a special appearance before the referee for the purpose of demurring to the jurisdiction upon the ground that, not being an officer or member of the bankrupt corporation, nor a resident of the Eastern District, this summary proceeding could not be maintained against him in this court upon service made out of the district. This motion to dismiss was by the referee sustained, in an able and well-considered opinion, following the rule laid down by Judge Seaman in Re Waukesha Water Co. (D. C.) 116 Fed. 1009. This ruling of the referee was by the court sustained. The referee also found that the proofs failed to establish the fact that Alphin had any moneys or property of the cotton company in his possession or under his control, which finding was also approved by the court; and the only remaining question to be determined now is the correctness of the referee's finding as to the respondent Lake, whom he finds to have in his possession, of the assets belonging to the cotton company, the sum aforesaid.

One of the issues of law certified to the court by the referee at the request of counsel for respondent is the admissibility of the testimony of Lake, Alphin, and Smith, taken prior to the institution of these proceedings under the provisions of section 7, cl. 9, and section 21a, of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 548, 552 [U. S. Comp. St. 1901, pp. 3425, 3430], and reduced to writing at the time.

The referee admitted the testimony of all the parties against the objections of respondents. Lake and Alphin being officers of the bankrupt corporation, it was their duty, under the law, to prepare and make oath to the schedules of assets and liabilities of their corporation, as corporations can only act through their officers. In fact, for this pur-

pose, and informing the trustee or referee as to the assets of their bankrupt concern, they are the real parties; the word "persons," as used in the bankruptcy act, including "officers of corporations." Section 1 (19) 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]. Their testimony taken under section 7 or 21—they having the right under the act to have the assistance of counsel, at the expense of the estate, if necessary, and an opportunity for cross-examination—was clearly admissible in any proceedings against them, other than criminal, as admissions against themselves. This was expressly decided by the United States Circuit Court of Appeals in Re Wilcox, 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. R. 362. Mr Greenleaf, in his excellent work on evidence, states the rule as follows:

"In regard to depositions, it is to be observed that, though taken informally, yet, as mere declarations of the witness under his hand, they are admissible against him, whenever he is a party, like any other admissions, or to contradict or impeach him when he is afterward examined as a witness." Section 552.

Their evidence was therefore properly admitted by the referee, and his action is approved.

But does this rule apply to the deposition of Smith, who was properly discharged by the referee from the rule to show cause for want of jurisdiction? The court being without jurisdiction as to him, all proceedings were void ab initio, and must be treated as if they had never been instituted. We are therefore called upon to determine whether the testimony of a person other than the bankrupt, or, in case of a bankrupt corporation, not an officer or member thereof, taken and reduced to writing under the provisions of section 21a of the bankruptcy act, before any proceedings to require the parties against whom the testimony is to be used to show cause had been instituted is admissible as evidence in a proceeding of this kind against the bankrupt, or, if the bankrupt is a corporation, against its officers. In re Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. R. 153, cited by counsel for respondent, is not in point. All that was before the court and was decided in that case was that a court is without jurisdiction to make an order requiring a bankrupt to pay over moneys of the bankrupt estate found to be in his possession, on evidence obtained in his examination under the provisions of section 7, cl. 9, or section 21a, of the bankrupt act, and, upon his failure to do so, that he be committed for contempt, when he had not been served with notice that the proceedings were for that purpose. The sole ground upon which this ruling was made was that, without notice to the bankrupt of such object, the proceedings are without due process of law, and therefore void. Judge Sanborn, who delivered the opinion of the court, well said:

"It is an axiom of pleading and practice that one may not bring a suit for one cause of action, and recover from another; much less may one recover an order or judgment for money or property without any suit or notice of the claim upon which it is founded. In the case in hand no notice was given to the bankrupt that any hearing would be had upon any claim that he should be required to pay over the $2,500 in controversy before the order to that effect was made. No order to show cause why he should not pay it was made or served upon him before the absolute order for its payment was presented to him. No opportunity was afforded to him to be heard upon the questions it presents. He was cited to appear and be examined under section 21 of the

bankrupt act, and his testimony and that of various other witnesses were taken before the referee upon that citation; but no notice was served upon him that the claim which culminated in the order for the payment of the $2,500 was to be made or was in issue at that examination, or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense, or to be heard upon the issues of fact or of law which the issue of the order involved. Such a proceeding lacks every element of due process of law."

A case practically direct in point is In re Wilcox, supra. In that case the statements of witnesses other than the bankrupt taken upon examination under section 21 were admitted by the trial court upon the hearing of the petition for a discharge of the bankrupt; and this was held on appeal to be error. Judge Shipman, who delivered the opinion of the appellate court, explaining the objects of these examinations, says:

"The testimony of third persons upon these roving attempts at discovery is not directed to a defined issue, and therefore the rules of evidence are not carefully applied, and testimony is liable to be given which is not carefully guarded, and may be unconsciously derived from hearsay. Inasmuch as no issue has been framed, the bankrupt or his counsel cannot always perceive the inferences which may be drawn from the testimony, and therefore will not produce rebutting facts. The danger in using the information which has been thus gathered in one of these fishing excursions as testimony upon which a court can rely in an issue between a bankrupt and his creditors is such as to render its admission inexpedient. It is liable to produce an injustice, and the testimony may therefore be regarded as inadmissible."

If such is the law in a case merely involving a discharge in bankruptcy, how much more in point is it in a proceeding involving not only large sums of money, but the liberty of the bankrupt! It will be noticed from the above excerpt that the serious objection to the admissibility of such evidence is not the fact that there was no opportunity to cross-examine, which in the case at bar was obviated by the order of the referee allowing counsel for respondent to cross-examine the witnesses whose testimony was objected to, but the much stronger reason "that examinations under section 21 are not directed to a well-defined issue, and the rules of evidence necessarily not carefully applied." As a general rule, depositions of witnesses taken in a former suit pending between one of the parties and a party other than the opponent in the last-tried action cannot be read in evidence at the trial of the latter suit, even if there has been cross-examination, nor, for that matter, if the parties to both actions were the same, but the issues involved or objects sought to be attained in the two suits were different —especially if the witness was competent to testify in the last action, and could have been used by the party as such. Tappan v. Beardsley, 10 Wall. 427–435, 19 L. Ed. 974, where Justice Miller said:

"As to Taylor's deposition, the fact that he was a competent witness in the present suit, and could have been used by the plaintiff as such, is sufficient to exclude his deposition in another suit, even if Tappan [the defendant in the last-tried case] had been a party to that suit."

Perhaps, had the record shown that the witness has since died, or has left the country and his place of residence is unknown, has become mentally unsound, or for some other cause it was impossible to secure his testimony, either orally or by deposition, his testimony given at a

former hearing between the same parties, and involving similar issues, might have been admissible; but, as no such showing has been made, it is unnecessary for the court to determine that question in this cause.

The amount involved in this case is not only large, but the testimony is so voluminous, and the expense of obtaining it so great that the court is unwilling to determine it finally without an opportunity to the trustee to obtain the testimony of this witness, whose testimony is of the highest importance, especially as the finding of the referee that this large sum of money is under respondent's control was based largely on the testimony of Smith, and the exhibits filed by him and made a part of his evidence.

The evidence in this case shows that, although millions were handled by respondent within a short time prior to the institution of the proceedings in bankruptcy, no regular set of books was kept by the corporation. Expert accountants had to be employed to construct a set of books from the memoranda made by respondent and his bookkeepers, from the stubs of his checkbooks, the books of a compress company, and the bank of which Smith was cashier. An order will be entered sustaining respondent's objections to the admissibility of the testimony of Smith taken under the provisions of section 21a, and, if the trustee desires, the cause will be re-referred to the referee, or, by consent of parties, the court will hear the cause without a re-reference; and the trustee may have 40 days from the date of the entry of the order herein within which to take the deposition of the witness Smith, upon due notice to respondent or his attorneys. After notice to counsel for respondent that the trustee has completed the taking of Smith's testimony, respondent may have 30 days within which to take proofs confined strictly to rebuttal of the testimony of Smith, and the trustee thereafter have 10 days to take testimony in surrebuttal. If the trustee declines to avail himself of this opportunity to take Smith's deposition, the court is now sufficiently advised to render its conclusions on the evidence before it, disregarding the testimony of Smith, including the exhibits filed therewith, and will do so as soon as advised of the election made by the trustee.

In re BURNSTINE.

(District Court, E. D. Michigan, S. D. July 21, 1903.)

No. 518.

1. DEATH BY WRONGFUL ACT—CLAIMS—ASSIGNABILITY.

Under the Michigan act (Comp. Laws, § 10,427) relating to death by wrongful act, providing that an action may be brought by an administrator, but that the recovery shall pass to decedent's next of kin, a father being entitled to the entire recovery for the wrongful killing of his son, his right thereto constituted assets belonging to his estate in bankruptcy, within Bankr. Act July 1, 1898, § 70, subd. 5, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451].

2. SAME—TRANSFER.

Where a bankrupt, prior to his adjudication, orally transferred to his wife a claim against a railroad company for the wrongful killing of his son, in consideration of her payment of the funeral expenses and costs

of a tombstone for deceased, such transfer, not having been inspired by fraud, was valid to the extent it was accepted as security for the amount paid by the wife, and hence the husband's trustee in bankruptcy was only entitled to an assignment of the claim on payment of the amount expended by the wife on the faith thereof.

Upon referee's certificate, and upon specifications in opposition to the discharge of the bankrupt.

Maybury, Lucking, Emmons & Helfman, for bankrupt.
Adolph Sloman and Bernard B. Selling, for opposing creditors.

SWAN, District Judge. Jacob Burnstine, of Detroit, Mich., was adjudged bankrupt upon his voluntary petition filed April 25, 1902. His schedule showed debts to the amount of $19,066.23, and but nominal assets. At the time the bankrupt filed his petition for adjudication he filed a petition in the probate court for the county of Wayne for the appointment of his wife as administratrix of his son, Abraham Burnstine, 18 years of age, who was killed in a railway accident April 6, 1902, and whose estate consisted in a right of action against the railway company. Specifications in opposition to the discharge of the bankrupt have been filed in behalf of Peritz Bros. and in behalf of Charles F. Funke. The specifications of Peritz Bros. charge:

"(1) That the bankrupt had committed an offense punishable by imprisonment in knowingly and fraudulently concealing, while a bankrupt, from his trustee, his property and rights in the estate of his son, Abraham Burnstine, deceased.

"(2) That he made a false oath in the proceedings, in stating that all of the property owned by him was wearing apparel to the amount of $100.

"(3) That he had committed an offense punishable by imprisonment in that he had stated in his petition that it contained an inventory of all his property, both real and personal."

The specifications filed by Funke were broader, of the like import, and based, in the main, upon the same transactions as those made by Peritz Bros.

With regard to the second and third specifications filed by Peritz Bros., charging Burnstine with making false oaths in the proceedings, and those of Funke that the bankrupt "knowingly and fraudulently concealed, while a bankrupt, from his trustee, property belonging to his estate," the referee's finding acquitted the bankrupt of any fraudulent purpose in the matters pleaded in the specifications, and adjudged that the bankrupt's dealings with his property, prior to the passage of the present bankruptcy act, were not fraudulent as to creditors, nor did the evidence show any continuing trust in fraud of the bankrupt act in the transfers made to his wife, which were the subject of investigation, and the basis, in part, of the opposition of creditors to the bankrupt's discharge. A careful reading of the testimony sent up with the referee's report in relation to the charges of fraudulent concealment of property, and that of knowingly and fraudulently making false oaths in relation to his proceedings in bankruptcy, to wit, in making oath to schedule B annexed to his petition, marked "Statement of all Property of Bankrupt," because, as the specifications charge, he omitted from his schedule certain items of property, is convincing of the correctness of the referee's conclusion finding adversely to these specifications. The

bankrupt is an ignorant man, unable to read or write English or Hebrew. His occupation is that of a rag peddler, and there is ground for the belief that his present wife has been the real manager, if not the owner, of his business, since the transfers of property to her in 1896, and is much more conversant with the bankrupt's affairs than himself. While the bankrupt's testimony is marked by many instances of lack of knowledge of the facts in issue, his advanced age, ignorance, and limited acquaintance with the English language are apparently responsible for most of the deficiencies and failures of recollection in his testimony. These infirmities are far from sufficient to establish the alleged fraudulent intent of the bankrupt, and I agree with the referee's conclusions that the opposing creditors have failed to sustain the second and third of the Peritz specifications and the specifications filed by Funke.

The referee further certifies:

"* * * That, in the course of the proceedings in said cause before me, a motion was made in behalf of the trustee of said estate, asking that the said bankrupt be directed to execute under seal, in such form as may be satisfactory to said petitioner, an assignment of all his right, title, and interest in and to the estate of his son, Abraham Burnstine, deceased, and of said claim against the Grand Trunk Western Railroad. Thereupon an answer was filed by the said bankrupt, averring, among other things, that his interest in the claim against said railroad was not property within the meaning of the national bankruptcy act of 1898 [Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418)], which passes to the trustee in bankruptcy; and further averring that the wife of said bankrupt paid the funeral expenses of Abraham Burnstine with the understanding that they were to be paid out of the moneys collected from the aforesaid railroad. Thereupon I ordered that the bankrupt should assign all his right, title, and interest in and to the estate of his son, Abraham Burnstine, deceased, to the trustee, and at the request of the bankrupt the said question is certified to the judge for his opinion thereon."

The question presented by this latter certificate was argued upon the fourth and fifth subdivisions of section 70 of the bankruptcy act (30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]), vesting in the trustee, by operation of law, the title of the bankrupt, as of the date he was adjudged a bankrupt, to, "all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." The referee has found that the claim for damages against the railroad company for the death of the bankrupt's son was not fraudulently omitted from the bankrupt's schedule. The testimony warrants this conclusion, and there remains, therefore, only the inquiry whether that claim is included in subdivision 5 of section 70 of the bankruptcy act, and should be surrendered by the bankrupt, as ordered by the referee.

The question of the transferability of a claim for negligence causing death has not been passed upon by the Supreme Court of Michigan. The statute of Michigan upon which this claim is founded is entitled "An act requiring compensation for causing death by wrongful act, neglect, or default." Comp. Laws, § 10,427. It is almost literally a reproduction of the New York statute passed for the same purpose. The right of action is conferred upon and must be brought in the names of the personal representative of the deceased person, and the

amount recovered is to be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. The administrator of the deceased bringing such action is merely a conduit or channel designated by the statute to convey to the persons entitled to the damages recovered. The beneficiaries are the next of kin. The administrator, therefore, is merely the trustee of the next of kin—the real parties in interest. The claim is a right of action of the estate of the deceased—not of his next of kin, and therefore not within section 70, subd. 6, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]. In this case the bankrupt would be entitled under the statute of Michigan to the entire recovery as the next of kin of the intestate. Under the broad word "property," used in subdivision 5, it is manifest that the intent of the act was to vest the trustee with all rights and claims having a pecuniary value, and which could be transferred by the party or parties entitled. The damages done to the estate of the deceased by the wrongful act or neglect which caused his death practically descend to his next of kin in the same manner as any other personal property, are as capable of ownership as any other property, and are legally assets. The right of action given to the administrator, by the statute of Michigan, for negligently causing the death of his intestate, constitutes assets of the estate of the deceased, within the meaning of the statute which authorizes administrators in case of the death of a nonresident "leaving estate to be administered in this state." Findlay v. Chicago, etc., R. R. Co., 106 Mich. 700, 64 N. W. 732; Merkle v. Bennington, 68 Mich. 134, 146, 35 N. W. 846; 11 Am. & Eng. Enc. Law (2d Ed.) pp. 763, 764. The bankrupt, as next of kin, being entitled to the whole recovery, if had, there is no reason why he could not transfer his interest in the right of action, which, being assets for the purpose of founding administration, is therefore "property" which he "could have transferred." The rigorous common-law rule that choses in action were not assignable has been greatly relaxed, and nowadays it is generally held that almost everything except an action for fraud may be assigned. Finn v. Corbitt, 36 Mich. 318. It is ruled in Quin v. Moore, 15 N. Y. 432, Meekin v. Brooklyn Heights Ry. Co. (N. Y.) 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635, and Ludwig v. Glaessel, 34 Hun, 412, that rights of this nature are transferable. The fact that the claim is contingent and uncertain in amount constitutes no objection to its assignability. In Erwin v. United States, 97 U. S. 392, 24 L. Ed. 1065, the court approved Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108, where it is said that:

"It might in general be said that vested rights ad rem and in re, possibilities coupled with an interest, and claims growing out of and adhering to property, will pass by assignment. Bankr. Act April 4, 1800, c. 19, 2 Stat. 19, provided that all the assets, real and personal, of every nature and description, to which the bankrupt might be entitled, either in law or in equity, should go to his assignee; and the court held that the words were broad enough to cover every description of vested right and interest attached to and growing out of property; that under them the whole property of a testator would pass to his devisee, and whatever an administrator could take in case of intestacy would go to him."

It seems clear that, had Burnstine died before becoming bankrupt, his administrator would have succeeded to the interest of his intestate

in the damages recovered by the administrator of the deceased in the statutory action. The conclusion, therefore, is that the bankrupt's interest in this claim is property, and alienable within subdivision 5 of section 70 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), and should have been scheduled by the bankrupt as part of his estate.

The testimony shows that prior to Burnstine's adjudication he had, by parol agreement, transferred to his wife, the stepmother of his deceased son, the claim against the railroad company, in consideration of her paying the funeral expenses and the cost of a tombstone for the deceased. The fact that this was a parol agreement constitutes no objection to its validity. Draper v. Fletcher, 26 Mich. 154. Mrs. Burnstine has performed her part. The proofs fail to show that this agreement and transfer was inspired by a fraudulent purpose on the part of husband or wife; but it is fairly inferable from the proofs that it was given and accepted as security for Mrs. Burnstine's advances, and not as an absolute transfer. The probable recovery, if any, which could be had from the railroad company, would be small. The deceased was but 18 years of age. There is no evidence that he contributed anything to the support of his father or stepmother, and the proof is that one attorney who had been employed by the bankrupt, and had investigated the circumstances of the death, was unwilling to prosecute the action, although hopeful at first of recovering large damages. After that the bankrupt brought the claim to his present attorneys, who have been unable, notwithstanding vigorous efforts, to obtain from the railway company anything more than a compromise offer of $200 in settlement. Burnstine is entitled to the presumption that his action in transferring the claim to his wife was actuated by a desire to pay proper respect to the memory of his son, which he could not have done without her aid. If the trustee desires to take the claim subject to the equities which have arisen in favor of Mrs. Burnstine by the payment of the funeral expenses and for the monument, viz., $395, he may do so, and he is entitled, upon paying that sum to Mrs. Burnstine, to an assignment of the claim for the benefit of creditors. If the bankrupt is willing to make, and the trustee will accept, the transfer on these conditions, the bankrupt, upon conveying his interest in the claim to the trustee, will be entitled to his discharge. In case the trustee refuses to accede to these terms and repay Mrs. Burnstine for the advances mentioned within 30 days, the bankrupt will receive his discharge. With this modification, the findings and conclusions of the referee are affirmed.

UNITED STATES v. BARTRAM BROS. SAME v. BENJAMIN H. HOWELL, SON & CO. SAME v. AMERICAN SUGAR REFINING CO.

(Circuit Court of Appeals, Second Circuit. June 2, 1904.)

Nos. 102–104 (2,918–2,920).

1. CUSTOMS DUTIES—SUGAR—POLARISCOPIC TEST—COMMERCIAL USAGE.
In construing the provision in paragraph 209, Tariff Act July 24, 1897, c. 11, § 1, Schedule E, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], regulating duty on sugars according to the polariscopic test, *held* that the expressions therein, "testing by the polariscope" and "shown by the polariscopic test," are not used with any special trade meaning that would confine them to a particular method of conducting such test, but import an intention on the part of Congress that the method adopted should be the one best calculated to make a scientific determination.

2. SAME—CUSTOMS REGULATIONS—AUTHORITY OF SECRETARY OF THE TREASURY.
Under the general power of the Secretary of the Treasury to make customs regulations not inconsistent with law, granted by section 251, Rev. St. U. S. [U. S. Comp. St. 1901, p. 138], it is competent for that officer to prescribe the method of "testing by the polariscope" the sugars dutiable according to such test under paragraph 209, Tariff Act July 24, 1897, c. 11, § 1, Schedule E, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]: and so long as he acts in good faith, and it does not appear that his regulations operate to make the polariscopic test less accurate than when Congress adopted it, the courts should not interfere with the administrative details confided to him.

3. SAME—TREASURY REGULATIONS—COGNIZANCE BY CONGRESS.
Where, for a period of years covering the operation of several tariff acts, the Secretary of the Treasury has made regulations for carrying out certain provisions in those acts, it is to be presumed that subsequent legislation by Congress was enacted with reference to such regulations.

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

For opinion below, see 123 Fed. 327.

These causes come here upon appeal from a decision of the Circuit Court, Southern District of New York (123 Fed. 327), reversing a decision of the Board of General Appraisers (G. A. 4,386, T. D. 20,850), which affirmed the action of the collector of the port of New York in assessing duty on certain sugars imported under the tariff act of July 24, 1897. Paragraph 209 of that act (chapter 11, § 1, Schedule E, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]) provides as follows:

"209. Sugars not above number sixteen Dutch Standard in color, * * * testing by the polariscope not above seventy-five degrees, ninety-five one-hundredths of one cent per pound, and for every additional degree shown by the polariscopic test, thirty-five one thousandths of one cent per pound, additional and fractions of a degree in proportion."

Chas. Duane Baker, for appellant.

John E. Parsons, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The opinions of the Board of General Appraisers and of the Circuit Judge, respectively, present forcibly the opposing theories of construction of the paragraph above quoted, and set forth the facts with quite sufficient fullness. Although the record is

a long one, there is but a single question presented, which is determinative of the case, viz., whether Congress used the words "testing by the polariscope" and "shown by the polariscopic test" with some special trade meaning, which would confine them to a particular method of conducting such test.

The following excerpts from the opinion of the Circuit Court and from that of the Board of General Appraisers show the particular matter complained of:

"The polariscope is an instrument so adjusted that when a ray of polarized light passes through a tube filled with a certain solution of sugar the scale indicates the percentage of pure sugar. * * * At the time of the passage of the act in question the polariscopic test had been in use for some twenty years." "During that period it was the custom of merchants, in buying and selling sugar, to have two separate polariscopic tests made, each by a trade chemist employed by the respective parties to the transaction. Where these two tests differed, a compromise or settlement test was adopted, which was the average of degrees shown by the two tests." "Under [this] system the actual readings of the scale on the eye piece of the polariscope were taken as showing the actual value of the sugar; * * * that is, the test was one made by reading by the eye. * * * Upon the passage of the act here in question the Treasury Department promulgated regulations for the use of the polariscopic test, which * * * provide that the reading must be corrected by certain arbitrary additions as prescribed in a table prepared by the officers of the government."

Although in the excerpt last above quoted the additions are called "arbitrary," the Circuit Court found (as did the Board of General Appraisers) that the preponderance of proof sustained the contention of the government that "there is a variation in the reading of the polariscope according to variations in temperature at the place where the sugar is tested; that the corrections and additions provided for by the regulations merely consist in an addition of .3 per cent. for each 10 degrees Centigrade of temperature above that at which the polariscope is standardized [viz., 17.5 degrees C.]; and that in this way the actual amount of pure sucrose in each sample is more accurately determined than was the case under the old eye test." The importers vigorously contest this proposition as to the effect of change of temperature, but evidently there is a division of scientific opinion thereon, and appellants have not made out a case strong enough to overcome the presumption that the Secretary of the Treasury, who chose the method of testing as between old and new, properly selected the one which would be likely in the greater number of cases to eliminate error. Apparently no single polariscopic test can be accepted as absolutely accurate. Under the old system there were constant differences, which were "adjusted" by striking averages. Under the new, occasionally the reading, when corrected for temperature, will indicate that the sugar is one-, two-, or three-tenths of 1 per cent. above par, which is impossible. There are some suggestions as to the cause of this apparent excessive percentage in the opinion of the board, which open up chemical questions that need not be discussed here.

The Circuit Court, although satisfied that the so-called new method of conducting the polariscopic test was on the whole more accurate than the old, nevertheless reached the conclusion that the Treasury Department was not justified in adopting it, because the term "testing

by the polariscope" had a well-settled commercial meaning at the time of the passage of the act of July 24, 1897, c. 11, § 1, Schedule E, par. 209, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], and that the customs officers should subject sugars to such test only in the way in which dealers in sugars had been testing them for 20 years. In this conclusion we are unable to concur. There is nothing in the phrases themselves, "testing by the polariscope," or "shown by the polariscopic test," which indicates that they are peculiarly trade terms, as are "white goods," "hem-stitched handkerchiefs," "structural iron," etc. On the contrary, they seem to import that Congress intended that there should be a scientific determination as to some constituent or constituents of the sugar, for the polariscope is a scientific instrument, and, as the proof shows, has never been used by the traders themselves, but only by expert chemists whom they employ. If this be so, if Congress had in mind the making of such scientific determination, then the only question to be answered is whether the method finally adopted is best calculated to achieve the result; and it is immaterial that prior to the passage of the act the chemists employed by dealers followed some different method of conducting such test. Concededly, there are no instruments and no methods now known to science which will secure an absolutely accurate polariscopic test. Suppose, now, that some one should discover an improvement in instrument or method which would wholly eliminate every inaccuracy—even that resulting from the personal equation—and that every scientist agreed that such new way of testing by polariscope was absolutely accurate, could it be that the government would be debarred from applying such improved polariscopic test to imported sugars because it was not known to science when the act was passed? Some years ago Congress regulated a sliding scale of duties on manufactures of cotton by the number of threads to the square inch counting warp and filling. Certain cotton goods were brought in, which the importers claimed were not within the particular paragraph, on the theory that it included only goods described and classed by the trade according to the number of threads when the act was passed. The importers offered to show not only that the goods in question were excluded in trade from the group of "countable cottons," but that in trade no one ever counted threads except by the microscope (or the unaided eye), and that it was impossible to count the threads in the imported goods in any such way; unraveling alone would disclose the number. The court held, however, that such proof was immaterial, because there was "no reference in the statute, either expressly or by implication, to any commercial usage, and there is no language in it which requires for its interpretation the aid of any extrinsic circumstances." Newman v. Arthur, 109 U. S. 132, 3 Sup. Ct. 88, 27 L. Ed. 883. The same rule of construction would seem equally applicable to a chemical and to an arithmetical test.

The polariscope is an instrument of science, used in the laboratory. It is composed of many parts, varying apparently in details of structure (some are made in Germany, others in France). It requires special knowledge and experience to operate it. The conditions under which the test is conducted apparently in some slight measure modify the results indicated by the readings. All these matters of detail have to be

provided for, and Congress has not specifically provided for them in the act itself. They come naturally within the province of the Secretary of the Treasury under the general power to make regulations not inconsistent with law, granted to him by section 251, Rev. St. U. S. [U. S. Comp. St. 1901, p. 138]. It is left to him to decide whether he will supply the testers with French or with German instruments, what measure of study and experience shall qualify persons seeking employment as testers, what improvements have received a sufficiently broad acceptance by scientists to warrant their adoption, which of two methods of manipulation (if there be two) touching the relative value of which scientists may be equally divided shall be the one followed in government laboratories. So long as he acts in good faith, and it does not appear that his regulations operate to make the prescribed test less accurate than it was when Congress adopted it, the courts should not interfere with administrative details which are confided to him.

Provisions as to payment of sugar duty on polariscopic test are first found in paragraph 235, Tariff Act March 3, 1883, c. 121, Schedule E, 22 Stat. 502. Thereupon the Secretary of the Treasury prescribed regulations which are apparently like those now in force, except as to correction for temperature. These regulations, however, did not provide for taking the average of conflicting tests made by experts employed one by the government, the other by the importer, which would be in substantial conformity to the mercantile practice, where buyer and seller had each his own expert. On the contrary, these regulations of 1883 required that all the tests—two or more—should be made by government chemists, and an average of them taken. In the tariff act of 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat. 567), some sugars were admitted free, others were made dutiable, but only by color standard, the provision for polariscopic test being omitted. In section 3 of that act (26 Stat. 612), however, which provided for duties on sugars coming from countries which might thereafter discriminate against the United States, such test is included; and the same is true of paragraph 231 (chapter 1244, § 1, Schedule E, 26 Stat. 583), which provided for the payment of bounties on domestic sugar. Thereafter (August 18, 1892) the Treasury Department prescribed regulations relative to the bounty on sugar, including directions for conducting the polariscope test, which were substantially the same as those now in force containing provisions for making additions to the reading of the instrument in order to correct for variance in temperature. The book containing them quotes the provisions of the tariff act of 1890 not only as to bounty, but also as to countries discriminating against the United States. It also calls attention to proclamations of the President, March 15, 1892, suspending from that date the provisions of the tariff act relating to the free introduction of sugar, and declaring the duties set forth in section 3 (which provided for polariscopic tests) to be in force as to sugar the product of or exported from Colombia, Haiti, and Venezuela. Manifestly these regulations applied not only to domestic sugars, but to such imported sugars as might come from those countries. Although it does not appear whether or not any sugars came here from such countries in 1892, 1893, or 1894, it must be assumed that Congress was fully cognizant of all the provisions of the treasury regulations, and

that its subsequent legislation was enacted with full appreciation of what those regulations contained.

As we have seen, Congress in the act of 1890 had adopted two modes of classification for duty on imported sugars—color standard, combined with polariscopic tests, for such as might come from countries discriminating against the United States; color standard only for sugars coming from all other countries. In the next tariff act (August 28, 1894) it provided for color standard alone as to sugars, and for polariscope test as to molasses. It also repealed the provisions for bounties on domestic sugars. The Secretary of the Treasury thereupon (May 13, 1895) promulgated regulations for the sampling and classification of sugars and molasses under the provisions of the tariff act of 1894, and for the polarization of sugars as an aid in determining their dutiable value. These regulations did not provide for any correction on account of variance in temperature.

Therefore, when Congress passed the tariff act now under consideration, it knew that the secretary had made regulations as to polariscopic tests; that he had varied them from time to time—presumably to secure more accurate results; that sometimes he had directed that additions to the readings should be made for changes of temperature; that at other times he had not required such additions to be made. It seems a reasonable conclusion that Congress, when it passed the act of 1897, containing merely the phrase "testing by the polariscope," without any further directions as to such test, without approval or condemnation of either of the variant methods of conducting it which the Treasury Department had theretofore prescribed for imported as well as domestic sugars, intended to leave all details as to selection of instrument, employment of experts, and instruction as to method to the sound discretion of the secretary.

The decision of the Circuit Court is reversed, and that of the Board of General Appraisers is affirmed.

GARLICH v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 3, 1904.)

No. 2,040.

1. WITNESSES—CROSS-EXAMINATION—SCOPE.
   It is no objection to the cross-examination of a plaintiff's witness that it discloses facts tending to constitute a defense, where such facts relate directly to matters about which he testified on his direct examination.

2. EVIDENCE—PRIVATE STATUTES—NECESSITY OF PLEADING.
   Neither a private statute nor a city ordinance is admissible in evidence to establish a defendant's negligence in the running of a railroad train, unless pleaded.

3. RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.
   The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and when a person goes upon such track, or so near it as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm, and no reliance on the exercise of care by persons in control of trains will excuse

his failure to exercise such care. If the use of these senses is interfered with by obstructions or by noises, ordinary reasonable care calls for proportionately increased vigilance.

4. SAME—FAILURE TO LOOK AND LISTEN.

Plaintiff, without occasion therefor, was walking near a city station in the space between railroad tracks and a river bank, used as a pathway, and ranging in width from 5 to 25 feet. A freight train was moving in the opposite direction on the second track from him, making the usual noise; and, after looking back along the nearest track, which could be seen for about 500 feet, and seeing no train thereon, plaintiff walked on about 150 feet, without again looking back, when he was struck and injured by the end of the pilot beam on the engine of one of defendant's trains which came from behind him. The space between the track and river bank was there 11 feet wide, and plaintiff was walking at a safe distance from the track until just before he was struck, when he made a side step toward the track. *Held* that, without regard to the question of defendant's negligence, plaintiff was guilty of such contributory negligence as precluded his recovery for the injury as matter of law.

5. SAME—VIOLATION OF SPEED ORDINANCE.

The fact that a railroad train at the time it struck and injured a plaintiff was being run in violation of a city ordinance limiting the speed of trains, while it may be evidence of the company's negligence, does not affect the defense of contributory negligence in an action for the injury, the plaintiff having no right to omit the exercise of ordinary and reasonable care for his own protection in reliance on such ordinance.

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

Entering the city of St. Paul from the west, the roadbed and tracks, side by side, and near together, of the Chicago, Milwaukee & St. Paul Railway and the Chicago, St. Paul, Minneapolis & Omaha Railway pass along the bank of the Mississippi river upon a narrow bench of land between the bank of the river (which is 10 feet or more above the water) and the foot of a high, steep bluff reaching the general level of the city in that vicinity. This narrow bench of land extends from some distance east of the line of Robert street westward beyond the line of Wabasha street, and both of said streets are continued as thoroughfares upon bridges from the top of the bluff, over, and more than 30 feet above, said railroad tracks, and across the river. The whole of this narrow bench of land between the line of the said two streets and for a distance on either side has been for many years, and still is, occupied by said railroad tracks, and used for railroad purposes, and not for road vehicles. But between the margin of the river bank and the nearest railroad track is a narrow strip of land varying from about 5 feet in width near the Wabasha Street Bridge to 25 feet in width near the Robert Street Bridge, used as a footpath by persons having occasion to pass there. When the city was platted, long before there were railroads in the country, this narrow bench was platted as a public street or levee, and was so used for a time, but was long ago abandoned to the use of railroads. On August 14, 1902, the plaintiff, without any special occasion or object, walked westward from the Union Depot, along the river bank and upon said pathway beyond the Robert Street Bridge and nearly to the Wabasha Street Bridge, where he turned, and retraced his way along the same path. A freight train going westward was then passing with its usual noise on the second track from him. Plaintiff turned, and looked back along the track nearest him, which was visible for about 500 feet, when further view was cut off by a curve and obstructions. Seeing no train or engine on this track, plaintiff proceeded eastward on said path at an ordinary walk for about 50 paces, when, having come within about 100 feet of the Robert Street Bridge without having taken any further pre-

¶ 5. Effect of violation of statutes and ordinances regulating speed of trains, see note to Shatto v. Erie R. Co., 59 C. C. A. 5.

See Railroads, vol. 41, Cent. Dig. §§ 1313, 1315.

caution, at a place where said pathway was 11 feet wide, he was struck on the left side by the end of the pilot beam of defendant's engine, which, with a passenger train, was coming from the west on said nearest track at a speed of about 15 miles an hour; and was seriously injured. The engineer, who was called by plaintiff, testified that when he came around the curve and saw the plaintiff the latter was on the path 6 or 8 feet from the track, and that when the engine came near plaintiff made a side step towards the track, bringing himself so near that he was struck by the end of the pilot beam; and that when plaintiff, by such side-stepping, suddenly came dangerously near to said track, the engine had so nearly reached the place of collision that it could not be stopped before striking the plaintiff. No bell had been rung or whistle blown on the engine as it approached. There was no contradiction in the testimony, and at the close of plaintiff's evidence the defendant moved that the court direct the jury to render their verdict in favor of the defendant, on the ground that, even if the defendant was negligent, the plaintiff was guilty of such contributory negligence as barred his right to recover in the action. The court granted the motion, and by its direction such verdict was rendered.

C. N. Dohs and E. R. Wakefield (D. A. Haggard, on the brief), for plaintiff in error.

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

Before VAN DEVANTER and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The cross-examination of the witness Root was not extended beyond the particular circumstances of the facts about which he had been examined by plaintiff's counsel. If the disclosure of such circumstances, explanatory of the very matters about which he had testified on his direct examination, also tended to establish a defense to the action, such tendency constituted no valid objection to the cross-examination. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. (C. C. A.) 129 Fed. 668.

2. The Minnesota statute offered in evidence is a private act; and neither it nor the ordinances of the city of St. Paul, also offered in evidence, had been pleaded, and they were rightly excluded. 1 Chitty's Pl. 238; 20 Encyc. Pl. & Prac. 596, and notes; Gen. St. Minn. 1894, §§ 5251, 5252. Besides, this proposed evidence had no bearing on the question of contributory negligence, upon which the case was disposed of.

3. The other assignments of error challenge the ruling of the court that upon the uncontroverted facts shown by the evidence, the plaintiff was guilty of such contributory negligence, directly resulting in the injury which he sustained, as precluded all right of recovery, even though the defendant was chargeable with negligence which was also a proximate cause of the injury.

The ruling was right. The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and that when a person goes upon such track, or so near as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm. And no reliance on the exer-

cise of care by persons in control of the movement of trains or engines will excuse any lack of the exercise of such care by persons going upon such tracks. If the use of these senses is interfered with by obstructions or by noises, ordinary, reasonable care calls for proportionally increased vigilance. Blount v. Grand Trunk Ry. Co., 61 Fed. 375, 9 C. C. A. 526; Pyle v. Clark, 79 Fed. 744, 25 C. C. A. 190; C., St. P., M. & O. Ry. Co. v. Rossow, 117 Fed. 491, 54 C. C. A. 313; C. & N. W. Ry. Co. v. Andrews (C. C. A.) 130 Fed. 65. The three cases last cited were decided by this court, and pages of citations of cases from this court and all the courts of the country to the same effect might be added. In this case, if the path between the railroad tracks and the river was a dangerous place, the danger was obvious, and the risk was voluntarily and needlessly assumed by plaintiff, who went there for an idle stroll. When, after turning in his walk, he looked back along the nearest track, his view of it extended but a short distance, when it was cut off by a curve and obstructions. Yet, without looking again, or bestowing further attention to the situation, he walked along at an ordinary gait about 50 paces, or 150 feet; and, though the path was there 11 feet wide, just as the engine was nearly opposite him, he blundered, and came by a side step, from a safe distance away, so close to the track that he was immediately struck by the end of the pilot beam. That he was grossly negligent, and that his negligence was a proximate cause of his injury, is manifest.

Since the argument counsel have called our attention to the decision by the Supreme Court of Iowa of the case of Camp v. Chicago Great Western Ry. Co. (recently filed) 99 N. W. 735. An employé of the company, after clearing snow from a switch in the company's Marshalltown yard, started along the track to a toolhouse 182 feet distant; having looked back along the track without seeing any engine. When within 25 feet of the toolhouse, and walking on the ends of the ties, he was struck by an engine which came up on the track behind him faster than 6 miles an hour, which is the limit of speed fixed by a Marshalltown ordinance. Though the switchman had taken no other precaution, the conclusion was arrived at that he would have reached the toolhouse before being so overtaken had the engine not exceeded 6 miles an hour. The Iowa court held that the switchman had the right to rely confidently on the belief that no engine would be run on that track faster than the Marshalltown ordinance prescribed, and that reasonable care did not require that he should again look back, or walk beyond the reach of passing engines. We do not find this decision persuasive, or in harmony with the settled law on the subject. Such ordinances are intended to prevent collisions and accidents in urban communities. The limit of speed fixed is a designation by the municipal council of the degree of care which shall be exercised in the operation of railroads within the municipality. To exceed the rate of speed so fixed as proper and safe may be some evidence of negligence; but, as between the railroad company and a person injured or put in danger, it is unlawful only in the sense in which any act of negligence which injures or endangers another is unlawful. And the doctrine of contributory negligence is just as applicable to cases of negligence in

respect to ordained rates of speed as to any other species of negligence chargeable to a railroad company. In Pyle v. Clark, decided by this court, and already cited, the opinion states that the train which struck the plaintiff's team was running at about 15 miles an hour, in violation of a municipal ordinance which prohibited a speed of more than 8 miles an hour, yet the plaintiff was held guilty of contributory negligence, because, after looking along the track, he allowed a full minute to elapse before driving upon the track without again looking. And in Blount v. Grand Trunk Ry. Co., also above cited, gates at the crossing were established by law to warn travelers, but it was held that the fact that the gates were open when a train was approaching did not excuse a person crossing the tracks for failing to look and listen. The well-settled rule of law is that no reliance upon the exercise of care by a railroad company will excuse a lack of the exercise of proper care by a person going upon a railroad track, or so near as to be in danger from passing trains.

The only other case which we find that seems to hold that running faster than the rate of speed allowed by a municipal ordinance has any bearing upon the matter of contributory negligence is the case of Smith v. St. Paul City Ry. Co., 79 Minn. 254, 82 N. W. 577, where damages were recovered for running over and killing a dog by defendant's trolley car running 20 miles an hour, in violation of a city ordinance limiting the speed to 10 miles. The court conceded that ordinarily the motorman need not stop for dogs, who should care for themselves, and get out of the way of the car, yet held that the jury might properly determine whether, but for this improper rate of speed, in violation of the ordinance, the dog would not in that instance probably have escaped. Without further comment on these cases, it is sufficient to say that we adhere to the prior decisions of this court.

Affirmed.

MAXFIELD v. GRAVESON.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1904.)

No. 1,282.

1. MASTER AND SERVANT—INJURY OF SERVANT—ACTS OF FELLOW SERVANTS.
   A master who furnished a stiff-leg derrick requiring no guy rope for use by his employés in unloading stone from cars, which was complete and in good repair, and suitable for the work, is not liable for the injury of an employé by the falling of a block forming part of a guy line which had been rigged by fellow servants of such employé for their own convenience to enable the derrick to be given a longer reach than it was intended to have, so that a car might be unloaded without being moved, such line having been put on in the absence of the master, and without his knowledge.

2. SAME.
   The fact that an employé was not present at the time a change was made in an appliance by his fellow servants, without the master's knowledge, by reason of which he was subsequently injured, does not render the master liable for the injury.

¶ 2. See Master and Servant, vol. 34, Cent. Dig. §§ 388, 397, 567.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Brent Spence and Michie & Green, for plaintiff in error.
Stephens, Lincoln, & Stephens, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action for personal injuries. In November, 1902, the defendant, as contractor, was engaged in building the stonework of the new intake pier of the Cincinnati Waterworks. A small number of men were engaged upon the job, and among others the plaintiff, who was employed as a day laborer. On November 7, 1902, the plaintiff was at work turning the crank or crab of a small derrick used to lift blocks of stone from a railroad car to a truck on which they were run out to the pier. While so engaged, a block, a part of a guy line fastened to the top of the derrick, fell, and struck the plaintiff on the head, injuring him. For this he brought suit, alleging the defendant was negligent in fastening the block at the top of the derrick with a defective and worn-out rope, and in not fastening it there with an iron chain or band. At the conclusion of the testimony the court below directed a verdict for the defendant on the ground that the guy line, of which the block was a part, did not belong to the derrick, which was complete in itself, but was attached by the men employed on the job for their own convenience, to enable them to secure a wider reach in handling the stone, so that the negligence which caused the injuries of the plaintiff was that of his fellow servants. For this error is assigned.

There was no conflict in the testimony. The derrick was a small, stiff-leg derrick, in which the mast is held upright by two timbers or stiff legs, the upper ends of which fit over an iron pin in the top of the mast, and are there fastened or held down by a piece of iron which runs through the eye of the pin. The mast and stiff legs stand on heavy timbers, which meet at right angles at the foot of the mast, and are weighted or fastened to the ground. The mast turns with the boom, which is attached to it. A stiff-leg derrick is a hoisting machine complete in itself. No guy line is ordinarily needed or used. When the derrick was first rigged, no guy line was attached, and, there being no iron pin at hand, a wooden pin was used to hold down the stiff legs. In the use of the derrick, in reaching sidewise for the stone, an unusual strain was put upon one of the stiff legs. This strain broke the wooden pin, and the derrick fell down. When it was rigged again, an iron pin was used to hold the stiff legs down, and a guy line was run from the top of the mast to the ironwork of a bridge near by. This guy line was composed of a pair of blocks and tackle fastened to the top of the mast by a rope strap composed of three double strands. This strap or loop was placed around the pin in the top of the mast, and the block hooked into it. The rope used to make the strap was as good as new, but by the turning of the mast gradually chafed through and broke, letting the block and tackle fall. The guy line was attached to permit the handling of stone beyond the normal reach of the derrick. By thus using this stiff-leg derrick in a manner for which it was not de-

signed, a car could be unloaded without being moved. The device was not necessary, for the car could have been moved, but it was convenient, because it saved the workmen the trouble of moving it. Plaintiff was in the employ of the defendant before the derrick was rigged with the guy line, but on another part of the job.

The record shows the defendant was at the derrick several times during the month the guy line was in use, but it does not show that he directed or suggested its use. Indeed, the court below, in directing a verdict for the defendant, offered to consider, on the motion for a new trial, "any evidence to show that the attachment of the guy rope to the derrick was caused by the master in any way." No advantage was taken of this offer. It is undoubtedly true, as the plaintiff claims, that the master owes his servant the positive duty of providing a reasonably safe place in which to work, and reasonably safe appliances with which to work, and that this cannot be escaped by intrusting its performance to an agent or servant. Such agent or servant, although working side by side with a servant injured through his negligence, is not regarded as a fellow servant, but as a representative of the master, for whose act the master is responsible. National Steel Co. v. Lowe (C. C. A.) 127 Fed. 311, 315. Under this rule it was the duty of the defendant to furnish a reasonably safe derrick for the use of the men employed on this job, not as a place, but as an appliance. Chambers v. American Tin Plate Co., 129 Fed. 561; Kelly v. Jutte & Foley Co., 104 Fed. 955, 44 C. C. A. 274. The testimony shows, however, that the derrick, as a stiff-leg derrick, was a reasonably safe appliance. The accident occurred not through the breaking of the derrick, or any part of it, but of the guy line attached by the fellow servants of the plaintiff for their convenience. It is true that the parts composing this guy line—the blocks, tackle, and rope—were furnished by the defendant. But they were not furnished for this use. They were sent out at the beginning of the job, along with the derrick, because blocks, tackle, and rope were needed in the proper use of the derrick as a stiff-leg derrick. There is nothing in the record to show that the master had anything to do with the use of this material as a guy line. The record fails to show that he ever directed, suggested, or contemplated such use. All the testimony was to the effect that a guy line, such as the one that was rigged, is no part of a stiff-leg derrick.

There is authority to the effect that the master is not responsible for an accident to a servant resulting from the negligence of a fellow servant engaged in rigging a derrick or similar appliance, when such work is a part of the duty of the common employment. Peschel v. Chicago, Milwaukee & St. Paul Ry., 62 Wis. 338, 21 N. W. 269; Beesley v. Wheeler & Co., 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266; Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421; McGinty v. Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510; Marsh v. Herman, 47 Minn. 537, 50 N. W. 611. But it is unnecessary to consider the application of this rule, for the accident did not result from the negligent rigging of the derrick as a stiff-leg derrick. As a stiff-leg derrick, aside from the guy, it stood properly rigged at the time of the accident, and it continued to stand and do its work after the accident. The injury resulted from the attachment of an extraneous thing—a

guy line. This was placed there by the men for their own convenience, to permit the handling of stone a greater distance from the mast than could be done without it. The natural reach of this stiff-leg derrick would not admit of the unloading of all the stone on a car without moving the car. An attempt to handle the stone outside of a certain radius would result in a toppling of the derrick. To prevent this, the guy line was rigged. It was attached so that the derrick could be put to a use never contemplated by the master. This was an illegitimate use, and the master cannot be held liable for an injury resulting to one servant from such use of the derrick by his fellow servants. Injury from the illegitimate use of an appliance by fellow servants is one of the risks of the employment. The master is only responsible for injuries resulting from a defect of the appliance itself. Griffiths v. Gidlow, 3 Hurlstone & Norman, 648, 655; The Persian Monarch, 55 Fed. 333, 5 C. C. A. 117; Callaway v. Allen, 64 Fed. 297, 12 C. C. A. 114; Kelly v. Jutte & Foley Co., 104 Fed. 955, 44 C. C. A. 274.

The fact that the plaintiff, while employed on the job, was not working at the derrick when the guy line was attached, cannot operate to make the defendant liable. The negligence of the men was still the negligence to fellow servants, for which the master was not responsible. O'Connor v. Rich, 164 Mass. 560, 42 N. E. 111, 49 Am. St. Rep. 483; Burns v. Sennett & Miller, 99 Cal. 363, 372, 33 Pac. 916; Butler v. Townsend, 126 N. Y. 105, 112, 26 N. E. 1017.

The judgment of the lower court is affirmed.

BRITTON v. CENTRAL UNION TELEPHONE CO.

(Circuit Court of Appeals. Sixth Circuit. June 29, 1904.)

No. 1,276.

1. MASTER AND SERVANT—INJURIES TO SERVANT—TELEPHONE POLES—APPLIANCES—SAFE PLACE TO WORK.

   Where a telephone lineman was injured by the falling of a defective pole from which he was removing the wires prior to the demolition of the pole, such pole was an appliance only, and not a place to work which plaintiff's employer was required to make safe for him to work on.

2. SAME—INSPECTION.

   Where defendant telephone company had not assumed the duty of independently inspecting and testing its telephone poles before they were climbed by linemen, and the only inspection required was such as an ordinarily skillful lineman could readily perform before undertaking to climb the pole, a lineman so employed assumed the risk incident to climbing such poles after making such examination and tests as his judgment would indicate was necessary.

3. SAME—WARNING.

   Where a telephone lineman had been previously discharged by defendant for incapacity, and thereafter, on again applying for employment, defendant was informed that he had not sufficient experience to work as a lineman, by reason of which he was employed at other work for a time, and was then directed to do a lineman's work in removing wires from certain old poles, in which work he was injured by the falling of a pole, whether defendant was negligent in permitting him to do such

work, which involved the climbing of the poles, without warning him to make an inspection thereof, and as to the manner in which such inspection should be made, was for the jury.

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

F. S. Monnett and Pugh & Pugh, for plaintiff in error.

L. G. Richardson and Stewart & Stewart, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Plaintiff, a lineman in the service of the defendant telephone company, was injured by the breaking of a decayed telephone pole which he had climbed in the ordinary course of his duty. He brought this action to recover damages, and upon the conclusion of his evidence the court instructed the jury to return a verdict for the telephone company. This is the only error assigned.

The pole which fell was decayed below the ground, and was apparently sound above the ground. Before climbing, plaintiff tested its strength by shaking, and then climbed up some five or six feet and again shook it. No weakness being thus discovered, he climbed to the top, and while engaged in working with the wires the pole fell. The plaintiff was one of a gang of men engaged in removing or transposing the wires from an old line of poles upon one side of a country road, along which the company's telephone line extended between two Ohio towns, to a line of new poles upon the opposite side of the same road. The old line of poles was being abandoned because the poles were old and needed replacement, and plaintiff knew this, and knew that as the wires were transposed the old poles were cut down. Another gang was at the same time engaged in putting up the new poles. This gang kept somewhat in advance of the wire gang. Both gangs were under the charge of a foreman, but the foreman was not personally present when plaintiff was hurt, and gave no direction to plaintiff about climbing the pole which fell, and made no inspection of that or any of the poles to be climbed.

1. It is first insisted that the instruction to find for the defendant was erroneous, because the telephone company owed the duty of providing plaintiff with a safe place in which to do his work. The pole is a mere appliance for the support of the wires. To reach the wires, the lineman uses the pole as he might a ladder or a scaffolding. It is therefore more in the nature of an appliance than a place. In Chambers v. Am. Tin Plate Co., decided April 5, 1904, 129 Fed. 561, we held that a scaffold was an appliance, and not a place; and in Maxfield v. Graveson (decided at this session) 131 Fed. 841, we held that a derrick was also an appliance.

2. It is next urged that, considered as an appliance or a place, the duty of the defendant was to inspect and test the poles before requiring plaintiff to climb it. But the evidence disclosed that the defendant did not assume the duty of having any independent inspection or testing of poles before they were climbed by linemen. The practice and custom under which it conducted its operations made every lineman his own inspector, and linemen were required to make such inspection and testing

of poles before going on them as they should deem essential to their own safety in doing the work they assumed to do. The case in this respect differed from Cumberland Telephone Co. v. Bills (C. C. A.) 128 Fed. 272, where there was evidence tending to show that under the practice and usage of that company it was the duty of the foreman of linemen to test the safety of a pole before it was climbed by the linemen, and that the plaintiff in that case did not make such a test as he otherwise would because he relied upon the foreman doing his duty. We therefore held that, if the jury found that the Cumberland Telephone Company had assumed to make an independent inspection before requiring its linemen to climb any particular pole, that the neglect of that duty by the gang foreman, upon whom the company had imposed it, would be the neglect of the company, and not that of a fellow servant. But we see no reason why a lineman, in view of the peculiar character of his work, may not lawfully contract to do any inspecting or testing reasonably necessary to determine whether he can safely climb a particular pole for the purpose of adjusting, transposing, or placing new wires. His acceptance of service with knowledge of the way in which the company conducts this part of its business, whether that way be the safest way for him or not, would imply an assumption of the risks incident to that mode of carrying on its work. Linemen must, in the very nature of the occupation, be often required to work alone, or in association with another lineman, and it would seem quite impracticable and unreasonable to send one man as an inspector with another of equal fitness to test a pole before climbed by the latter. The case might be altogether different if skill of a kind not presumably required from a lineman in the usual course of his calling was necessary to apply the tests reasonably sufficient in such cases. The tests which the plaintiff's evidence shows to be customarily used are by shaking, by pushing against the pole by means of a long staff with a point at one end, and by throwing away the dirt next the surface at the base of the pole and examining by use of an axe or crowbar the soundness of the pole at that point. These tests are all simple, and quite within the range of the experience of a qualified lineman, as shown by the evidence in this case. The experience of any such lineman would advise him that the life of a pole varies with climate, soil, and character of the wood. The same experience would warn him of the danger of putting the strain incident to climbing and removing or adjusting wire upon a pole of uncertain age, for a pole may well stand under the support of wires extending from one pole to another which will not stand under the weight of a man with the tension of the wires removed. That he should be held to assume the risks incident to climbing after making such examination and tests as his own experience and judgment should indicate were necessary is not inconsistent with the fair implications arising from his acceptance of employment. This is the view indicated by the opinion of Judge Richards in Cumberland Tel. Co. v. Bills, cited above, and is supported by the cases cited by him of McIsaac v. Northampton Electric Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244, and McGorty v. The Southern New England Tel. Co., 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62. To these we add Cumberland Tel. Co. v. Loomis, 87 Tenn. 504, 11 S. W. 356; Sias

v. Lighting Co. (Vt.) 50 Atl. 554. McGuire v. Bell Telephone Co., 167 N. Y. 208, 209, 212, 60 N. E. 433, 52 L. R. A. 437, is not in conflict. The evidence there showed an assumption of the duty of inspection, before climbing, by the company, and the opinion distinguishes the case from McIsaac v. Tel. Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244, upon that very ground. This is also true of W. U. Tel. Co. v. Tracy, 114 Fed. 282, 52 C. C. A. 168. The principle applicable in such cases is that by continuing in the service with knowledge of the manner in which that business is conducted the servant agrees that the dangers obviously incident to the discharge of his duties when he is expected to determine for himself the safety of a particular pole before climbing shall constitute a term of the contract of employment. This is the doctrine of assumption of risk as many times expounded by this and other courts. Narramore v. Cleveland Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; Chesapeake & Ohio R. Co. v. Hennessey, 96 Fed. 713, 38 C. C. A. 307; Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188; Gibson v. The Erie Ry. Co., 63 N. Y. 449, 20 Am. Rep. 552; Hickey v. Taafe, 105 N. Y. 26, 12 N. E. 286; Hawk v. Penn. Ry. Co. (Pa.) 11 Atl. 459; Whelton v. Ry. Co., 172 Mass. 555, 52 N. E. 1072; Richards v. Rough, 53 Mich. 212, 18 N. W. 785; Hayden v. Smithville M. Co., 29 Conn. 548; Randall v. B. & O. R. R., 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003; Tuttle v. Milwaukee Ry., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150; Felton v. Girardy, 104 Fed. 127, 43 C. C. A. 439.

3. But it is urged that the plaintiff was an inexperienced lineman, and that the defendant company knew this, and did not instruct him as to the methods of inspecting or testing a pole before climbing, and did not furnish him with the tools adapted to make tests. The learned trial judge erred, as we think, in taking this question from the jury. The extent of the experience of this plaintiff in the matter of climbing poles, new or old, was, upon his testimony, quite limited. Whether it was sufficient to constitute him a competent lineman in all branches of his work was a matter left in some doubt by the testimony of certain alleged experts as to the time necessary to make a first-class lineman. The occupation of a lineman is evidently one attended with a considerable degree of risk, and these risks are accentuated if he be put to the business of dismantling an old line of telephone poles. The dangers incident are for the most part of an obvious kind, but the best way of minimizing them by determining the reasonable safety of a given pole for one whose duty it is to climb and detach the wires must be acquired by experience in and observation of such work, or by instruction. A qualified lineman may be presumed to know how to take care of himself. But the presumption does not hold true as to an inexperienced man. Was the plaintiff a man who had had the experience and observation needful to enable him to guard in the best way against the dangers of a decaying or weak pole under the strain of a man working among the wires at its top? If he applied for employment as a lineman, and was apparently mature and intelligent, the company might act safely upon the presumption that he was qualified for his work, and capable of exercising due care to guard against the dangers inci-

dent to his duties. In such case no duty to instruct would be imposed. But where facts are brought to the notice of the master showing the disqualifications of the servant to safely encounter dangers which the employer knows he will meet, and which he has reason to believe the servant, from inexperience or other cause, does not appreciate or know how to guard against, the duty of cautioning and instructing becomes a personal duty of the master. Louisville & Nashville R. Co. v. Miller, 43 C. C. A. 436, 104 Fed. 124; Felton v. Girardy, 43 C. C. A. 439, 104 Fed. 127; Burgess v. W. U. Tel. Co. (C. C.) 108 Fed. 26. But application for or representations of qualifications for the duties of a particular place will not excuse the master from cautioning and instructing a servant whom he knows, from inexperience or otherwise, to be in fact either ignorant of dangers known to the master or ignorant of the methods of guarding himself against such unknown dangers. In L. & N. R. Co. v. Miller, cited above, we said:

"It is illogical to say that a servant impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant, unless the dangers are so obvious that even an inexperienced person could not fail to escape them by the exercise of ordinary care."

But it was in evidence in this case that the plaintiff had been in the employment of the defendant company as a lineman for some two weeks in the spring preceding the September when he was hurt, and that he had been discharged for incompetency by the foreman under whom he was then working. He says he complained to the manager that he had not been treated right in thus discharging him, and applied for another job, and that the manager said he would inquire into the grounds of his discharge, and might return upon another day. He did return, and was told to apply for work to one Whiting. He accordingly applied to Whiting, and this is what plaintiff says occurred: "Whiting asked me if I was a lineman. I says, 'No, sir, I am not a lineman; I haven't been working at line work long enough to call myself a lineman, but I can do some work.'" Upon this he was employed as a second-class lineman. The difference between a first-class and a second-class lineman is not defined. But it appears that this first employment was as a green hand—an apprentice learning the business. When Mr. Brennan, the manager, inquired as to why plaintiff had been discharged, he was told that it was because of his inexperience; "because we were afraid he would hurt himself or some one else." It was also in evidence that Mr. Whiting, one of the defendant company's officials of whom Mr. Brennan made inquiry, recommended his employment as an "instrument man; not as a lineman." The witness Whiting says: "I told him I thought he would do well enough if he put him inside somewhere, where he did not have so much climbing to do; that he was inexperienced for to do Columbus work." The result was that he was employed and first put on some inside work, and then to hauling cross-arms and distributing them, and then to digging holes and putting in the new poles. Two weeks before he was hurt he was changed over to the wire gang, and put to the dangerous work of dismantling an old line of poles of their wires. He says he was told nothing whatever of the dangers incident, and nothing of how to test poles before

climbing. He saw other linemen shaking the poles before going up, and he "followed suit." He was not told about examining the base of the pole below the ground, or the use of the pike staff, or furnished with tools to make either test. Under these facts we think the court should have put to the jury the question as to whether the circumstances did not raise the duty of cautioning and instructing plaintiff before putting him into the work of transferring wires from this dangerous line of poles.

For this reason the judgment is reversed, and a new trial will be awarded.

DODGE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 2, 1904.)

No. 181

1. TRIAL—JUDGMENT ON THE PLEADINGS.

Under the mandate of a Circuit Court of Appeals directing a new trial the entry of judgment upon the pleadings without taking testimony may properly be directed by the trial court. If the pleadings present such a state of conceded facts as to entitle either party to a judgment, the action of the trial court in making proper disposition of the case, after hearing the argument, is itself a trial.

2. SAME—NOTICE OF MOTION—JUDGMENT ON THE PLEADINGS.

In moving for a judgment on the pleadings in a cause on trial in a federal court it is not required by section 537, Code Civ. Proc. N. Y., that a notice of motion should be given. When the cause is regularly reached for trial, the parties are sufficiently advised that the pleadings and the proofs are before the court for consideration. The notice contemplated in said section is required only when some special application is to be made for judgment on the pleadings in advance of the trial.

3. CUSTOMS DUTIES—PASSENGERS' BAGGAGE—EXEMPTED ARTICLES—DUTY OF MAKING ENTRY—FORFEITURE.

In construing the provision in paragraph 697, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], that $100 in value of articles purchased abroad by returning residents of the United States may be admitted free of duty, *held* that it is the passengers' duty to enter and declare the value of such articles, whether they cost more than $100 or not, and that when not so declared they are subject to forfeiture under section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873].

4. SAME—FORFEITURE—FRAUDULENT INTENT—SMUGGLING.

In construing section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], providing for the forfeiture of "any article subject to duty * * * found in the baggage of persons arriving in the United States, which was not at the time of making the entry for such baggage mentioned to the collector before whom the entry was made," *held*, that fraudulent intent is not an ingredient of the cause of forfeiture; also, that dutiable articles found in the handbag of a passenger after said passenger had entered other dutiable articles were subject to the enforcement of the penalties prescribed by said section.

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

Note U. S. v. Harts (D. C.) 131 Fed. 886, herewith.

This cause comes here upon a writ of error to review a judgment of the District Court, Southern District of New York, condemning one pearl necklace, with charm studded with one ruby and diamonds, one pearl and diamond band

necklace, and other articles of jewelry, the property of the claimant, a resident of the United States returning from abroad, which had been purchased abroad. The two pearl necklaces were presents, which had been given to her during a visit in Paris shortly before she left to return home. The facts sufficiently appear in the opinion.

W. Wickham Smith, for plaintiff in error.
Ernest E. Baldwin, for the United States.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. This case has once before been considered by this court (111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130), and to the opinion then rendered but little need be added. The information set forth three causes of action, of which the first was abandoned at the first trial; the second and third were based, respectively, on sections 3082 and 2802, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 2014, 1873]. Upon the first trial the case was submitted to the jury under instructions which were, in substance, that if the jewelry was brought in by the claimant without any purpose of escaping the payment of duties, and not as merchandise in the guise of baggage, she was entitled to a verdict. We held that such instruction was erroneous, and that, "if the claimant omitted to mention the jewelry to the customs officer who received her entry made before the examination of her baggage, the articles became liable to forfeiture if they were in fact dutiable." This conclusion was based upon the language of section 2802, which reads:

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

Commenting upon this section, we said:

"The forfeiture provision does not mean necessarily that the article is subject to forfeiture whenever it appears that it was not mentioned in the entry or the declaration. The statute does not so declare, and as a penal statute it is not to be enlarged by implication to embrace cases not within its terms. The entry and declaration by the passenger are usually made upon the vessel, and often hurriedly, and omissions may occur in the documents from inadvertence or ignorance as well as from intention. The documents are executed in the presence of the customs officer, who administers the oath to the declaration, and who is the representative of the collector in receiving the entry; and, if these omissions are brought to his notice by the passenger, it would seem to be sufficient to satisfy the statute. If at any time while the entry is being made, and before it is completed, there is a disclosure by the passenger which is sufficient to put the customs officer upon inquiry as to the dutiable character of any of the contents of the packages, we think that within the meaning of the statute it is to be deemed that the articles were 'mentioned to the collector before whom such entry was made,' notwithstanding they were not mentioned in the documents. Of course, if the articles are mentioned in the entry or declaration, they are mentioned to the collector. Section 2802 does not make the element of fraudulent intent an ingredient of the cause of forfeiture."

It was further held that the jewelry, including (as the majority held) those articles which had been purchased by others and presented to her, was dutiable. The record showed that the claimant

made a declaration and entry for her baggage before it was examined; that such entry set forth the foreign cost of two articles which she had purchased abroad, and did not mention the cost price of any of the jewelry, nor did it contain anything to indicate that there was any jewelry in the baggage; that she did not, while the entry was being made nor before it was completed, make any disclosure to the customs officer sufficient to put him upon inquiry as to the dutiable character of any of the contents of the packages of baggage; and that subsequently, upon examination of her hand bag, the jewelry was found. Thereupon the judgment was reversed, and new trial ordered. The cause being remitted to the District Court was duly moved for trial at a stated term thereof April 14, 1903. The government thereupon moved for judgment upon the pleadings. Claimant was allowed to make certain amendments to her answer, and on June 13, 1903, judgment in favor of the United States was so entered, which judgment is now brought up for review.

The claimant contends:

1. That, since the mandate reversing the first judgment directed a new trial, entry of judgment upon the pleadings could not properly be directed. This proposition is wholly without merit. The taking of testimony is not essential to the "trial" of an action. If the pleadings present such a state of conceded facts as to entitle either party to relief, whether by dismissal or by judgment in favor of plaintiff, the action of the trial court making proper disposition of the cause after hearing argument is itself a trial.

2. That no notice of the motion was given, reference being had to section 537 of the New York Code of Civil Procedure. Such notice, however, is required only when some special application is to be made for judgment on the pleadings in advance of the trial. When the cause is regularly reached for trial, defendant is sufficiently advised that his pleadings, as well as the proofs he has provided, are before the court for consideration. He cannot properly complain of surprise if defects in his pleading are then brought to the court's attention. Moreover, in the cause at bar claimant was allowed to amend her answer, and it was not until after that privilege was availed of and argument heard that the judgment sought to be reviewed was entered.

3. That the case was not one in which judgment on the pleadings could properly be ordered. The information contained three counts, the third of which charged that the several articles of jewelry enumerated "were on June 24, 1899, found in the baggage of [the claimant] when she arrived in New York upon the steamship St. Paul, * * * which said goods, wares, and merchandise, as aforesaid, were not, at the time of making entry of such baggage, mentioned or declared to the said collector before whom such entry was made by the said [claimant] making the same; contrary to section 2802 of the Revised Statutes of the United States." As to the allegations contained in this third count, the amended answer denies that the articles were "found in her baggage," but admits that they were partly worn by her and partly "carried in an open hand bag, [which] upon inquiry as to whether she possessed any jewelry

was opened and shown to the customs official at the time that this claimant left said steamer." It avers that "the written declaration, and the only written declaration made and subscribed by her, was presented to her while the vessel was on its way through the harbor," and concedes that it was made before she left the steamer. Therefore the jewelry was found after the declaration was made. The contention that the hand bag in which it was found was not a part of her baggage is frivolous. It further avers that she declared certain linens which she had bought in Europe, but "did not declare any part of her jewelry, as she in good faith believed that such jewelry was not subject to any duty." Under our former ruling these are all the facts necessary to sustain judgment of forfeiture, the element of fraudulent intent not being an ingredient of the cause of forfeiture under section 2802.

4. It is contended that three of the rings and one scarf-ring were purchased abroad at a cost of $80; that they were within the proviso as to $100 in paragraph 697 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]); were not subject to duty, and could not, therefore, be forfeited under section 2802. We do not construe paragraph 697 as specifically exempting any particular articles from duty. The language is: "Provided * * * no more than one hundred dollars in value of articles purchased abroad by such residents of the United States shall be admitted free of duty upon their return." Articles purchased abroad, which are within the dutiable schedules, are still dutiable although brought back by a returning resident; but, when entered and declared, $100 in value of such articles—whether that sum be made up by an aggregation of several articles, or of parts of articles, or out of a single article—shall be allowed to such resident in making calculation as to what duty he shall pay. Section 2799, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1872], indicates quite clearly that it is the passenger's duty to enter all such purchases, although some of them may fall below $100 in cost.

5. That the judgment in this case is inconsistent with the decision of this court in One Pearl Chain (I. J. Dulles, Claimant) v. The U. S., 123 Fed. 371. There is a very essential difference between the two cases. Neither claimant made a proper entry of her jewelry; neither of them at the time of making entry mentioned orally to the customs officer that she had any jewelry with her, but one of them gave the officer a written declaration, which, in substance, advised him that she "had in her baggage and on her person wearing apparel [including jewelry] which she had purchased abroad." The other made no such declaration, oral or written.

The judgment is affirmed.

CLEVELAND FOUNDRY CO. et al. v. DETROIT VAPOR STOVE CO.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1904.)

No. 1,262.

1. PATENTS—VALIDITY—MISCONCEPTION OF PRINCIPLE BY PATENTEE.
   If the construction of a patentee effects the desired results, and they are beneficial, he does not lose the benefit of his invention because he may not have correctly understood the principles of its operation.
2. SAME—AMENDMENT OF CLAIMS.
   If an inventor comes to better understand the principles of his invention while his application for a patent is pending, an amendment of his claims to conform thereto does not introduce any original matter nor enlarge his invention, and is within his legal right.
3. SAME—DOUBLE PATENTING—PRIOR ISSUANCE OF IMPROVEMENT PATENT.
   Where a patent first granted is distinctly and only for an improvement on another and generic invention which is the subject of a prior application by the patentee, then pending, it does not invalidate the patent subsequently granted thereon, although there is no express disclaimer of the matter claimed in such prior application.
4. SAME—INFRINGEMENT—OIL BURNERS.
   The Jeavons patent, No. 475,401, for an oil burner, claim 1, was not anticipated, and is valid; also *held* infringed.

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

The bill of complaint in this cause was filed in the Circuit Court by the appellants for the purpose of restraining the defendant from infringing four several letters patent, namely: No. 438,548, issued to William R. Jeavons, October 14, 1890; No. 467,466, issued to the same patentee January 19, 1892; No. 475,401, also issued to Jeavons, and dated May 24, 1892; and No. 461,219, issued to Jeavons and John A. Lannert October 13, 1891, for a joint invention of the persons last named—all of which patents the complainants claimed to own. These patents severally relate to oil or vapor burners. At the hearing upon pleadings and proofs, for reasons stated in the opinion of the court, the bill was dismissed. The complainant thereupon appealed. But the controversy here relates to the first claim of patent No. 475,401, that being the only claim of the several patents relied on in the argument and briefs of counsel.

Thos. B. Hall, Thomas W. Bakewell, and John R. Bennett, for appellants.

Parker & Burton, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

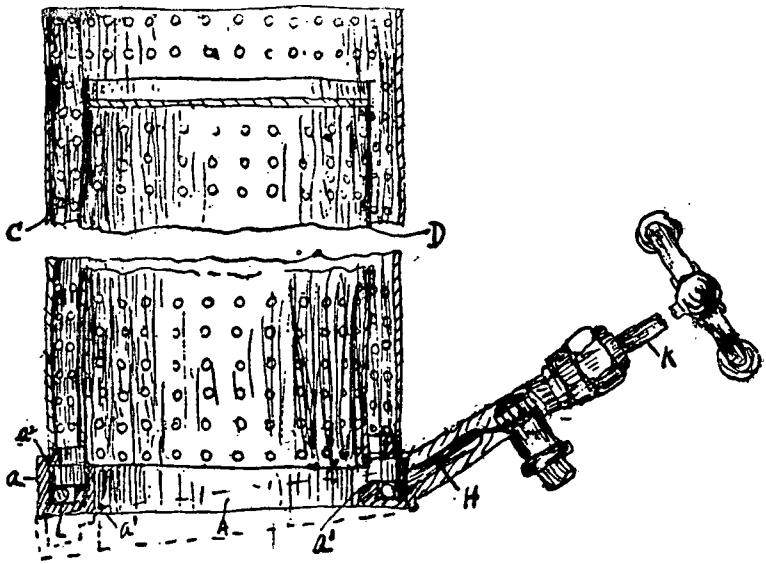
SEVERENS, Circuit Judge, having made the preceding statement, delivered the opinion of the court.

The patent which is now in question is for the basic or generic invention of Jeavons, upon which he devised several improvements which were the subjects of other patents enumerated in the foregoing statement, and which have fallen out of the contest. His application for it was filed December 20, 1888. He stated therein that his invention related to hydrocarbon burners, and consisted in the method of construction described by him in his specifications. He recognizes the previous constructions, and their manner of use, in the language following,

which we copy, believing that it fairly states the existing conditions at the date of his application. He says:

"In the construction and operation of burners prior to my invention, different ways of obtaining a distribution of hydrocarbon oils or vapors or carbureted air have been known, among which may be mentioned: First, the distribution of oil by capillary attraction, as by a wick, in which the oil is drawn to the surface of a wick and consumed, as in an ordinary lamp. In this style of cases vaporization occurs directly at the point of combustion, and the oil itself is distributed. Secondly, by spraying the oil by means of a jet of air or steam under pressure. Thirdly, by generating the vapor in a suitable retort, in which the vapor is subjected to a head or pressure, and depending on the artificial pressure in the retort to distribute or feed the vapor. This style of burner is exemplified in the well-known vapor burner which feeds through a jet orifice. Fourthly, by evaporating or vaporizing gasoline or other light hydrocarbon on an exposed surface by passing a current of air over the same and then feeding the carbureted air to the burner, the old and well-known carbureting devices being of this class."

He then proceeds to state that his own method, differing from those above described, involves, first, the conversion of the oil into vapor by exposing the oil to a heated surface, and then distributing or conveying the vapor by its gravity to the place or places where or about which the vapor is supplied to the burner and maintains combustion. His explanation of his method and the means devised by him to accomplish it are somewhat lengthy, and we epitomize so much of it as seems necessary to understand the claim. To do this we insert Fig. 1 of the drawings, which shows one, and probably the most generally used, form of his burners, in central vertical section.



C and D are two perforated concentric metallic cylinders resting on a base shown below them. Around the inner side of the base is a cir-

cular trough, closed on the outside, but opening upward into the space between the cylinders. This trough is seen at the right and left hand in the base. The asbestos rope, L, lies in the bottom of it. The oil is admitted into the trough through the tube, H, and is controlled by the valve, the stem of which is K. In operation, when oil or gasoline is used, enough is let in to saturate the asbestos cord, L, which being lighted heats up the trough. The oil as it comes out of the tube, H, is immediately vaporized by the heat, and, the vapor being two or three times heavier than air, sinks and flows around in the trough and fills it. The oil expanding into vapor fills several hundred times its own space, and as the latter piles up, so to speak, it passes into the perforated combustion tubes, when, on receiving the air through the perforations and being lighted, it burns with a blue flame ascending through the top of the cylinders, where its combustion is ended. The trough is kept hot by the conductivity of the heated metal of the burner, and condensation of the vapor on the bottom is thereby prevented. If the asbestos is employed for the initial heating up, it is not longer used after the process is under way. The patentee lays stress upon the fact that as the vapor is formed it falls by gravity and flows around through the trough, whereby an even foundation or source of supply throughout the entire circuit or length of the trough is secured, and, by consequence, an even flame in all parts of the combustion chamber. This is the purpose of constructing the parts in such form as that the trough shall be on a level below the entrance of the oil where the vaporizing takes place. We are satisfied that this is substantially the manner in which the vapor is distributed and supplied to the combustion chamber. It is evidently so for a time, at least, after the beginning of the vaporizing, and is probably true in a modified degree after the trough is filled by the vapor.

The claim is here set forth:

"A hydrocarbon vapor burner, consisting of a vapor holder constructed for the free and uniform distribution of the vapor therein by gravity, and having a free opening for the escape of vapor, in combination with perforated combustion walls having a flame space between them, in communication with the said holder, substantially as described."

The court below found difficulty in believing that the principle of gravity had anything to do with the operation of the burner, and was disposed to discard the theory of the patentee, on which his apparatus was constructed, as unfounded. But the fact is that, by constructing the burner in the manner prescribed by him, the vapor is produced and distributed to and in the combustion chamber in a very satisfactory and useful way. That it is a successful improvement on all former methods is shown by the general adoption of it by the public, no less than 122,000 burners of this kind having been sold within 2½ years. It may be that the patentee did not fully understand the rationale of the manner in which his construction effected the results. And it may be that the expert witnesses have not in all respects correctly apprehended it. But if the fact be that his construction does effect the results, and they are beneficial, he is none the less entitled to the benefit of his invention though he may not have correctly understood the principles of its operation. Andrews v. Cross, 19 Blatchf. 294, 8 Fed. 269, per Judge (after-

ward Justice) Blatchford, approved in the Driven Well Case, Eames v. Andrews, 122 U. S. 40–55, 7 Sup. Ct. 1073, 30 L. Ed. 1064; Walker on Patents (4th Ed.) § 175, and cases there cited.

Certain prior patents are cited as anticipations of Jeavons' supposed invention. We will examine them in the order of their dates. First in this order are three patents to Morrill: No. 18,465, dated October 20, 1857; No. 44,548, dated October 4, 1864; and No. 60,224, dated December 4, 1866. These were burners having a wick rising out of an oil reservoir. The oil was carried up by the wick, and the combustion was at its upper end on the instant of vaporization at that point. The resemblance of the structures covered by these patents, and their mode of operation, to that of the Jeavons patent, is so slight as not to require discussion. They belong to the wick-burner class, and the differences are radical. The next is a patent to Brown, No. 60,680, dated January 1, 1867, which is also a wick burner belonging to the same class as the Morrill patents. Patent No. 127, 236, to Rogers, dated February 13, 1877, was for an improvement on a former vapor burner invented by him which is not shown. Whether it was designed for using any heavier kind of fluid than gas or gasoline, we do not know. From the indications, we should suppose not. However this may be, he did not make any provision for taking down the vapor after it was generated into the trough below for distribution by gravity, nor was any such thing contemplated by him. In his device the vapor was formed as the fluid ascended, and the combustion took place in the chamber where the fluid was vaporized. The vapor was generated simultaneously all around the chamber, and not at one point, as in the Jeavons patent, after the initial heating. There are other differences not so important. Patent No. 281,107, to Miller, dated July 10, 1883, shows a burner with an indestructible wick, as asbestos, on the surface of which combustion took place; in short, combustion took place simultaneously with the formation of the vapor. There was no independent vapor trough such as is used in the Jeavons construction, nor was it intended to effect the diffusion of the vapor in the same way. A patent to Stephens, No. 286,862, dated October 16, 1883, for a lamp stove, showed a reservoir of oil over which was spread an absorbing mat which was saturated with the oil. Combustion took place on the surface of this mat. The vapor was burned as soon as it was generated, the two processes occurring together. It was another form of wick burners, and bears no resemblance that we can perceive to the patent in suit. There was no provision whatever for the distribution of the vapor, other than such as would ensue from the ignition of the surface of an outspread, saturated wick. A patent to Carsley, No. 397,630, dated February 12, 1889, shows a form of burner in which gas or vapor was used. In use the reservoir was located in the fire pot of a stove or some heating apparatus, whereby the action of the vapor or gas was accelerated. From this and other parts of the specifications, we gather that it was designed to use gas or vapor already generated. There is no mention of any method or means for generating vapor, but only of means for conducting gas or vapor and distributing it to the place of combustion. It lacks, therefore, the essential characteristic of the patent to Jeavons. It has no

use for such features. It is proper to observe, also, that the means employed for effecting the distribution and delivery of the vapor into the combustion chamber are quite different.

A patent to Bodwell, No. 320,533, and some others are referred to. But it is unnecessary to discuss them further in detail, for they are still more remote from the patent in suit than those already considered. It must be admitted that the devices we have described were designed to effect similar results, in general, but they did not do it in the same way as that contemplated by Jeavons, and the burners having no wick were not successful. We are therefore of opinion that nothing is shown which would justify the conclusion that the patent in suit, in respect to this first claim, is invalid because anticipated. Moreover, the proofs show that this invention contributed quite decisively to the success of the class of burners which dispenses with a wick, and effectively generates, distributes, and consumes the vapor by a well-arranged combination of means which had not been previously disclosed.

But the defendant contends that the proceedings in the Patent Office show that the applicant, Jeavons, was constrained to surrender the substance of his first claim, and acquiesced in the requirement of the office. If this was so, of course it would be fatal to his claim to the extent of the matter surrendered, and the claim would be limited to the bounds of that which he was permitted to retain. It is necessary, therefore, to find out what the original application was in respect of the matter of this first claim, and follow its essential characteristic through the proceedings to the final allowance of the claim, for it must be conceded that if that feature was not disclosed by the application, but was brought in by amendment, the claim would not be valid. We are not required to pursue other matters which were considered in the office. The drawings which accompanied the application when filed remained unaltered throughout the proceedings, so far as this special feature was concerned. The functions which the apparatus disclosed by the drawings performed were in no wise affected by any changes made in the specifications. A burner made according to their construction would operate in the way to be expected from the claim. It is true that the patentee did not fully perceive nor correctly perceive, as we think, the principles on which the operation of his burner proceeded. For instance, we more than doubt whether he appreciated that the principle of gravity co-operated in the method of his invention. But he did see and know that the burner he had devised would successfully accomplish the results he anticipated and was laboring for. It is clear enough that while the application was pending he came to understand the operation of his device better than he had, and that his first claim was founded on that better understanding. These are the essential facts on which the issue as to whether such new matter was brought in and claimed as would defeat the validity of the claim must be tested. We think this issue must be determined in favor of the patent. In the case of Michigan Central R. R. Co. v. Consolidated Heating Co., 67 Fed. 121, 14 C. C. A. 232, we had occasion to consider the question of the validity of amendments made while the application for a patent was pending. We there held that the validity of such an amendment de-

pended upon the question whether it brought in original matter, or was of something that might be fairly deduced from the original application. In the first instance the amendment would not be justified; in the latter it would. The case was decided upon that distinction. And this is the rule which is elsewhere recognized. Hobbs v. Beach, 180 U. S. 396, 21 Sup. Ct. 409, 45 L. Ed. 586; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164; Sugar Co. v. Yaryan Mfg. Co. (C. C.) 43 Fed. 140. This distinction harmonizes with the doctrine that the benefit secured by an invention extends to all the uses of which it is capable, whether the inventor had them all in contemplation or not, and the other rule, to which we have already referred, that it does not matter that he does not understand the principles on which his device operates. If he discovers new uses to which his invention may be put, or discerns the principles thereof more clearly, while his application is pending, in neither case is there any new invention, nor any enlargement of the old. And, that being so, there can be no legal objection to his so molding his claims as to secure all his invention discloses.

Another objection urged is that the invention covered by this claim had already been patented by former patents issued to the same patentee during the pendency of the application for the patent in suit. The facts upon which this objection is based are these: The application for the patent in suit was filed December 20, 1888, but the patent did not issue until May 24, 1892. In the meantime Jeavons had filed three or four applications for as many several improvements on his original invention. In them he described his original structure, as well as, in each case, the improvement he proposed. He then added claims which embodied his improvements as applied to the original structure. But he did not therein claim his original structure. Nor did he refer to his original application or disclaim the subject thereof. On each of these subsequent applications patents were issued prior to the issuance of the patent in suit. In support of the defense that the patent in suit is void because thereby the invention was doubly patented, the defendant cites: Miller v. Eagle Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107; Palmer v. Lozier, 90 Fed. 734, 33 C. C. A. 255; Dayton Fan Co. v. Westinghouse, 118 Fed. 573, 55 C. C. A. 390. This subject has been so fully elaborated by us, especially in the last-cited case of Dayton Fan & Motor Co. v. Westinghouse Co., that we do not think it necessary to go over the ground again. The cases of Miller v. Eagle Mfg. Co. and Palmer Pneumatic Tire Co. v. Lozier are not applicable. As was explained in the Dayton Fan & Motor Co. Case, when the patent first granted is distinctly and only for an improvement on another invention which is already the subject of a prior application then pending, and on which a later patent is granted, the patent for the improvement in no wise interferes with the other application or the patent issued thereon, for the reason that the patents are for separate and distinct inventions. In just such a case as this we held that the later patent, being one for the generic invention, was not invalidated by

reason of the issue of a previous patent in which improvements upon the other only had been patented. We had already so held in Thomson-Houston Electric Co. v. Ohio Brass Co., supra. It is true that in the applications for these patents for improvements there was no express disclaimer or renunciation of the matter of the former application. But that was unnecessary. That application was pending and being prosecuted in the Patent Office, and the fact that the applicant for the improvement patents did not intend to release his former invention to the public was as well understood as if he had in express terms said so. In order to explain the basis of the improvement patents, it was necessary to state what the improvement was upon, and how it fitted it. Having done this, he claimed what was new, and thereby distinguished what his patent was intended to include.

It is further contended that the claim is for a function of the apparatus, and, again, that it is for a process, two rather inconsistent propositions, neither of which is well founded. It is clear that the claim, when construed by reference to the specifications and drawings, as it should be, is for definite means devised to perform desirable functions, but it is not for the functions themselves. That it is not for a process is obvious.

We think none of the defenses resting upon the ground that the claim in question is invalid can be sustained. If the matter were in doubt, we should still incline to the same conclusion, because of the concurrence of so many makeweights, the granting of the patent after protracted examination and discussion, the obvious utility of the invention, the favor with which it has been received by the public, and the recognition of its merit, testified by the defendant's adoption of it. It is not denied that, if the patent is held valid, the defendant infringes it.

The decree of the Circuit Court, in so far as it relates to the first claim of patent No. 475,401, is reversed, with costs. In all other respects the decree is affirmed. The cause will be remanded with directions to enter a decree for complainant for an injunction, and for profits and damages, to be ascertained. No costs will be recovered by either party in this court or in the court below; each party having succeeded only in part.

LINCOLN IRONWORKS et al. v. W. H. McWHIRTER CO.

(Circuit Court, E. D. New York. July 29, 1904.)

1. PATENTS—SUIT FOR INFRINGEMENT—PARTIES.

In a suit against a patentee, it was adjudged that, by virtue of an agreement made before the application was filed, plaintiff was entitled to a half interest in the invention; and it was decreed that the patentee should convey to him "the equal undivided one-half of whatever interest he may have acquired" to the invention, and a conveyance was accordingly made in the terms of the decree. At the time the patentee held the title to a one-half interest only in the patent, having assigned the other half interest. *Held*, that the conveyance carried his entire interest, and divested him of all title, so that he was not a necessary party to a subsequent suit for infringement.

2. SAME—ANTICIPATION—STONE PLANING MACHINE.

The Gilmour patent, No. 575,154, for a stone planing machine, having two tables or platens, which may be operated separately, or locked together and operated as one, was anticipated as to the general idea, which was conceived by another, from whom the patentee obtained it, and who afterward embodied it in concrete form; and the patent is valid only as to the specific means for locking the two platens together, shown in claim 3. Such claim *held* not infringed.

In Equity. Suit for infringement of letters patent No. 575,154, for a stone planing machine, granted to Joseph Gilmour January 12, 1897. On final hearing.

David J. Newland (Harry E. Knight and W. H. Deady, of counsel), for complainants.

Walter C. Flanders (E. B. Stocking, of counsel), for defendant.

THOMAS, District Judge. The bill was filed to enjoin the defendant from infringing letters patent No. 575,154, granted January 12, 1897, to Joseph Gilmour, pursuant to application filed February 20, 1896. On April 2, 1900, Gilmour assigned his whole interest to the Lincoln Ironworks, one of the complainants. On June 27, 1901, the Lincoln Ironworks assigned to Gilmour an "undivided one-half of the right, title, and interest." On April 20, 1900, it was found by Mr. Justice Dickey, in a suit in the Supreme Court of the state of New York, wherein William R. Young was plaintiff and Joseph Gilmour was defendant, that on the 20th day of February, 1896, the plaintiff, William R. Young, and the defendant, Joseph Gilmour, entered into a partnership for the purpose of devising and inventing a double platen planer, and that Gilmour promised to assign to Young one-half interest in the invention, or any patent obtained therefor, and it was decreed that Gilmour should execute such assignment in a prescribed form. On July 10, 1901, Gilmour executed and delivered such assignment to Young, in the form directed. At the time of such assignment, the Lincoln Ironworks and Gilmour each had legal title to an undivided one-half interest in the letters patent. At least, Gilmour's holding was subject to the equitable title of Young, and when he conveyed to Young "the equal undivided one-half of whatever interest" he "may have acquired to any invention," etc., he fulfilled the commands of the decree, and thereby retained no inter-

est. He was directed to transfer, not one-half of what interest he technically held at that time, but one-half of what "he may have acquired." His actual, technical holding chanced to be coincident with the interest that Young was entitled to receive. Hence Gilmour retained nothing. Upon a motion to bring Young in as a party, he disclaimed all interest, and the court declined to make him a party; reserving to the complainant the right to renew the application "if it shall be made to appear to the court that said Gilmour has any interest." It is concluded that the complainants hold the whole title to the letters patent.

The defendant objects that Young, and not Gilmour, was the inventor, or that they were joint inventors. Gilmour and Young, before the application for the patent was filed, agreed that Gilmour was the inventor, after consultation with their attorney, and thereupon the patent was taken in Gilmour's name. Young is a party to this suit, and he and the Lincoln Ironworks, also a complainant, have the whole title. Hence the defendant is not imperiled, so far as either Gilmour or Young is concerned, in any decree that may be made herein. The only question is whether the statute is fulfilled.

In the suit between Young and Gilmour, the former testified:

"I invented it. I got the idea. I took a piece of paper, I put it on my drawing board, and I began to draw out the planer, and then I began to study out how two beds could be put together and worked singly individually or together. Q. Where did you get the idea? A. From Joseph Gilmour. He said he got it from another party. Q. You developed the idea that he gave you? A. I did. Q. And you made— What did you do? A. I made the drawings, so that the patent drawing could be made from my drawings."

But the evidence in the state court was of such a nature that Young was constrained to amend his complaint as follows:

"(1) That on or about the 20th day of February, 1896, plaintiff and defendant entered into an agreement of copartnership, whereby they agreed to devote their time and energies toward devising and inventing a machine for finishing and cutting stone, to be known as the 'double platen planing machine.'

"(2) That such double platen planing machine was invented, and letters patent for said machine were issued by the United States to Joseph Gilmour, defendant, in pursuance of the agreement entered into between plaintiff and defendant, in consideration whereof defendant promised and agreed to assign to the plaintiff an undivided one-half interest in said patent, and further agreed to pay to plaintiff one-half of the profits arising from the sale of said machine."

And the finding and judgment proceeded as above given. This did not establish that Young was an inventor or joint inventor, but that he was a copartner, entitled to share equally in the results. Upon the trial of the suit at bar, Young testified:

"I do not exactly recollect all the particulars of the machine. At this time I am of the belief that he suggested keys or other fasteners. It was certainly understood at the time that it was necessary to fasten the two platens together when working as a unit or a whole, and there is no doubt he informed me how to do it at the time. I would state that at that time neither Mr. Gilmour nor myself were familiar with Patent Office law, and I was of the opinion at that time that the person who made the drawings and devised the machine, or, in other words, made it a mechanical device, was the inventor. I would like to qualify the word 'mechanical device' by saying I mean by that as a draftsman or mechanic would naturally put the idea of the other party on paper. We talked over the matter on those lines, and he thought that probably or possibly

I might have been right, and therefore, to save trouble should any crop out later, concluded that was so; but, on talking the matter over with our patent solicitor, he explained that I was not right, and I therefore assigned orally to Mr. Gilmour what I was supposed to possess. The patent was then, by the advice of our patent solicitors, and I think rightly, taken out in the name of Mr. Gilmour. Q. And you say that he told you that he wanted to put two of those machines together, so that he could use them as one machine for planing a large stone—too large to be planed upon a single machine—and that you understood immediately just what he wanted the machine to do. Now, the question I want to ask you is, did he tell you how he wanted you to make those drawings in the details of the machine, or did he leave that all to your judgment as a mechanical engineer? A. As I have already stated. Mr. Gilmour brought the drawings of a single planer to me, and told me that he wanted the two machines put together, so that they could be worked together, and also said that it would be necessary, in having the two platens when used as a unit or a whole, to have them fixed together by some means, such as a key, or bolted, or some other means."

The positions and evidence of Young in this and the other suit are neither harmonious nor satisfactory. The fact is that neither was the first inventor. Brown or Thomson—one or both—anticipated Gilmour's alleged invention. Indeed, it is probable that Gilmour gained whatever conception he had from Brown, and Young studied out the details. Young testified:

"If I recollect aright, Mr. Gilmour came into the office, saying that he had seen a Mr. Brown, of Newark, and that Mr. Brown and he had been speaking of a double platen planer. Mr. Gilmour then said, 'We will have to get at that right away, or it will be too late,' giving me the impression that he had been thinking of the thing before; and I recollect, when I got out a patent for a radial planing machine, some time before—I don't know the date—Mr. Gilmour then told me that he had some other improvements that he wanted to put on or wanted to do with stone planers. That was all I recollect of either conversation. Q. Did Mr. Gilmour at that time state to you, in substance or fact, that he had been talking to a party called Brown, in Newark, who was in the stone business, and that party had asked him if it would not be a good thing to get up a double platen planer, and he (Gilmour) said: 'No; I told Brown this because I thought it was a good thing, and I will tell you we will go into the same thing upon the plan that we worked on the radial planer'? A. That statement is true, as far as I can recollect it."

Gilmour filed his application February 20, 1896. Brown filed his application March 5, 1896, but it does not appear in the record. On June 5, 1896, an interference was found between the two applications. Gilmour filed a preliminary statement that he conceived of the invention on or about March, 1895; "that on or about October, 1895, he first explained the invention to others; that early in January, 1896, a working drawing of the invention was commenced, using sketches previously made; that on or about the 1st day of February, 1896, the invention was reduced to practice by the completion of a full and complete working scale drawing of the machine."

Brown failed to file a preliminary statement, and judgment of priority of invention was rendered in favor of Gilmour on July 20, 1896. But on July 13, 1896, Brown relinquished all claim on the patent, in consideration of the payment of $60, and "the right to use the machine as patented by Gilmour, and built by A. G. Thomson for George Brown & Co." Brown was a witness for the defendant. He testified:

"Mr. Gilmour called at our office in Newark about in the early part of 1895—in the spring of 1895, to the best of my recollection. In the course of

the general conversation in relation to matters connected with stone-working machinery, I asked him his opinion as to the feasibility of making or building a planing machine which could be used as a double or a single machine. I took a piece of paper, made a rough sketch of the idea and showed it to him. Mr. Gilmour, after looking at the sketch, said that it was impracticable; that the idea was not worth a d——.

"I hand you a copy of the Gilmour patent, and ask you to look at the same, and state whether or not the machine there shown and described, in its general features, agrees with the invention which you described and illustrated by sketches to Mr. Gilmour during the conversation referred to in your last preceding answer? A. This is the same general idea spoken of to Mr. Gilmour. Q. Did you represent in the sketch any means for coupling the tables, or the driving mechanisms for the tables? A. I don't think I went into any details at all. Q. Had you in mind at that time any particular means for coupling the tables or the driving mechanism? A. At that time the drawings of this machine were well advanced, and, if I remember right, the patterns were even being made, so that I must have known about the details. Q. Please tell me what means you have for fixing the date—the spring of 1895—as the time of this conversation with Mr. Gilmour? A. I have no means except a conviction that it was about a year before the application of the patent."

He had earlier testified that it was in the latter part of the year 1894, to the best of his recollection, when he first thought of the double planer; that he talked with Mr. Thomson, a machinist in his employ; and that the latter made drawings pursuant to which a machine was commenced early in 1896, and finished in August of that year. The only portion of Brown's patent in evidence is claim 1, which reads:

"(1) The improved stone planing machine herein described, comprising a bed or frame having parallel ways and adjustable tool carriers, and tables arranged side by side on said ways, and operable either together, or movable independently, but simultaneously, whereby either one large stone carried by the two tables may be planed, or two stones, each on a table, may at the same time be planed independently on said tables, and means for operating said table, either separately or in unison, said parts being arranged and combined substantially as set forth."

This claim does not set forth either intention or means to unite the patents, but "means for operating said table, either separately or in unison," and might refer to a union of the gearing.

Thomson, Brown's draftsman, testified to conversations with Brown, and produced a drawing which he said was the outcome of such conversations. The witness calls it "but an outline." It does not show any means of locking or joining the platens. He also produced a second drawing. As to this he says:

"This is the second drawing I gave Mr. Brown, illustrating a different way of driving the machine by gearing, and also showing the way, or part of the way, that I intended to connect the two tables together, which was by means of a hole bored in each end of the table, and a plug being inserted, and then clamped together by a bolt at each end of the table."

He states that it was completed about March, 1895. Referring to defendant's Exhibit Thomson Drawing, No. 3, he testified: "Q. What was the date of completion of this drawing No. 3? A. About December, 1895." This drawing, as to the connecting bolts, was followed in the construction of Brown's double platen, which was finished about July or August, 1896.

Beyond doubt, Gilmour got from Brown a conception of a double planer, whose platens could be operated separately or in combination.

Before that, Thomson had made a drawing showing the connection of the platens by bolts. Brown states that in his conversation with Gilmour he did not go into details. Therefore Gilmour employed Young to work out specific means for uniting the platens, and, as a result, Young devised the keys. The keys were not Brown's or Thomson's, but the bolts were Thomson's, and his drawing plainly shows that. The defendant used bolts, and therefore carried out Brown's general conception, and, in addition, provided a definite means for uniting the platens. Dayton, defendant's expert, testifies:

"In Figs. 1 and 2 [Thomson drawings], the sections A and A' of the platen are indicated as having at their ends, and adjacent to their meeting edges, perforated lugs through which horizontal bolts may be passed to lock the two sections of the table or platen together. These lugs I find to be already marked by red arrows. The Thomson drawing No. 3 also bears three figures, which I have numbered, in blue, 1, 2, and 3. In this drawing the driving gear, or rather the two independent driving gears, for the separate sections of the duplex table or platen, correspond in general with the drawing No. 1, and is more fully elaborated. It contains a sliding clutch for uniting the two driving gears, situated at a point which I have marked with an X in drawing No. 1; said drawing No. 3 having shaft and hand lever for operation of said clutch. I have marked these several parts with their names. I find in Figs. 1 and 3 of the Thomson drawing No. 3 the same horizontally pierced coupling-lugs for bolting the table sections together that are marked with a red arrow in the Thomson drawing No. 2, but without any mark, and I have therefore applied to them a blue arrow. These coupling lugs are in these figures 1 and 3, drawn in ink. In Fig. 2 the same lugs are roughly indicated in pencil only."

It is difficult to escape the conclusion that Brown, or Brown and Thomson, anticipated Gilmour in the conception of a machine such as is described in claim 1 of the patent, and also in making provision for such means for uniting the platens as are used by the defendant. The very statement of Young himself as to his conversation with Gilmour in this regard, confirms the conclusion that Brown and Thomson—one or both—had worked out the conception before Gilmour effected anything. It is quite improbable that Gilmour either conceived the patent generally or in detail. The fact seems to be that Gilmour set himself to work to utilize Brown's general conception, and that Young invented no definite means for uniting the platens until after the Thomson drawing No. 2 had been made. Young testified as follows:

"Q. Please state when and how you first became familiar with the invention shown and described in that Gilmour patent? A. I became acquainted with that invention in January of the year that patent was applied for, or it may have been December of the year previous. I became acquainted with the invention by Mr. Gilmour coming to me and saying that he would like to get out a patent for a double platen planer, or words to that effect."

The patent was applied for February 20, 1896, and was issued January 12, 1897.

Defendant's references may now be examined:

British patent No. 1,584, of 1861, issued to Fletcher and Fuller. Defendant concedes in its brief that this patent does not show "means for joining and locking them [platens] together," as shown by Gilmour in claim 1, nor "means for joining the sections and holding them locked relatively to each other," as shown in claim 2, nor "tapering keys matching corresponding notches in the adjacent edges of the sec-

tions for locking the latter together," as shown in claim 3. The provisional specifications states:

"When the planing machine is required for planing very large articles, the tables are driven simultaneously, thus answering the purpose of one solid or entire table; but, when smaller articles of different sizes are to be operated upon, the tables can be driven independently of each other."

The specification states:

"The nature of our invention of improvements in machinery for planing consists in rendering such machines available for being used to plane two or more articles of different dimensions and shapes at the same time. In order to accomplish this, we make the bed with the required number of guides or grooves for two or more tables, each of which is furnished with a toolholder and an independent starting, driving, and stopping apparatus."

Thereafter the specific means for "giving motion to each table independently of the other" are described, and later it is said:

"In planing very large castings the tables, b and b^1, act simultaneously, the shafts, g^1, being coupled at g^5, as shown in dotted lines in figure 2, but at other times the shafts, g^1, are disconnected, and each table can then be traversed the required distance, irrespective of the other, as the strap fork of each driving apparatus is acted upon by an adjustable stud or reversing stop fixed to the table, as in ordinary planing machines, where a single table is employed."

In Knight's Mechanical Dictionary, vol. 2, p. 1730, it is said:

"Fletcher's duplex planing machine (English) is arranged with double beds and double tables, each table having a separate set of gearing, with starting, stopping, and feed motion. There are two tool boxes on the cross-slide, each of which is independently self-acting, so as to work with its own table. Thus the two tables may be used separately as two smaller machines working independently of each other, and capable of planing different lengths of work at the same time, or, when planing a large article, the two tables, gearing and motion, may be coupled so as to form one large machine—an arrangement rendering the machine capable of doing a variety of work. * * * Also one table may be fixed stationary as a bedplate to bolt awkwardly shaped or long pieces of work upon while they are planed by a slide rest fixed upon the other table. When used as one machine, both sets of straps and gearing are in operation, and are reversed by the stops of one table only, so as to insure the straps moving at the same time."

Presumptively this article refers to an English machine related to Fletcher. If there is any other machine than that of Fletcher and Fuller falling within the description, viz., "Fletcher's duplex planing machine (English)," whose is it? In the absence of answer to this inquiry, the Fletcher and Fuller patent must be deemed described. The article does state:

"The two tables, gearing and motion, may be coupled, so as to form one large machine. * * * When used as one machine, both sets of straps and gearing are in operation, and are reversed by the stops of one table only, so as to insure the straps moving at the same time."

There is not a suggestion of means for uniting the tables, except through straps and gearing. No one could learn from this language that there were means for uniting the tables themselves, and how it could be done; and, if one interested went back to the patent, which was the subject of the description, he could find no suggestion of coupling tables. On the other hand, he would find a mere coupling of the gearing.

It is not deemed necessary to discuss the other references, for they have no bearing on the patent in suit, except to emphasize that it is an advance in the art.

It is considered that Gilmour's letters show something new and useful, except as anticipated by Brown or Thomson, or both. If Gilmour is entitled to the patent, the defendant infringes. Defendant uses tapering bolts at the extremities of the platens, which lock the platen sections in alignment crosswise. These bolts tend to hold the platens in such relation as to prevent longitudinal motion by one that is not shared by the other. They assure coincident reciprocation. Lateral approach or departure of the platens was not the vice to be remedied. There could be no mischief in that regard, for each platen is held in place by underlying and fixed guideways, on which it runs, and there could be no lateral motion of either platen. Such were the means employed before the Gilmour patent. But the difficulty was that the platens did not reciprocate contemporaneously. They did not keep step one with the other. This needed remedy. Fletcher and Fuller sought prevention by means of uniting the gearing, so that a unitary gearing would apply and maintain such application of moving power that one platen would reciprocate in correspondence with the other. Therefore the needed improvement was the direct coupling of the platens, so that they would reciprocate together and correct any lack of correspondence in motion. Gilmour's patent aims to employ two means—one old and one new. The old means was by connecting the gearing so as to make a unitary whole. The new means was by connecting the platens immediately so that they would move together like one platen. Each means assists the other. It aims to combine the driving power and to combine the platens to be driven. But there is another essential always present. The means must allow the platens to be reciprocated separately or in unison. The defendant's machine provides for this. It combines power and platens. The only question is whether Gilmour limited his claims for means of connecting the platens, so that the defendant's means of connecting the platens are not included in the claims. The defendant urges that its tapering bolts lock the platens together, but do not join them together. The defendant's position is understood to be that Gilmour's claims (1 and 2) provide for means that "draw the tables into close contact," and at the same time keep them locked in such juxtaposition, while defendant's means do not bring their opposing sides into physical contact, nor tend so to do, but leave each platen in its former physical relation to the other, and shackle them for the purpose of reciprocation. It has been noted that the platens cannot be drawn into physical contact, because they are carried on "two sets of parallel ways," and are intended to operate "separately or in unison"; nor is there the slightest evidence of intention to cause them to approach each other laterally when unitary action is required, nor to recede laterally from each other when separate operation is desired. Such discussion may be laid aside at once.

The only other contention is that, by "joining the sections," Gilmour's claim intends that the connecting means become an integral part of each platen, so as to unite both in one whole, as a bridge joins the shores of an intervening stream. But the specification states:

"Other forms of keys may be substituted for those shown, correspondingly altering the shape of the notches, or other fastenings, as sliding bolts, may be employed."

This shows that the words "joining the sections and locking them" (claim 1) and "joining the sections and holding them locked" (claim 2), refer to means that connect the platens, and hold them locked in such connection. The defendant's device does this, and falls within the claims.

The third claim calls for "tapering keys matching to corresponding notches in the adjacent edges of the sections." The defendant's expert describes the defendant's means of connecting the platens as follows:

"The tables or table sections do not touch each other, but are separated by a substantial space, as indicated by the double line in the lowermost figure of the blue print. At each end of each table section is formed a transverse trough open at the top and closed at its ends and sides, as best indicated in the drawing Defendants' Exhibit Defendants' Platen Connection. Through the adjacent inner end walls of these troughs, marked D^7, D^7, in Fig. A of Defendants' Exhibit Defendants' Platen Connection pass the tapered bolts, D^8, having on their smaller ends the nuts, D^9; said bolts being fitted to correspondingly tapered holes in the walls, D^7, D^7. These bolts do not tend to draw the table sections towards each other, or into junction along their adjacent edges, but the nuts on said bolts merely draw the bolts severally into close fit with the different sized tapered holes through which they severally pass. There is nothing in the bolt, D^8, to prevent the right-hand table. B, from moving inward further towards or into contact with the left-hand table, or to prevent the left-hand table from moving to the right towards or against the right-hand table. And there is nothing in the machine to prevent an inward lateral movement of either table. Each table is, however, held against outward movement by the vertical surface, A^2, formed on the lower part of the V-shaped slide which runs in the fixed way, A', of the bed; and therefore the bolt, D^8, or both said bolts are not called upon to perform any function whatever in holding the table, or either of the tables, against lateral displacement. Either table may be laterally displaced inwardly, notwithstanding the bolts, or without prevention from either the bolts or the shoulders, A^2, on the slides."

The troughs are continuations of the platens, and their "adjacent inner end walls" carry bolts. If the bolts passed into "corresponding notches in the adjacent edges of the sections," they would fall within claim 3. Does the fact that the side pieces, vertical to the bed of the platens, are provided to carry the bolts, take defendant's device out of the claim? It seems that claim 3 was intended to provide an exact and peculiar manner for fastening the platens, and defendant's bolts, while effecting the same result, do it in a different way from that very definitely described in claim 3. Therefore it is concluded that defendant's device falls within claims 1 and 2, but does not fall within claim 3.

The discussion of infringement has been upon the assumption that Gilmour was the inventor. But it has been earlier concluded that Thomson's drawing No. 2 shows the patent, except as to the peculiar means of connection shown in claim 3, which defendant does not infringe.

The defendant should have a decree dismissing the bill, with costs.

SANITARY FIREPROOFING & CONTRACTING CO. et al. v. SPRICKERHOFF et al.

(Circuit Court, E. D. New York. July 27, 1904.)

1. PATENTS—INFRINGEMENT—FIREPROOF WALLS.

The Geraerdts patent, No. 555,693, for a fireproof wall, consisting of a series of thin plates or blocks placed edge to edge, and provided with grooves in their sides and ends, and with registering mortises in the grooved edges thereof, and metallic tenons for connecting the plates or blocks at the sides and ends, discloses invention, but, in view of the prior art, must be limited to the precise structure shown. As so construed, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 555,693, for a fireproof wall, granted to Hubertus and William Geraerdts March 3, 1896. On final hearing.

Henry D. Williams, for complainants.
Menken Bros., for defendants.

THOMAS, District Judge. The bill is filed to enjoin infringement of letters patent No. 555,693, issued March 3, 1896, to Hubertus and William Geraerdts. There is a single claim, which is for:

"A fireproof wall, consisting of a series of thin plates or blocks placed edge to edge, and provided with grooves in their sides and ends, and with registering mortises in the grooved edges thereof, and metallic tenons for connecting the plates or blocks at the sides and ends, substantially as set forth."

There is no invention in the mere connection of thin blocks or plates, as distinguished from heavier and thicker blocks; nor is there any novelty in blocks with grooves in the sides and ends, inasmuch as the same are shown in the letters patent issued to Fowler June 3, 1873. His claim is as follows:

"The grooves, b, for the reception of the dry cement, in combination with the mortar-grooves, for the purpose of constructing a wall of building blocks with wet mortar and dry cement, in combination, substantially as described."

The Fowler invention is described as follows in the specifications:

"It consists in the making of round, square, or flat grooves, near the center on all sides of the blocks, where it is desired, and of a size suitable for the reception of mortar of the desired consistency, as shown by A; also grooves on the perpendicular ends each side of the mortar grooves, as shown by b, between it and each face, of a size suitable for the reception of dry cement, plaster, or lime mixed or unmixed with appropriate materials, and in the use of dry materials as a bed for the block, and as an absorbent for any moisture that might otherwise escape to soil the surface of the block. In using this invention, as each tier of blocks is laid, the outer perpendicular grooves should be filled with the dry material before filling the mortar-groove, and on each tier the dry material should be evenly spread, to furnish a bed for the next tier. * * * By the dry bed the adjustments of the blocks are rendered easy, and moisture is furnished by the mortar in the groove to convert the dry material into paste or mortar for the adhesion of the blocks, and all together it renders easy the laying of double-faced blocks the thickness of the desired wall with dispatch, exactitude, neatness, and firmness."

The intention of the inventor of the patent in suit was to carry a groove around the edges of the blocks, both at the sides and ends, and in the channel formed by the grooves of two blocks when placed one

upon the other, or end to end, to place "cement so as to produce a good joint."

Complainant, in his brief, describes the Fowler patent as follows:

"This patent * * * discloses building blocks of considerable thickness for making a massive wall. These blocks are to be laid dry, and cemented after being laid, and have central grooves extending continuously around the top and bottom and end faces of the blocks, and additional smaller grooves on each side of the central grooves on the vertical end faces of the blocks. In construction, a dry, powdered cementing material is laid between the blocks and in the outer vertical grooves, and, after the blocks have been laid, a liquid cement or grouting is poured into the central grooves. The object is to prevent the escape of the moisture to the surface, and the consequent tarnishing of the blocks or decorative surfaces thereof. The dry powder in the additional grooves and the dry powder between the faces absorb this moisture, and prevent it from reaching the faces of the wall."

While Fowler used "grooves, near the center on all sides of the blocks, * * * for the reception of mortar; * * * also grooves on the perpendicular ends each side of the mortar grooves, * * * for the reception of dry cement," he did not provide for a canal formed by the grooves in the edges of adjacent blocks, and the superior usefulness of the complainant's structure, for the purposes of blocks placed edge to edge, appears.

The complainant's provision for mortises in the grooved edges of the blocks, and for metallic tenons for connecting the plates or blocks at the sides and ends, is not new, in such regard. In letters issued to Seldis, October 28, 1873, the claim is as follows:

"A building block made in the form of a cube or parallelopipedon, in two or more segments, fitted together by tongues and grooves, or by dowel pins and sockets, with or without the tongue, g, and groove, h, substantially in the manner herein shown and described."

The specification states:

"This invention relates to a building block having the shape of a parallelopipedon, and divided into two or more segments, which fit together by tongues and grooves, or by dowel pins and sockets, in such a manner that, when said segments are connected, they form a block of considerable size and weight, while each segment can be easily handled and put in position, and by these means a firm and durable building can be constructed with comparatively little expense."

This patent simply and plainly shows the use of tenons or dowel pins for the purpose of holding together the segments of a block.

The letters issued to Frost in 1880 have the following claim:

"A building block consisting of a parallelopipedon having openings, perforations, or sockets for the reception of fastening pins in all its various sides, ends, and faces, substantially as shown and described, said openings or sockets leaving all the solid edges and angles of the block intact, and there being two holes at right angles to each other in each cubic section of the block, substantially as shown and described."

The specification states:

"My invention has for its object to provide means whereby building blocks of the same outlines and substantially the same relative proportions as ordinary building bricks may be securely fastened together by an unadhesive substance or material which will permit the ready detachment of said blocks for reuse or reunion in changed or modified combinations."

"My invention has for its further object to construct building blocks capable

of being joined to and detached from each other by means of a detachable unadhesive substance or material, the angles and edges of said blocks being preserved solid or unbroken. My invention accordingly consists, first, of a block, brick, or parallelopipedon having perforations, openings, sockets, or passages in its various sides, ends, and faces for the reception of pins, whereby two or more of such blocks or bricks may be fastened together; second, in the provision of plates having openings corresponding to those in the blocks, and adapted for the reception of pins or pegs, whereby said plates may be fastened between said blocks as a substitute for mortar; third, in the peculiar construction of the fastening pins, which consist of pegs of any suitable form and material, slitted at either end longitudinally, so as to permit their ready insertion in the openings in the blocks and dividing boards or plates, and thereby effectually holding the same together."

Later, Frost states that the "pins" made use of "may consist of tubes or hollow cylinders slit lengthwise their entire extent, and said pegs may be integral with, and permanently attached to or fastened in, the strips, plates, or boards which represent mortar."

So far as the record is contained, this shows the former art, with the exception of the evidence of Bell, who was called for the purpose of proving that he had been engaged in the manufacture of fireproof partition and dumb-waiter blocks for 20 years last past, similar to the blocks shown in the complainant's construction. As a matter of fact, he does not testify that he had been making such blocks, or any part thereof, for 20 years. At the very most, 6 years cover his use of any part of the patented structure, and he gave evidence October 15, 1903. Although the use of grooves in blocks for holding some adhesive substance for the purpose of connecting the blocks, and tenons for like purpose, was known, yet nobody seems to have conceived of the plan of carrying the grooves all around the sides and ends, and passing tenons through mortises in the grooved edges. A beneficial and desirable structure is thus obtained, and, while the invention displayed may be small in degree, yet there seems sufficient to sustain the validity of the patent. In such case, however, the complainant should be limited to the precise structure shown. It was the evident intention of the inventor to use his blocks for a straight wall. He seems to have had no conception of departing from a straight line, except so far as it may be inferred from his intention to use his structure for fireproof ceilings. After the application was filed, the examiner, among other things, sent this communication:

"It is not understood how ceilings are built with these blocks. For instance, how can a block be put in place in the upper right-hand corner, Fig. 1, with a dowel pin projecting from the upper edge of the block below, and from the end of the block to the left?"

The answer was as follows:

"Referring to this criticism we beg to state that the pins, d, are removable, and that, in order to accomplish the feat mentioned, it is only necessary to remove the pins."

There is no suggestion of any way of turning the corner, other than that. After the issue of the patent, complainant did use blocks for the purpose of making dumb-waiter shafts for tenement houses; but this required a structure having four sides, with joints at the corners. As one block was laid upon another, the horizontal grooves at the adjoining sides were preserved, and the tenons were passed into each

block in the mannner described. But there were no grooves along the ends of the blocks, nor were the ends of the plates or blocks "provided with mortises for receiving tenons, which extend into the corresponding mortises of the adjacent ends of the plates or blocks, so that the plates or blocks are connected not only in a transverse direction with the adjacent side plates or blocks, but also in a longitudinal direction with the plates at the ends of the same."

Complainant's counsel, in his brief, describes the corner connection as follows:

"It happens that in dumb-waiter shafts there are no edge to edge vertical joints. The horizontal dimensions of the shafts are so small (about two feet six inches or three feet each way), that a single block of usual dimensions will extend the full horizontal length of each side of the shaft, and therefore all vertical joints will be corner joints, with the end edge of one block opposed to the end of the inner face of the adjacent block. In these vertical joints there is therefore no edge to edge juxtaposition of the blocks, and the metallic tenons embedded within this thin walled structure are necessarily bent to follow the angular horizontal line of the thin wall. By reason of the fact that there is no edge to edge joint on vertical lines, and that one end edge alongside of each vertical joint is necessarily exposed, the continuation of the mortar grooves along the end edges from top to bottom thereof would be of no utility whatsoever in the exposed end edges, and of slight, if any, utility in the end edges opposed to the ends of faces, and is in fact not required and not used in any of the end edges."

In such construction the tenons are bent so as to follow the corners, and are laid in the grooves in the horizontal sides of the blocks, and are not inserted and imbedded in the block itself. The defendants' structure is practically the same. There is no description of such structure in the specification or in the claim, and, in view of the narrowness of the patent, such structure is deemed not to be within the invention.

The defendants should have a decree.

CURTAIN SUPPLY CO. v. KEELER.

(Circuit Court, S. D. New York. July 22, 1904.)

1. PATENTS—INFRINGEMENT—SHADE HOLDERS.
   The Forsyth patent, No. 559,446, for a holding mechanism for spring-actuated shades, is not for a pioneer invention, and is entitled to only a narrow construction limiting it to the particular means shown. Claims 3 and 4 *held* not infringed.

In Equity. Suit for infringement of letters patent No. 559,446 for a shade-holding device granted May 5, 1896, to Henry H. Forsyth and Henry H. Forsyth, Jr. On final hearing.

C. C. Linthicum, for complainant.
Frederick S. Duncan, for defendant.

PLATT, District Judge. This is a patent suit, alleging infringement, asking injunction and accounting, and has been heard on final pleadings and proofs. The complainant owns letters patent No. 559,446, granted May 5, 1896, to the Forsyths, for an improvement

in shade-holding devices. The defendant says that when the claims of the patent in issue are properly construed he does not infringe. Those claims are:

"(3) A holding mechanism for spring-actuated shades, comprising in combination spring-actuated rods slidably mounted in the lower margin of the shade, and having heads whose outer faces extend at right angles to the lower margin of the shade, friction tips carried by the heads and normally projecting beyond the plane of the edges thereof, and said heads having bearing points above and below the tips, and on which the fixture may rock when force is applied to the shade near one side thereof, substantially as described.

"(4) A holding device for spring-actuated shades, comprising in combination sliding rods mounted in the lower margin of the shade, heads carried by said rods, a plurality of friction tips mounted in said heads and providing separated bearings, and said heads being extended above and below the tips and adapted to contact with the window frame when the lower margin of the shade is moved into an abnormal position, substantially as described."

The primary duty is to construe the claims, and in doing so we must endeavor, by a study of the specifications and of the prior art, to learn what the gist of the invention is, if there be an invention. It relates to spring-actuated curtains, which had been in common use for many years on railroad and street cars. At the lower end of these had been attached a tube, having in its ends loosely mounted heads which fitted into grooves in the window casing. These heads were carried on rods within the tube, which met near the middle of the tube, and were connected through a slot with pinch-handles below. Springs within the tube pressed the heads outward, and kept them normally in contact with the bottom of the grooves, and the frictional holding power of the heads was enough to maintain the curtain at any desired height, in spite of the constantly acting upward pull of the curtain spring. By pressing the pinch handles together the heads could be withdrawn from frictional contact with the bottom of the grooves, and the fixture could be adjusted, and upon releasing the pinch handles the frictional contact again appeared, and the fixture remained wherever placed. Frequently, however, careless people would neglect the pinch handles, and try to shove the curtain up by hand, usually taking it by one end. In such case the upward pressure of the hand might overcome the frictional resisting power, and one end of the curtain would be shoved up out of level, and not infrequently the head would be brought out of the groove entirely. It was at an avoidance of these difficulties that the patentee aimed. Everything about the device is old until we come to the "head" (sometimes called "foot"). It is the use of certain heads in certain ways which is said to bring about the result which the inventor desired. In each claim they are to be used "substantially as described," and we are thus led directly to the specifications.

At the outset we will find that the patentee had one object in mind, and one only, and that was to make a "self-righting" curtain fixture; that is, one capable of automatically returning to a horizontal position after careless handling had left it tilted or canted. For this purpose he devised a peculiar form of head. These heads are fairly long. The face of the head (also called a "tip-holder") is provided with one or more friction tips, or bearing surfaces, preferably of leather or rubber (although a harder substance might be

used), carried by said head, and projecting beyond the face of the head. The head is longer than the friction tip, and extends at each end beyond the tip. The extended ends of the head are preferably provided with antifriction rollers, in order to increase the difference between the holding power of the tips and of the metal ends of the head. Figures 7, 4, and 8 show three suggested forms, No. 7 evidently being his most highly-approved device, and No. 8 of the least consequence. All through his specifications he is impressed with the idea that he has solved the problem of "self-righting" by the use of two sets of bearing surfaces having wide differences of frictional holding power; and the wider the better, so long as one takes into account the amount of upward strain applied by the curtain spring. The higher the holding power in the normal position, the less upward strain by the curtain spring is necessary; and, the less frictional resistance exercised by the outer ends when tilting has occurred, the more quickly and easily the fixture returns to its normal position. The ideal condition would be one where the lightest spring pressure of the friction tips against the grooves would overcome the upward strain, and the practical absence of frictional resistance at the ends would enable the fixture to at once rock back into place after canting or tilting.

Page 3 of the patent, lines 80 to 96, contains the following:

"It will be observed that the friction tips project beyond the plane of the outer edge of the head, so that when the bottom of the shade is in the normal position or horizontal the friction tips only contact with the bottoms of the groove. When, however, the bottom of the shade is tilted to an abnormal position, the metal ends contact with the bottom of the grooves and rock the tips away from frictional contact. As these metal ends offer but a slight frictional resistance to upward pull of the springs of the shade roller, they easily slide along the grooves. The instant the curtain is released, the shade at once rights itself, and the tips again come into frictional contact with the bottom of the grooves, thus holding the shade in the adjusted position."

This antithesis of holding power in the frictional tips and the antifrictional ends can be found even in figure 8, which is the simplest and least perfect form of the patented device.

It is not thought necessary to occupy space in outlining the prior art. It is enough to say that after careful examination I am of the opinion that self-righting action in curtain fixtures was not first exposed to the world by the Forsyths. It was inherent in all outwardly spring-pressed fixtures, and more or less valuable contributions had been made by other inventors. The patent in suit is not a pioneer, but discloses particular means for employing a well-known principle to obtain an old result. The entire theory of action of the fixture in the patent in suit is based upon the presence in the head of two sets of separate bearing surfaces of widely different frictional holding power. One set consists of friction tips of leather, rubber, or other material of a high coefficient of friction, located at or near the center of the head, and projecting beyond the face of the head, and forming the normal contact and holding surface when the fixture is horizontal. The other set consists of the extended ends of the head, and must be made of metal or other material of a low coefficient of friction, and preferably with antifrictional rollers. In the horizontal

position the ends are out of contact with the window frame, and are rocked into momentary contact only when the fixture is tilted. At such times the friction is so slight that the ends slide into their normal position under the pull of the curtain spring above. The claims in suit are in terms limited to this construction.

Defendant's fixture differs radically from the patented device, both in construction and mode of operation. It does not have two sets of bearing surfaces of widely different frictional holding power. There are no friction tips of a material having a high coefficient of friction, and no extended ends with a low coefficient of friction. It has no centrally located friction tips mounted in the head and projecting beyond its face. Tilting defendant's fixture does not cause a rocking of the head off of friction tips onto antifriction ends, but, on the contrary, causes one end of the head to press even harder against the window frame, tending to cause the curtain fixture to retain its abnormal position.

I agree absolutely with the proposition that, if defendant is using the complainant's invention as defined in the patent in suit, it is not important how much of the prior art he may employ; but I cannot subscribe to the major premise of the syllogism. The complainant admits that defendant's fixtures do not work "quite as well" as the patented device, and by so saying he seems to me to give away his case. What he sought was a device which would work better than those at that time in evidence, and congratulated himself upon having found it. Now he says to the defendant, "You are doing the same thing which I am doing, but you do not do it anywhere near as well as I do, and therefore you ought to stop work, and pay me for your infringement."

I do not think that the patent in suit is invalid, but I am very clearly of the opinion that the spirit and scope of the invention is too narrow to include the defendant's device. It does not comport with one's general ideas of justice that complainant, with all its flocks and herds, should covet the ewe lamb about which the combat rages. Its abundance, of course, ought not to count against it, but it would seem that it ought to have tempered its appetite when no more serious cause for complaint existed than can be found in this cause.

Let the bill be dismissed with costs.

GENERAL ELECTRIC CO. v. YOST ELECTRIC MFG. CO. et al.

(Circuit Court, S. D. New York. July 30, 1904.)

1. PATENTS—INVENTION.

As a general rule, the mere making in one piece of a device formerly made in two parts does not constitute patentable invention.

2. SAME—EVIDENCE OF INVENTION—GENERAL USE.

The fact that a patented device has come into general use because it can be made more cheaply than those previously in use is not sufficient to

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¶ 1. See Patents, vol. 38, Cent. Dig. § 20.

¶ 2. Utility, extent of use, and commercial success as evidence of invention, see note to Doig v. Morgan Mach. Co., 59 C. C. A. 620.

establish invention, unless in a limited class of cases, where that is otherwise doubtful.

3. SAME—INVENTION—INSULATING LINING FOR LAMP SOCKETS.
The Painter patent, No. 718,378, which covers an insulating lining used in incandescent lamp sockets and a process of making the same, so far as relates to the claims covering the product, is void for lack of patentable invention; the only difference between the patented article and those previously in use being that the former is molded in a single piece, whereas they were formerly made in two pieces, cut or stamped from a sheet of material.

In Equity. Suit for infringement of letters patent No. 718,378, for improvements in insulating linings and processes for making the same, granted to George B. Painter January 13, 1903. On final hearing.

Richard N. Dyer and Charles Neave, for complainant.
Clifton V. Edwards and Marcellus Bailey, for defendants.

HAZEL, District Judge. This suit was brought for an alleged infringement of United States letters patent No. 718,378, granted January 13, 1903, to the complainant, as assignee of George B. Painter, for improvements in insulating linings and processes for making same. The defenses interposed are that the patent is void for want of novelty and patentable invention. The alleged novelty involved in the patent consists of a vulcanized insulating lining for incandescent electric lamp sockets of two diameters, made or formed in a single piece to fit the interior of the socket. The similarity in the insulating lining manufactured and sold by the defendant to that described in the specification of the patent in suit is not controverted. The patent has 24 claims. Twelve relating to the lining as an article of manufacture are alleged to be infringed. The remaining claims relate to the process of manufacture. The defendants do not manufacture their device in this district, and therefore the present suit is based solely upon the sale of defendants' sockets therein. Hence the court is not asked to consider the process claims. It is thought sufficient to set out claims 1 and 2, which read as follows:

"(1) A lining for lamp sockets which consists of a single piece of insulating sheet-fiber shaped by molding to have a shoulder intermediate its length and with the sections on opposite sides of said shoulder of different diameters.

"(2) A lining for lamp sockets which consists of a single piece of insulating fiber shaped by molding into a tube having cylindrical portions of different diameters and a shoulder portion joining the other portions."

The first claim covers a single piece of insulating lining of two diameters having a shoulder intermediate its length. Claim 2 is for a one-piece insulating fiber shaped by molding into a cylindrical tube having different diameters joined at the shoulder portions of the tube. In the defendants' brief the claims are divided into two groups, namely, the first group comprising the claims for making the article in one piece from any known moldable insulating material, and the other for making single piece lining of one particular kind of insulating material. The Painter patent, as has been stated, describes a single piece of vulcanized fiber extending over the interior surface of a metallic shell of different diameters and forming a seamless insulat-

ing lining for the same. An incandescent lamp, briefly described, consists of an illuminating filament bent into the form of a loop and inclosed in a glass bulb. When inserted in the socket, electrical connection is made, resulting in an illumination of the lamp. Fine wires leading into the socket extend through and convey the electric current to the filament. The insulating lining prevents contact of the strands of wires with the metal parts of the socket. The illumination appears when the key, which controls the electric flow, is turned, and is extinguished when the electric contact is severed by breaking the circuit. The lamp may be manufactured and sold separately. As will appear presently, the prior art shows a form of metal sockets for electric lamps having an insulating lining formed in two cylindrical end portions with an intermediate sloping shoulder. The patentee, when his invention was conceived, was familiar with the state of the art, as may well be supposed from the admission found in the specification. The inventor stated in his application:

"My invention relates to that class of electrical apparatus in which a metallic shell surrounds other metallic parts serving to carry or regulate an electric current, and will be described with particular reference to sockets for incandescent lamps, though it is useful in various other relations. In such apparatus it is highly desirable that the metallic shell should be lined with an insulating sheet for obvious reasons. It has hitherto been the custom to stamp out from sheets of fiber or other similar material curved pieces which would, when assembled, form an approximately cylindrical lining of the proper shape; but this arrangement was objectionable, both because of the cost of manufacturing and assembling such pieces and because of the imperfection of the lining thus formed. My invention contemplates forming a single lining of the proper shape, made in one piece, and entirely suitable for the purpose for which it is intended."

It will be noted in this connection that the insulating lining in question is adapted to fit the interior of metallic shells having end portions of different diameters joined by an intermediate shoulder. The shape or configuration of the shells was not new when the patent was granted. Insulating linings of various kinds and of various materials, as applied to incandescent lamp sockets, were also old. Vulcanized fiber in sheet or tubular form adapted to molding was familiar. Moreover, it is contended that it was common in the art to supply a one-piece insulating lining to a metallic shell of an incandescent lamp to prevent the strands of wire which enter the socket and connect the metallic parts from twisting or abraiding the circuit by contact with the outer shell. To support this contention, the patents of Taylor, No. 316,847 and No. 616,746, Bergman, No. 443,562 and No. 484,580, Dempster, No. 443,746, and Klein No. 471,645, are cited to anticipate the patent in suit. The Taylor patents treat of shaping or molding vulcanized fiber by compression. The Klein patent describes a socket for electric lamps having a metallic shell of different diameters. The lining of insulating material prevents contact with the circuit connections, and is located in the outer or smaller portion of the shell. It does not extend through the socket, and obviously is without a shoulder by which the upper and lower parts are joined. The Bergman and Dempster patents show shells of one diameter, but the lining of hard rubber, though extending through the shell, lacks

the shoulder intermediate its length. According to the testimony of complainant's expert witness, the language of the specification setting forth the known "custom to stamp out from sheets of fiber or other similar material curved pieces, which would, when assembled, form an approximately cylindrical lining of the proper shape," merely contemplates the utilization of fiber for an insulating lining of a single piece instead of two pieces. The patent of Perkins, No. 626,927, dated June 13, 1899, describes an insulating lining of vulcanized fiber formed in two parts to closely fit sockets shaped like those of the patent in suit. Although the Perkins patent is of later date than the Painter patent, the insulating lining is of the precise shape as the two-piece lining which Painter, in his specification, admits to be old. Therefore, irrespective of the process by which the lining is molded, the single question presented is whether it was invention to make in one piece a seamless insulating lining for a lamp socket which previously had been made in one or more pieces of the same material. The function of the one-piece and that of the prior two-piece lining is precisely the same. The process by which the vulcanized tubing is utilized to make a one-piece lining of different diameters to closely fit the interior of the lamp socket is practically identical with that of shaping or forming metals of different diameters by forcing the same into a female die. The process by which the insulating lining is made, as already said, is not here directly involved. Nevertheless, the question of novelty of the device may be considered in connection with the process of manufacture for the purpose of ascertaining the state of the art. For example, the operations by which cartridge shells are formed and the desired conformation of the insulating lining of the patent in suit is obtained are apparently similar. This point, however, need not be decided, and no opinion thereon is expressed, as the construction of the process feature of the patent is not intended. The theory of complainant is that the invention for an insulating seamless lining of different diameters, and having a shoulder intermediate its length, has great merit, and hence is entitled to the protection of the patent laws. As heretofore indicated, the only difference found between the patent under consideration and the prior art is the seamless feature of the lining. This feature, according to complainant, is of the essence of the invention. Defendant lays particular stress upon the fact that the previous patents and the customary method of manufacturing insulating linings enabled the construction of a seamless lining like that described in the patent in suit by the skilled in the art without experiment or engineering skill. This contention is thought to possess merit. Giving consideration to the state of the art as known and understood by the inventor when the device was conceived, it is clear that Painter made no such alteration as resulted in a different application. Therefore his invention is not patentable. The production of a seamless insulating lining having a shoulder intermediate its length required nothing more than the knowledge of the trained engineer or workman. Complainant's device consists merely in making in one piece that which was formerly made in two parts, and performs no new function. The principle announced in Howard v. Detroit Stove

Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039, would seem to apply to the case at bar. There the patent related to an improvement in stoves, and the court substantially held that, because the bolting or riveting together of sections of a stove was well known at the time of the alleged invention, the claims were void for want of patentability. The court said:

"It involves no invention to cast in one piece an article which had formerly been cast in two pieces and put together, nor to make the shape of the grate correspond with that of the fire pot."

In Standard Caster Wheel Co. v. Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109, the patent described a method of making in one piece that which has formerly been made in two. It was there stated as a general rule that the mere making in one piece of a device formerly made in two parts, which were mechanically attached, is not invention. It was further stated that there were exceptions to the general rule, which, however, depended upon the special facts indicating the presence of inventive faculty in a degree beyond mere mechanical knowledge. The patent involved in the Standard Caster Wheel Company Case was for an improved socket for receiving the shank of a furniture caster. The socket was provided with a spring of the same material made integral with one side of the socket. No invention was found to exist, because the function of the spring made integral with the caster socket was precisely the same as that resulting from its application in the prior art. In reaching its conclusion the court distinguished the case of Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, on the ground that the collar button involved there was an improvement of form, strength, and lightness, and, being made of gold, resulted in an important cheapening in cost. True, there is evidence in the record tending to show that the Painter device, because of its cheapness, speedily superseded the two-piece insulating lining of the prior art, but, as was said in Consolidated Electric Manufacturing Co. v. Holtzer, 67 Fed. 907, 15 C. C. A. 63: "Such considerations are applied with caution to a very limited class of cases otherwise doubtful." McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707; Olin v. Timken, 155 U. S. 141, 15 Sup. Ct. 49, 39 L. Ed. 100. The principle of these cases applies here. In Consolidated Electric Manufacturing Co. v. Holtzer, the patent was for a negative battery element in which the electrode and the cover were made in one, with a hole in the cover. In the prior art the electrode and cover were separate. The decision of the court was to the effect that there was no patentable invention in making solid castings in lieu of construction of attached parts, and that the burden rested upon the inventor of such an improvement to show special reasons in support of his claim. Complainant's expert witness Wirt testified that the linings of the prior art were not satisfactory, in that the fine strands of wires would pass through the seams, and thus come in contact with the shell. Though this defect has been removed by the patent in suit, it is nevertheless thought to have been merely such a modification of the two-piece lining as comes

within the sphere of the skilled artisan. This conclusion also finds support in the evidence showing that it was not new to compress or mold vulcanized fiber either in sheet or in the form of tubing.

For the foregoing reasons a decree may be entered dismissing the complaint, with costs.

SPEAR v. KEYSTONE LANTERN CO. et al.

(Circuit Court, E. D. Pennsylvania. August 27, 1904.)

No. 20.

1. PATENTS—INFRINGEMENT—LANTERNS.
   The Spear patent, No. 413,464, for an improvement in lanterns, the object of which is to make a stronger union between the oil pot and the guard frame, was not anticipated, shows invention, and the invention was not abandoned by the taking out of patent No. 399,944, by the same inventor. Claims 1 and 2 also *held* infringed.

2. SAME—VALIDITY—PRIOR PATENT FOR ELEMENT OF COMBINATION.
   A prior patent for a device does not defeat a patent for a combination of which such device forms one of the elements.

In Equity. Suit for infringement of letters patent No. 413,464 for a lantern, granted to Furman D. Spear October 22, 1899. On final hearing.

Arthur M. Pierce, James H. Raymond, Otto R. Barnett, and Hector T. Fenton, for complainant.

Chas. B. Collier, for Keystone Lantern Co.

Frederick G. Dussoulas, for John T. Casey.

HOLLAND, District Judge. The complainant, to whom patent No. 413,464 was granted on October 22, 1899, for a new and useful improvement in lanterns, brings this suit, and alleges that claims 1 and 2 of said patent have been infringed by the defendants. The defense is: (1) Noninfringement; (2) lack of invention in the subject-matter of the patent; (3) that the patent has been anticipated; (4) that the patent was abandoned, or his right to a patent lost, by reason of prior issue of a patent to the complainant No. 399,944.

The patent No. 413,464 is for an improvement in lanterns, and the object to be attained, as set forth in the description, "is to provide a simple, cheap, durable, and easily applicable means of uniting the oil pot and chimney or globe with the guard frame, the union being such as to increase the strength and rigidity of the structure at or in the region of the union, so that it will effectually withstand any damaging force or strain to which it is likely to be subjected." To secure this advantage in lanterns, the complainant claims to have invented a new and useful method of uniting the body hoop with the frame of the lantern in such a way that the hoop is not only securely held in place against any possibility of disarrangement, but so that the form of joint adds to the strength and stiffness of the structure in the region of the frame always most liable to damage. Heretofore

¶ 2. See Patents, vol. 38, Cent. Dig. § 8.

lanterns were made by joining the body hoop to the frame of the lantern, either by hooking the upright guards to a top flange, which was secured to the top of the body hoop, or the upright guards were extended down and joined to the body hoop by various devices; but in no other prior construction of a lantern do I find the employment of a body hoop frame ring to which the upright guards are attached, and which entirely encircles the body hoop, as in the complainant's lantern. In other words, the complainant is the first to have used a body hoop frame ring which embraces the body hoop at its center, and rigidly secured to the body hoop frame ring by being buckled over the inside edge of the body hoop frame ring. This gives the entire structure strength, stiffness, and rigidity at the point where it is necessary in order that the oil pot and the light may be secure against damage. The body of the lantern is composed of a series of upright wide and thin steel bars arranged radially to the axial line of the lantern and united together and held in proper relative position with regard to each other and to the other members of the lantern body by horizontal spacing rings called "guard rings." These guard rings are also wide and thin annular steel rings united to the upright wide and thin bars by notching and interlocking them together. The lower frame ring is what is called in the patent in suit "the horizontal body hoop frame ring," which is notched and interlocked with the upright guards. The body hoop consists of a vertically set sheet-metal cylinder, and is secured in the horizontal body hoop frame ring at a point intermediate of its ends by being buckled under and over the inner margin of the body hoop frame ring, and afterwards dipped or tinned; the patentee claiming that the form of joint adds to the strength and stiffness of the structure in the region of the frame always most liable to damage.

The first and second claims in the specification are as follows:

"(1) In a lantern, the combination, with the horizontal frame ring, B^3, secured to the upright guards, substantially as explained (that is to say, by internotching them, and thus interlocking them together), of a body hoop secured upon said frame ring, substantially as and for the purposes set forth.

"(2) In a lantern, the combination, with the flat metal horizontal frame ring notched upon and secured to the upright guards, of the body hoop bent or buckled upon said flat metal ring, substantially as shown and described."

The defendants' lantern, which complainant alleges infringes his patent, is correctly described by Edward Wilhelm, the expert called by complainant, and is as follows:

"Defendants' lantern is of the same general type as that of the Spear patent in suit, and contains a lantern frame which is composed of upright guard members, horizontal guard rings, and a body hoop, the guard rings being rigidly secured to the upright guard members, and body hoop being rigidly secured to that horizontal guard ring, which connects the inwardly turned portions of the upright guard members, the body hoop frame ring; and the lower ends of the upright guard members are notched and interlocked so as to connect these parts rigidly, and the body hoop frame ring is seated in an annular depression or recess formed in the outer side of the body hoop (which corresponds to the buckling in the complainant's lantern), so that the latter is rigidly secured to this ring. The lantern then appears to be dipped for securing these members of the guard frame together and giving them a finish. The upright guard members are made of flat metal which is the preferred form specified in the Spear patent, and the body hoop frame ring, to which the lower

ends of the guard are secured, is also flat in its outer portion with which the lower ends of the guard members are interlocked. The body hoop frame ring is turned up on its inner side, inside of the lower ends of the upright guard members, so as to form a short, annular, upright flange or collar, which surrounds the body hoop in the external annular depression formed in the latter. In this respect the body hoop frame ring of the defendants' lantern differs from that shown in the Spear patent in suit, in which that ring is flat from the outer to the inner edge. In the defendants' lantern the ring therefore takes a somewhat wider bearing on the body hoop."

I am unable to see any difference between the use of the body hoop frame ring in the complainant's lantern and the wider body hoop frame ring in the defendants' lantern, other than that stated in the last part of the witness' description, to wit, that one ring has a wider bearing upon the body hoop than the other; but the one used by the defendants is the equivalent of that used by the complainant. There are two other variations in the frame ring, to wit, a narrowing of the frame ring between the points where the upright guards join it, and by extending the upright guards beyond the body hoop frame ring and bending them in through the body hoop and turning their ends up on the inner side. These variations from the complainant's structure are plainly of no substance, and embody no new invention. It is evident that the first and second claims of the complainant's patent are infringed, unless the patent is void for any of the reasons set forth in the defense.

As to the question of invention in the complainant's patent, it is evident that he has made an important improvement, which has not been anticipated by the various patents to which the court's attention has been called. No other lantern shows the simple and desirable connection of the body hoop with the frame that is shown in complainant's lantern. It is true, the improvement, after the discovery, seems slight; but it had never been known or used before, and lanterns previously made were not as rigid and stiff at this juncture. It is not necessary to separately consider the great number of patents for lanterns introduced, as the drawings and exhibits all show that this particular method of joining the parts had never been described or used in either; nor do we think that the patent has been abandoned by the complainant, or his right to a patent lost, by reason of the issuance of patent No. 399,944. That patent was for the frame of a lantern, and describes the kind of material to be used in the frame and the method of notching and interlocking the parts together; the lower horizontal guard ring of which is described in the patent in suit as the body hoop frame ring. The thing patented by the complainant was the method of securing the body hoop to a frame ring, which was part of the frame of a lantern, rigidly and securely, which had never theretofore been known; and the fact that this body hoop frame ring is part of the frame of the lantern described in the prior patent to himself is not an abandonment. A prior patent for a device does not defeat a patent for a combination of which such device forms one of its elements. McMillan v. Rees (C. C.) 1 Fed. 722; Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68 (see page 74).

Let a decree be drawn in favor of the complainant.

MORRILL v. HARDWARE JOBBERS' PURCHASING CO. et al.

(Circuit Court, S. D. New York. July 22, 1904.)

1. PATENTS—INFRINGEMENT—SAW-SETS.
The Morrill patents, Nos. 441,962, 532,175, and 703,440, each covering a saw-set, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 441,962, to Charles Morrill, granted December 2, 1890, No. 532,175, to the same, granted January 8, 1895, and No. 703,440, July 1, 1902, to Sarah C. Morrill, executrix, each for a saw-set. On final hearing.

A. Bell Malcomson, for complainant.
Mr. Wilkinson, for defendants.

PLATT, District Judge. Patent suit for infringement and accounting on divers patents mentioned hereafter. Final hearing. The defense is that, in view of the prior art, the claims in issue are either invalid, or that they must be construed so narrowly that the defendant avoids infringement. An examination of the art instantly discloses the fact that for more than 20 years the opportunities for advancement must have stimulated the sale of powerful microscopes. With the unaided eye important changes may pass unnoticed. The candid trier must exercise unusual care when he treads upon such delicate ground.

Patent 441,962. Claims 1 and 2 are in issue:

"(1) The combination, with a saw-set having an adjustable or fixed anvil and saw-adjusting device, of a horizontally moving cylindrical hammer having a concaved and adapted to work in frictional contact with the cylindrical projection on the lower end of the punch-handle, substantially as shown and described.

"(2) The combination, with a saw-set having an adjustable or fixed anvil and horizontally moving cylindrical hammer, of the saw-adjusting device composed of a screw arranged at a suitable angle to the horizontal center of the main body of the device, and supported by the correspondingly depending screw-threaded lug arranged on the under side of the device, substantially as shown and described."

It is admitted that complainant's exhibit, defendants' infringing saw-set, does not infringe claim 1. The only attempt at novelty is the concavity of the horizontally moving lever, engaging frictionally with the cylindrical projection on the punch-handle, thus securing alignment. This is a common device, and it is only necessary to select the Harvey patent, 248,463, from the many references. Complainant says that it appears in figure 1 of the drawing of defendants' exhibit Potter Application, under which defendant claims to be manufacturing, but it is enough to say that it is absent from the device in evidence. So that, in any aspect of the case, we must eliminate claim 1.

If claim 2 has any novelty, it resides in the substitution of the adjusting screw, d, for Charlton's gage-plate, nn (302,891), and the adjustment of the screw at a particular angle. Defendant sets his screw at an acute angle to the saw. Complainant, by his specification, con-

fines himself to practically a right angle, which he calls in his claim "a suitable angle." This claim may be eliminated.

Patent 532,175. This has only one claim, viz.:

"The combination, substantially as shown and described, consisting of the main stock, a, the lever, b, plunger, c, retracting spring, d, depending lug, e, gage screw, f, rotatively adjustable anvil, h, having the indentations, o, thereon (the latter adapted to engage with corresponding means for locking the anvil in position), pin, i, shield washer, k, pin, l, and spring, m; the whole forming a complete device."

When letters are scattered so profusely through a claim, one naturally expects a narrow construction. The example before us is no exception to the rule. The complainant evidently sees that his only chance to discover infringement here is to claim pioneership, and so obtain the benefit of a stronger application of the doctrine of equivalents. Both by the prior art and by its own plain statements, the claim is closely limited to a means for automatically locking the anvil in its various operative positions. The other elements appear in Charlton, 302,841, or in the preceding patent in suit, 441,962. The rotatory adjustable cylindrical anvil having the eccentrically beveled edge came from Trickett's English patent No. 2,076. What remains is the automatic locking device, one form of which is shown in figures 1, 2, and 4, and another form appears in figures 9 and 10. In the beginning of his specifications he speaks specifically of the combination of parts whereby the anvil is locked automatically. And he must be confined to the kind of lock he describes, because an anvil lock was old. Taintor patent, No. 452,399, shows how essential it was to specify the exact parts and form of parts to be used. Defendant obsolutely omits the important feature of the patent in suit, and has not copied certain other details of construction, which must appear if we are to sustain the patent. Defendant does not infringe the second patent.

Patent 703,440. Claim 1 only is in issue:

"(1) In a saw-set a rotary concentric anvil having an eccentric bearing-surface and beveled anvil face, and a movable setting device having its operative face slightly inclined to the anvil face, the inclination being toward the perimeter of the anvil as described."

The defendant does not use a rotary concentric anvil having an eccentric bearing-surface. His anvil is eccentric, and his bearing-surface and beveled face are concentric to the anvil. This is enough of itself.

The defendant also claims that the operative face of his hammer is not at all inclined toward the perimeter of the anvil, but that it is parallel to the beveled face, and thus sets flat against the whole saw tooth. My eyes are too weary to work out positively this contention. I think that he is right, but he does not infringe in any event, and I need not follow him further.

FORCE v. SAWYER-BOSS MFG. CO. et al.

(Circuit Court, E. D. New York. August 10, 1904.)

1. PATENTS—ACCOUNTING FOR INFRINGEMENT—COST OF MANUFACTURE.
A corporation organized and owned entirely by persons who joined in the sale and assignment of a patent to complainant, and which subsequently engaged in the manufacture and sale of an infringing article, cannot avoid an accounting for profits made on the ground that by reason of its having also made and sold other articles the cost of the infringing articles cannot be definitely ascertained, nor because it lost money on its entire business, where it does not appear that it lost on the infringement. In such case the cost of the article as made by complainant where shown may be made the basis for the accounting.

2. SAME—PROFITS—USE OF PATENTED IMPROVEMENTS.
Where it appears that the improvements covered by complainant's patent constituted the chief value of the infringing articles sold by defendant, and that without them no sales would probably have been made, complainant is entitled to recover the entire profits realized from the sale.

In Equity. On accounting for infringement.

William E. Warland and Henry Schreiter, for complainant.
H. A. West, for defendants.

THOMAS, District Judge. The defendant Sawyer-Boss Manufacturing Company was composed of the four persons who sold the patent in suit to the complainant, Force. After such sale such persons formed the defendant corporation, and through it and the firm of Stewart & Co. made and sold their entire product, including a large number of infringing machines. The vendors' action in making and selling a patented article, after transferring the patent, was unconscionable. They knew what the patent was, and gave it every assurance of validity. They began the manufacture after selling. They substantially reduced the price of the machine, and compelled the complainant to do the same. They sought by the tortious use of the patent to enrich themselves, and to that end sought to limit their assignee's beneficial use of what they had sold him. Their present defense in this accounting is that the defendant corporation made other articles, and that the expense of one product is so confused with the expense of others that the expense of making cannot be singled out, and, moreover, that they lost some $5,000 on the entire undertaking. This excuse for persons who deliberately seek to deprive their assignee of his merited profit upon the thing sold is claimed to be justified by law. If such law prevent a recovery herein, a gross injustice will follow. The defendants have, for their own gain, and with full knowledge, injured their assignee, and now conceal themselves behind their confusion of products. They put down the price, made the person who had the sole right to sell lower his price, and then assert that "there is such complication in our varied manufactures that the expense of and profit on the infringing article cannot be determined." Their

¶ 1. Accounting for profits by infringer of patent, see note to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8.

¶ 2. See Patents, vol. 38, Cent. Dig. §§ 572, 573.

entire business was probably done at a loss, but neither they nor their books show that the infringing articles were made and sold at a loss. Because they failed to profit by what they legitimately did, it does not follow that they failed of profit by that portion of their business, which they illegally did. They do not know the expense of the manufacture of the infringing Defiance machine, but they do not show that there was no profit. The complainant has given satisfactory evidence of the cost of labor and material of the Defiance machines. The number made and sold was 4,024. The cost of such labor and material should have been $5,352.06. The complainant shows that the proportion of other expenses that should be borne by these machines is $1,165.61; making their total cost $6,517.67. These machines were sold to Sawyer & Co. for $13,389.19; hence a profit is shown of $6,871.52. Some special items are pointed out by the defendants that are alleged to impugn the correctness of the corporation's expenses. For instance, the cost of boxes to the amount of $254.19 is mentioned, and then some other details. If an additional $500 be allowed the defendant corporation to cover such items, there would still remain a profit of $6,371.52, and that amount, at least, the defendant corporation should pay. The complainant shows that Stewart & Co. realized a profit of $2,245.26 from the sale of the Defiance machine; that Holihan, a partner of that firm, was entitled to $1,222.63 thereof, and that sum he should pay. It is undoubted that the wrongdoer compelled the complainant to reduce its prices, but the complainant even then probably made a profit, and it sold more machines on account of the reduced price. What, on the whole, it lost, does not appear. It was within the power of the complainant to illustrate to what extent its whole profit fell off by reason of the competition. It did not do so, and the court is unable to know to what extent it was finally injured by the competition. Therefore no damages growing out of this unlawful competition can be allowed. It is urged that the complainant must be limited to the damages arising from the improvement shown by the patent. The Defiance machine infringed the first and second claims. It is considered that the combination shown in the first claim covered the substantial profit of the patented article, and that the chief value is found therein, although the stop pin may have facilitated sales. It is further considered that the sales of the Defiance machines were made possible by employing the patented combination; in other words, the salability of the device resulted from the use of the patent. This conclusion results from the evidence of the business done by means of the patented device both by the complainant and the defendants. The whole history of the business shows that the new article was the inducement to the sale. There is no satisfactory evidence from which it could be concluded that any sales would have been made had not the machine involving the combination been offered.

The complainant should recover pursuant to the views above expressed.

UNITED STATES v. HARTS.

(District Court, N. D. California. June 30, 1904.)

No. 1,635.

1. CUSTOMS DUTIES—SMUGGLING—PASSENGERS' BAGGAGE—INTENT TO DEFRAUD.
Under section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], providing for the forfeiture of, and the imposition of penal duties on, dutiable articles found in passengers' baggage, it is not necessary that there should have been an intent to defraud the revenue in order to incur the penalties there prescribed.

2. SAME—PENAL DUTY—FAILURE TO ENTER BAGGAGE.
Articles subject to duty were found in the baggage of a person arriving in the United States, which he had intentionally failed to mention to the collector of customs before whom the entry of the baggage was made. *Held*, that he was liable to a penalty of treble the value of the articles, under section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], though it was not shown that there had been any intention to avoid the payment of duty.

3. SAME—EVIDENCE OF INTENT TO DEFRAUD THE REVENUE.
On the examination of a passenger's baggage dutiable articles were found placed in the skirts of dresses in such a way that they could not be seen until the skirts were unfolded. *Held*, that this evidence would not justify the conclusion that the owner of the baggage had intended to avoid the payment of duty upon such articles.

4. SAME—FORFEITURE—PASSENGERS' BAGGAGE—EXEMPTED ARTICLES.
The provision in paragraph 697, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], exempting $100 in value of dutiable articles in the baggage of returning residents of the United States, is not applicable in proceedings under section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], for the forfeiture of, and the collection of penal duty on, dutiable articles not mentioned on the entry of the baggage. It applies only when a proper entry has been made of the articles entitled to such exemption, and not otherwise.

5. SAME—APPRAISEMENT OF FORFEITED MERCHANDISE—PASSENGERS' BAGGAGE.
The statute does not contemplate that in an action to enforce the forfeiture or penalty prescribed by section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], relative to dutiable articles found in passengers' baggage, the court shall be required to make an appraisement of the value of such articles for the purpose of ascertaining what portion would have been entitled to admission free of duty if a proper declaration and entry thereof had been made.

At Law. Action for penal duties on merchandise imported in violation of customs laws.

Note Buckley v. U. S., 4 How. 251, 11 L. Ed. 961, and Dodge v. U. S., 131 Fed. 849, herewith.

Benj. L. McKinley, Asst. U. S. Atty.
Wright & Lukens, for defendant.

DE HAVEN, District Judge. This action is prosecuted by the United States under section 2802 of the Revised Statutes [U. S. Comp. St. 1901, p. 1873]. It is alleged in the declaration that the defendant came from Japan to the port of San Francisco on the United States transport Thomas, bringing with him certain baggage, and that in making entry of the same before the collector of customs he did not mention certain dutiable articles contained therein of the value

of $657.04, and by reason thereof judgment is demanded against him for the sum of $1,971.12, three times the alleged value of the goods, with interest and costs of suit.

It appears from the evidence that the defendant is a captain in the engineer corps of the United States army, and on July 10, 1903, arrived at the port of San Francisco as a passenger on the United States transport Thomas, with his baggage. Part of this baggage was brought by him from Manila, and a part was purchased at Nagasaki, Japan, and there placed on board the Thomas for shipment to San Francisco. Upon his arrival the defendant was furnished by the customs officers with a printed form entitled, "Baggage Declaration and Entry," and was requested to fill out and sign the same. This form contained the following clause:

"That all the articles in said baggage or on my person, or that of the members of my family accompanying me, that have been purchased abroad, or in any other manner procured or obtained abroad, are fully set forth and described in the annexed entry, together with cost price for each item, or the actual market value if obtained by gift or otherwise than by purchase."

These words were struck out by the defendant, and he made no detailed list of any articles contained in his baggage. The declaration and entry, however, as made out and delivered by him, truly stated that he had with him, belonging to himself and members of his family, "six trunks, three bags or valises, one box, and one other package, making a total of eleven pieces," and that no article contained in his baggage or upon his person or that of those accompanying him was intended directly or indirectly for sale, or for the use of any person other than himself and the members of his family. The defendant testified that he did not at the time have any memorandum by which he could fully set forth and describe the articles purchased abroad and the cost price of each, and for that reason did not specifically mention them in his declaration; and that he was ready and willing at all times to pay the duties legally chargeable thereon. After the baggage was landed upon the wharf, the defendant requested the proper officer to examine it, and in doing so made no suggestion that the examination should not be careful and thorough, but he made no mention of the fact that any dutiable articles were in his baggage. The baggage was then examined in his presence, and it was found that many dutiable articles, such as pieces of silk in the original fold or bolt, had been placed in skirts of dresses in such a way that they could not be seen until the skirts were unfolded. It is insisted upon the part of the government that this was done for the purpose of concealment, and with the expectation that the silks would not be discovered by the customs officers, and thus the payment of duty thereon be avoided; that such was the intention of defendant in failing to mention to the officer that merchandise of that character was in his baggage. But I am not inclined to adopt that view. The trunks were packed by the wife of the defendant, and her testimony to the effect that the silks were folded in the dress skirts as a matter of convenience in packing, and also for their protection, seems reasonable. But, independently of this consideration, a conclusive answer to the contention of the government on this point is that the articles referred to were not packed in such a way as to prevent their

being seen upon a proper examination of the baggage, and they were in fact discovered as a result of the usual examination which is given to baggage coming from foreign ports; and not only was there no attempt at concealment of the trunks, but, as before stated, the defendant himself requested the customs officers to make an examination of their contents. In view of this action, which is certainly not consistent with an actual intention on his part to defraud the government of its revenue, and upon consideration of all the evidence in the case, and giving due weight to the presumption of innocence, my conclusion is that it has not been shown that defendant intended to avoid the payment of duties upon such articles as were dutiable.

The question for decision, then, is whether the failure of the defendant to mention to the proper officers, at the time of making entry of his baggage, the dutiable articles contained therein, was a violation of section 2802 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1873], and rendered him liable to the penalty prescribed by that section. The section is as follows:

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

It was provided by section 16 of Act June 22, 1874, 18 Stat. 189, that in proceedings to enforce a forfeiture for the violation of the customs revenue laws no judgment of forfeiture should be given unless the court or jury should find that the alleged act of violation was committed with an actual intention to defraud the government. That section, however, was repealed by section 29 of Act June 10, 1890, c. 407, 26 Stat. 141, and it has been held in United States v. One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130, that in actions to enforce a forfeiture under section 2802 of the Revised Statutes [U. S. Comp. St. 1901, p. 1873] it is not incumbent upon the government to prove that the owner of the goods intended to defraud the revenue. This decision rests upon the principle "that, where a statute imposes a duty upon a citizen, for the protection of the revenue, or for any other specific purpose, to do specific acts, and establishes penalties or forfeitures as a part of the consequences of not doing the required acts, the motive of the person incurring the penalty has nothing to do with it." United States v. One Pearl Necklace (D. C.) 105 Fed. 359. While in this case there was no intention on the part of the defendant to defraud the revenue, still the evidence shows that his failure to comply with the requirements of section 2802 was intentional, and this was all the government was required to prove to entitle it to recover in this proceeding. This rule may seem harsh, but its apparent hardship is greatly modified by the fact that "the statutes confer upon the Secretary of the Treasury the widest discretion to remit forfeitures and penalties accruing for a violation of the customs and revenue laws. This discretion has always been liberally exerted in cases where violation was unintentional or excusable upon any consideration." United States

v. One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287. The courts, however, are without authority to relax the rule.

2. Paragraph 697, Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], provides:

"That in case of residents of the United States returning from abroad, all wearing apparel and other personal effects taken by them out of the United States to foreign countries shall be admitted free of all duty, without regard to value, upon their identity being established, under appropriate rules and regulations to be prescribed by the Secretary of the Treasury, but no more than one hundred dollars in value of articles purchased abroad by such residents of the United States shall be admitted free of duty upon their return."

It is claimed by the defendant that under the first clause of this paragraph, the wearing apparel and other personal effects found in his baggage taken by him to Manila and thence to Japan, and thence to the United States, were not dutiable, and therefore he incurred no penalty in the failure to mention the same at the time of making entry of his baggage; and in regard to the purchases made in Japan, the defendant claims that articles of the value of $100 were entitled to be admitted free of duty. The questions thus presented, and particularly the latter, cannot be said to be entirely free from doubt, but, in my opinion, the provision of the statute above quoted is not applicable in a proceeding like this. It is intended for the guidance of the customs officers and for the Circuit Court in reviewing decisions of the Board of General Appraisers, under section 15, Act June 10, 1890, c. 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933], when the person claiming the benefit of its exemptions has complied with the requirements of the law in respect to the declaration and entry of his baggage and personal effects. In other words, the statute confers a privilege or benefit, which can only be claimed by one who has complied with the provisions of the law made for the protection of the revenues. The articles therein referred to are to be admitted free of duty by the customs officers upon legal entry thereof, and not otherwise. This is clearly so as to wearing apparel and other personal effects taken out of the United States to foreign countries, which are to be admitted free after their identity has been established under appropriate rules and regulations prescribed by the Secretary of the Treasury. United States v. Dominici et al., 78 Fed. 334, 24 C. C. A. 116. And I am inclined to think that under a proper construction of the statute articles not exceeding $100 in value, purchased abroad by residents of the United States, can only be admitted free when duly entered at the customs office, and after appraisement by the proper officers. The customs officers are to determine, not only the value of such articles, but whether they may be properly classified as baggage or personal effects, because it is only to such articles that this clause of the statute applies, and one of the regulations of the Treasury Department introduced in evidence requires that passengers shall be notified that:

"Residents of the United States returning from abroad should prepare a detailed list of all articles purchased or otherwise obtained abroad, and the price paid therefor, or the value thereof, specifying separately wearing apparel, articles of personal adornment, toilet articles, and similar personal effects. The exemption of $100 allowed by law will be made by the appraiser at the dock.

Articles, including wearing apparel, will be appraised at the market price in the country where purchased."

The statute does not contemplate that in an action to enforce the forfeiture or penalty prescribed by section 2802 of the Revised Statutes [U. S. Comp. St. 1901, p. 1873] the court shall be required to make an appraisement of the value of the wearing apparel or other personal effects contained in the baggage of the passenger, for the purpose or ascertaining what portion, if any, would have been entitled to admission free of duty if a proper declaration and entry thereof had been made before the customs officers. The only questions for the court to determine in such an action are whether the goods sought to be forfeited are such as fall within the general description of goods subject to duty, and, if so, were they, at the time of making entry of the baggage in which they were found, mentioned to the collector before whom such entry was made, and, if not, was the failure to so mention them intentional?

3. I find the value of the merchandise mentioned in the declaration to be $552, and the government is entitled to recover as against the defendant a judgment for three times that sum and costs.

FARMERS' LOAN & TRUST CO. v. CITY OF SIOUX FALLS et al.

(Circuit Court, D. South Dakota, S. D. July 11, 1904.)

1. MUNICIPAL CORPORATIONS—GRANT OF WATERWORKS FRANCHISE—IMPLIED CONTRACT.

   The granting of a franchise by a city to a water company to construct and maintain waterworks to supply water for public use does not raise an implied contract that the city will not itself construct and maintain a waterworks system in competition with that of the grantee.

2. SAME—CONSTRUCTION OF GRANT—COMPETITION BY CITY.

   Where a city having power to grant a franchise to a water company to occupy its streets, but not to grant a perpetual exclusive right, entered into a contract which purported to grant the exclusive privilege of laying and maintaining water pipes in its streets, and by which it agreed to pay certain rentals for hydrants, such contract to continue in force for 20 years, such contract and grant did not, either expressly or by implication, prevent the city from constructing and operating waterworks of its own after the expiration of the 20 years, provided it has the constitutional and statutory power to do so, and the water company would be without remedy for any damage resulting to it from the competition so created. If, however, the city has no such power, the company was justified in investing its money in reliance thereon, and is entitled to an injunction restraining it from constructing competing works, which will result in irreparable loss and damage to its own property, and for which its property will be taxed.

3. MORTGAGE—RIGHTS OF MORTGAGEE—SUIT TO ENJOIN INJURY TO MORTGAGED PROPERTY.

   The mortgagee of a water company has such an interest in the property of the company pledged as security as entitles it to maintain a suit to enjoin the city from constructing and maintaining a rival water system, the effect of which will be to cause irreparable damage to such security, on the ground that the city has no constitutional or statutory power to build such works.

4. MUNICIPAL CORPORATIONS—POWER TO CONSTRUCT WATERWORKS—CONSTITUTIONAL LIMIT OF INDEBTEDNESS.

Const. S. D. art. 13, § 4, as originally adopted, provided that "the debt of any county, city, town, school district or other subdivision shall never exceed five per centum upon the assessed value of the taxable property therein," the debts then existing to be included in computing the amount of legal indebtedness. By subsequent amendments, the last of which was adopted in 1902, a proviso was added allowing counties, etc., to incur "an additional indebtedness, not exceeding ten per centum" upon the assessed valuation of the taxable property therein for the year preceding that in which the indebtedness was incurred, for the purpose of providing water for irrigation or domestic uses. *Held*, that the indebtedness authorized by the amendment was "additional" to the 5 per centum to which the indebtedness for general purposes was limited, and not additional to its existing indebtedness, whatever its amount might be; and that a city already indebted to an amount nearly equal to 15 per cent. of the assessed value of the property therein for the preceding year had no power to construct waterworks by an issue of bonds which would increase its indebtedness to 23 per cent. of its assessed valuation.

5. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Where rights involved in a suit in a federal court were acquired on the faith of a constitutional or statutory provision of a state, the court is not bound by a construction subsequently placed on such provision by the highest court of the state, but is required to exercise its own independent judgment as to such construction.

6. MUNICIPAL CORPORATIONS—CONSTRUCTION OF WATERWORKS—LEGALITY OF INDEBTEDNESS.

Const. S. D. art. 13, § 4, was amended in 1902 by adding a proviso that the additional 10 per cent. of indebtedness which a county or municipality was thereby authorized to incur for water purposes should be based on the assessed value of the property therein for the preceding year, whereas previously the assessment of no particular year was specified. It also provided that no such indebtedness should be incurred unless authorized by a vote in favor thereof by a majority of the electors of such county or municipality. *Held*, that a city had no authority to issue bonds thereunder for waterworks on a vote taken before its adoption, under a statute providing that a majority of the electors should be determined by the vote for mayor at the last preceding city election, but that, in order to create a valid indebtedness, an election must have been held after the adoption of the amendment, and in strict accordance with its provisions.

7. SAME—VALIDITY OF ELECTION TO AUTHORIZE BONDS—COUPLING ALTERNATIVE PROPOSITIONS TOGETHER.

Sess. Laws S. D. 1899, p. 62, c. 53, §§ 1, 2, which grant the power to cities of the first class on the vote of the electors thereof to issue bonds "for the purpose of constructing, equipping, maintaining, and operating or purchasing a system of waterworks," do not authorize the submission of the question of issuing bonds for the purpose of "constructing * * * or purchasing" a system of waterworks; and a vote on the question so submitted confers no power to issue the bonds, since a voter is given no choice between the two propositions, but is compelled to vote for or against both.

In Equity. Suit for injunction. On final hearing.

The original bill in this case was filed on November 30, 1901, by the Farmers' Loan & Trust Company, a corporation of the state of New York, against the

¶ 4. Constitutional and statutory limitations of municipal indebtedness, see note to City of Helena v. Mills, 36 C. C. A. 6.

¶ 5. State laws as rules of decision in federal courts, see notes to Griffin v. Overman Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

See Courts, vol. 13, Cent. Dig. § 957.

city of Sioux Falls, S. D., George W. Burnside, mayor, E. G. Ledyard, auditor, John Olson, treasurer, and H. N. Gates, John Mallanney, Thomas S. Roberts, Jonah Jones, J. M. Neil, F. A. Marvin, Iver L. Bratager, J. M. O'Neill, Alexander Reid, W. H. Ramsey, Thomas J. Bushell, and David Park, aldermen, of said city, all being citizens and residents of the state of South Dakota, and W. S. Kuhn, a citizen of the state of Pennsylvania, and Sioux Falls Water Company and South Dakota Water Company, corporations of the state of South Dakota. The bill was filed by the Farmers' Loan & Trust Company for the purpose of restraining the city of Sioux Falls from proceeding to construct and establish a system of waterworks in said city, to be operated and maintained by said city for the purpose of supplying water to itself and its inhabitants, for the reason that the construction and operation of such a system of waterworks would impair, if not wholly destroy, the revenues which were being earned by the South Dakota Water Company in furnishing the city of Sioux Falls and its inhabitants with water under and in pursuance of the contract between the city of Sioux Falls and W. S. Kuhn, hereinafter referred to. The South Dakota Water Company, Sioux Falls Water Company, and W. S. Kuhn answered the original bill, and also filed a cross-bill against their codefendants and the complainant, the Farmers' Loan & Trust Company. The city of Sioux Falls and the remaining defendants demurred to the original bill and to the cross-bill. The demurrers were subsequently argued, and, by the court, overruled, for the reason that the city of Sioux Falls had no right or authority, during the existence of the contract hereinafter mentioned, to establish a system of waterworks to furnish water to itself and its inhabitants, in competition with the South Dakota Water Company. The city and the other demurring defendants then answered the original bill and cross-bill. No further proceeding was had in the case until October 16, 1903, when an amended and supplemental cross-bill was, by leave of court, filed by the South Dakota Water Company, W. S. Kuhn, and the Sioux Falls Water Company, making defendants the same parties who were the defendants in the original cross-bill. The Farmers' Loan & Trust Company answered the original cross-bill and also the amended and supplemental cross-bill. The city of Sioux Falls, and the same defendants who demurred to the original bill and to the original cross-bill, again demurred to the amended and supplemental cross-bill. This demurrer came on for argument, and, by the court, was overruled. At the same time that the demurrer to the amended and supplemental cross-bill was argued a motion for a temporary injunction, based upon all the pleadings in the case, was made and heard, and at the time of overruling the demurrer to the amended and supplemental cross-bill this court granted a temporary writ of injunction restraining the defendant the city of Sioux Falls from proceeding any further in the construction of a system of waterworks for the purpose of supplying itself and its inhabitants with water, and to be constructed and maintained by the taxation of the citizens thereof. As a condition of granting said temporary writ of injunction the court required the South Dakota Water Company to execute a bond in the sum of $200,000, conditioned to pay all damages which might arise by reason of the granting of said temporary writ. At the time of making the motion for the temporary writ, the South Dakota Water Company made an offer to the effect that, in case either the city or itself was successful in this litigation, it would take the plant or system of waterworks, so far as it had been constructed by the city, from the city at its actual cost, and the bond given upon the granting of said temporary writ also is conditioned for the faithful performance of this offer, and the granting of the writ was conditional both as to the execution of the bond and the performance of this offer. Upon the overruling of the demurrer the city and the demurring defendants answered the amended and supplemental cross-bill, and the case, after testimony had been taken, came on for hearing upon the merits.

The facts established by the pleadings and proof, so far as they are material to the decision arrived at in this case, are as follows: On April 9, 1884, the city of Sioux Falls, then being a municipal corporation acting under a special charter granted by the Legislature of the territory of Dakota, entered into a contract with one W. S. Kuhn, of the city of Pittsburg, Pa., and his associates, successors, and assigns, for the purpose of obtaining a supply of

water for the city of Sioux Falls and its inhabitants. In the first part of said contract is found the following language:

"That said party of the first part has granted to the said party of the second part the exclusive privilege of laying water pipes for public use beneath the surface of the highways of said city, with all necessary facilities and privileges for laying water pipes for public use beneath the surface of the highways of said city, with all necessary facilities and privileges for laying and repairing said water pipes from time to time as same may become necessary."

In consideration of this privilege, W. S. Kuhn, his associates, successors, and assigns, agreed to construct within the city of Sioux Falls a system of waterworks sufficient to supply a constant and sufficient supply of pure water to every citizen in said city requiring it for ordinary house use, upon condition of such citizen or citizens paying to said W. S. Kuhn, his associates, successors, and assigns, quarterly, in advance, of the usual charges for water privileges at rates not exceeding those at present charged in Kansas City, Mo., Council Bluffs, Iowa, Quincy, Ill., and Lincoln, Neb. Said Kuhn further agreed to erect at once on the line of the water pipes to be placed in the streets of said city, and maintain in good repair, 40 fire hydrants of the kind known as "double delivery," to have a certain capacity specified in the contract; the city by said contract agreeing to pay to said Kuhn, his associates, successors, and assigns, the annual sum of $3,000, in quarterly installments, for the water to be supplied from said hydrants for fire protection and other public purposes. And said contract further provided that said W. S. Kuhn, his associates, successors, and assigns, should, whenever required by the city, furnish additional hydrants, and this has been done up to the number of 117. And said W. S. Kuhn further agreed to extend at any time the original pipe line of said system of waterworks, when so required by the party of the first part. Paragraph 9 of said contract is in the following language:

"It is further understood and agreed by the parties to this contract that the same shall continue in full force and effect for and during the period of twenty years from April 9, 1884, with the privilege for the party of the first part to purchase this waterworks from party of the second part, his successors or assigns, on the expiration of ten years, by appraisement by disinterested parties of three persons, one elected by the party of the first part, another by the party of the second part, and a third chosen by the two thus named, and if not purchased then, the same privilege is granted at each successive five years."

W. S. Kuhn, his associates, successors, and assigns, so far as this record is concerned, have complied with all the obligations of said contract on their part, and the city has received its supply of water for public purposes and for the use of the inhabitants of said city from said company; said system of waterworks having been enlarged from time to time during the 20 years since April 9, 1884, until it now represents an expenditure of some $481,000; said enlargements of the water system being required by the growth of the city of Sioux Falls and by the request of the city council of said city from time to time. Said system of waterworks has been largely extended. The Farmers' Loan & Trust Company is a corporation of the state of New York, authorized to become trustee in mortgages or deeds of trust. The Sioux Falls Water Company is a corporation organized in the year 1884 under and by virtue of the laws of the territory of Dakota for the purpose, among other things, of constructing and operating waterworks in and adjacent to the city of Sioux Falls, for the purpose of supplying water for municipal, fire, domestic, and other purposes within the limits of said city and other territory adjacent thereto. The South Dakota Water Company was originally incorporated and organized under the laws of the state of South Dakota on the 28th day of June, 1890, for the purpose of acquiring, purchasing, constructing, and operating waterworks in and adjacent to the city of Sioux Falls, and other cities, towns, and villages in the state of South Dakota, for the purpose of supplying water for fire, domestic, and other purposes, and to acquire, purchase, hold, and pledge any franchises, rights, and properties of any waterworks or water companies in said state; also to acquire, purchase, and hold such real estate as its legitimate purposes might require, and to transfer, sell, and convey any and all property owned by it, and to borrow money, issue bonds,

notes, and other obligations, and to secure the same by mortgage upon any and all rights then owned or thereafter acquired by it. On or about the 22d day of July, 1885, the said W. S. Kuhn, by assignment in writing, duly sold, assigned, transferred, and conveyed to the Sioux Falls Water Company all his right, title, and interest in and to and under said agreement entered into with the said city. On or about the 30th day of June, 1890, the said Sioux Falls Water Company duly granted, bargained, sold, and conveyed to the defendant the South Dakota Water Company all the property, lands, and franchises, including its waterworks plant, in and adjacent to the city of Sioux Falls, and all its rights, privileges, powers, and immunities under and by virtue of said agreement made between the said Kuhn and the said city of Sioux Falls, and that the said South Dakota Water Company has been, since the date of that assignment, and still is, in the possession and enjoyment of said property, waterworks, and franchises as the owner thereof. That on the 1st day of July, 1890, the South Dakota Water Company was indebted in a large sum of money for the purchase price of said waterworks, real estate, property, franchises, and improvements theretofore purchased by said South Dakota Water Company from the Sioux Falls Water Company, and for the purpose of paying said debt and for providing for future extensions, betterments, and improvements, and also for the purpose of exchanging and retiring $60,000 outstanding first mortgage bonds of the Sioux Falls Water Company of date July 1, 1884, which were a first lien upon said waterworks and franchises; and in order to meet the requirements and necessities of the city of Sioux Falls and its inhabitants, under the terms of said agreement aforesaid, said South Dakota Water Company on said date executed to the Farmers' Loan & Trust Company three hundred bonds, numbered consecutively from 1 to 300, inclusive, each of the denomination of $1,000, aggregating $300,000, and payable by the terms thereof in lawful money of the United States at the office of the Farmers' Loan & Trust Company in the city of New York on July 1, 1910, with interest from the date thereof at the rate of 6 per cent. per annum, payable on the 1st days of January and July in each year. That for the purpose of securing the payment of the said bonds the said South Dakota Water Company on said July 1, 1890, executed and delivered to the said Farmers' Loan & Trust Company its mortgage deed, or deed of trust, wherein and whereby it did grant, bargain, sell, and assign, set over, transfer, alien, release, convey, and confirm to the said Farmers' Loan & Trust Company, its successor and successors in the trust thereby created, all and singular its waterworks hereinafter mentioned, situated in and near the city of Sioux Falls, in Minnehaha county and state of South Dakota, together with all lands, rights, and interests in lands, machinery, outfits, pipes, pipe lines, reservoirs, hydrants, rights, privileges, and franchises, and any and all property or estate, personal, real, or mixed, then or now owned or which might thereafter be acquired by the said South Dakota Water Company, with all tenements, hereditaments, and appurtenances to any of the same belonging, and all revenues, rents, incomes, and privileges from any of the same or from any other source arising or coming, and also all deeds, mortgages, leases, contracts, and all muniments of title to any real or personal property in the state; and for further assurance it was provided in said deed of trust that all rights of action thereafter should be vested exclusively in said Farmers' Loan & Trust Company as such trustee. That in and by said mortgage the Farmers' Loan & Trust Company acquired, and ever since has had, and still has, an estate in and a lien upon all property, real, personal, and mixed, of the said South Dakota Water Company and its revenues, to secure and insure the payment of all of said bonds with the coupons thereto attached. That in and by the terms of said mortgage or deed of trust said South Dakota Water Company covenanted and agreed that, in addition to the payment of interest, and in order to provide a fund for the payment and retirement of the principal of said bonds, it, the said South Dakota Water Company, would, beginning with its receipts on the 1st day of July, 1895, and continuing during the existence of the lien of the mortgage debt, pay over to the said trustee on the 1st days of July and January in each and every year an amount equal to 10 per centum of the net income after satisfying the interest requirements of the said bonds of the Sioux Falls Water Company of

July 1, 1884. That the Farmers' Loan & Trust Company, as trustee, should use the said fund in redeeming the said bonds. The said South Dakota Water Company further, in and by said mortgage or deed of trust, transferred and set over to the Farmers' Loan & Trust Company and its successors all its claims and demands against the city of Sioux Falls not used for the payment of interest as provided in said mortgage of Sioux Falls Water Company of July 1, 1884, during the existence of any part of the mortgage debt so secured by said conveyance for the use of fire hydrants and other public purposes by virtue of the contracts of said South Dakota Water Company with the city of Sioux Falls. That the water rentals payable by the city of Sioux Falls under the contract thereinbefore referred to are necessary and essential to pay the principal and interest upon the bonds secured by the deed of trust hereinbefore referred to. Under the provisions of the said deed of trust $290,000 of the said bonds have been negotiated and sold and delivered for the purposes aforesaid, and are now outstanding and unpaid, and are in the hands of divers and sundry persons and corporations; and that this suit is brought by the Farmers' Loan & Trust Company, as it believes it to be its duty to protect said securities in behalf of the holders of said bonds. That the total revenues inuring to the South Dakota Water Company under and by virtue of the contract made with Kuhn amounts annually to about the sum of $23,404. That the only means of paying the bonds and interest thereon, hereinbefore referred to, are the revenues received from the city of Sioux Falls and its inhabitants for supplying water. That the South Dakota Water Company, in addition to the system of waterworks hereinbefore described, is the owner of real estate in said city, which was assessed for the year 1901 at the sum of $1,725, for the year 1902 $1,755, and for the year 1903 $1,571; and that the assessed valuation of the personal property of said South Dakota Water Company in said city of Sioux Falls for the year 1901 was $37,500, for the year 1902 $86,000, and for the year 1903 $90,000; making an aggregate assessed valuation of real and personal property for the year 1903 of $91,871. That the annual taxes upon said real and personal property for the year 1901 were $2,087, for the year 1902 $4,861, and for the year 1903 the sum of $4,244; the total levy for all purposes for the year 1903 being 46.2 mills on the dollar. That in the month of October, 1901, the mayor and city council of the said city of Sioux Falls passed an ordinance in the following language:

"An ordinance declaring it necessary to call a special election for the purpose of submitting to the legal voters of the city of Sioux Falls the question whether bonds shall be issued for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks and the mode of conducting the same.

"Be it resolved by the city council of the city of Sioux Falls:

"Section 1. That a special election be held on Tuesday November 5, A. D., 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether the said city of Sioux Falls shall issue its bonds to the amount of $210,000 for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the use and benefit of said city for providing water for domestic uses.

"Sec. 2. The question submitted to the legal voters of said city as provided in section 1 shall be as follows: Shall the city of Sioux Falls issue its bonds to the amount of $210,000 for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the uses and purposes of said city and for providing water for domestic uses?

"Sec. 3. Said election shall be conducted and the ballots therefor prepared and the voting for or against said proposition shall be in the same manner as in the case of regular annual elections in said city, and the votes shall be canvassed and counted and the result declared in the same manner as for said election so held at the regular annual election in said city and all rules and regulations prescribed by statute relative to the manner of voting and declaring the result and canvassing the vote shall be in the same manner as prescribed by statute in the case of regular annual election.

"Sec. 4. This ordinance shall be in force and take effect from and after its approval and publication."

And in connection with said ordinance, on October 15, 1901, passed the following resolution:

"Be it resolved by the city council of the city of Sioux Falls:

"That a special election be held on the fifth (5) day of November, A. D. 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether the said city of Sioux Falls shall issue its bonds for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks to provide water for domestic uses.

"Also resolved, that the amount of bonds to be issued shall be two hundred and ten thousand ($210,000) dollars to run twenty (20) years from the date of their issuance, and shall bear interest not to exceed five per cent. per annum, and the purpose for which said bonds are to be issued is to construct, equip, maintain and operate or purchase a system of waterworks to provide water for domestic uses.

"Also resolved, that the question to be submitted at said special election and the ballots to be voted at said special election shall read as follows:

" 'In favor of the proposition of issuing bonds to the extent of two hundred and ten thousand ($210,000) dollars for the purpose of providing water for domestic uses.'

" 'Against the proposition of issuing bonds to the extent of two hundred and ten thousand ($210,000) dollars for the purpose of providing water for domestic uses.'

"Also resolved, that said special election shall be conducted and the votes cast thereat shall be counted, returned and canvassed in such manner as is now provided by law in the case of regular annual elections."

And in pursuance of said resolution the notice of special election was given, which, so far as is material to the decision of this case, was as follows:

"Be it resolved by the city council of the city of Sioux Falls:

"That notice is hereby given that a special election will be held on Tuesday, November 6th, A. D. 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether the said city of Sioux Falls shall issue its bonds to the amount of two hundred and ten thousand ($210,000) dollars to run twenty (20) years from the date of their issuance and to bear interest not to exceed five (5) per cent per annum, said bonds to be issued for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks to provide water for domestic uses.

"The question to be submitted at said special election and the ballots to be voted at said special election shall be as follows:

" 'In favor of the proposition of issuing bonds to the extent of two hundred and ten thousand ($210,000) dollars for the purpose of providing water for domestic uses.'

" 'Against the proposition of issuing bonds to the extent of two hundred and ten thousand ($210,000) dollars for the purpose of providing water for domestic uses.' "

In pursuance of said ordinance, resolution, and notice of special election, a special election, which it is claimed authorized the issuance of the said $210,000 of bonds mentioned in said ordinance and resolution, was held. In the summer of 1903, $210,000 of the bonds of said city were issued and sold, and the city has received the sum of $182,300 as the proceeds of said bonds, and has expended in the construction of the proposed water plant for itself about the sum of $150,000. That the assessed valuation of property subject to taxation in the city of Sioux Falls for the year 1901 was $2,510,671, for the year 1902 $2,739,598, and for the year 1903 $3,481,988. That the indebtedness of the city of Sioux Falls in the year 1903 and at the time the said $210,000 of bonds were issued by said city was $391,000. That the indebtedness of the city of Sioux Falls in the year 1903 and at the time the bonds hereinbefore referred to were issued, based upon the assessed value of the property of said city for the year 1903, was between 14 and 15 per cent. That the addition to said indebtedness of the sum of $210,000 would make the indebtedness of the city of Sioux Falls, figuring on the same assessed valuation, over 21 per cent.

Davis, Lyon & Gates, for complainant Farmers' Loan & Trust Co.
Bartlett Tripp (Bailey & Voorhees, of counsel), for cross-complainant South Dakota Water Co.
H. H. Keith (R. H. Warren, of counsel), for defendants.

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

CARLAND, District Judge, after stating the case as above, delivered the opinion of the court.

In this opinion the Farmers' Loan & Trust Company will be called "complainant," the South Dakota Water Company "water company," and the city of Sioux Falls "the city."

Upon this record the complainant and the water company insist that the city must be enjoined from proceeding further in the construction and operation of a system of waterworks of its own for supplying itself and the citizens of said city with water for public and domestic uses in competition with the defendant water company, the complainant and defendant water company claiming that the construction and operation by the city of a system of waterworks, to be supported by taxation, would absolutely ruin the plant and revenues of the water company, in which the complainant and the water company are interested, the water company as owner and the complainant as trustee for the holders of bonds issued under the trust deed executed to it by the water company upon the property, franchises, rentals, and income of the water company. The evidence conclusively established that the construction and operation of a system of waterworks by the city will inflict grave, nay, irreparable, injury upon the complainant and upon the water company. It will institute a ruinous competition between their business and that of the city, and will impose a tax upon their property, so that the security of the complainant and the value of the property of the water company will be practically destroyed. The complainant and the water company are therefore entitled to the relief which they seek, unless the city has the right, under the Constitution and the statutes of the state, to inflict this serious damage. Every one has a right to the fruits and advantages of his property, skill, and industry, and to its protection against every injury not justified by the law. Damages inflicted by authority of law are, indeed, a part of that great mass of wrongs termed "damnum absque injuria," for which neither law nor equity furnishes a remedy. But damages inflicted without the authority or in violation of the law are never remediless. The threatened injury in the case at bar is not debatable. The only question is whether or not its infliction is justified by the law. The complainant and the water company insist that it is without justification, (1) because the city is not authorized to inflict, but is prohibited from inflicting, it, by the Constitution and the statutes of the state of South Dakota, which forbid it to construct and maintain its waterworks; and (2) because it agreed by the contract of April 9, 1884, that it would not do so, and that Kuhn and his associates should have the exclusive privilege of constructing and maintaining such

works in the city of Sioux Falls. If either of these propositions is tenable, the complainant and the water company are manifestly entitled to an injunction. In the discussion of these propositions the right of the water company and of the complainant to a perpetual injunction by virtue of the contract will first be considered. In the discussion of this right the assumption will be indulged that under the constitution and laws of the state the city is authorized to construct and maintain its own waterworks, and the question presented by that proposition will be later considered. All that is said in the consideration and determination of the question whether the contract entitles to relief is based upon this assumption.

In the view of this case which the court has been compelled to adopt, it is unnecessary to consider or decide whether or not the privilege to lay and operate the water mains granted to Kuhn and his assigns continued after the expiration of the 20 years specified in the contract, because the city has neither taken nor threatened any action inconsistent with this continuance. When, if ever, it attempts to prevent the exercise of this privilege, it will be time enough to consider its duration. The material question which the contract now presents is whether the grant of the "exclusive privilege" contained in it estops the city, if otherwise lawfully authorized to do so, from constructing, completing, and maintaining its own waterworks. It is conceded by counsel for the complainant and the water company that the word "exclusive" in the contract between the city and Kuhn, if construed to exclude every person perpetually, would be void as against public policy; but that the word "exclusive" must be construed as having the effect of an agreement on the part of the city not to construct and maintain a system of waterworks in the city of Sioux Falls in competition with the water company. As bearing upon the complainant's and water company's claim based upon or arising out of the contract of April 9, 1884, we believe that the following propositions are sound:

First. The city of Sioux Falls, on April 9, 1884, had no power to grant to W. S. Kuhn a perpetual exclusive franchise or privilege for laying water pipes for public use beneath the surface of the highways of said city. Authorities in support of this proposition need not be cited, as counsel for complainant and the water company, at the argument, conceded its correctness.

Second. On April 9, 1884, the city of Sioux Falls had the power to grant the privilege to W. S. Kuhn to lay water pipes for public use beneath the surface of the highways of said city for a reasonable time. This proposition needs no discussion in view of the fact that for 20 years the city and the water company have performed their several obligations under the contract referred to.

Third. The city had the power by an express contract to renounce its authority to construct and maintain waterworks itself during the time which it would be proper and lawful to grant the privilege to a third party. Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

Fourth. The grant of the privilege by the city to W. S. Kuhn to lay water pipes beneath the surface of the highways of said city for

public use did not imply that the city would not itself construct and maintain a rival waterworks system. Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585; City of Joplin v. S. W. Missouri Light Co., 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127.

Fifth. The word "exclusive" in the contract between the city and W. S. Kuhn is insufficient to raise the implication that the city, by the use of said word, thereby agreed to renounce its power to construct waterworks itself, because (1) such is not the ordinary meaning of the word; (2) because it is conceded that under the law the word "exclusive," if given its usual interpretation, would render the exclusive feature of the contract void; (3) because the express provision of the contract of the city to take water for a term of 20 years raises the contrary implication that, after the expiration of that 20 years, both parties intended that the city should be free to exercise its power to construct and maintain waterworks, or to obtain its water in any other lawful way.

Sixth. As the city is not bound by the contract to refrain from exercising its powers to construct and maintain waterworks, and as the terms of its contract with the complainant and the water company were that it should cease to have effect on April 9, 1904, its subsequent construction and operation of waterworks for its own benefit and that of its citizens would not be a violation of any of the express or implied terms of this contract, and would not entitle the complainant or the water company to any relief, if, under the Constitution and the statutes, the city had the lawful right to construct and operate them. If the city had lawful authority to build and operate rival works, neither the destructive competition nor the depreciation of the value of the property of the complainant and the water company would entitle them to any relief, because the infliction of this loss would not violate any legal or moral duty of the city, would not break or impair the obligation of any of its contracts, and would not take away any private property without compensation, within the meaning of the Constitution and the law. Irreparable injury alone furnishes no ground for equitable interposition. Damage inflicted by lawful competition is damnum absque injuria, and remediless. Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354–367, 22 Sup. Ct. 400, 46 L. Ed. 585; Lehigh Water Co. v. Easton, 121 U. S. 388–390, 7 Sup. Ct. 916, 30 L. Ed. 1059.

The general doctrine that no legal damage arises from the lawful pursuit of another's rights and duties is well stated by the Supreme Court of Massachusetts in the case of Walker v. Cronin, 107 Mass. 555, where, at page 564, the following language is used:

"Every one has the right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose,

it then stands upon a different footing, and falls within the principle of the authorities first referred to."

See, also, Passaic Print Works v. Ely & Walker D. C. Co., 105 Fed. 165, 44 C. C. A. 426, 62 L. R. A. 673.

It is said that the complainant and the water company have invested more than $430,000 in their plant in the faith that the city would not construct and operate rival works. If this municipality is without authority, or if it was forbidden, to build and maintain a rival plant by the Constitution or by the statutes of the state, that fact raises a persuasive—a controlling—equity, which entitles the complainant and the water company to relief, because they had the right to invest their money and to establish their business in the faith that the city would not be permitted to violate the Constitution or the law to destroy their property or their business. But if the city was lawfully authorized to construct and operate a rival plant, there is nothing in the contract or in the investment to forbid it. The thought that underlies the suggestion under consideration is that the city is equitably estopped by its acquiescence in the construction and operation of the plant of the water company and by its silence from building and maintaining rival works. But if the city has lawful authority to build and operate a rival plant, the case lacks two essential elements of an estoppel—ignorance of the complainant and of the water company, and deceit or fraudulent concealment by the city. Neither of these is to be found in this case. All the parties to this controversy knew that at the end of the 20 years the contract would no longer bind the city not to build and operate its own waterworks, because it plainly so declared. The city never made any concession or representation to the contrary. If the city had lawful authority to build and maintain its own works, the damage from prospective competition and taxation was irremediable.

It is argued that an injunction should be issued because the city is about to levy and collect a tax upon the property of the complainant and the water company for the purpose of constructing and maintaining its own works. But this contention is conditioned by the same considerations which have already been expressed. If the construction of the new works and the threatened taxation to build and maintain them is in violation of the Constitution and of the law, it is wrongful. It inflicts irreparable injury, and it presents an unanswerable ground for an injunction to forbid it. But if the city has lawful power to construct and maintain its own plant, it has the right to tax the property of the complainant and of the water company within its limits to pay for this construction and maintenance. The contract contains no express or implied agreement to the contrary.

We have been cited to the case of White v. City of Meadville, 177 Pa. 643, 35 Atl. 695, 34 L. R. A. 567, in support of the argument that a taxpayer may sustain a bill upon a contract similar to that here under consideration to enjoin a city from constructing a rival plant, although it has lawful power to do so under the Constitution and the law. After an examination, however, of the decisions of the Supreme Court, so far as that court has had occasion to intimate its

opinion upon this subject, and after the reading of some other well-reasoned opinions, it is not probable, we think, that this proposition will ever commend itself to the favorable consideration of that court.

In the case of Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S., at page 268, 13 Sup. Ct. 93, 36 L. Ed. 963, the Supreme Court, Justice Harlan delivering the opinion, said:

"It may be that the stockholders of the plaintiff supposed at the time it became incorporated, and when they made their original investment, that the city would never do what is evidently contemplated by the ordinance of 1889, and it may be that the erection and maintenance of gasworks by the city at the public expense, in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purpose for which they were established; but such considerations cannot control the determination of the legal rights of the parties."

Again, in the same case it is said:

"If parties wish to guard against contingencies of that kind, they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

In Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622, the Supreme Court said:

"We are forbidden to hold that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and same people with water drawn in like manner from a different stream or river."

A very instructive case is the case of North Springs Water Co. v. City of Tacoma, 58 Pac. 773, 47 L. R. A. 214, where it was directly held by the Supreme Court of the state of Washington that the grant of a franchise to a water company, without any words of exclusion or of limitation upon the right of the city, did not preclude the city from subsequently establishing waterworks of its own, although the result would be to destroy the value of the franchise.

Our conclusion is that, if the city was lawfully authorized, under the Constitution and the statutes of the state of South Dakota, to construct and maintain its own waterworks in the way it threatens, and was proceeding to accomplish this end, then neither the franchise nor privilege granted to Kuhn and his assigns, nor any of the provisions of the city's contract with him, nor the investment made thereunder and its threatened loss furnish any tenable ground to invoke the aid of a court of equity to prohibit the city from constructing and operating its own waterworks. State ex rel. Hamilton Gas & Coke Co. v. Hamilton, 47 Ohio St. 52, 23 N. E. 935; Westerly Waterworks Co. v. Westerly (C. C.) 80 Fed. 611; Thomson-Houston Electric Co. v. Newton (C. C.) 42 Fed. 723; Colby University v. Canandaigua (C. C.) 69 Fed. 671; Long v. Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; In re Borough of Millvale, 162 Pa. 375, 29 Atl. 641, 644; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546.

The question remains, has the city the lawful right, under the Constitution and the law, to construct and operate its own plant, and thereby inflict upon the complainant and upon the water company the irreparable injury which must follow its maintenance, and to tax their property to pay a part of the expenses of committing this injury? If its proposed action is in compliance with the Constitution and the law, it is justifiable, and the complainant and the water company are without remedy for the grave loss they must sustain. On the other hand, if its threatened action is in violation of the Constitution of the state, or if it is without lawful authority under the statutes, then its action is wrongful, unjustifiable, and, as the injury which will be inflicted upon the complainant and the water company must be irreparable, this wrongful action furnishes an unanswerable reason for the granting by a court of equity of the relief which they seek.

It is contended that the right of the complainant and the water company to restrain the city from constructing its works and taxing the property of the complainant and the water company, upon the ground that the city has proceeded without authority of the statute, and in violation of the Constitution, may not be litigated in this case, because it is not a cause of action of the complainant, but one brought into the case by the cross-bill of the water company, separate from, and not germane to, the issues presented by the original bill and answer. A cross-bill which presents a matter that is not a subject of litigation between the complainant and the defendants or between the defendant who presents the cross-bill and the complainant, and which does not aid in the determination of any of the issues presented in the original suit, is demurrable, and must be dismissed; but the right here asserted is the right to relief against irreparable damage to the property of the complainant and the property of the water company alike, arising from the alleged illegal construction of the city waterworks and the alleged illegal taxation of the property of both complainant and the water company. It is a cause of action of the complainant, because the depreciation of the property will deprive the complainant of the security for the payment of the bonds, and the increased taxation and damage to the property is clearly alleged in the original bill. Our conclusion is that the question is presented whether or not the contemplated injury to the security of the complainant by the threatened competition and taxation entitles the complainant to relief in case the city is proceeding without authority of law or in violation of the Constitution, and hence is in the position of a wrongdoer.

It now appears that the water company has invested in its waterworks system at Sioux Falls an amount in excess of $481,000; that the property created as a result of this investment has been lawfully acquired and is legally held; that the complainant has an interest in the property and the revenues derivable from the operation of the same to the extent of the indebtedness which the trust deed secures. The water company is the owner of the legal title. This property, being so situated, is entitled beyond question to the protection of the law of the land. No person or corporation may invade

such rights of property as are held by the complainant and the water company, except in pursuance of law. As the establishment and operation of a system of waterworks by the city will practically ruin the security of the complainant and the property of the water company, the serious question in this case is whether the city has proceeded in accordance with the law. If not, the injunction must be issued, because the complainant and the water company have no adequate remedy at law. It must be conceded that where a municipality is prohibited from incurring any indebtedness for the construction of a system of waterworks except under certain conditions, then that municipality has no power to construct a system of waterworks by means of the incurring of an indebtedness if these conditions do not exist. In other words, where a city has no power to incur an indebtedness for a particular purpose, it has no power to accomplish that purpose, or any part thereof, by means of the incurring of an indebtedness. Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; City of Helena v. Mills, 94 Fed. 916, 36 C. C. A. 1; City of Walla Walla v. Walla Walla Water Co., 19 Sup. Ct. 77, 43 L. Ed. 341; Grant v. City of Davenport, 36 Iowa, 396; City of East St. Louis v. St. Louis Gaslight & Coke Co., 98 Ill. 415, 38 Am. Rep. 97; Merrill Railway & Lighting Co. v. City of Merrill, 80 Wis. 358, 49 N. W. 965; Prince v. City of Quincy, 105 Ill. 138, 44 Am. Rep. 785; Foland v. Town of Frankton, 142 Ind. 546, 41 N. E. 1031; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; Wade v. Borough of Oakmont (Pa.) 30 Atl. 959; Keihl v. City of South Bend, 76 Fed. 921, 22 C. C. A. 618, 36 L. R. A. 228.

In the case of Loan Association v. Topeka, 20 Wall. 660, 22 L. Ed. 455, the Supreme Court says:

"It follows that in this class of cases the right to contract must be limited by the right to tax, and if, in the given case, no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it."

See, also, Sutherland-Innes Co. v. Village of Evart, 86 Fed. 597, 30 C. C. A. 305.

We now have to consider the contention of counsel for the complainant and the water company as to whether or not the city is proceeding according to law in its attempt to construct, maintain, and operate a system of waterworks of its own. Its power, if it has any, comes from the Constitution and laws of the state of South Dakota. Section 4, art. 13, of the Constitution of the state of South Dakota, adopted on the admission of the state into the Union, reads as follows:

"Sec. 4. The debt of any county, city, town, school district or other subdivision, shall never exceed five per centum upon the assessed value of the taxable property therein. In estimating the amount of indebtedness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of this Constitution shall be included."

In the year 1896 said section 4 of article 13 was amended to read as follows:

"Sec. 4. The debt of any county, city, town, school district, civil township, or other subdivision, shall never exceed five (5) per centum upon the assessed value of the taxable property therein. In estimating the amount of indebted-

ness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of this constitution shall be included: provided, that any county, municipal corporation, civil township, district or other subdivision may incur an additional indebtedness not exceeding ten per centum upon the assessed value of the taxable property therein for the purpose of providing water for irrigation and domestic uses: provided further, that no county, municipal corporation or civil township shall be included within any such district or subdivision without a majority vote in favor thereof of the electors of the county, municipal corporation, or civil township as the case may be, which is proposed to be included therein, and no such debt shall ever be incurred for any of the purposes in this section provided, unless authorized by a vote in favor thereof of a majority of the electors of such county, municipal corporation, civil township, district or subdivision incurring the same."

In the year 1902 the same section was again amended to read as follows:

"Sec. 4. The debt of any county, city, town, school district, civil township or other subdivision, shall never exceed five (5) per centum upon the assessed valuation of the taxable property therein for the year preceding that in which said indebtedness is incurred. In estimating the amount of the indebtedness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of the Constitution shall be included. Provided, that any county, municipal corporation, civil township, district or other subdivision may incur an additional indebtedness not exceeding ten per centum upon the assessed valuation of the taxable property therein for the year preceding that in which said indebtedness is incurred, for the purpose of providing water and sewerage for irrigation, domestic uses, sewerage and other purposes; and * * * provided further, that no county, municipal corporation, civil township, district or subdivision, shall be included within such district or subdivision without a majority vote in favor thereof of the electors of the county, municipal corporation, civil township, district or other subdivision, as the case may be, which is proposed to be included therein, and no such debt shall ever be incurred for any of the purposes in this section provided, unless authorized by a vote in favor thereof by a majority of the electors of such county, municipal corporation, civil township, district or subdivision incurring the same."

The indebtedness for the construction of the system of waterworks by the city was incurred in 1903; that being the year when the bonds were issued. In that year, and when the bonds were issued, the city was indebted, in round numbers, in the sum of $391,000. Its assessed valuation for the year 1902 was the sum of $2,739,598. The assessment of 1902 must be taken in considering the debt limit of the city, for the reason that section 4 of the Constitution, herein referred to, as amended in 1902, limits the indebtedness for water purposes to 10 per centum upon the assessed value of the taxable property therein for the year preceding that in which said indebtedness is incurred. This indebtedness would be nearly 15 per cent. of the assessed value for the year 1902 and over 9 per cent. above the limit for general purposes mentioned in section 4. Adding to this indebtedness the $210,000 of waterworks bonds, and it makes an indebtedness of over 21 per cent.; and if the city had a right, as is claimed by counsel for the city, to impose a tax of 10 per cent. upon the assessed valuation, regardless of existing indebtedness, and the whole amount of 10 per cent. was voted, there would be an indebtedness of nearly 25 per cent. on the assessed valuation, which is enough to make one pause. If this power exists to impose taxes in the city

of Sioux Falls, one may well consider whether or not one is fortunate to own property therein. If the existing indebtedness of the city is to be considered, then the issuance of the waterworks bonds was clearly in excess of any authority possessed by the city, and it was wholly without power to incur the indebtedness; and, if wholly without power to incur the indebtedness, it had no power at all; and, unless we stray from the plain language of the Constitution and wander into the realms of speculation, we are of the opinion that the power did not exist on the part of the city to incur an indebtedness of 10 per cent. on the assessed valuation of the city for 1902 for water purposes, regardless of its then existing indebtedness. The language of the Constitution is a plain, prohibitive limitation upon the power of municipalities to incur an indebtedness for the purpose mentioned. It should receive a strict construction, or else it will serve no purpose. As the language of section 4 of the Constitution is plain and unambiguous, where else shall we go to find its meaning? Section 4 as it originally stood in the Constitution, provided that the debt of any county, city, town, school district, or other subdivision should never exceed 5 per centum upon the assessed valuation of the taxable property therein. It also provided that in estimating the amount of indebtedness which a municipality or subdivision may incur the amount of indebtedness contracted prior to the adoption of this Constitution should be included. Here we have a positive limitation of 5 per centum on the assessed valuation of the taxable property in such municipal corporations, including existing indebtedness. In 1896 an amendment of said section was adopted by the people, providing that any county, municipal corporation, civil township, district, or other subdivision may incur an additional indebtedness, not exceeding 10 per centum upon the assessed valuation of the taxable property therein, for the purpose of providing water for irrigation and domestic uses, and in estimating the amount of indebtedness the indebtedness already existing is included. The question now arises as to what meaning should be given to the word "additional" in the amendment. Additional to what? There was already a 5 per cent. limitation for general purposes in the section, and the natural, logical, and ordinary meaning that would be given to the word "additional" would be additional to the 5 per cent. already limited; in other words, that the indebtedness of this municipal corporation might ascend to the limit of 5 per cent. for general purposes, and might continue to ascend to 15 per cent. for the purpose of supplying water. If the members of the Legislature who proposed, and the people who adopted, this amendment, intended that the 10 per cent. should be additional to the already existing indebtedness of said corporations, why did they not say so? It would have been a simple thing to do, and the fact that it was not done is strong argument that they did not have any such intention. If the people, in their Constitution, have plainly and without ambiguity declared the law, this court has no authority to guess and surmise what the people intended. Their intention must be gathered from what they said. There are several reasons which occur to us that are convincing that section 4, as amended, means just what it says.

First. The members of the Legislature who proposed, and the

people of the state who adopted, the amendment, already knew that the section contained the 5 per cent. limitation. Now, the members of the Legislature and the people must be presumed to have acted intelligently, and with a knowledge as to what they were doing. They could vote intelligently upon the proposition as to whether 10 per cent. should be added to the 5 per cent. limitation for water purposes; but if we adopt the contention of counsel on the part of the city that they intended to fix a 10 per cent. limitation for water purposes upon the assessed valuation of property within the municipality, regardless of the existing indebtedness, how could they have acted or voted intelligently? No member of the Legislature knew what the existing indebtedness of any particular municipality or district referred to in said section amounted to, and yet we are urged to hold that they intended to limit the power to tax for water purposes to 10 per cent. upon the assessed valuation, regardless of existing indebtedness. For example, take the city in this case. Its indebtedness in 1903 appears to have been nearly 15 per cent. of its assessed valuation. To adopt the construction contended for by the city, this amendment would authorize the city of Sioux Falls to have incurred a 10 per cent. indebtedness in addition to the 15 per cent. That is, although the Constitution had limited its indebtedness for general purposes to 5 per cent., and for water purposes to 10 per cent. additional, it could lawfully impose a taxation of 25 per cent., so that if, as contended by counsel for the city, the 10 per cent. limitation is regardless of existing indebtedness, we have a limitation of 25 per cent. Of what account are constitutional limitations upon the power to incur indebtedness if this state of affairs can exist?

It is contended that the members of the Legislature who proposed, and the people who voted upon, the amendments both of 1896 and 1902, must have known that many municipalities had already exceeded the 5 per cent. constitutional limitation, and that they amended the section with that knowledge. We think this proves too much. Is it to be presumed that the members of the Legislature who proposed, and the people who voted upon, these amendments, had no care whatever as to whether any municipality had exceeded this 5 per cent. limitation? If they knew that the city of Sioux Falls was indebted to an extent amounting to 15 per cent. of the assessed valuation of its taxable property, did they intend to give its officers the authority to confiscate all the property of the citizens of Sioux Falls by increasing the 15 per cent. to 25 per cent.? We should hesitate very long before we should find that the members of the Legislature who proposed, and the people who voted upon, the amendments intended any such result.

It is contended that to say that the 10 per cent. limitation of the amendment was to be additional to the 5 per cent. limit would have conferred unequal benefits upon the different municipalties and other subdivisions mentioned in the amendments. The only presumption for courts to indulge in in construing constitutions and statutes is to presume that the members of the Legislature or the people intended no violation of law when they acted, nor intended to ratify or indorse violations of law. If we must presume that they knew

anything about the matter, we must presume that they knew the limitation was 5 per cent., and that they did not know that municipilities and other subdivisions had already violated the Constitution.

There is another reason, we think, why the amendments should be construed as a limitation to 10 per cent. in addition to the 5 per cent. in the general section, and that is, section 17 of article 6 of the Constitution of South Dakota reads as follows:

"No tax or duty shall be imposed without consent of the people, or their representatives in the Legislature, and all taxation shall be equal and uniform."

Different sections of a Constitution must be construed, if possible, with reference to the whole Constitution. They must be so construed as to give effect to all sections of the instrument. Here is a mandate of the people, expressed in their Constitution, that all taxation shall be equal and uniform. By section 4, art. 13, of the Constitution, we have a limitation of 5 per cent. If we construe the amendment as giving an additional 10 per cent. for waterworks purposes to the 5 per cent., we have, so far as the law is concerned, an equal and uniform law of taxation. Property may be taxed for general purposes to the limit of 5 per cent. The indebtedness may ascend for water purposes to 15 per cent. Now, if the contention that the 10 per cent. limitation is exclusive of existing indebtedness shall obtain, then, notwithstanding the limitation in section 4 of 5 per cent., and a 10 per cent. limitation, the city of Sioux Falls may impose a tax upon its citizens of nearly 25 per cent. This certainly would create a great lack of uniformity among the several municipalities of the state in regard to the limit of their indebtedness. The absolute absurdity of the contention appears when we consider the language of section 4, where it appears that the municipalities therein mentioned shall never exceed 5 per cent., and then say that a city that has violated this section by an excess of 10 per cent. over the 5 per cent. limit may still raise the indebtedness 10 per cent. more. This would make the proviso destroy the main section, for it would directly sanction the unlawful indebtedness already existing over 5 per cent. Instead of wandering from the plain chart made by the people into the realms of speculation in order to find the meaning of the section, let us look at the chart itself. There the meaning is clear. The limitations upon the power of the people to tax themselves should not be construed so as to destroy the limitations themselves. It will be profitable at this point to quote from the language of the Supreme Court in Lake County v. Rollins, 130 U. S. 670, 9 Sup. Ct. 652, 32 L. Ed. 1060:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution and the people who voted it into existence meant exactly what it says? At the first glance, its reading produces no impression of doubt as to its meaning. It seems all sufficiently plain, and in such case there is a well-settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself. And when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for the meaning beyond the

instrument. To get at the thought or meaning expressed in a statute a contract, or a Constitution, the first resort, in all cases, is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instruments, then that meaning, apparent on the face of the instrument, must be accepted; and neither the courts nor the Legislature have the right to add to it or take from it. Newell v. People, 7 N. Y. 9, 97; Hills v. Chicago, 60 Ill. 86; Dean v. Reid, 10 Pet. 524, 9 L. Ed. 519; Leonard v. Wiseman, 31 Md. 201, 204; People v. Potter, 47 N. Y. 375; Cooley, Const. Lim. 57; Story on Const. § 400; Beardstown v. Virginia, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or implied, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. United States v. Fisher, 2 Cranch, 358, 399, 2 L. Ed. 304; Doggett v. Florida Railroad, 99 U. S. 72, 25 L. Ed. 301. There is even stronger reason for adhering to this rule in the case of a Constitution than in that of a statute, since the latter is passed by a deliberate body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while Constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."

In Law v. People, 87 Ill. 385, the Supreme Court of Illinois said:

"But should it work hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the Constitution. The liberty of the citizen and his security in all his rights in a large degree depend upon the rigid adherence to the provisions of the Constitution and the laws and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. Then the will—it may be the unbridled will—of the judge would usurp the place of the Constitution and the laws, and the violation of the provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. Nor are we justified in resorting to strained construction or astute interpretation to avoid the intention of the framers of the Constitution, or the statutes adopted under it, even to relieve against individual or local hardships. If unwise or hard in their operation, the power that adopted can repeal or amend and remove the inconvenience. The power to do so has been wisely withheld from the courts, their function only being to enforce the laws as they find them enacted."

In opposition to our view of the meaning of section 4 of the Constitution we are cited to the cases of Wells v. City of Sioux Falls (S. D.) 94 N. W. 425; People v. City Council (Utah) 64 Pac. 460; Graham v. Spokane (Wash.) 53 Pac. 714; Smith v. City of Seattle (Wash.) 65 Pac. 612.

Wells v. City of Sioux Falls is a decision of the Supreme Court of South Dakota rendered April 7, 1903, and in which decision the said court construes section 4 of article 13, now under consideration, with reference to the point as to the meaning of the additional 10 per cent. limitation. The court in that case arrives at the conclusion that the 10 per cent. limitation is independent of the 5 per cent. limitation and confers authority to tax for water purposes up to the limit of 10 per cent. of the assessed valuation of taxable property in the municipalities mentioned, irrespective of existing indebtedness, whether within the limit of 5 per cent. or in excess thereof. We

may admit that where, as a general proposition, the construction or validity of a state statute does not involve rights acquired upon the faith of the statute or earlier decisions, it is the duty of the federal courts to accept the decisions of the higher court of the state in regard to the construction of state statutes; but in the case at bar the rights of complainant and the water company became vested long prior to the decision in the Wells Case, and the original bill and original cross-bill were filed long prior to the commencement of or decision in the Wells Case, and we are bound in this proceeding to exercise our own independent judgment as to the meaning of the constitutional provision in question. Burgess v. Seligman, 107 U. S. 33, 2 Sup. Ct. 10, 27 L. Ed. 359; Bartholomew v. City of Austin, 85 Fed. 359, 29 C. C. A. 568; City of Ottumwa v. City Water Supply Co., 119 Fed. 324, 56 C. C. A. 219, 59 L. R. A. 604; Speer v. Board County Commissioners, 88 Fed. 760, 32 C. C. A. 101; Pleasant Township v. Ætna Life Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864; Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Jones v. Hotel Co., 86 Fed. 370, 30 C. C. A. 108; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778; Columbia Ave. Sav. Fund Co. v. City of Dawson (C. C.) 130 Fed. 166. It would cause this opinion to become too long to quote extracts from the cases cited, but they firmly establish the principle here laid down. It seems to us that the construction placed upon the amendment by the Supreme Court of South Dakota would entirely obliterate the word "additional" from the section, and, with due respect to the judgment of the Supreme Court of South Dakota, we cannot follow its interpretation of the section. The case of Wells v. City of Sioux Falls we have the right to characterize as a friendly litigation for the purpose, no doubt, of obtaining the opinion of the Supreme Court as to the proper interpretation to place upon section 4, and also for the purpose of having an interpretation placed upon it which was favorable to the issuance of the bonds. The record shows that the summons was issued and the complaint verified on January 16, 1903, and the answer was duly verified and filed on the 17th day of the same month. A demurrer was interposed by plaintiff in that suit to the answer of the defendant, and the circuit court for Minnehaha county, S. D., overruled the demurrer the same day on which the answer was filed. An undertaking on appeal was waived by stipulation of counsel, and on the same day, to wit, the 17th day of January, 1903, the case was appealed, and the record certified to the Supreme Court of the state, and on the 7th day of April, 1903, the judgment of the Supreme Court was rendered affirming the judgment of the court below. We are well aware that cases in courts may be expedited, but as long as the question to be decided was involved in this action, what need was there of so much haste? Litigants in the federal tribunals cannot under the circumstances of this case be foreclosed in such a manner.

As to the proper construction to be placed upon constitutional limitations, the following cases can be read with profit: Dudley v. Board of Commissioners, 80 Fed. 672, 26 C. C. A. 82; People v. May, 9 Colo. 80, 10 Pac. 641; Sutliff v. Commissioners, 147 U. S. 230, 13

Sup. Ct. 318, 37 L. Ed. 145; Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060.

For the reasons thus stated, we are of the opinion that, as the city of Sioux Falls had an existing indebtedness, at the time the so-called waterworks bonds were issued, of nearly 15 per cent. of the assessed valuation of taxable property in said city for the year 1902, said city had no power to incur the indebtedness, and therefore no power to construct and maintain a system of waterworks.

We are also of the opinion that the people of the city of Sioux Falls never voted upon the proposition, as required by the Constitution, as to whether they would incur an indebtedness in the sum of $210,000 for the construction of a system of waterworks in said city, for the reasons (a) that no election was held for the purpose of voting upon said proposition after the adoption of the amendment to the Constitution of 1902; and (b) that, if the election held November 5, 1901, would authorize the issuance of bonds after the adoption of the constitutional amendment of 1902, then that the people never voted upon the proposition as to whether they would incur an indebtedness to construct waterworks, for the reason that the proposition submitted to them was whether the city of Sioux Falls should issue its bonds to the amount of $210,000 for the purpose of constructing, equipping, maintaining, and operating or purchasing a system of waterworks to provide water for domestic uses. Section 4 of article 13, as it was amended in 1902, contained this provision, as already quoted in the statement of facts:

"Provided further, that no county, municipal corporation, civil township, district or subdivision shall be included within such district or subdivision without a majority vote in favor thereof of the electors of the county, municipal corporation, civil township, district or other subdivision, as the case may be, which is proposed to be included therein, and no such debt shall ever be incurred for any of the purposes in this section provided, unless authorized by a vote in favor thereof by a majority of the electors of such county, municipal corporation, civil township, district or subdivision incurring the same."

The same section was also amended at the same time by changing the language of the first proviso so that the limit of indebtedness should be 10 per cent. upon the assessed valuation of the taxable property therein for the year preceding that in which said indebtedness is incurred, while the proviso of the amendment adopted in 1896 said nothing about the year in which the assessed valuation should be taken, but from its language it would mean the assessed valuation of taxable property in the year in which the indebtedness was incurred, if an assessment had been made. This amendment to section 4, art. 13, in 1902, operated prospectively, and required legislative action in order to carry out its provisions; but the prohibitory limitation that the 10 per cent. limit should only be expended for the purposes mentioned, unless authorized by a vote in favor thereof by the majority of the electors of such county, municipal corporation, civil township, district, or subdivision incurring the same, was self-executing, and operated directly upon all municipalities or subdivisions mentioned in the section, so that from and after the date of the adoption of the amendment no indebtedness could be incurred unless it was authorized by a vote, as stated in the amendment. The

amendment of 1902 changed the language as to the time when the assessed value should be taken; in other words, a person inquiring in regard to the bonds issued by the city in 1903 would be bound to know of the constitutional limitations contained in section 4 of article 13. He would then inquire whether or not any vote had ever been taken to authorize the bonds subsequent to the amendment of 1902. There could be only, upon this record, one answer to that question, and that would be "No"; that the election was held in November, 1901.

We think the case of Norton v. Brownsville, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. Ed. 774, is decisive of this question. In delivering the opinion of the court in the case cited Chief Justice Fuller says:

"It is clear that the inhibition imposed by section 29 of the Constitution of 1870 operates directly upon the municipalities themselves, and is absolute and self-executing. These cases [referring to several cases cited] sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the Legislature and of a constitutional inhibition upon the municipality itself. In the former case past legislative action is not necessarily affected, while in the latter it is annulled."

The amendment to the Constitution of 1902 requires that, before the 10 per cent. limit of indebtedness can be incurred, it must be authorized by a majority vote of the electors. The law under which the city took the vote in 1901, being chapter 53, p. 62, Sess. Laws S. D. 1899, required that a majority of the electors of such city should be determined by the vote cast for the mayor of the city at the last preceding election for such officer; while section 4 of article 13, as amended in 1902, and as such language has been construed by the Supreme Court of the United States, declared a majority of the electors should be a majority of those present and voting at the election. In the case of Norton v. Brownsville, supra, the Legislature of the state of Tennessee had passed a special act allowing the city of Brownsville to vote bonds, and the city had voted bonds unanimously; but before the bonds were issued the people adopted a new Constitution, which, in addition to the former provisions authorizing the issue of such bonds, required a three-fourths majority in their favor. It was contended that, the vote being unanimous, the requirement of the Constitution was satisfied; that the act under which the bonds were voted was a private or special act, and therefore was taken out of the general rule as to repeals; that the Constitution repealed only what was repugnant, and left the balance in force; that under another provision of the Constitution, which declared that all laws not inconsistent with the Constitution should remain in force, only inconsistent provisions were repealed. But the Supreme Court held that the inhibition was upon the action of the municipalities, and, unlike inhibition or limitation upon Legislatures, must be strictly construed, and in that case, although bonds had been previously voted by unanimous vote, the court held them void for the reason that they had not been authorized in accordance with the provisions of the new Constitution, which only required a three-fourths vote. We see no reason why the case cited does not rule the law in this case, and, when applied to the facts, it renders wholly

nugatory the vote taken in November, 1901, so far as said election shall be invoked as authority to issue bonds in 1903. The following cases also sustain the view here expressed: Aspinwall v. Commissioners of County of Daviess, 22 How. 364, 16 L. Ed. 296; Town of Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. Ed. 628; Wadsworth v. Supervisors, 102 U. S. 534, 26 L. Ed. 221; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; Concord v. Robinson, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. Ed. 885; Pearsall v. Great Northern Ry., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; Falconer v. Buffalo & J. R. Co., 69 N. Y. 491; Covington & L. R. Co. v. Kenton County Court, 12 B. Mon. 144; Fidelity Trust & Safety Vault Co. v. Lawrence Co., 92 Fed. 576, 34 C. C. A. 553; Wagner v. Meety, 69 Mo. 150; State ex rel. Wilson v. Garroutte, 67 Mo. 445; List v. City of Wheeling, 7 W. Va. 501; Cumberland & O. R. Co. v. Barren County Court, 10 Bush, 604.

We now come to the submission of the question of issuing bonds to the voters of the city of Sioux Falls. The election in November, 1901, was held in pursuance to chapter 53, p. 62, Sess. Laws S. D. 1899. Section 1 of said chapter 53 provides:

"That there is hereby granted to cities of the first class the right and power to issue bonds for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the purpose of providing water for domestic uses."

Section 2 of the same chapter provides:

"The city council of any such city may, by resolution passed by a majority of the aldermen-elect at any regular meeting of such city council or special meeting called for that purpose, call a special election and submit the question of the issuance of such bonds to the electors thereof."

Said section further provides that such resolution shall set forth, among other things, the purposes for which they are to be issued. By reference to section 2 of the ordinance passed by the city in October, 1901, the following language is found:

"The question submitted to the legal voters of said city as provided in section 1 shall be as follows: Shall the city of Sioux Falls issue its bonds to the amount of $210,000 for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the uses and purposes of said city and for providing water for domestic uses?"

In the resolution calling the special election the following language is found:

"That a special election be held on the 5th day of November, A. D. 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether the said city of Sioux Falls shall issue its bonds for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks to provide water for domestic uses."

The notice of special election contained the following language:

"That notice is hereby given that a special election will be held on Tuesday, November 5, 1901, for the purpose of submitting to the legal voters of the city of Sioux Falls, South Dakota, the question whether said city of Sioux Falls shall issue its bonds to the amount of $210,000, to run twenty years from the date of their issuance and to bear interest not to exceed 5% per annum; said bonds to be issued for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks to provide water for domestic uses."

It will be plainly seen that the city under the act of 1899 had the power to issue bonds, provided they complied with the constitutional requirements, for the purpose of constructing, equipping, maintaining and operating or purchasing a system of waterworks for the purpose of providing water for domestic uses. Manifestly, the city could not construct and maintain a system of waterworks and also purchase a system at the same time. The power conferred is in the alternative, but the question, as appears in the ordinance, resolution, and notice of special election, was submitted to the voters in the language of the law in the alternative. It thus results that no voter has had the privilege of voting upon the question as to whether he was in favor or not in favor of issuing bonds in the sum of $210,000 for constructing, equipping, and maintaining a system of waterworks. He might have been in favor of the construction of the waterworks system and against purchasing a system, or he might have been in favor of purchasing a system and against constructing one; but he could not vote for one without he voted for both, and the result is that he cannot be said to have voted upon either proposition.

The case of Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374, 49 N. E. 335, is a case directly in point, and we agree thoroughly with the reasoning of the learned court in its opinion filed in that case, and we think we cannot do better than quote from the opinion in that case as follows:

"There is, we think, another fatal objection to this resolution. It declares the necessity for the issue and sale of the city's bonds for the purpose of the purchase and erection of waterworks, and provides for the submission of the question of so issuing and selling the bonds, at the election to be held under the resolution, for the purposes thus declared. The power conferred by the statute on the council is to issue and sell the bonds of the municipality for the erection or purchase of waterworks. The two purposes are entirely distinct. The purchase of waterworks necessarily implies that they have already been erected, and are a present existing property, the subject of sale and purchase; while the erection of waterworks can only have reference to their future construction. That a municipal corporation may own two plants, one acquired by purchase and another erected by it, or, after having acquired one in the former mode, may proceed to erect a new plant, is not questioned. But their acquisition by these two different methods requires different proceedings. And it is the policy of the statute that the proposition for each separate improvement shall stand on its own merits, unaided by combination with any other measure, and be so acted upon by the council in the first instance, and then, if adopted, be so submitted for approval by the electors that each may be voted upon as a separate measure, uninfluenced by combination with others. The reason is that the requisite majority of the council and of the electors may be in favor of one measure and against the other or against each; while by uniting them as one, and submitting them to be acted upon in that form, the members of council and the electors are required to vote for or against both propositions combined, or abstain from voting at all, and thus denied the right to express their will with respect to each. A resolution declaring the necessity for the issue and sale of municipal bonds for the purchase and erection of waterworks is not a resolution for either purpose separately, but for both purposes combined; nor is a vote in favor of issuing bonds for both purposes a vote in favor of either separately. And the attempt, in the proceedings subsequent to the resolution, to eliminate the declared purpose to issue bonds for the purchase of waterworks, and thereafter carry the measure to completion as one for the erection of waterworks only, does not obviate the objection. The subsequent proceedings must conform to the resolution. It cannot

be altered or amended by them. A substantial departure from the resolution leaves the proceedings without foundation to support them. A resolution declaring a necessity for one purpose does not authorize proceedings for the accomplishment of another; nor does a resolution declaring a necessity for two or more purposes combined authorize proceedings for the accomplishment of any one of them separately."

The proposition stated in the language quoted seems to state the true rule, and in fact there seems to be no conflict of authority upon the proposition. The following cases may be cited in further support thereof: McBryde v. City of Montesano (Wash.) 34 Pac. 559; Supervisors of Fulton County v. Mississippi & Wabash R. R. Co., 21 Ill. 338; People v. County of Tazewell, 22 Ill. 147; Village of North Tonawanda v. Western Transportation Co., 1 Sheld. 371; Hensly v. City of Hamilton, 3 Ohio C. Ct. 201; Jones v. Hurlburt, 13 Neb. 125, 13 N. W. 5; Garrigus v. Board of Commissioners of Parke Co., 39 Ind. 66; Bronenberg v. Board of Commissioners of Madison County, 41 Ind. 502; Finney v. Lamb, 54 Ind. 1; Lewis v. Commissioners of Bourbon County, 12 Kan. 186; Springfield & Illinois South-Eastern Ry. Co. v. County Clerk of Wayne County, 74 Ill. 27; City of Leavenworth v. Wilson (Kan.) 76 Pac. 400.

The discussion of the proposition affecting the power of the city to incur indebtedness for the construction and operation of a system of waterworks could be further extended, but at the risk of making this opinion, already quite lengthy, more so. We believe that sufficient has been stated to present plainly the views of the court. It seems to us that the failure to vote upon the issuance of bonds under the amendment of 1902, the submission of the question of issuing the bonds in the alternative at the election of 1901, and the fact that the city of Sioux Falls, in 1903, was already indebted nearly 15 per cent. of the assessed valuation for 1902, shows an absolute want of power in the city to construct, operate, and maintain a system of waterworks of its own; it having, under the law, and the way the city proceeded, no power to incur an indebtedness therefor.

The result is that a perpetual injunction must issue against the threatened construction and operation of a system of waterworks by the city.

The counsel for the respective parties to this litigation have presented with marked diligence and eminent ability every argument which occurs to us that could lawfully be urged in support of the claims of their respective clients. The evidence, the arguments, and the citations of authority have been considered by the court, not without some study, deliberation, and reflection. For the reasons which have now been stated, the Constitution of the state of South Dakota and the law of the land leave us, in our opinion, no alternative but the announcement of the conclusion which has been reached. Fortunately the result which the law compels appears to be just and equitable. It entails no substantial additional loss or injury upon any of the parties to the controversy. The bond which was given by the water company when the preliminary injunction was issued secures to the city a restoration to its treasury of all the moneys it has expended in the construction of its contemplated works. The citizens of the municipality may be relieved from the imminent bur-

den of an increase of taxation, already too heavy, and the complainant and the water company from the threatened destruction of a property and business lawfully acquired in the faith that the Constitution and the law would be obeyed.

UNITED STATES v. BREESE.

(District Court, W. D. North Carolina. July, 1904.)

1. NATIONAL BANKS—EMBEZZLEMENT BY OFFICERS OR AGENTS—ELEMENTS OF OFFENSE.

The crime of embezzlement from a national bank by an officer, clerk, or agent, within Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], involves two general elements: First, a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, the wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others.

2. SAME—ABSTRACTION BY OFFICER OR AGENT.

Abstraction, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], is the act of one who, being an officer, clerk, or agent of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished.

3. SAME—MISAPPLICATION OF FUNDS BY OFFICER OR AGENT.

Willful misapplication of the moneys, funds, or credits of a national bank, within Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], consists in their misapplication by an officer, clerk, or agent of the bank, made willfully and wrongfully, and with intent to injure or defraud the association or some other person or company, and their conversion to his own use, or to the use of some one other than the bank. No previous lawful possession is necessary to constitute the crime.

4. SAME—OFFENSES INCLUDED IN EMBEZZLEMENT.

The crime of embezzlement by an officer, clerk, or agent of a national bank, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], necessarily includes the offenses of abstraction and willful misappropriation, but either of the latter offenses may be committed without embezzlement.

5. SAME—INTENT TO INJURE OR DEFRAUD.

The intent to injure or defraud, made by Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], an element of the offenses of embezzlement, abstraction, or willful misapplication of funds by an officer, clerk, or agent of a national bank, need not necessarily have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done.

6. CRIMINAL LAW—BURDEN AND SUFFICIENCY OF PROOF.

While the burden of proof rests upon the prosecution in a criminal case from the beginning to the end of the trial, it is successfully met whenever, from all the evidence introduced in the case, and taking into consideration the presumption of innocence in favor of the accused, the jury are satisfied of his guilt beyond a reasonable doubt.

7. SAME—EVIDENCE OF INTENT—OTHER TRANSACTIONS.

On the trial of an officer of a national bank for embezzlement, abstraction, and misapplication of funds, under Rev. St. § 5209 [U. S. Comp. St.

1901, p. 3497], which makes an intent to injure or defraud an element of either offense, evidence of other transactions by defendant of similar character is admissible, but may be considered by the jury only on the question of the knowledge and intent of the accused when he committed the acts charged in the indictment.

8. NATIONAL BANKS—EMBEZZLEMENT BY OFFICER—DEFENSES.
An officer of a national bank is not guilty of embezzlement, abstraction, or willful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committee, but he is only protected by such arrangement where it was made by those representing the bank in good faith, and in the supposed interest of the bank.

9. CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER.
The good character of a defendant, proved in a criminal case, is evidence in his favor, which goes to strengthen the presumption of his innocence.

Indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497]. On charge to the jury.

See 106 Fed. 680, 45 C. C. A. 535; 108 Fed. 804, 48 C. C. A. 36.

The defendant, William E. Breese, was president and director of the First National Bank of Asheville, N. C., and was indicted for violation of section 5209, Rev. St. The indictment contained 66 counts, and charged the defendant with embezzlement, abstraction, and willful misapplication of the moneys, funds, and credits of the bank. Defendant was found guilty of abstraction and willful misapplication.

A. E. Holton, U. S. Atty., and A. H. Price, Asst. U. S. Atty.

H. C. Jones, F. I. Osborne, J. S. Adams, Thos. S. Rollins, and Chas. A. Moore, for defendant.

KELLER, District Judge (orally charging jury). Gentlemen of the jury, when I assumed the position that I now hold, I took upon myself a solemn obligation to the effect that I would administer justice without respect to persons, and do equal right to the poor and to the rich, and that I would faithfully and impartially discharge all the duties incumbent upon me, according to the best of my ability and understanding, agreeably to the Constitution and laws of the United States. It is with a reverent spirit, and with the idea of fulfilling that obligation to the best of my ability, that I approach this last and most important duty of mine in connection with this long and important trial. The time is fast approaching when you, too, will be called upon to discharge the last and most important duty that you have in regard to this trial.

The office of the jury is an ancient, honorable, and highly important one. To it is committed the sole and final judgment of the facts of the case. This is no idle fiction of law, and I desire to emphasize the point that you, gentlemen, are the sole judges of the facts; and, while I shall not intentionally intimate any opinion whatever upon any disputed matter of fact in this case, yet, if I should inadvertently do so, I desire that it shall not influence your action in the slightest degree. You are sworn to well and truly try the defendant, and a true verdict render according to the evidence, and the tenor of the oath indicates the

¶ 9. See Criminal Law, vol. 14, Cent. Dig. § 840.

frame of mind in which you should approach your duties. No prior impressions, no public clamor against the defendant, no pity or sympathy for him, or for those whom his acts may be alleged to have injured, should for one moment have place in your minds; but calmly, dispassionately, as citizens of the United States, discharging a most solemn duty of citizenship, sworn to render a true verdict, you should examine and weigh the evidence in this case in the light of the instructions given you as to the law in this charge, and let your lips utter the verdict that your honest thought inspires.

As I have said, gentlemen, I am sworn to discharge my duty according to the best of my abilities, and shall give you in this charge the law applicable to this case, as I understand it; and it is your duty to receive it as the law of the case, and to apply it to the facts as you believe them to be.

It is the ordinary practice, and is perhaps wise, that the last word to the jury should be from the court. Counsel, in the earnestness of endeavor to serve well their clients, press their respective contentions, enforced by passionate appeal and ingenious argument; and, while it is right and proper for the jury to consider and weigh these arguments of counsel, in so far as they are based on the evidence, yet a last, dispassionate statement of the considerations of law which must guide the jury in their determination of their judgment upon the facts of the case seems wise and right. And at this juncture I take occasion to say that counsel on both sides of the case, first for the defendant, and then for the government, referred in their arguments to matters connected with the former trials of this case. I desire to withdraw these remarks from the consideration of the jury, and to say to you that you are trying this case and are to try it just as if it were being heard for the first time, and any considerations of former trials are not before you, and are not to be considered by you.

Before adverting at all to the indictment in this case, I desire to call your attention to one or two general and fundamental rules of law which are applicable to all cases where a brother man is tried for the commission of a criminal offense:

First. Under the law of our land, every person accused of crime is presumed to be innocent; and I instruct you in this case that the defendant is presumed to be innocent of the charges in the indictment, and that this presumption continues in his favor throughout the trial, the same as though it had been testified to as a matter of evidence, and it can only be overcome by evidence which satisfies you beyond a reasonable doubt of the defendant's guilt.

Second. The burden of proof is on the government to satisfy your minds, by legal and competent evidence, "beyond a reasonable doubt," of the guilt of the defendant upon one or more of the offenses charged in the indictment; and the evidence in the case must be so conclusive that, taking it all together, it cannot be reasonably reconciled with the theory of the defendant's innocence.

A reasonable doubt is an honest, substantial doubt, actually existing in your minds, and arising either from evidence favorable to the defendant, or from a want of evidence on behalf of the government. It is not merely such a doubt as may be conjured up in the mind of

one desirous of escaping the responsibility of decision, or such as may be engendered by pity or sympathy for the accused.

The indictment in this case is drawn under the provisions of section 5209 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3497], which reads as follows:

"Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

There are, as you will observe, a number of distinct offenses enumerated in this section, but in the indictment in this case only three of these have been charged against the defendant, William E. Breese. The defendant is charged with having (1) embezzled, (2) abstracted, and (3) willfully misapplied moneys, funds, and credits of the First National Bank of Asheville, with intent to injure and defraud the association and other persons to the grand jurors unknown. The indictment contains sixty-six counts, founded upon twenty-two separate transactions, each of which has been made the subject of three separate counts—one for embezzlement, one for abstraction, and one for willful misapplication of the moneys, funds, or credits of the bank. Thus the first count charges the defendant, as president of the bank, with having on January 7, 1897, embezzled the sum of $351 of the moneys, funds, and credits of the bank, and converted the same to his own use, with intent to injure and defraud the First National Bank of Asheville, and other persons to the jurors unknown. The second count charges the abstraction of the same amount on the same day by means of a check drawn by the defendant on the First National Bank of Asheville to the order of "Cash Memo." The third count charges the willful misapplication of the same amount on the same day, and by the same means. I have kept a memorandum of the charges made in the counts, and, if I have it correct, the remaining counts are, in substance, as follows: The 4th, 5th, and 6th counts are based upon a check for $100 drawn to the order of W. H. Westall, and dated January 7, 1897. The 7th, 8th, and 9th counts, upon a check drawn to the order of "Cash Memo.," dated January 21, 1897. The 10th, 11th, and 12th upon a check for $156 drawn to the order of Robt. U. Garrett, and dated January 21, 1897. The 13th, 14th, and 15th, upon a check for $25 drawn to the order of "Cash," and dated February 9, 1897. The 16th, 17th, and 18th, upon a check for $44.50 drawn to the order of Thomas Lawrence, and dated February 11, 1897. The 19th, 20th, and 21st, upon a check for $50 drawn to the order of "Self," and dated February 18, 1897. The 22d, 23d, and 24th upon a check for $100 drawn to the order of "Self," and dated

February 22, 1897. The 25th, 26th, and 27th upon a check for $169.84 drawn to the order of "Cash Memo.," and dated March 9, 1897. The 28th, 29th, and 30th upon a check for $68 drawn to the order of "J. D. Church, General Agent," and dated March 4, 1897. The 31st, 32d, and 33d, upon a check for $680.15 drawn to the order of "W. H. Penland, Cashier," and dated March 24, 1897. The 34th, 35th, and 36th, upon a check for $100 drawn to the order of "Mrs. M. A. E. W.," and dated April 7, 1897. The 37th, 38th, and 39th, upon a check for $176.19; and my memorandum does not state in whose favor it was drawn, but the fact that it was in full or part payment of Veorhoff's draft, and dated May 7, 1897. The 40th, 41st, and 42d, upon a check for $111, Mrs. Anna R. Cartmell, dated May 27, 1894. The 43d, 44th, and 45th, upon a check for $135.21 drawn to the order of Nordyke, Norman & Co., and dated May 21, 1897. The 46th, 47th, and 48th counts are out of the indictment. No evidence was offered in support of these counts. The 49th, 50th, and 51st are based upon a check for $74.39 payable to the order of Powell & Snyder, and dated June 10, 1897. The 52d, 53d and 54th, upon a similar check for $74.38, payable to the order of Powell & Snyder, and dated June 19, 1897. The 55th, 56th, and 57th, upon a check for $48.25, payable to the order of the Fulton Bag Company, and dated June 21, 1897. The 58th, 59th, and 60th, upon a check for $102.43, payable to the order of Nordyke, Norman & Co., and dated June 21, 1897. The 61st, 62d, and 63d, upon a check for $94.45—my memorandum does not show to whom it was made payable, but I think to the New York Life Insurance Company—upon a draft dated July 13, 1897. The 64th, 65th, and 66th, upon a check for $349.80, dated July 21, 1897, and drawn for the purpose of paying the draft of Veorhoff & Co.

The first charge in the indictment, gentlemen, is that of embezzlement. This word, as used in the statute, has a technical meaning, and is a species of larceny. I will endeavor to explain this technical meaning to you, in order that you may be the better enabled, when you go to your room, to determine whether the proof before you brings the acts of the defendant charged in the first count of the indictment, and in every third count thereafter, or any of them, within the scope of that definition; and, for this purpose, I cannot do better than to quote with approval the words of another federal judge (the late Mr. Justice Howell E. Jackson) in charging a jury in a similar case. United States v. Harper (C. C.) 33 Fed. 474–476. I now quote:

"It [the crime of embezzlement] is especially applicable to the unlawful conversion of property by clerks, agents, and servants acting in fiduciary or trust capacities, and, under the statute above quoted, by a president, director, cashier, teller, clerk, or agent of any national banking association. It involves two general ingredients or elements: First, a breach of trust or duty in respect to the moneys, properties, and effects in the party's possession, belonging to another; and, secondly, the wrongful appropriation thereof to his own use. In order to constitute this crime, it is necessary that the property, money, or effects embezzled should have previously come lawfully into the hands, possession, or custody of the party charged with such offense, and that while so in his possession and custody, held for the use and benefit of the real owner, he wrongfully converted the same to his own use. In other words, there must be an actual and lawful possession or custody of the property of another, by virtue of some trust, duty, agency, or employment, committed to the party

charged, and, while so lawfully in the possession and custody of such property, the person must unlawfully and wrongfully convert the same to his own use, in order to commit the crime of embezzlement. The difference between the crime of embezzlement and that of larceny may serve to better illustrate what is required to constitute the former offense. In larceny there is the ingredient of an unlawful taking from the possession of the owner with the intent to deprive him of his property, and to wrongfully appropriate the same to the use of the party so taking. The custody or actual possession in larceny is acquired by the party unlawfully, in the act of feloniously taking the owner's property without his consent. But in embezzlement there is no wrongful or unlawful acquisition of the custody or possession of the property embezzled. On the contrary, the party embezzling must be lawfully in possession, by virtue of some employment, trust, or agency, under and with the consent of the owner, and while so in possession, holding the property in trust, or for the benefit of the owner, he wrongfully converts the same to his own use. A few practical illustrations may serve better to explain the offense of embezzlement. If your clerk—a clerk in your store—within the line of his employment, sells your goods to a customer, and receives the price therefor, and, while holding the money thus received, even on his way to deposit it in the cash drawer or to deliver it to his employer, he converts it to his own use, or any portion thereof, this would constitute embezzlement. Now, if, after having received the money from a customer, the clerk should deliver it over to his employer, or cashier authorized to receive it for him, and should thereafter secretly take the same identical money from the employer's pocket or the cashier's drawer, with the intent to appropriate it to his own use, that would be larceny. You send your hired man to the city or depot with a load of corn. The property is yours, but it is lawfully for the time being in the possession of the hired man as your agent, to hold and deliver for you, for your use and benefit, according to your directions. Instead of executing his duty, he converts or appropriates all or any portion of the corn to his own use. This would be embezzlement. If he should surreptitiously take from your crib corn, with the possession of which he had not been previously intrusted, his offense would be larceny. If the general bookkeeper of a bank, having no general or special custody or possession of the funds of the bank, secretly takes from the safe or drawer of the receiving or paying teller moneys of the bank, with the intent to appropriate the same to his own use, he commits an act of larceny. If, however, the teller—receiving or paying teller—in whose custody the moneys of the bank are placed by virtue of his employment or duty takes the same amount from his drawer, and converts the same to his own use, he would commit the crime of embezzlement. These instances will serve to illustrate the principle which you should keep in mind and apply in considering the charge of embezzlement against the defendant. It must appear from the evidence that the moneys, funds, credits, or assets of the association, alleged to have been embezzled, were, previously to their wrongful appropriation, lawfully in the possession and custody of the defendant, and that they were, while so held by him, wrongfully converted to his own use. It is not, however, necessary that he should have been in the exclusive custody or possession at the time of the conversion to his own use, in order to constitute this offense. If the evidence establishes that the business and assets of the bank were actually or practically intrusted to the care and management of the defendant, so that, by virtue of his position as vice president, director, or agent, he had not merely access to, or a constructive holding of, but such actual custody of the funds, moneys, and credits of the association as enabled him to have and exercise control over the same, that would place him in the lawful possession of said funds or other property; and if, while so lawfully in possession of such assets, funds, and credits, or other property, committed to his care and custody for the benefit of the bank, he wrongfully converts any part or portion of said assets to his own use, with intent to injure or defraud the association, he would thereby commit the offense of embezzlement. If his position and employment gave the defendant a superior or a joint and concurrent possession with subordinate employés or agents of the bank, that would be sufficient to place him in such lawful possession as would enable him to commit the crime of embezzlement, in relation to assets of the bank so committed to his keeping. If, for example, his position and employment in

the bank gave the defendant a joint or concurrent possession and custody of the bank's moneys, funds, and credits with the teller, cashier, or other officer, this would constitute lawful possession on his part for the benefit of the association, equal with that of such teller, cashier, or agent; and if, while so lawfully in possession, either alone or jointly with other officers or agents of the bank, he wrongfully converts said funds or assets to his own use, with intent to injure or defraud the association, he would thereby commit the offense of embezzlement."

So far I have quoted.

You are not required to find that the exact sum or sums stated in these counts in the indictment was or were embezzled. If, under the circumstances mentioned, any portion of the funds described in the counts was embezzled, no matter how small the amount may be, it will be sufficient to sustain a verdict, and you are not required to specify in your verdict the amount embezzled.

We next come to the charge of abstraction. This has no such technical and limited meaning as has the word "embezzlement." To "abstract" means to take from or to withdraw from, so that to abstract the moneys, funds, or credits of the bank, or a portion of them, is to take or withdraw from the possession and control of the bank such moneys, funds, or credits. To constitute the offense, within the meaning of the act, it is necessary that the moneys, funds, or credits should be abstracted from the bank without its knowledge and consent, and with intent to injure or defraud it, or some company or person other than the bank. Abstraction, under section 5209, Rev. St. [U. S. Comp. St. 1901, p. 3497], is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. It may be done by one act, or by a succession of acts. It may be done under color of loans, discounts, checks, and the like. The means used do not change the nature of the act. If the necessary or natural result is to wrongfully withdraw funds or moneys of the bank, without its actual knowledge and consent, by its board of directors, and to convert the same to the use and benefit of the abstractor, or to that of some person or company other than the bank, the means resorted to are of no consequence, and in no way affect its criminal nature.

"Willful misapplication," as described in the statute, means a misapplication, willfully and unlawfully made by one of the officers enumerated therein, of the moneys, funds, or credits of the bank, and made with intent to injure the bank, or some other company or person; and it has been held that there must be a conversion of the funds misapplied, to the use and benefit of the wrongdoer, or to the use of some one other than the bank. It is not necessary that the officer so charged should have been previously in the possession or custody of the money, funds, or credits of the bank by virtue of any trust, duty, or employment.

You will thus see that an officer of a bank cannot be guilty of embezzlement unless the moneys, funds, or credits of the bank have first

been placed lawfully in his custody and control, to be held and used in trust for the bank; but he may be guilty of abstracting or misapplying them without having been lawfully intrusted with their custody. Similarly, to constitute the crime of embezzlement, the thing embezzled must be converted to the use of the criminal, while the moneys, funds, or credits of a bank may be criminally abstracted or willfully misapplied, whether used by the criminal for his own benefit, or for that of any person other than the bank.

It thus appears that whenever the crime of embezzlement, under section 5209, is committed, it embraces as well the offenses of abstraction and willful misapplication, but the converse of the proposition is not necessarily true. That is, as to any transaction which is made the subject of an indictment under this section, if the defendant is proved guilty of embezzlement, he is also necessarily guilty of abstraction and willful misapplication, because every essential feature of the latter crimes is included in the essentials to constitute embezzlement; but he may be found guilty of abstraction or of willful misapplication, or both, without being necessarily guilty of embezzlement as to the transaction which is the subject of the charge. You will notice that, in each of these offenses, intent to injure or defraud the bank, or some other person or company, is an essential element; and, unless the jury are satisfied beyond a reasonable doubt that this intent to injure existed at the time of the commission of one or more of the acts charged in the indictment, they cannot convict the defendant.

It becomes important, then, to ascertain what is meant, in law, by this intent to injure or defraud, and what is necessary to establish it. Ordinarily the intent with which a man does a criminal act is not proclaimed by him. Ordinarily there is no direct evidence by which a jury may be satisfied from the declarations of the criminal himself as to what he intended when he did a certain act. The statute does not mean that it must be made to appear to the jury by proof which convinces their minds beyond a reasonable doubt that the defendant had malice or ill will towards the bank, or that he intended to wreck it. The intent to injure or defraud contemplated by the statute is not inconsistent with a deep and abiding interest on the part of the accused in the prosperity of the bank, and a sincere desire for its ultimate success and welfare. I say intent to defraud is not inconsistent with that state of affairs. If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily and intentionally does the act, he is chargeable, in law, with the intent to injure or defraud. It is not necessary that his object or purpose was primarily to injure or defraud. It may have been to benefit himself. These terms, as used in the statute, mean nothing more than that general intent to injure or defraud which always arises, in contemplation of law, when one willfully or intentionally does that which is illegal or fraudulent, and which, in its necessary and natural consequence, must injure another. The law presumes that every man intends the natural and ordinary consequences of his acts. Wrongful acts knowingly or intentionally committed cannot be justified on the ground of innocent in-

tent. The color of the act, done with knowledge of its natural or necessary results, determines the complexion of the intent.

This question of intent, like all other questions of fact, is solely for the jury to determine, but it must be determined by you in this case in accordance with these legal principles; and I therefore instruct you that if, from all the evidence in the case, you should believe beyond a reasonable doubt that any one or more of the acts charged against the defendant was or were committed by him at the time and in the manner charged in the indictment, and that he committed such acts voluntarily and intentionally, and with full knowledge that the natural and necessary result thereof would be to injure or defraud the bank or some other company or person, then you must necessarily infer, as to such act or acts, that they were committed with the intent to injure or defraud mentioned in the statute; and unless, from the presumption of innocence existing in favor of the defendant raised by the law, or from evidence introduced in his behalf, there exists in your minds a reasonable doubt of such intent, you should find him guilty as to the count or counts embodying such act or acts.

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. But this burden is successfully borne whenever, from all the evidence introduced in the case, and taking into consideration the legal presumption which the law indulges in favor of the innocence of the accused, you have no reasonable doubt of his guilt. If the whole evidence, when carefully examined, weighed, and compared, produces in your minds a settled conviction or belief of the defendant's guilt—such a conviction as you would be willing to act upon in the most important matters relating to your own affairs—you are free from any reasonable doubt, and should find a verdict in accordance with that conviction or belief.

I desire to direct your attention for a moment to the distinction between the presumption of innocence raised by the law in favor of the defendant and reasonable doubt. In the words of the Supreme Court of the United States (Coffin v. United States, 156 U. S. 459, 460, 15 Sup. Ct. 394, 39 L. Ed. 481):

"The presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him, on the other hand, constitute the elements from which the legal conclusion of guilt or innocence is to be drawn."

Thus far I quote.

Reasonable doubt, you will observe, is the result of the proof, and not the proof itself, and must arise, if, in fact, it exists in your

minds, from the presumption of innocence alone, or in connection with other evidence favorable to the accused, and it must exist after weighing all the evidence in the case, in order to justify a finding based upon it. In other words, if, after weighing all the evidence on both sides, including the legal presumption of which I have spoken, you are convinced of the guilt of the accused, it is your duty to so find by your verdict.

Certain evidence has been introduced by the prosecution as to transactions by the defendant other than those made the subject of the several counts in the indictment. I stated to you at the beginning of the introduction of this testimony and evidence that it was only admissible for the purpose of affording light to the jury as to the knowledge, motive, or intent of the defendant in the commission of the acts with which he is charged in the indictment. I reiterate that statement now. It is a rule of law especially applicable to cases like the present, wherein the intent of the defendant is an essential element of the offense charged, that evidence of other acts done, tending to show knowledge, motive, or intent, is admissible, even if it involves other offenses than those charged in the indictment; but such evidence is only competent for the purpose of showing such knowledge, motive, or intent, and the jury must be careful not to confound the evidence given as to these matters with that bearing directly upon the charges in the indictment. For, even if you believe the defendant guilty of wrongdoing connected with these transactions not embraced in the indictment, about which the witnesses have been permitted to testify, you cannot convict him on account of such wrongdoing; but you may consider this evidence so far, and so far only, as it may aid you in arriving at the knowledge of the defendant of his own financial condition and that of the bank at and before the time of the acts charged in the indictment, and in so far as it may aid you in determining the motive and intent influencing the defendant in doing the acts charged in the indictment, if you find that he did such acts. Indeed, the Supreme Court of the United States has said, referring to a similar case (Wood v. United States, 16 Pet. 342, 10 L. Ed. 987):

"The question was one of fraudulent intent, or not, and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of a party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but, taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with conclusive certainty. They constitute exceptions to the general rule excluding evidence not directly comprehended within the issue, or rather, perhaps, it may with some certainty be said, the exception is necessarily embodied in the very substance of the rule, for whatever does legally conduce to establish the point in issue is necessarily embraced in it, and therefore the proper subject of proof, whether it be direct or only presumptive."

Special prayers for instructions to the number of 63 have been presented by the defendant. Of these, many have been embodied

substantially in the charge as given. I give you the following additional ones: Here is one that refers to the matter about which I have been speaking (No. 20):

"Although the jury may believe that the defendant is guilty of other offenses and violations of the law than those charged against him, and that such other transactions about which the witnesses have been permitted to testify constitute such offenses, the jury cannot convict the defendant upon this bill of indictment of the same; and the jury should therefore be careful not to confound the defendant's acts and doings which appear in the evidence detailed as to other transactions than those charged in the bill of indictment with those acts charged in the bill, for, though the jury may believe the defendant guilty of violations of the law other than that charged in the bill of indictment, they would not be justified in finding him guilty in this case for such violations, and the jury is instructed to put out of consideration all the evidence of other transactions and doings of the defendant, no matter how wrongful and unlawful the same may appear to them to be, unless such transactions and doings tend to show the wrongful intent of the defendant in doing the acts charged in the bill of indictment."

I give you that with the added clause, of course, that these matters and things testified about are also competent for the purpose of showing knowledge, if they do tend to show knowledge, of the condition of the defendant's affairs and those of the bank.

I am asked in No. 21 to instruct you that:

"A president of a national bank is not guilty, under the statute, for merely obtaining money from the bank of which he is such president by means of overdrafts made by him upon the bank. He has the same legal right to deal with the bank and to borrow money from it as any other individual; and in this case, if the defendant overdrew his account in the bank, or borrowed money from the bank, under any honest or bona fide arrangement or agreement with the bank or its duly authorized officers and committees, he would not be guilty of embezzlement, as charged, on that account."

And I am asked substantially to give you the same charge with respect to the offense of abstraction and willful misapplication in Nos. 23 and 28. I accordingly give you this charge, but with the explanation that such arrangement or agreement with the bank, or its duly authorized officers and committees, must be a bona fide exercise of their official discretion, in good faith, and without fraud, and made for the actual or supposed advantage of the association. In such case there is no criminal responsibility, although the transaction result in loss and damage to the bank. But if such loans or discounts or overdrafts are made or permitted in bad faith, for the purpose of personal gain, or for private advantage of the officers, and not, therefore, in the honest exercise of official discretion, they do not give the consent of the bank, and the defendant would not be protected by such authority so given, if he was a party to such arrangement. If fraudulent credits were given upon the books of the bank, either to the defendant, or to other persons acting for him, neither he nor they acquired thereby any right to the funds represented by such credits. A credit upon the books of the bank, to be valid and create the relation of creditor and debtor between the parties having such credits and the bank, must represent value received by the bank in the shape of actual cash, or what is honestly deemed its equivalent. It must represent bona fide indebtedness. The authority of the directors and of the officers and com-

mittees of the bank extends only to legitimate transactions intended for the benefit of the bank; and, if you find that any such arrangement or agreement was made, you must consider with whom and under what circumstances it was made, and whether in good faith, and for the actual or supposed benefit of the bank. The defendant has testified that he had authority to make overdrafts from the board of directors at the time of the transactions charged in the indictment. He admits that nothing appears of record on the minutes of the board authorizing this. In his statement he is contradicted by Mr. Rawls, one member of the board, and the only one, so far as the evidence discloses, of those who were directors in the last years of the bank's history, who paid his liabilities to the bank. As to the other directors, Messrs. Penland and Dickerson, the collateral evidence introduced in this case shows that they also largely overdrew their own personal accounts; and I invite you to consider these circumstances in determining whether or not such arrangement or agreement, if you shall find it was made at all, was entered into honestly and bona fide as official action for the actual or supposed benefit of the bank, or whether, on the contrary, it was an agreement intended for the mutual personal advantage of the directors of the bank, or some of them. If the former, it conferred valid authority; if the latter, it conferred no authority whatever, and funds withdrawn thereunder would be wrongfully withdrawn. Every act of fraud, every known departure from duty by the board in connivance with the president for the plain purpose of sacrificing the interest of the stockholders of the bank, would be an excess of power, from its illegality, and, as such, void as an authority to protect the president in his wrongful compliance.

I am further asked to charge you in No. 33 as follows:

"No other abstraction or willful misapplication of the moneys and funds of the bank by the defendant, than those charged in the bill of indictment against him, will authorize or warrant the jury in convicting the defendant on these charges. If the jury should become satisfied beyond all reasonable doubt that the defendant had on one or many occasions abstracted or willfully misapplied the moneys and funds of the bank, with intent to injure and defraud the bank, but not on the occasions and at the times charged in the bill of indictment, this would not justify a verdict of guilty in this case. In this case the jury must find and be satisfied beyond all reasonable doubt, and from the evidence alone, that the defendant abstracted or willfully misapplied the moneys and funds of the bank, as charged in the bill of indictment, and in the way and manner and at the time or times therein charged, or they will return a verdict of not guilty on these charges."

I am also asked to instruct you in No. 38 as follows:

"The mere drawing of a check creating an overdraft, standing alone, is not a fraud on the part of the drawer, and its payment by the bank officers does not, alone, constitute a fraudulent abstraction or willful misapplication of the funds of the bank."

I give you this in connection with what I have just stated about the authority of the directors and president, and the manner and way in which the act is done.

I am asked in No. 41 to charge you with reference to the question of good character. I cannot give you the instruction asked in the

language of the prayer of the defendant, but I do charge you that a good character proven in a case is evidence in favor of him who possesses it. It goes to augment the presumption of innocence which the law raises in behalf of a defendant, and it must be manifest that the man who, while presumed to be innocent, and therefore presumed to have an ordinarily good character, strengthens that character by the testimony of persons residing in the vicinity in which he lives, produces such evidence as should tend to strengthen the presumption of his innocence, just as, if he had undertaken to introduce such evidence, and had failed—in other words, if his witnesses had proven him a bad character—it would tend to detract from that presumption of innocence which the law indulges in favor of every defendant; and to that extent it is proper and competent evidence, and is to be considered by the jury along with this presumption of innocence, and along with the other evidence in the case.

And this brings me to refer to your rights and duties in respect to the testimony of the witnesses introduced before you. You have a right to consider their bearing and demeanor on the stand; their interest, if any, in the result of the suit; the inherent probability or improbability of their evidence; its self-contradictions, if any, etc. Since the passage of the act of March 16, 1878, c. 37, 20 Stat. 30 [U. S. Comp. St. 1901, p. 660], a defendant in a criminal case in the courts of the United States may, "at his own request, but not otherwise," be introduced as a witness in his own behalf. His failure to embrace the privilege, in the words of the statute, "shall not create any presumption against him," and this has been held by the Supreme Court of the United States to forbid all comment in the presence of the jury upon his omission to testify. Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. But on the other hand, if he does avail himself of the privilege, he is entitled to all the rights, and subject to all the criticisms, of a witness in general. The defendant here has availed himself of that privilege, and, in considering his evidence, you have a right to look to his testimony in the light of the considerations suggested. In weighing his evidence, and determining how far it is credible, you have a right to consider his deep personal interest in the result of the trial, as well as his manner and demeanor on the witness stand, the inherent probability or improbability of his evidence, and, in short, to weigh his evidence just as you would that of any other witness having an equally strong personal interest. If his evidence, or that of any other witness, is self-contradictory, you have a right to consider that in determining what credit, if any, you will give to it.

Now, gentlemen, as to the facts in the case, I desire simply to refer in the most general way to the contentions of both sides. You have heard all of the evidence, and are doubtless more familiar with it than I am. This evidence has been elaborately argued by most able counsel on both sides, and that will refresh your memory if you have forgotten any points of the testimony.

The government contends that the acts charged in the indictment

were committed by the defendant without the bona fide knowledge and consent of the bank, with full knowledge on his part of a desperate condition in his own finances and those of the bank, and with the intent to injure and defraud the bank and other persons. For the purpose of showing such knowledge and intent on his part, it has introduced evidence tending to show: That the defendant, who came to Asheville in 1885 and organized this bank, and who, it is admitted, at all times thereafter, until its failure, was its president and a director, bought and paid for $5,000 of its capital stock, and that at that time there is no evidence that he had other property. That the defendant thereafter bought property of various kinds, including real estate, additional bank stock, and some smaller blocks of stock in several companies in the vicinity of Asheville, and that the money to pay for these purchases was obtained from the First National Bank of Asheville. That only a portion of the money so obtained was obtained by him upon notes upon which he was nominally bound, and that, beginning not later than 1891, he began to obtain credits by the discount of notes of accommodation makers, some of whom were then insolvent, and that, of such accommodation makers as were then solvent and remained solvent, none remained bound to the bank in 1897, when it failed; all notes signed by such men having, it is contended, been replaced by the notes of men having no financial responsibility. That, notwithstanding he was obtaining this large line of credit upon these accommodation notes, and upon other notes signed and indorsed by himself, his account in the bank was frequently overdrawn for large sums—so large that the Comptroller of the Currency was constantly calling upon the directors to reduce these overdrafts. In addition to this, that his loans upon which he was maker or indorser during much of the time exceeded the limit fixed for the loans to any one person, namely, 10 per cent. of the capital stock of the bank. That if he had appeared as maker or indorser upon these notes, of which he admits he got the benefit in loans and credits from the bank, his account would have shown, as early as January, 1894, that he had borrowed over $80,000, or eight-tenths of the capital stock of the bank. That Penland, a co-director and the cashier of the bank, had at that time obtained credit in a similar manner to the extent of $60,000, and that Dickerson, another director, had obtained $30,000, or a total to these three directors of $170,000, in January, 1894, or 1.7 times the entire capital of the bank. That at the date of the failure of the bank these amounts had been increased largely, so that the defendant then owed the bank something like $114,000, Penland about $81,000, and Dickerson about $60,000, or a total of about $255,000, besides two $10,000 notes owed by Breese and Penland jointly as balance of the purchase money on the purchase of the bank building, or, in all, these three directors then owed the bank something like $275,000, or nearly 2.8 times its entire capital stock.

It is contended by the government that the bank neither knew of nor authorized these credits, and they introduced Mr. R. R. Rawls, one of the directors, who testified that he only knew of the

loans shown by the reports to the Comptroller of the Currency, and neither knew of, nor consented to, the credits made up of the Leonard, Kemp, and similar notes. It is further contended by the government that the defendant made false and misleading reports and statements to the Comptroller of the Currency in various particulars; reporting in one instance no overdrafts against himself, when in fact he was overdrawn to the extent of $2,844, and failing constantly to show that he was indorser or guarantor or payor of this large sum represented by the Leonard and other similar notes, of which he admits he got the benefit, and for which he claims and admits he had guarantied the payment to the bank.

It is further contended that he caused a false entry to be made upon the books of the bank, creating a false credit in favor of the bank of about $1,353, and a false charge against the Carolina Savings Bank of the same amount, for the purpose of deceiving the bank examiner, who arrived unexpectedly. You will recall and consider the evidence in that regard. It is claimed that, without authority, he signed the name of W. W. Rollins to two notes, for $1,000 each, dated April 6, 1897, and sent them to other banks in renewal of other notes theretofore in such banks, and which had fallen due. This contention, I understand it, is admitted by the defendant, who claims to have afterwards communicated the facts to and received from Maj. Rollins a ratification of his act. This is denied by Maj. Rollins, who says he never knew anything of the transaction until he saw the notes at this trial, and who says that, when he saw these notes at a former trial, he knew they were not signed by him, but supposed they were copies of notes of his own signing, although he had never, to his knowledge, signed notes to exceed $7,000, in the aggregate. And I call your attention to the fact that even the defendant does not claim that he ever communicated these facts to the bank, or to the other banks in which these notes were rediscounted.

The government also contends that the defendant made a false statement to Col. Burgwyn, bank examiner, in June, 1897, a short time before the failure of the bank, as to the financial condition and responsibility of Kemp, the colored driver of the defendant. You will recall the evidence as to this. It is further contended by the prosecution that the defendant received a good and valuable credit through the Purefoy transaction of $3,000, and that when Dr. Purefoy withdrew the money loaned, by means of his check, he was suffered to appear as having overdrawn his account for a time; the apparent overdraft being eventually covered by a note of no value.

All of these and similar transactions were introduced by the government merely for the purpose of showing knowledge and intent, and, of course, have no other bearing upon the charge in the indictment.

There is a transaction, however, which it is contended by the government has a somewhat closer relation to the offenses charged in the indictment. It is contended, and not denied, that in the month of July, when the bank was tottering to its fall, collections aggregating about $17,000 were made by the First National Bank

of Asheville for other banks, and that the funds so collected were deposited in the bank by the bank's collector, and checks were drawn by him upon the Chemical National Bank of New York in settlement thereof, and signed by the defendant as president, but, by direction of defendant, these checks were not sent out, but were withheld until after the bank closed its doors. According to the testimony in the case, a number of the checks of the defendant were paid out of funds in the bank after the time when these remittance checks were drawn and withheld, and the prosecution contends that the defendant knowingly withdrew to that extent this money, which honesty and good faith required should be applied to these remittances, leaving the bank, to that extent, indebted to these other banks for moneys belonging to such banks, and which the First National Bank of Asheville had received, and which the defendant had wrongfully embezzled, abstracted, and misapplied, with intent to injure and defraud. The defendant contends that in all of these various transactions he acted honestly and in good faith; that he believed himself to be, and knew that he was, solvent and able to pay his debts. You will recall his testimony. He admits that all the time, since 1894 at least, his obligations to the bank were growing by leaps and bounds, and that in face of the fact that during the period from January 1, 1894, to January, 1897, inclusive, the dividends from his bank stock credited to his account amounted to $11,500 and over, and his salary to over $6,000 more. Notwithstanding these facts, he was putting in bank more and more of these notes of Leonard, Kemp, etc., to pay interest, and interest on interest. He explains the necessity of the increase of the Rollins notes from $7,000, the original amount for which he agreed in 1892 to save Maj. Rollins harmless, to $9,400, the amount when the bank failed, by a calculation showing that the accrued interest on these notes would have increased them to the latter figure, and avowed his inability to pay this interest as the reason for having taken the liberty of signing Maj. Rollins' name to the two $1,000 notes on April 6, 1897. Gentlemen, it is for you to consider whether such a state of financial paralysis is consistent with his statement of an absolute solvency on his part, or his belief in it. Indeed, in his testimony the defendant has tried to make it appear that after January, 1894, he obtained no actual money from the bank, and that the increase of his obligations to it from $80,800 to $114,000 arose solely from accumulations of interest which he was unable to pay. The government, on the other hand, contends that he never ceased drawing money from the crippled bank by check until July 21, 1897, the date of the last transaction charged in the indictment.

I have neither the time nor the inclination, gentlemen, to refer further to the evidence in this case. The facts and the contentions have been fully and ably argued before you by the learned counsel on both sides. It is now to be submitted to your honest, conscientious consideration as sworn jurors of the United States court for this district.

One word more, and I have done: When you have retired to your room and considered of your verdict, and have taken your

ballot, it may be that you will not view the evidence alike; that its effect upon the minds of a portion of you may be weaker or stronger than upon the minds of the remainder. In that event, I would say to those of you who may find yourselves in the minority you should not too hastily conclude that your brethren are wrong, and you alone right. If you of the minority are for conviction, you should ask yourselves, "Is the evidence of guilt which fails to convince a majority of my brethren of the guilt of the accused beyond a reasonable doubt in truth so strong as I thought it was?" If you are for acquittal, you should inquire of your own heart and mind, "Is the doubt in my mind, and which fails to appeal to the reason of my brethren, indeed a reasonable doubt, or is it founded upon some prejudice, or induced by a desire of avoiding the responsibility of decision?" Ask yourselves these questions, talk the matter over with your brethren, with a view of arriving at a true and just conclusion, and you will be in a fitting frame of mind to reach it.

A word as to the form of your verdict: If you should find the defendant not guilty upon all the charges against him, you will return a general verdict to that effect. If you should find him not guilty upon all of the counts for embezzlement, but guilty upon one or more counts for abstraction and willful misapplication, your verdict should be, "We, the jury, find the defendant not guilty of embezzlement, as charged in the within indictment, but we do find him guilty of abstraction and willful misapplication, as therein charged." If you should find that he is guilty upon one or more of the counts for each of the offenses of embezzlement, abstraction, and willful misapplication, you may find a general verdict of guilty.

I now dismiss you to your room with a solemn adjuration to do your duty as you see it, without prejudice, without favor, and without fear.

HOLST et al. v. SAVANNAH ELECTRIC CO. et al.

(Circuit Court, S. D. Georgia, E. D. July 16, 1904.)

1. MUNICIPAL CORPORATIONS—POWERS OF COUNCIL—GRANTING OF STREET FRANCHISE BY RESOLUTION.

The mayor and council of the city of Savannah, Ga., are authorized by the city's charter (MacDonell's Code, p. 12, § 32) to make, ordain, and establish "by-laws, ordinances, rules and regulations," but nowhere, in terms, to legislate by resolution; and in view of cognate provisions requiring the improvement of streets, regulating the speed of street cars, etc., to be by ordinance, and of section 44, which provides that the city may either build street railways, "or let or farm the privilege to individuals or companies under the conditions and at such rates of fare and other charges as the city council of said city may by ordinance determine," the mayor and council have no power to grant a franchise to a street railroad company to occupy a street with its tracks by a resolution, and such a resolution passed without notice to owners of property on the street affected, and without prior publication as required by the charter in case of ordinances, is void and confers on the company no right or authority.

2. CONSTITUTIONAL LAW—TAKING PROPERTY WITHOUT COMPENSATION.

The owners of property fronting on a street may maintain a suit in equity in a federal court against the city and a street railroad company,

both of which are corporations of the state, to enjoin the laying of tracks in the street under a void enactment by the city council purporting to authorize such act, where irreparable injury will result to their property, as a taking of property under color of authority from the state without due process of law.

3. EQUITY JURISDICTION—PREVENTING MULTIPLICITY OF SUITS—ADEQUATE REMEDY AT LAW.

Such suit is within the jurisdiction of equity, where the complainants are numerous, on the ground that it will prevent a multiplicity of actions, and for the further reason that there is no adequate remedy at law.

4. INJUNCTION—USE OF STREET—STREET RAILWAY.

For a municipal corporation, over the protest of every abutting lot owner on a residence street, to refuse them a hearing, and grant in secret caucus to a street railway the right to appropriate said street for its track, to be used to shunt all the empty cars in use in the city into the car barns at midnight and to distribute them at dawn, thus destroying the quiet, repose, and comfort of many homes, when the railway has a parallel track one block away, long used, and ample for such purpose, is unnecessary, unreasonable, and oppressive municipal action, and should be enjoined by a court of equity having jurisdiction.

In Equity. On motion for preliminary injunction.

The complainants before the court are J. B. Holst, A. J. Ives, Lena Anderson Myers, J. J. Cummings, R. P. Lovell, Mary Ganahl Stovall, Henrietta Seabrook, Sarah O. Adams, all of whom are citizens of the county of Chatham, state of Georgia, and Emma L. Carrington, who is a citizen of New York, and resident on Long Island. The respondents are the mayor and aldermen of the city of Savannah and the Savannah Electric Company. The bill is brought in behalf of the complainants and other property owners whose interests are also affected. These, with the complainants, are 42 in number, and include, without exception, every owner of a lot abutting on that portion of the street involved in the controversy, and which, as will be seen, the mayor and aldermen of Savannah have resolved that the electric company may appropriate in part for its own uses. The bill alleges the additional value of their homes resulting from the quiet of the street and its freedom from cars and other disturbing noises; that the Electric Company, without first offering to pay compensation in any amount, is proceeding to erect poles, string wires, and lay tracks under pretended authority passed by the mayor and aldermen of the city near the hour of midnight on the 25th of May, 1904; that this was done without any notice whatever being given to the public of such intended action; that the resolution was read but once, the law requiring that all ordinances and resolutions, to become laws, shall be read twice, and published for two weeks in the public gazette; that the resolution is illegal and void; and that the Savannah Electric Company acquired no right thereunder. It is further alleged that the fact that the mayor and aldermen were considering the grant to the electric company of the right to thus use the street was purposely kept secret for the purpose of preventing plaintiffs and other property owners affected, from protesting against the resolution, but, anticipating a movement of this character, the plaintiffs and 59 other property owners and residents had petitioned, in writing, the mayor and aldermen of the city to permit them to be heard whenever the petition of the electric company should be presented to the body for action. This request, it is charged, was ignored and utterly disregarded, although they were assured by the mayor of the city of Savannah that they would be given ample opportunity to be heard. In this petition it is further alleged that the complainants notified the governing body of the city that to grant such resolution would cause irreparable damage to them and other owners of property and residents on said street. Notwithstanding this, the mayor and aldermen of the city immediately proceeded to grant and did grant the electric company the right to lay its tracks, string its wires, erect its poles, and operate its cars on said street. This, it is charged, will deprive plaintiffs of their property rights without due process of law, in contravention of the Constitution of the United States, and without compensa-

tion having been first paid, as required by the Constitution of Georgia. Special averments of damage allege that J. B. Holst will be prevented from using the street in front of his property, and that the same will be damaged in at least the sum of $3,000. The property of A. J. Ives, Lena Anderson Myers, J. J. Cummings, R. P. Lovell, and Mary G. Stovall, it is alleged, will be damaged, each, in the sum of $2,000. The property of Henrietta Seabrook, it is alleged, will be damaged in a large sum, as will also the property of Sarah O. Adams. Mrs. Carrington, the New York complainant, who also owns an abutting lot, lays her damages in the amount of $2,500. It is further alleged that the appropriation of this portion of Gwinnett street is wholly and entirely unnecessary for the public convenience, benefit, or necessity, and is entirely for the convenience of the Savannah Electric Company, a corporation which already owns all the street railways in the city of Savannah. It is alleged to be unnecessary and unreasonable, because the electric company already has a line on which its cars are operated now on Bolton street, which is the next street south of Gwinnett, and parallels the same, and which can be used by the corporation for its purpose just as conveniently as Gwinnett street. This purpose is to run its empty passenger cars into its car barn at night, and to distribute them in the morning. It is charged that the Savannah Electric Company, within a few hours after the passage of the resolution, and before the public had become aware of its passage, had commenced the work of laying its track, erecting its poles, and stringing its wires, and, if permitted to continue with this work, and operate its cars on the track thus laid, that plaintiffs will suffer irreparable injury therefrom, and that this injury will be inflicted unless prevented by a suitable order in equity. All of this conduct, it is charged, is in contravention of the relating provisions of the Constitution of the United States. It is alleged that the Savannah Electric Company is chartered by the state of Georgia; that the mayor and aldermen of the city of Savannah, acting under assumed authority from the state of Georgia, and as an agent of the state for governmental purposes, has availed itself of the governmental agencies furnished by the state to unlawfully grant authority to do the unlawful acts complained of, and that the action of both defendants is therefore the action of the state, and that their conduct under color of its pretended authority is to deprive orators of their property without due process of law. Waiving answer under oath, the complainants pray an injunction pendente lite to restrain the defendants from doing or continuing to do the wrongful acts complained of. There is also a prayer for general relief.

In response to the rule to show cause, the defendant the Savannah Electric Company alleges that the court has no jurisdiction; that there is no equity in the bill; that no federal question is involved in the bill; that it states no cause of action, and makes no case for injunction or other relief; and that the complainants have adequate remedy at law. It denies that complainants will be damaged in any manner whatever, "cognizable by the Constitution and laws of the state of Georgia," by the construction of the proposed tracks. It avers that everything was done by itself and the mayor and aldermen of Savannah in the utmost good faith, and to locate a greatly needed public improvement. It alleges that the kind of cars it proposes to run over that portion of Gwinnett are ordinary street passenger cars, making only such stops as are necessary for the purpose of receiving and discharging passengers; that this will put no additional servitude upon said street; that their scheme is a necessary part of a plan agreed upon between the mayor and aldermen of the city of Savannah and Atlantic Coast Line Railroad and the defendant to build a subway beneath the Atlantic Coast Line Railroad at Gwinnett street crossing in Savannah. Defendant points out the great danger to which passengers are subjected by the grade crossing over the Atlantic Coast Line Railroad, and alleges its intention to abandon the line of street railroad on Bolton street, so that defendant's cars, instead of running upon Bolton street, thereby passing over the grade crossing, will be run upon Gwinnett street, and pass under instead of over the railroad, thus obviating the delay and inconvenience to which the public is put by reason of stopping for passing trains, and obviating, also, great peril and danger which passengers incur from passing trains; that, by reason of this arrangement, it will be necessary to take up tracks of the defendant on Bolton street, and, as part and condition of entering into the

subway agreement, the city assented to this defendant laying a single track between Habersham and Abercorn streets, with proper connections between the two streets, it being necessary that the defendant should have this for the purpose of connecting its line of street railroad on Habersham street with its line of street railway on Abercorn street, this being the only convenient and accessible line with which defendant's said connections can be made. Defendant alleges that Gwinnett street is a public street of the city of Savannah; that the title is in the state of Georgia and in the mayor and aldermen of the city of Savannah; that abutting property owners have no rights thereon, other than the easement enjoyed by the general public; that the building of defendant's proposed line of street railway thereon will not impair this easement, damage complainants' property, or place any additional servitude upon said street. Defendant alleges that the charter granted it by the state of Georgia and the permission given by the resolution of the mayor and council of the city of Savannah were given subject to the right of all persons to receive just compensation for any private property taken or damaged, and the defendant expressly disclaims any right under said resolution or said charter to take or damage the property of any of the complainants in the manner contemplated by the Constitution of the state of Georgia without making just and adequate compensation therefor. Defendant admits that if, by the laying of the tracks and operation of its cars on Gwinnett street, the lots of complainants will be damaged in the manner contemplated by the Constitution of the state of Georgia and the decisions of the courts of last resort in that state, the defendant will have to make them just and adequate compensation therefor, and expressly disclaims any right under said resolution to take or damage any of the property of complainants in said manner without first making just compensation.

The answer of the city of Savannah is in substantial respects the same as that of the Savannah Electric Company. It is, however, admitted in the answer that the resolutions granting the electric company the right to lay its tracks on the disputed portion of Gwinnett street were adopted without any notice being given to the public of such intended action, and that the resolutions were read but once at said meeting; it being averred that no notice whatever is required to be given to the public of any resolution before council. It denies that the proceeding was purposely kept secret for the purpose of preventing the complainants and other property owners from protesting against the passage of such resolution, but admits that the complainants and a number of other property owners and residents on the portion of Gwinnett street in dispute requested, in writing, that the mayor and aldermen of the city of Savannah would give them a hearing upon the matter. It denies that this request was ignored and disregarded. On the contrary, it states that the petition of the property owners was "received as information." It alleges that, in the "committee of the whole" of said meeting, hearing was given counsel representing the Gwinnett street property owners and residents, Mr. William P. Hardee, and that said hearing was full on all points—said attorney of said property owners stating their objections just as fully as they could have done themselves—and that council accorded him a patient and respectful hearing. Denying the allegations in complainants' bill that the laying of the track in question and the operating of street cars on that portion of Gwinnett street are unnecessary for the public convenience, benefit, and necessity, and that said improvement is made entirely for the convenience of the Savannah Electric Company, it admits that said company does own all the street railways of the city of Savannah, and that it now has a line on Bolton street, which is a narrower street than Gwinnett, which street is next south of Gwinnett, and parallel to the same; that said city denies that said street can be used by said street railway company for every purpose just as conveniently, so far as the public is concerned, as Gwinnett street. It alleges that the damages of complainants, if any, are not irreparable, but are easily computable; "it being merely a question of dollars and cents, without any sentimental, whimsical, or archaic measure of damages being considered." The tenth paragraph of the answer alleges that the conclusions of complainants in the relative paragraph of their bill are conclusions of law, and "manifestly erroneous conclusions at that, the same being in the teeth of the decisions of the Supreme Court of the

United States and the Supreme Court of Georgia on the subject." It contends the acts done by it and the electric company are done in the proper exercise of lawful powers, and, since they do not directly encroach upon private property, even if the consequences of such acts should damage and depreciate the value of abutting property, are universally held not to be a "taking" under the constitutional provisions. There has been here, the answer states, no direct physical disturbance of any right, either public or private, which complainants enjoy in connection with their respective properties. But even if such be the case, respondents allege that the courts can grant no relief, provided there is no physical interference with the right or easement of said property owners to egress from and ingress to their lots along said street. As to whether or not said railway track should be upon Gwinnett street, or upon Bolton street, or upon any other street, the city council of Savannah, in its best judgment and discretion, is vested with the responsibility of determining the same, and the courts are relieved from such responsibility, and have no right to interfere therewith.

J. F. Cann and Walter G. Charlton, for complainants.

W. W. Osborne and Alexander A. Lawrence, for defendant Savannah Electric Co.

William Garrard, City Atty., for defendant mayor and aldermen of city of Savannah.

SPEER, District Judge (after stating the facts). That portion of Gwinnett street in the city of Savannah which is involved in the controversy before the court is what is termed a "residence street." On either side are the homes, all comfortable and many spacious and elegant, of well to do people. It is made clear that this locality was selected for homes by the class of residents who own the abutting lots because of its quietude and repose. The Savannah Electric Company enjoys a monopoly of street railway traffic in that city, and has long evinced a desire to lay its tracks on this portion of Gwinnett street. The parties complainant, the owners of residences thereon, have consistently and earnestly objected. They have contended that it would largely impair the comfort, the quiet, accessibility, and therefore the value, of their homes. They have also contended that the appropriation of the street by the electric company is unnecessary, for a short block to the southward the same street railway company already owns and controls a line on Bolton street parallel to Gwinnett; and this track, it is insisted, is ample for all purposes of the street railway service of Savannah. Previous to the occurrences of which complaint is now made, the mayor and aldermen of the city of Savannah have accorded a hearing to the property owners on this street whenever the electric company sought authority to lay its tracks thereon. It is now, as appears from the foregoing statement, alleged that such a hearing was promised, but was unlawfully and injuriously denied; that the action of the city government is unlawful and void; that no lawful grant of power to the electric company to appropriate the street in question has been or can be made; that the electric company appears on the street as an intruder; and that the present action of the city council and the electric company, both creatures of the state, and jointly acting under its assumed authority, is obnoxious to that clause of the Constitution which declares:

"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 law."

The answer of the city, with unequivocal and perhaps temperamental emphasis of the pleader's language, presents certain important legal questions which may properly be considered before we approach the consideration of the facts. They are, first, that the act done by the electric company is done in the proper exercise of lawful powers; second, that it does not directly encroach upon private property, and, even if the consequences of such act should damage and depreciate the value of abutting property, that it is not a taking of the complainants' property, under the constitutional view, and the court therefore can grant no relief; and that whether the railway tracks should be upon Gwinnett street, or upon Bolton street, or upon any other street, is a matter stated to be, in substance, in the arbitrary judgment of the city council of Savannah, and the courts have "no right to interfere therewith."

It may be observed that there is involved in this case, and perhaps in every case, not the right, but the duty, of the court. The rights of parties are at stake. It may be further added that if, upon judicial consideration, it may be determined by the court, even though erroneously, that it is a duty to arrest the acts complained of, and, for the protection of the rights of complainants, to stay the joint action of the city and the electric company, such action can in no proper sense be termed "interference." The action of the court is invoked in the usual manner. Its attention to the cause of complainants is obligatory, and here, at least, their complaint will be heard.

In the first place, we inquire, was the effort of the electric company to seize the portion of Gwinnett street in controversy lawful, or, to use the language of the answer, "in the exercise of lawful powers," or was it rather an effort on the part of that corporation, aided and abetted by the city council, to obtain an unconscionable advantage, with that disregard of private rights on the part of such corporations for which it is so frequently the duty of courts to afford redress? The facts relating to this inquiry do not appear to be in conflict. The affidavits make it clear that the electric company was well aware of the earnest objections of the property owners to its project. The previous effort of the company to appropriate this street, and its defeat before the city council by the protest and argument of the property owners, is conceded on all hands. With regard to the present movement, Mr. Edward Karow testifies by affidavit that some months ago it was rumored that the Savannah Electric Company would make another effort to secure permission to use this portion of Gwinnett street; and some of the property owners, in behalf of themselves and the others, informed the president of the electric company that objection would be made to the granting of the petition. This is not controverted. The city authorities were also apprised of a unanimous protest on the part of a large and highly respectable number of its property holders and taxpayers. Not only is this true, but the city had promised to give them a public hearing. Mr. A. J. Ives, a lot holder in the territory affected, and owner of a home on which he had spent many thousands of dollars, testifies that he had heard of the impending movement of

the electric company and he gave to another lot owner, Mr. W. P. Hardee, the information, and requested him to prepare a protest. He also called upon the mayor and notified him of the grave objection of the lot owners, when that gentleman assured him, before any action was taken, that they should be accorded a full and public hearing. This affidavit is corroborated by the affidavits of W. P. Hardee, J. B. Holst, and Edward Karow. Mr. Holst was also informed by Mr. Ives that he had seen the mayor, and had received his promise that ample opportunity would be given the property owners and residents on Gwinnett street to be publicly heard in protest, in the event the petition to appropriate the street should be presented by the Savannah Electric Company. Mr. Karow was present at the time Mr. Ives made this statement. Holst and Karow both agreed that it would be well to see the mayor, that there might be no mistake or misunderstanding about the matter. They at once had an interview with the mayor, and were then and there assured by him that opportunity would be granted to the property owners affected to have a public hearing. The mayor himself testified, and his affidavit is before the court. He does not offer to controvert in any way the truthfulness of these depositions by Ives, by Holst, and by Karow. It is true, he contends that the property owners were given a full hearing. It is proper to inquire if the mayor is correct in this view. Mr. W. P. Hardee testifies that he is a resident and property owner; that his home is on the north side of Gwinnett street, between Lincoln and Abercorn. Having heard of the rumors of the contemplated movement he prepared the protest and request to be heard. It was signed by 42 property owners and residents along the line of said proposed extension. On Wednesday, May 25, 1904, about 4 o'clock in the afternoon, he was advised by one of the signers that an effort by the electric company would probably be made at the meeting of council that night to obtain permission to lay its tracks on that portion of Gwinnett street on which he lived. At 8 o'clock in the evening he repaired to the council chamber. While there, W. W. Osborne, Esq., attorney for the electric company, handed to the assistant clerk of council a paper stating that it was a petition for the electric company to lay its tracks on Gwinnett street, and asked that it be filed and sent in to council. It will afterwards appear that the municipal legislature was in secret caucus or executive session, euphemistically termed in its rules the "committee of the whole." Shortly afterward, deponent handed the assistant clerk of council his protest, and requested that it be sent in to council. Then Mr. Osborne, attorney as aforesaid, left the room, with the clerk of council, and was absent some minutes, and returned. A short time after his return the clerk asked deponent to come before the caucus and prefer his request for a public hearing. This the deponent did, then left the caucus, and waited until the mayor and aldermen emerged from their secret session and convened in the public council chamber. Deponent entered the council chamber, and remained there until the clerk of council read a brief of the petition presented by the Savannah Electric Company, handing the same to the mayor. That gentleman remarked, "Received as information." A few minutes later the clerk of council read a brief of the protest and request for hearing, and handed the same to the

mayor, who again remarked, "Received as information." Deponent waited in council chamber until about 11 o'clock p. m., and, council in the meantime having passed to other business, he concluded nothing further would be done, and went home. That something had been already done is made manifest by the affidavit of the mayor himself. He testifies that before the council convened, and while the body was still in what seems the potential "committee of the whole," they had already adopted the resolution authorizing the electric company to lay its track on the street. In that secret caucus, the deliberations, if any there were, were conducted, and the conclusion reached. The singularity of a proceeding which will permanently affect the property of so many citizens of Savannah and their constitutional rights will not escape the attention of the observant. Mr. Osborne was first called before the caucus, or perhaps he had the entrée into what John Randolph might have termed this "cave of Trophonius." It also will not escape attention that Mr. Hardee was not permitted to appear while Mr. Osborne was in the presence of the conclave. After Mr. Osborne left, Mr. Hardee was summoned. The sententious observation made by the mayor, when afterwards, in the council chamber, the briefs of the electric company's petition and the protestants' protest and request for hearing were presented, is also noteworthy. As each paper was received from the clerk of council, the mayor exclaimed, "Received as information." Since the "committee of the whole," as appears from its resolution in the record, had conclusively determined the matter, it is difficult to see what further information the council would require. The remark of the mayor, however, could have no other effect than to lead Mr. Hardee to conclude that the matter was still pending; that information on the subject was yet valuable to the council; and that he and those acting with him would be accorded the hearing which he appeared to ask. That the electric company had all the information necessary is perhaps manifested by the fact that shortly after 5 o'clock next morning it is posting "with quick dexterity" to lay its track, and to appropriate for its purposes the unappropriated portion of Gwinnett street.

The contention of the city that complainants were heard before council is based upon the following statement to be found in the affidavit of Mr. Myers, the mayor:

"Two years ago the Savannah Electric Company petitioned council for consent to lay their track on the portion of Gwinnett street involved in the above-named case. The lot owners on the street filed a protest, and council heard the same, and did not grant the request. At that time they had a public hearing, and heard all the argument. At the present time there is a new council, but nearly all the members of the present council were members of the old council, and had formerly heard the arguments advanced."

Assuming, under the law, that the complainants are entitled to an opportunity to be heard upon a matter affecting their rights of property, this proposition of the mayor does not appear to be maintainable. The fact that an adjudication on the same matter and on the same facts had been previously made by the same council now contemplating a change of mind, instead of precluding a hearing, would give a stronger claim to that settled right under popular government. So plain is this that

such a proceeding in a tribunal governed by law is termed a "rehearing." The mayor, however, himself contends that the facts were not the same. Indeed, he contends that the permission was granted because the facts were different. Nor was the council the same. Nor is it true that Mr. Hardee appeared as attorney for the lot holders, or to make the showing against the resolution for them. He had not been employed as attorney, and his appearance was in propria persona merely for the purpose of asking a hearing for himself and the others at an appropriate time to be fixed by council. If this request was passed upon at all, council gave him no information of the fact, but, on the contrary, by receiving his petition "as information," impliedly confirmed the express promise of the mayor that a hearing would be accorded the complainants and those having rights in common with them.

It will be observed that the authority to the electric company to lay its track on Gwinnett street was granted by resolution of the "committee of the whole." This we have seen to be a secret session of the council, from which the public is excluded. It, however, appears that the resolution, late at night, was approved by council. A certified copy of the resolution is in evidence, and this constitutes the sole authority upon which the electric company is proceeding. It begins:

"By the Committee of the Whole: Resolved, by the mayor and aldermen of the city of Savannah, in council assembled, that permission is hereby granted to the Savannah Electric Company," etc.

In the final clause there is this proviso and condition:

"That the said Savannah Electric Company, at its own cost, shall pave between its tracks and five feet on either side thereof, with vitrified brick under the direction of the director of public works, at the intersection of Abercorn and Gwinnett streets, covering the proposed switch there; likewise at the curve at Atlantic and Gwinnett streets, and at the two curves at Atlantic and Bolton streets, also at the two curves at Gwinnett and Ott streets, and at the two curves at Bolton and Ott streets, also at the reverse curve at Gwinnett street and Waters avenue. All of the foregoing paving with brick to be done within thirty days after each of said pieces of work shall have been done."

A careful consideration of the charter of Savannah and various provisions of the city code is convincing that the powers to farm out or donate the streets for railway purposes as herein sought to be done cannot be exercised by resolution. It is well settled that the powers granted a municipal corporation, particularly where they affect private rights, must be strictly construed, and the method marked out by law for giving effect to such powers must be as strictly followed. In 1 Dillon on Municipal Corporations (4th Ed.) 309, it is declared that, when the mode of enacting ordinances is prescribed, it must be pursued. This is supported by many authorities. 20 Am. & Eng. Ency. Law, 1142. In clause 32 of the charter of Savannah (MacDonell's Code, p. 12), it is provided:

"The mayor and aldermen of said city shall have power and authority from time to time to make, ordain and establish such by-laws, ordinances, rules and regulations as shall appear to them requisite and necessary for the security, welfare and convenience of said city and its inhabitants, and for preserving health, peace and good order within the limits of the same."

By-laws are rules and ordinances made by a corporation for its own government. 1 Bouvier, p. 274. While the terms "ordinances" and "by-laws" are sometimes used interchangeably, it cannot, we think, be contended that the resolution under consideration is a by-law. "The term 'ordinance,'" said Judge Dillon (1 Municipal Corporations, par. 307), "in this country, is limited in its application to the acts or regulations in the nature of local laws passed by the proper assembly or governing body of the corporation." The words "rules or regulations," as used in the clause of the Savannah charter above quoted, are not regarded as material. The act of council under consideration is neither a rule nor a regulation. It is, in short, what it expressly imports to be—merely a resolution of council; and a critical scrutiny of the charter of Savannah and the rules of council will, we think, disclose the fact that authority to pass any resolution is nowhere expressly given, and is by implication derivable only from an expression in rule 5 (MacDonell's Code, p. 46), reading:

"And no resolution providing for the expenditure of money shall be passed at the same meeting at which it is offered, without the consent of three-fourths of the members present," etc.

The power, then, to dedicate one of the city streets for street railway purposes, can be expressed by ordinance only. This is clear from the general power of the city to legislate (section 32 of the charter), as from other cognate clauses relating to the particular matter under consideration. The power of the city over streets and lanes is also limited to certain purposes by clause 35 of the charter. On the question of paving the streets and assessment of cost on property owners, section 36 of the charter provides that:

"The mayor and aldermen of the city of Savannah shall have full power and authority, by a vote of two-thirds," etc., "to adopt at any time an ordinance requiring the grading, paving, macadamizing or otherwise improving for travel or drainage, any of the streets or lanes of said city, a street railway company now having or which may hereafter have tracks running through the streets of said city so improved being required to macadamize or otherwise pave, as the said mayor and aldermen of the city of Savannah may direct," etc.

All of this must be done by ordinance. And this, as we have seen, has actually been attempted here by resolution; and here the street railway, it seems, has in this resolution been twice commanded to promptly pave—once with "brick," and again with "vitrified brick." A cognate section even more illustrative of the proposition announced is No. 43, p. 15, MacDonell's Code:

"The said mayor and aldermen, in council assembled, are authorized and empowered to build and operate carriage railways for the convenience of persons traveling in and visiting said city; and the rate of speed is to be regulated by ordinances."

And again, in section 44, the—

"Corporation of Savannah, may either build, construct and use such railways on its own account, or let or farm the privilege to individuals or companies, under the conditions and at such rates of fare and other charges as the city council of said city may by ordinance determine: provided that the rates of fare and other charges must beforehand be fixed by ordinance and published for general information."

It is true that, in their exhaustive brief, Messrs. Osborne & Lawrence, solicitors for the electric company, contend "that, the organic law authorizing council to do or not to do a thing, without prescribing the method, it is appropriate for council to act on resolution instead of by ordinance"; citing Dillon on Municipal Corporations, § 307, and note. Unhappily for this contention, the learned counsel do not quote the author with precision. The language of Judge Dillon is as follows:

"Where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by ordinance."

Nor do they quote the material language which follows:

"But if the organic law requires an act to be done by ordinance, or if such requirement is implied by necessary inference, a resolution is not sufficient."

Where the charter is silent as to the method, there are cases in which a resolution was held sufficient, and many others in which an ordinance was required; but it is believed in no case where it is expressly declared, as in the charter of Savannah, that the control of the streets, paving, street railways, and the like, must be by ordinance, that over the protest of the property holders a mere resolution has been sustained, granting permanent use of a street for railway purposes.

Then, to be effective, this attempted grant of power of the city to the electric company to appropriate Gwinnett street for its track must be regarded as an ordinance; and, as an ordinance, it is a void thing, because it in no sense complies with the method for enacting ordinances prescribed by the organic law of the city. This provides, under the head of "Council" (MacDonell's Code, p. 46, rule 5):

"All motions shall be made in writing, and seconded before debate, and every bill shall be read twice—that is, once at two distinct regular meetings of council—before it passes into an ordinance, unless in case of emergency, when a bill may be read twice by unanimous consent at the same session and passed; and after the passage of an ordinance, the same shall be signed by the mayor or presiding chairman, as soon as fairly copied, and be immediately thereafter published. * * * All ordinances when passed shall be fairly and correctly transcribed by the clerk of council in a book of ordinances, and when examined by the mayor and found correct, shall be signed by him or the officer presiding at the time of its passing, and countersigned by the clerk, with the seal of the city affixed. And all ordinances after having been read the first time shall, forthwith, be published for information in the official gazette until the next regular meeting of council."

None of these requisites appear. It is, moreover, not pretended that this is an ordinance, but it is relied upon as a resolution.

This precise question has been recently decided by the Circuit Court of Appeals of the Sixth Circuit in the case of Mayor, etc., of Morristown, Tenn., v. East Tennessee Telephone Co., 115 Fed. 304, 53 C. C. A. 132, Circuit Judges Lurton and Day, and by District Judge Wanty. It was there distinctly held that, where the charter conferred the power to grant street franchises by ordinance, no other method was admissible. Judge Lurton, rendering the opinion, states the same rule in another form:

"When, by statute or charter, power is conferred upon a municipal council, and is silent as to the mode of action, the decision may be by either ordinance or resolution, at discretion of the council. But when the charter prescribes that franchises can be granted by ordinance, it is not competent to make such

a grant by resolution." Citing Board v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573, and a number of other authorities.

In view of this established principle, and in view, also, of the provisions of the charter of Savannah, which expressly restrict the power to legislate by ordinance only for the control of streets, pavements, street railways, and the like, it is clear that the effort on the part of council to grant the franchise under discussion to the street railway by resolution is absolutely null and void.

This conclusion greatly simplifies the duty of the court. We have under consideration the property rights of many complainants, all seriously threatened with loss and damage by the unlawful and void action of a city government which is itself the creature of the state. This action is taken in behalf of a street railway corporation which is also a creature of state law. It is clearly a case where the complainants have no adequate remedy at law. Before equitable relief is denied on this ground it must be made to appear that the remedy at law is in all respects as effective and satisfactory as that in equity. If driven to legal remedies, each lot owner must pursue his separate action in each case, with costs perhaps as great as in the case now before the court. The injunction sought will prevent a multiplicity of suits, all involving the same void enactment, all involving identical property rights of citizens, all residents of one locality. Notwithstanding the somewhat disparaging reference of the city's answer to "sentimental, whimsical, or archaic damages," that valuable property rights are in issue in this case is no longer open to question in the United States courts, and that injunction, under such circumstances, is the appropriate remedy, is equally as well settled.

In the recent case of Hart v. Buckner et al., from the Circuit Court of Appeals of the Fifth Circuit (5 C. C. A. 1, 54 Fed. 925)—a decision rendered for the court by that eminent jurist, Judge Pardee, December 19, 1892—it was held that owners of lots abutting or adjacent to a public street of the city, even if not owners of a fee in the street, have the right of access and the right of quiet enjoyment, and such rights are property which may be protected by injunction when invaded without legal authority. It was also held that, where there is an unauthorized obstruction of a public street, all of the adjacent lot owners who sustain special injury therefrom can maintain a suit for injunction. Here, moreover, it seems that in this particular locality in Savannah the fee to the streets is in the lot owners. The colonial act of May 1, 1760, which appears never to have been repealed, and is condensed in the city code (MacDonell) par. 117, contains this provision:

"And be it further enacted by the authority aforesaid, that the common appertaining to the said town, extending southerly from the extremity of the bluff on the River Savannah to the north line of the garden lots, and westerly from the west line of the garden lots, lying east of the said town to the east line of the lots lately laid out between Musgrove's Creek and the said town, including all the squares, streets, lanes, and passages, described in the plan of the said town in the Surveyor General's office, and have been heretofore accustomed or made use of by the inhabitants of the said town, shall be and continue the common property of the lot holders in the said town, and shall not be aliened or granted away for any purpose, whatsoever, than by act of the General Assembly."

This includes the lots and streets involved.

If, however, this colonial act shall be deemed inoperative, the general principle as announced by Judge Pardee is none the less applicable. The term "right of quiet enjoyment," as used by the Circuit Court of Appeals of this circuit in the case above quoted is somewhat elaborated in the case of Beeson v. Chicago (C. C.) 75 Fed. 880—opinion rendered by Judge Grosscup, now Circuit Judge. There it was declared that:

"The owner of abutting property has an interest in the street not common to all the people of the state, but personal and peculiar to himself. His property is affected in its commercial value, and in the possibilities and advantages of its use, by the character of the streets upon which it abuts. Such use of the street may destroy the availability of his land for the purpose he has in mind, or has already put into execution. Even partially sentimental objections, such as the noise of electric cars or the unsightliness of elevated structures, largely make up the actual elements of market value. Will any one contend," continues Judge Grosscup, "that the abutting property owner, having such a peculiar and personal interest, may not protect it, in his own right, in a court of equity, against the intrusion of a usurper who comes on the street without color of law?"

Nor has the Supreme Court of the United States been voiceless on this topic, so indispensable to the preservation of private property rights against the aggressions of municipal corporations. In the case of Chicago v. Taylor, 125 U. S. 162, 8 Sup. Ct. 820, 31 L. Ed. 638, under a clause of the state Constitution practically identical with the Constitution of the state of Georgia (Code Ga. 1895, § 5729), Mr. Justice Harlan, for the court, approves the conclusion that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass or actual physical invasion of the owner's real estate, as contended in the answer of the city here, but, if the construction and operation of a railroad or other improvement is the cause of the damage, though consequential, the party may recover. It is true that the Supreme Court of Georgia, in the case of Austin v. Augusta Terminal Co., 34 S. E. 852, has announced a different rule. It has held, in effect, that in such cases a citizen has no property right capable of protection by a court of law or of equity unless there is an actual physical taking of his property. This is the rule in Georgia, although two of the most eminent members of that distinguished tribunal placed on record their elaborate and most forceful dissent to the conclusions of the majority. With great deference to the distinguished judges who compose that court, it is not believed that their holding can contravene the decision of the Supreme Court of the United States in Chicago v. Taylor, supra, and the cases cited from the Circuit Courts of Appeal, which, upon precisely the same question, reach a conclusion diametrically the opposite. Besides, in that case the presence of the railway on the street was by lawful authority. It is no doubt upon the authority of this decision that the answer of the mayor and aldermen insists with such earnestness of asseveration that whether or not such railroad tracks should be upon Gwinnett street, or upon Bolton street, or upon any other street, the city council of Savannah, in its best judgment and discretion, is vested with the responsibility

of determining the same, and that in no event was there any taking of the property of the citizens. Were this true, there could be no bar to the exercise of an arbitrary discretion by municipal corporations, which, so far as his property was concerned, would reduce the American citizen to a condition in this respect not superior to that of the subjects of the most autocratic governments of the old world. There is, however, a conclusive bar to the exercise of such arbitrary discretion by municipal corporations. It is found in that salutary clause of the fourteenth amendment which declares that no state shall deprive any citizen of the United States of life, liberty, or property without due process of law. This is effective to protect the rights of citizens of Georgia, who are also citizens of the United States, who complain to the court, and, as well, the citizen of New York who has joined in their complaint. It is at this precise point that the courts of the United States, in the exercise of the jurisdiction depending upon that clause of the Constitution, are obliged to intervene in the proper cases, and they are not to be wholly controlled by the interpretation which state courts have placed upon the ordinances of municipal corporations which have the effect to take or to destroy the property rights of the citizen. In Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, it was declared in a suit brought before the Supreme Court from a state court, which involved the constitutionality of ordinances made by municipal corporations in the state, that the United States court will, when necessary, put its own independent construction upon such ordinances. This, it may be observed, is obviously necessary, from the nature of the jurisdiction which the United States court exercises in the enforcement of this constitutional provision. If the construction given to the ordinances by the state courts was conclusive in such cases, the right of application to the United States court might be of little practical value.

Surely these principles thus distinctly and authoritatively announced are especially applicable in the case before the court. It is indisputable from the record that the electric company has no purpose to use this beautiful residence street for the transportation of passengers. It is adroitly alleged in the answers, and also stated in the affidavit of the mayor, that the proposed track is to be used for "passenger cars." This is true, but all of the evidence shows the fact that such passenger cars would be empties shunted into the car barns late at night, when the work of the day is over, and distributed therefrom at dawn, before the work of the day had begun. It is unfortunately true that this proposed servitude upon one of the most desirable and beautiful residence streets of the city of Savannah will occur at precisely that hour of the day and night when repose is most desired, and when its disturbance will be most injurious to the comfort and health of the residents and of their families, and to the value of their property. To this now quiet street, from several lines crossing it at right angles, at midnight and dawn, a multitude of empty passenger cars from every mile of the immense trackage of this great corporation will come, grinding and screeching around the curves, and with sounding of bells, the humming of motors, and the clangorous noise of machinery, will go speeding to or from the car barns of the company. It is not difficult to perceive that in the

climate of Savannah, where for the greater part of the year the people must sleep with open windows, such a concentration at midnight and dawn of empty cars of the electric company on that portion of Gwinnett street will constitute a burden upon the people of the most oppressive and injurious character, and be practically destructive of the comfort of their homes, and the especial value of their property.

It is equally clear that the company already has ample facilities for housing and distribution on Bolton street, where its track, as appears from the evidence, is only used to move empty cars. On these, according to the testimony of Mr. Holst, who lives in view, no passenger has ever been seen. This track is but one square to the south of Gwinnett, and now crosses the Atlantic Coast Line on grade level. This is done in order to reach the car barns of the defendant company, which are situated to the eastward of that railroad. By a turn to the left on the street contiguous to the railroad, and by running north the depth of one block, the Bolton street line thus used can be readily connected with the track already in use on the lower part of Gwinnett, and thus have easy and direct access to the proposed subway which is to be located there. It is true, as stated by the mayor, that there must be two turns in this track; but the only inconvenience therefrom, if any, will be experienced by the electric company and its employés. The question is readily suggested, is it conscionable for the city government of Savannah, by resolution or by ordinance, for the convenience of the corporation, to so largely impair the homes of one of the fairest sections of the city, and with the consequent loss of value and depreciation of property rights? It is to be observed that the mayor testified that the electric company proposed to take up the track on Bolton street altogether, and put it down on Gwinnett. It has always been used for the housing and distribution of empty passenger cars. This track has been on Bolton for many years. No complaint has been heard about its presence. The street is a narrow one, and by no means so desirable as Gwinnett for residence property. The latter street was by act of the city clearly dedicated for residential purposes. Indeed, it appears from the evidence of Mr. J. B. Holst that by ordinance of the city of Savannah it is required that not more than one house shall be built on every 40 feet in that section of the city. The import of this provision is obvious.

In view of these considerations, after careful deliberation, we have reached the conclusion that the resolution of the mayor and council of the city of Savannah was passed in grave, if not flagrant, disregard of the just rights of the citizens and property holders who are complainants; that the latter, in a manner violative of the usages, if not the principles, of popular government, have been denied a hearing in a matter vital to their interests by the government of their city, when that hearing had been expressly promised them, but that the resolution passed in disregard of their rights is, happily, in the interests of justice, null and void, and is not authorized by the charter of the city, or conformable to the express methods of legislation therein enacted with relation to the topics involved; that the resolution is unnecessary for the benefit of the electric company, unreasonable, and wholly unnecessary for the public convenience. On the contrary, if permitted to stand,

it would be most oppressive to the complainants, in that it is particularly destructive of the quiet and comfort of their homes, with large and inevitable diminution in the value of their property rights.

For these reasons, it will be ordered that the injunction pendente lite shall be made permanent until final decree, and that the cause will proceed as usual in equity.

WARD v. WARD et al.

WARD et al. v. SAME.

(Circuit Court, S. D. New York. August 17, 1904.)

1. MORTGAGE—FORECLOSURE SALE—NECESSITY OF CONFIRMATION.
Under the law of New York, the failure to procure an order confirming a referee's report of sale in a foreclosure suit does not invalidate the purchaser's title, where he has paid the consideration and received a deed from the referee.

2. SAME—VALIDITY—FAILURE TO RECORD.
The fact that a mortgage covering both personal and real estate was not filed does not invalidate it as between the parties under the law of New York.

3. SAME—MORTGAGEABLE INTEREST—ESTATE IN EXPECTANCY.
A testator left his residuary estate in trust, the interest therefrom to be paid to a beneficiary during her life, and the principal at her death to be divided equally between three cousins of the testator; the children of either, should he die before the termination of the trust, to take in his place, and, should either die leaving no children, the estate to be divided between those surviving or their children. *Held*, that each of the cousins took a contingent estate in expectancy, which, under the New York statute (1 Rev. St. pp. 722–725, pt. 2, art. 1, c. 1, tit. 2), which provides that "expectant estates are descendible, devisable, and alienable in the same manner as estates in possession," was alienable, and could be mortgaged, although from the nature of the contingency attached neither descendible nor devisable.

4. SAME.
One of the cousins mortgaged his interest, which was sold under foreclosure, and bought by another of the cousins, who died intestate before the termination of the trust; the mortgagor, however, surviving. *Held*, that while the estate in expectancy of the purchaser, under the will, was terminated by his death, the interest acquired by his purchase was not affected thereby, but passed to his heirs, and became vested in them on the termination of the trust during the life of the mortgagor.

5. SAME—PRESUMPTION OF VALIDITY.
Where the devisee of a contingent interest in an estate gave a mortgage thereon to the executor, which was foreclosed by regular proceedings, and the interest sold to another devisee, who gave a like mortgage thereon to the executor, it must be presumed, in the absence of evidence to the contrary, that the transaction was bona fide, and divested the first mortgagor of his interest, although no reason for it appears.

6. ESTOPPEL—EXPRESSION OF OPINION.
The expression of an opinion by one of the parties, on a question of law, where both parties have full knowledge of the facts, cannot create an estoppel.

¶ 2. See Chattel Mortgages, vol. 9, Cent. Dig. § 152; Mortgages, vol. 35, Cent. Dig. § 199.

7. DOWER—ESTATE IN EXPECTANCY.

Under the law of New York a wife has no dower rights in lands in which her husband has only an estate in remainder expectant upon a life estate.

In Equity.

These actions were tried and argued together. They both relate to the same subject-matter and the main controversy is identical in each. The first action is for a distribution of personal property; the second for a partition of real estate under the will of Henry H. Ward upon the termination of a trust estate created by said will. The defendant Evarts is not personally interested in the controversy and is joined as defendant in the first action because he holds the personalty as trustee or custodian. The city of New York is made a defendant in the second action in order to bar any lien for taxes. The vital question, therefore, is how the property, real and personal, shall be divided between Charles H. Ward and wife, complainants, and Maria E. G. McK. Ward and Caroline C. Ward.

Henry M. Ward, for complainants.
William G. Wilson, for defendants Ward.
Allen W. Evarts, in pro. per.

COXE, Circuit Judge (after stating the facts). Henry H. Ward died August 27, 1872, leaving a will, executed July 31, 1872, whereby, after making certain minor devises and bequests, he left all the rest, residue and remainder of his estate to his executors to hold during the life of his cousin Eliza Ann Partridge in trust, the income to be paid to her during her life. The will then proceeds as follows:

"Upon the termination of such trust by the death of said Eliza Ann Partridge, I give, devise and bequeath the capital of such trust estate, as the same shall then exist, unto my three cousins, William G. Ward, Charles H. Ward and John Ward, sons of my deceased uncle William G. Ward, in equal shares, in fee simple and absolutely, and to their heirs, representatives and assigns forever; if, at such time of the termination of the trust, either of my said three cousins, William, Charles and John, shall be dead leaving issue who shall then be living, such issue shall take in his place, per stirpes and not per capita, absolutely, and in fee simple, the shares of the capital of such trust estate, which he would have taken if living, and if, at the time of such termination of the trust, either of my said cousins, William, Charles and John, shall be dead and there shall be no issue of him at such time surviving, the share of the capital of said trust estate which would have gone to the one so dead, if he had been living, shall pass in equal shares in fee simple and absolutely, to the then survivors or survivor of my said three cousins, William, Charles and John, and to the then surviving issue, if any, of any of them who may have previously died, leaving issue surviving until such period, such issue to take by representation and per stirpes and not per capita, and only the share which their ancestor would have taken if he had survived the termination of the trust; and I give, devise and bequeath the capital of said trust estate, upon the termination of the trust by the death of my said cousin, Eliza Ann Partridge, in accordance with the foregoing provisions."

Miss Partridge died September 19, 1902, John Ward died, intestate, August 9, 1896, without issue, his brothers William and Charles being his only heirs at law and next of kin. He left little available property, hardly enough to pay his debts. William G. Ward, a widower, died, intestate, January 16, 1901, leaving as his sole

¶ 7. Estates subject to dower, see note to Black v. Elkhorn Min. Co., 8 C. C. A. 316.

surviving issue his two daughters, the defendants, Maria E. G. McK. Ward and Caroline C. Ward. Charles H. Ward, the complainant, was the only survivor of the three cousins of the testator mentioned in the will. When, therefore, the trust terminated September 19, 1902, the persons entitled, under the terms of the will, to the capital of the trust estate were Charles H. Ward and the issue of William G. Ward—Maria E. G. McK. Ward and Caroline C. Ward—half going to the complainant and half to the defendants Ward; one-fourth to Maria E. G. McK. Ward and one-fourth to Caroline C. Ward. Charles E. Butler and the complainant were appointed executors and trustees under the will. Charles E. Butler died May 1, 1897. On September 1, 1897, the complainant having resigned as executor, Prescott Hall Butler was appointed trustee. He died in 1901, and the defendant Allen W. Evarts was appointed sole trustee or custodian of the trust funds.

The defendants insist that the complainant is not entitled to take under the will for the reason that all his interest in the estate, real and personal, was transferred to John Ward and that his sole interest in the estate is as heir at law and next of kin of John Ward. The transfer was accomplished in the following manner: On October 24, 1874, William G. Ward and Charles H. Ward, for the purpose of securing their indebtedness to the estate of Henry H. Ward, executed their bond to Charles E. Butler, as executor, in the sum of $50,000, conditioned for the payment of $25,000 and interest, and as security for the payment of this bond each, severally, gave a mortgage covering all his interest in the estate of Henry Hall Ward "both real and personal of every kind and description whatsoever and wheresoever situated which belonged to the said Henry H. Ward deceased at the time of his death." These mortgages were duly foreclosed and the property was bid in by John Ward for $49,000, who received from the referee a deed covering all the real and personal property "whereof Henry H. Ward died seised or possessed, and which constitutes a part of his residuary estate." This property is specifically described in the deed.

The court has not the slightest doubt that this mortgage was properly and regularly foreclosed after personal service of the summons upon Charles H. Ward and that he had general knowledge, at least, of the foreclosure and sale. To prove this it is only necessary to refer to two pieces of testimony.

First. On July 1, 1887, he wrote a note to the attorneys in the foreclosure suit, informing them that one of the defendants "in the above suit * * * holds a judgment against another Charles H. Ward." This note is entitled in the foreclosure suit and imports knowledge by the writer of the character of the action.

Second. In an account of Charles E. Butler and Charles H. Ward, as executors, appears the following item:

"1888 January 23 Bond and Mortgage of John Ward, secured by premises covered by mortgages made by Charles H. Ward and William G. Ward foreclosed $25,000"

Over his own signature the complainant acknowledged that he had examined this account, found it to be correct and ratified and ap-

proved it. The failure to procure an order confirming the referee's report of sale does not invalidate the title of the purchaser at the sale who has paid the consideration and received the referee's deed. Peck v. Knickerbocker Ice Co., 18 Hun, 186; Fort v. Burch, 6 Barb. 76; Fuller v. Van Geesen, 4 Hill, 173. The fact that the mortgage covered both the realty and personalty belonging to the trust and was not filed, does not render it invalid as between the parties. Jones v. Graham, 77 N. Y. 628; Briggs v. Oliver, 68 N. Y. 336. The $49,000 bid at the sale was paid as follows: John Ward executed a bond for $25,000 principal, secured by a mortgage upon the interests which he had just acquired. There was a cash payment of $902.84 and the remainder, being for interest, which under the terms of the will belonged to Miss Partridge, was discharged by her acknowledgment of the receipt from Mr. Butler, as executor and trustee, of the sum of $23,156. On November 13, 1896, after the death of John Ward, William G. Ward conveyed and assigned to the defendants Maria E. G. McK. Ward and Caroline C. Ward "all the share or shares, estate, right, title and interest whatsoever which the said William G. Ward now hath or at any time hereafter shall or may have or in any wise become entitled to have and receive, of, in or to any or all of the estate and property of every name, nature and description whatsoever, and wheresoever situated, which belonged to Henry H. Ward." On the same day William G. Ward executed an assignment to the said defendants of his share in the personal property which belonged to John Ward. William G. Ward was appointed administrator of John's estate and, on April 18, 1898, he, individually, and as administrator, and Charles H. Ward, entered into an agreement with Miss Partridge by which her claim against John, amounting, with interest, to $45,275, was adjusted by conveying to her certain real and personal property previously belonging to John, she releasing his estate and William and Charles Ward from all claims which she had against any of them by reason of the indebtedness of John.

The clause of the will above quoted provides that the gift to William, Charles and John shall take effect upon the termination of such trust by the death of Miss Partridge and that the property to be disposed of shall be the capital of the trust as it exists at the date of such death. If, prior to this date, either William, Charles or John shall die leaving issue, such issue shall take in his place per stirpes. This provision is applicable to the defendants, William, their father, having died before Miss Partridge. So far as they are concerned the situation is precisely as it would have been had the will mentioned them by name. William could transfer his own interest in the estate, but whether the party receiving the transfer realized anything or not depended upon the contingency of William outliving Miss Partridge. He could not by transferring his interest deprive his daughters of their interest, which vested in them absolutely at the death of Miss Partridge, provided their father had died previously.

The will further provides that if, at the death of Miss Partridge, either William, Charles or John shall be dead, leaving no issue, the share of the deceased shall go to the survivor or survivors. It seems

plain, therefore, that neither of the cousins could touch a dollar of the estate until the trust was terminated by the death of the beneficiary. When that event took place, if all were living, each would take a third; if two were living each would take a half; and if but one survived he would take it all. As before stated, if nothing had occurred to disturb the status of the parties, the estate would have been divided equally; Charles taking one-half and the daughters of William one-half. But until the event occurred which made it possible to dispose of the residuary estate no vested interest was created but only an expectant contingent interest.

Was this interest alienable? The complainant insists that during the lifetime of Miss Partridge the disposition of the estate upon the termination of the trust was wholly conjectural, William, Charles and John having mere possibilities that they would acquire interests if they were living when Miss Partridge died. Their interests, it is said, were neither descendible, divisable nor alienable; they could not be mortgaged and hence no title passed by the foreclosure of the mortgage. The court is unable to accede to this view. There seems to be little controversy as to the proposition that the interests of the three cousins under the will were contingent remainders. By the statutes of New York estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy, the latter being subdivided into future estates and reversions. "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." A future estate dependent on a precedent estate, may be transferred by the name remainder. A future estate may be either vested or contingent. It is contingent when the person to whom or the event upon which it is limited to take effect remains uncertain. "Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession." 1 Rev. St. N. Y. pp. 722–725, part 2, art. 1, c. 1, tit. 2. It may well be that the estate in question is not devisable for the reason that the event which makes the will operative—the death of the testator—defeats the estate. For the same reason it is not descendible; it remains an expectant estate only during the life of the beneficiary and, as such an estate, it cannot descend because the death of the intestate, before that of the beneficiary, terminates it. But why may it not be alienated? Such an estate has a tangible present value. It may be sold and property which may be sold may be mortgaged. Can there be any doubt, if the complainant had sold his interest for a valuable consideration, that the vendee would now be entitled to complainant's share? If he had mortgaged or pledged his interest would not the purchaser on foreclosure be entitled to the same right? The trust estate was in esse and the beneficiary was well advanced in years. The only risk the purchaser of such an interest would incur would be the chance that the beneficiary would outlive the remainderman. In the due course of nature this would be an unlikely event. Like a life policy the complainant's interest possessed an actual existing value. To hold that it was incapable of

disposition and worthless in the hands of the transferee seems to run counter to the progressive spirit of the law, the tendency of which is to limit the suspension of the power of alienation within as narrow bounds as possible.

In Ham v. Van Orden, 84 N. Y. 270, the interest of the property forming the substance of the legacy was to be paid to one Wessel during his life and upon his death without issue one-fourth to the plaintiff. The court says:

"In either case, she [the plaintiff] acquired an interest although the right to possession was postponed to a future period and depended upon the contingency of the death of Wessel without children. This did not prevent the creation of the estate, but rendered it liable to be defeated. It was an estate in expectancy, however, and could not be destroyed by any alienation or other act of Wessel or his trustee, and upon his death without children would become absolute in the plaintiff. It was therefore alienable by her to the same extent as if in possession, and whether it be deemed vested or contingent. These rules apply although the property involved is personal and not real."

In Hennessy v. Patterson, 85 N. Y. 91, 103, the court says:

"John Foley had something more than a mere possibility of acquiring an estate; he had the fixed, absolute right to have the estate if the contingency occurred. That right was conferred by the will of the testator, and vested in him at the instant of the latter's death. The devisee held it as a vested right, but such a right as the contingent and uncertain character of the devise created; nevertheless a fixed and vested right, which the Revised Statutes recognize as an estate, place in the category of expectant estates, and decree shall be descendible, and which, as we have already seen, was descendible even at common law. In his chapter on executory devises Washburn reminds us of the necessity of distinguishing 'between the vesting of a right to a future estate of freehold, the vesting of a freehold estate in interest, and the vesting of the same in possession.'"

See, also, Moore v. Littel, 41 N. Y. 66; Kelso v. Lorrillard, 85 N. Y. 177.

If the foregoing conclusions be correct the proposition that the title which passed to John by the foreclosure sale was defeated by his death cannot be maintained. If Charles had sold his interest to A, a total stranger, it seems obvious that A's death would not have extinguished his interest and reinvested the title in Charles. It is plain that the interest was one that descended to A's heirs and next of kin and, on the death of Miss Partridge, vested in them the share in the estate which Charles would have taken if he had not parted with it. The legal effect of the death of John without issue was to extinguish his own contingent interest in the trust estate, but not his title to the property purchased by him at the foreclosure—this, like any other property, was his to dispose of by conveyance or will as he saw fit, or by descent to his heirs and next of kin if undisposed of at his death.

The complainant contends further that even if John obtained title by virtue of the sale in foreclosure whatever title passed to him, and by descent from him to William and his daughters, was and is impressed with a trust in favor of the complainant. The entire transaction of the bond, the mortgages, the foreclosure and the sale seems inexplicable. If the amount bid at the sale had been paid in cash, the indebtedness to the trust discharged and the balance paid to Miss Partridge a sufficient reason would be disclosed. But

why so complicated and expensive a proceeding should have been carried through, the net result of which was to substitute the bond of John for the one of Charles and William it is difficult to understand. If Miss Partridge had given a receipt for past interest and a waiver of future interest before instead of after the foreclosure, it would seem that the result, so far as a benefit to the trust is concerned would have been the same. There must have been some good reason why she was unwilling to release Charles and William but willing to release John. The high character of the parties and the unquestioned professional standing of the counsel preclude the idea that there was anything unfair or questionable in the transaction. There must have been a reason and a good reason, but what that reason was the record fails to disclose. Mr. Butler died in 1897 and has left no word of explanation. In the absence of proof to the contrary it must be assumed that the transaction was a bona fide one. The court is not permitted to indulge in speculation as to the motive of the trustee or the object sought to be attained. It is suggested that Mr. Butler's intention was to preserve the trust for the benefit of the family by barring the claims of creditors. Several reasons are suggested against this explanation, one of which is that it was a most complex and inadequate remedy and one which would hardly have appealed to a lawyer of Mr. Butler's astuteness and ability. It is, however, enough to say that the suggestion is advanced simply as a "theory" and an "inference." If the acquisition of the title by John were a temporary arrangement merely it would seem that the complainant must have known it. Not only was there a failure to reduce such agreement to writing but there is no testimony from the complainant or any one else indicating that such was the intention. It is, indeed, strange that such elaborate machinery should have been set in motion to accomplish a definite purpose and no evidence left to establish that purpose. If the foreclosure had been undertaken for the advantage of William and Charles would the proceeding have terminated at a point distinctly prejudicial to their interests? Miss Partridge lived 15 years after the foreclosure, William 14 years, Mr. Butler 10 years and John 9 years, ample time, it would appear, in which to remove from the situation those elements of uncertainty which were sure to create confusion and, in all probability, work injustice to Charles. In other words, if a trust were intended there was every reason why its existence should have been made clear. The fact that no such proof is presented raises a strong presumption against the trust.

Again, the complainant's brief says:

"Another theory by which we reach the same result is that in making the purchase in this way John was acting as the agent of Butler; that in reality the purchase was made by Butler as trustee. This is the real fact."

The court is unable to accept this view. The real fact is that the purchase was made by John. The proceeding operated to vest in him, not in Mr. Butler, the interests of Charles and William. Why this was done we may not know; that it was done admits of no doubt; the burden is on him who asserts the contrary to prove his contention. If John were living to-day can there be a doubt, upon the

present facts, that his title to the interest of Charles would be valid? John's title to William's share was defeated by the latter's death, but Charles survived Miss Partridge, his interest in the trust became vested and absolute and the title would have passed to him had he not parted with it 15 years before. John's interest as purchaser at the foreclosure sale did not lapse but passed to his heirs and personal representatives.

The defendants Ward do not inherit through their father, but under the following language of the will of Henry:

"If, at such time of the termination of the trust, either of my said three cousins, William, Charles and John, shall be dead leaving issue who shall then be living, such issue shall take in his place, per stirpes and not per capita, absolutely, and in fee simple, the shares of the capital of such trust estate, which he would have taken if living."

These defendants assert title to half of the interest sold to John on foreclosure as assignees and grantees of their father, who was one of the heirs of John, Charles being the other heir. It is argued by the complainant that the defendants are estopped in pais and of record from claiming any title by descent from their father by reason of his action on the death of John. This contention is based first upon a letter written November 11, 1896, by counsel for William to counsel for Charles, which contains this expression of opinion upon the question of law involved:

"On careful examination of the terms of the will of Henry H. Ward, I am satisfied that there is fair ground for claiming that the interests of William G., Charles H. and John Ward in the residuary estate of Henry H. Ward were not vested. But at the same time it is certainly more prudent to take such precautions as may be to protect all interests in case they should be held to be vested."

This is treated "as a representation of William and his counsel that John had no interest in the estate of Henry." The court cannot think that it bears this construction. There is here no concealment of fact; it is rather a mere impression, expressed tentatively, upon a proposition of law. Although the writer of the letter is inclined to think that there is "a fair ground for claiming" that the interests of William and Charles did not pass to John his advice is to proceed upon the theory that they did so pass. Charles was represented by learned counsel and both knew all the facts. On the question of law there might well be a difference of opinion, but how Charles was misled or injured by the statements of the letter in question it is not easy to perceive. In June, 1897, an action was brought by Miss Partridge against Prescott Hall Butler, as executor of the will of Charles E. Butler, deceased, Charles H. Ward and others, praying that a suitable person be appointed trustee under the will of Henry H. Ward in the place of Butler and Charles, who is alleged to be in poor health and anxious to resign. It is said that this complaint alleges that Charles and William, by John's death, had become the persons entitled, if they survived, to John's share in the trust estate. This was true upon any view of the law, but it is said, because certain facts are not alleged that the complaint proceeds upon the theory that John took nothing by the foreclosure sale. There is here no element of an estoppel of record and the same is true of

the proceeding in the Surrogate's Court and in Smith v. Butler. During this entire controversy the facts upon which John Ward's title is based were as well known to one party as to the other, neither was misled, and the fact, if it be a fact, that counsel for complainant has changed his position as to the legal effect of the purchase by John is not material upon any of the issues involved.

In Brewster v. Striker, 2 N. Y. 41, it is said:

"But again, the alleged admission was not of a fact, but of a conclusion of law. The will itself, and the clauses it contains, are not, and never were, as matters of fact, in dispute; but the construction of those clauses, and the estate and interest taken by the devisees under them, upon which the controversy turns, are questions of law. The grandchildren, at the time of the partition, doubtless supposed the devise of the real estate to them to have the legal effect to vest in them the estate in equal shares, as tenants in common, in fee simple absolute, and on such erroneous supposition they acted in the partition they assumed to make. But could that mistake of the law be urged and used against either party, to estop him from afterwards claiming and asserting his rights under the true exposition of the will?"

This question was answered in the negative.

Every right which the complainant ever had to assert the invalidity of John's title he now possesses.

What has been said already disposes of the alleged agreement between counsel that William and Charles should not assert title through descent from John, but that they should take the position that their interests were not assignable and that the mortgages and foreclosure sale did not transfer the title to those interests. The burden is upon the complainant to establish this agreement and it cannot be said that this has been done in the face of the denial by counsel for defendants that such an agreement was made.

The court has looked in vain through the family history and the complicated transactions of the firm of Ward & Co. for a solution of this controversy. The relations between the brothers seem to have been of the most cordial and friendly nature and each seems to have been willing to make personal sacrifices to sustain the honor and business reputation of the family. Not only was this true of the brothers, but other members of the family seem to have been actuated by the same spirit until this unfortunate misunderstanding arose.

It is not thought necessary to decide, even were it possible to do so, who was responsible for the failure of the firm and the disasters which followed. The situation is so complicated, the meager accounts presented so inconsequential, the interests of the parties so complex—with rights crossing, recrossing, combining and separating at every stage—that it is impossible to draw any satisfactory deduction therefrom adverse to the conclusion which the law attributes to the undisputed acts of the parties.

The authorities cited in the defendants' brief seem to establish conclusively the proposition that the wife of Charles had no dower right in the property covered by the mortgage to Butler. Durando v. Durando, 23 N. Y. 331; House v. Jackson, 50 N. Y. 165; Clark v. Clark, 84 Hun, 362, 32 N. Y. Supp. 325.

There can be no impropriety in saying that the court entered upon the examination of this cause with the hope that a conclusion might

be reached which would permit the distribution of the estate in question according to the intention of the testator. But the obstacle in the path of such a result was the act of the complainant himself in transferring the title upon which his rights depended. Were all the parties to this transfer alive it might, perhaps, be explained in accordance with the theories which are now advanced; but the court has been compelled to the conclusion that the deliberate and solemn act by which Charles parted with his title cannot be overthrown by mere inference and presumption.

It follows that the defendants are entitled to a decree substantially as stated at the conclusion of their main brief.

It would seem that a settlement of the amount in the hands of the trustee might be reached by agreement, but if this should prove impossible a master will be appointed to pass the account.

BRINCKERHOFF v. ROOSEVELT et al.

(Circuit Court, E. D. New York. August 2, 1904.)

1. CORPORATIONS—LIABILITY OF OFFICERS—NEGLIGENT MANAGEMENT OF CORPORATE BUSINESS.

   Defendant was president and trustee of a building association, and, in connection with other trustees, who were authorized to transact the business of the association, made a sale of real estate, which constituted its only property, to a trust company, of which he was also president and a large stockholder, in exchange for certain securities, which were of doubtful validity and value. A bond and mortgage, however, were taken from the trust company as a guaranty of the collection of the securities to the amount of the agreed price of the property, but by agreement the mortgage was not recorded. The trust company desiring to sell the property, defendant procured the passage of a resolution by the trustees of the building association authorizing the cancellation of the mortgage, and it was so canceled, without the knowledge or consent of the stockholders. The trust company was or became insolvent, and nothing was ever realized by the building association from the securities. *Held*, that the cancellation of the mortgage operated as a fraud upon the association, by depriving it of its only valid security, and rendered defendant individually liable for the price of the property, which liability could be enforced at the suit of a stockholder; the association having refused to bring the suit.

2. SAME.

   Such suit could be maintained without first exhausting the remedy against the trust company, since the mortgage could have been similarly enforced.

3. SAME.

   Shortly after the securities were transferred to the association the trustees caused the loans to be called and the securities sold at auction, the purpose being to cut off outstanding equities. They were bid in for the association for a sum fixed by the trustees, which exceeded or equaled the price for which the real estate had been sold. *Held*, that such sale did not bind the association as to the value of the securities, as between it and the trust company, nor affect its right to enforce the bond and mortgage.

In Equity. Suit by stockholders.

Duncan & Duncan (Frederick S. Duncan, of counsel), for complainant.

George C. Kobbe (George H. Yeaman and John E. Roosevelt, of counsel), for defendants.

THOMAS, District Judge. The Holland Building Association was organized in January, 1890, for "purchasing, taking, holding, and possessing real estate and buildings in the city of New York, and selling, leasing, and improving the same." Its capital stock, of $100,000, was divided into 1,000 shares, of $100 each. All of the capital stock was fully paid in. On February 1, 1890, it purchased and came into possession of 33 Nassau street, in the city of New York, for which it paid $92,500; taking title subject to a mortgage of $82,500 held by Stuart. Thereafter, to March 16, 1891, the building association leased the property for sufficient sums to pay all expenses, corporate expenses, and 5 per cent. dividends upon its stock, and had a surplus of about $4,000. The defendant Roosevelt and Mr. Van Siclen, as president and secretary, respectively, of the building association, executed a deed stating a consideration of $135,000, dated March 16, and acknowledged March 18, 1891, of 33 Nassau street, to the Holland Trust Company; and the same persons, as president and secretary of such trust company, executed a bond and mortgage, dated March 16, 1891, and acknowledged March 31, 1891, to the building association, which mortgage was never recorded. In connection with this conveyance, there was transferred to the trust company $3,900.81 then remaining in the treasury of the building association. No money was paid to the building association, but there was transferred to it certain promissory notes, of the nominal amount of $140,000, held by the trust company, executed by J. W. Coffin, Coffin & Co., Moritz Lippmann, and Coffin & Lippmann, indorsed, "Without recourse, Holland Trust Company, R. B. Roosevelt, President." These notes and the accompanying collateral are herein called the "Brigantine Securities." There was no resolution of the trustees of the Holland Trust Company authorizing such transaction, nor was there any written agreement therefor, except so far as shown in the bond and mortgage and deed. At a special meeting of the trustees of the association held March 12, 1891, at which were present Robert B. Roosevelt, president, William Remsen, John D. Vermeule, G. Van Nostrand, and George Van Siclen, secretary, the following resolution was unanimously passed:

"Resolved that the officers of this company be and they hereby are authorized, empowered and instructed to accept from Holland Trust Company as the consideration for the deed of No. 33 Nassau street, subject to the existing mortgage to Stuart Estate instead of $100,000 cash, all the indebtedness due Holland Trust Company from Brigantine Beach R. R., Brigantine Company, J. W. Coffin & Co., Moritz Lippmann, Coffin & Lippmann and their kindred companies at Brigantine Beach, N. J., with all the collateral belonging thereto for the sum total of the face value of said indebtedness being with accrued interest about $140,000 in amount, provided Holland Trust Company guarantee the payment of $100,000 therefrom to this company and also guarantee 6% per annum dividends on $100,000 to this company so long as we hold said indebtedness, and that Holland Trust Company execute and deliver its bond and mortgage for $100,000 on said 33 Nassau street subject to the existing mortgage for $82,500 held by the estate of Jane Stuart as collateral to said guarantee, said mortgage for $100,000 not to be recorded; with the privilege or call to said trust company to buy back said indebtedness and collateral at any time for $100,000 cash, on payment of all unpaid dividends aforesaid due this company, and pro-

portional dividends up to such time, the dividends, income and profits on said Brigantine and Lippmann and Coffin matters to belong to said Holland Trust Company in consideration of said guaranteed dividend, call, and guarantee."

At a meeting of the executive committee of the building association held March 21, 1891, at which Robert B. Roosevelt and George W. Van Siclen were present, the following resolutions appear:

"Moved that the deed of this company to Holland Trust Company in accordance with a resolution of the board of trustees passed at its special meeting held March 12th, 1891. Carried.

"Moved that the loans and securities of Brigantine Beach and Coffin et al. be accepted from Holland Trust Company together with a mortgage for $100,000 on number 33 Nassau street, as collateral, in full payment for said premises.

"On motion, ordered that the officers draw and pay a check for $3,900.81 to Holland Trust Company on account of the adjustment of the sale of premises and purchase of securities aforesaid."

The mortgage executed by the trust company to the association, among other things, contained the following:

"Whereas, the said party of the first part is justly indebted to the said party of the second part, in the sum of One hundred thousand dollars lawful money of the United States, secured to be paid by a certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of One hundred thousand dollars, to be realized, with interest thereon payable half yearly, within three years from the date hereof, from the proceeds of the promissory notes of Coffin & Co., J. W. Coffin, Coffin & Lippmann and Moritz Lippmann, with the collateral thereto, this day purchased by the party of the second part from the party of the first part it being thereby expressly agreed, that the whole of the said principal sum shall become due after default in the payment of interest, taxes or assessments as hereinafter provided.

"Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of the sum of one dollar paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant and release, unto the said party of the second part, and to its successors and assigns forever: [Here follows description of premises, etc.].

"And the said party of the first part covenants with the said party of the second part as follows:

"First. That the said party of the first part will pay the indebtedness as hereinbefore provided, and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises herein described, according to law.

"Second. That Holland Trust Company the said party of the first part, will execute any further necessary assurance of the title to said premises and will forever warrant said title.

"Fourth. And it is hereby expressly agreed that the whole of said principal sum shall become due at the option of the said party of the second part after default in the payment of interest for thirty days, or after default in the payment of any tax or assessment for thirty days after notice and demand."

Thereupon provision is made for enforcing the mortgage in the case of default.

The bond, among other things, states:

"The condition of the above obligation is such, that if the above-bounden Holland Trust Company cause to be paid unto the above-named Holland Building Association, its successors or assigns, the sum of One hundred thousand dollars with interest thereon at six per cent. per annum from the date hereof, payable half-yearly on the first days of February and August in each year, the first payment to be made August 1st, 1891, said sum of One hundred thousand dollars, and interest aforesaid to be realized and paid on or before January

25th, 1895, from the promissory notes of J. W. Coffin, Coffin & Co., Moritz Lippmann, and Coffin & Lippmann with the collateral hereto which Holland Building Association has purchased from Holland Trust Company, then the above obligation to be void, otherwise to remain in full force and virtue."

As a result of this transaction, the building association had no assets whatever, except such bond and mortgage and the Brigantine securities, which were stocks and bonds issued by companies organized to develop an island known as "Brigantine Island," in the state of New Jersey. No interest had been paid on these loans for over a year prior to their transfer. Therefore the building association was, as regards the subject of the collateral to the Brigantine loans, in the position of dealing with matters beyond its chartered rights.

There is some confusion as to the price agreed to be paid the association for 33 Nassau street. The deed fixes the sum at $135,000, and the conveyance was subject to the Stuart mortgage. The resolution of March 12th states that the Brigantine loans and collateral shall be accepted "instead of $100,000 cash," with the trust company's bond and unrecorded mortgage for $100,000 as collateral, but with privilege to the trust company to buy back "at any time" the Brigantine loans and collateral for $100,000 cash, on payment of unpaid dividends; the trust company meantime being entitled to the "dividends, income, and profits" on the Brigantine "matters." But the subsequent resolution of March 21st provided that the Brigantine securities, together with a mortgage for $100,000 on 33 Nassau street as collateral, be accepted "in full payment for said premises." The bond acknowledged March 31st was conditioned for the payment of $100,000, with semi-annual interest; "said sum * * * and interest aforesaid to be realized and paid on or before January 25th, 1895, from the promissory notes of J. W. Coffin and Coffin & Lippmann with the collateral hereto which Holland Building Association has purchased from Holland Trust Company." The mortgage recites indebtedness to the amount of $100,000 by the trust company, and undertakes to recite the condition of the bond, and the mortgagor covenants to pay the indebtedness.

The agreement, as gathered from the resolutions and bond and mortgage, seems to be that the association should accept the Brigantine securities for 33 Nassau street, and that on or before January 25, 1895, it should realize $100,000 and interest thereon from them, and that the trust company would assure the receipt thereof. According to this, the property was sold for the Brigantine securities, whatever their value, and an assurance of $100,000 and interest, on or before the date fixed. The Brigantine securities, in themselves, were at the time practically worthless, but the bond and mortgage furnished a consideration to the extent of $100,000 and interest.

The first question relates to the sufficiency of the price. There was a very close relation between the Holland Trust Company and the building association. From 1890 to 1894, Robert B. Roosevelt was a trustee, member of the executive committee, and president of the Holland Building Association, and was at the same time trustee, member of the executive committee, and until July, 1892, president of the trust company. J. W. Van Siclen was, until the latter part of 1892, sec-

retary, member of the executive committee, and a trustee of both companies. He was succeeded as secretary of both companies by Van Woert, who was at the same time a trustee of both companies, and a member of the executive committee of the trust company. Until 1893 the executive committee of the building association was composed of Roosevelt and Van Siclen, and such committee was empowered by resolution of the trustees passed January 15, 1890, "to transact all business for the association till the by-laws shall be adopted." At the same meeting, Roosevelt and Van Siclen were appointed a committee to draft by-laws for the association, but none were ever proposed or adopted. All the trustees and officers of the building association were trustees or officers, or both, of the trust company. The building association was organized for the specific purpose of buying 33 Nassau street, and for leasing and finally selling the same to the Holland Trust Company, and the terms of the stock subscription specifically show the plan which was to be followed in this regard. Among other things, it provides:

"The undersigned hereby severally subscribe the amount set opposite each name respectively for the capital stock of the Holland Building Association, for the purpose of buying No. 33 Nassau St. for $175,000 and improving the same, and leasing the same to Holland Trust Company for five years, to pay a rent of five per cent. net dividend upon the stock above all expenses, taxes and disbursements of every kind, Holland Trust Company through its Executive Committee having agreed to purchase said premises from said Building Association, within the term of said lease, at a price that will pay par and one per cent. profit for every year or portion of a year elapsing before such purchase. The capital stock of said Building Association to be either $125,000 or $100,000; per $100 per share; the premises being subject to a mortgage of $82,500 at the time of purchase."

It is probable that No. 33 Nassau street was at the time of its sale to the trust company worth somewhat more than $100,000 and the Stuart mortgage thereon, but the conveyance of the property to the Holland Trust Company for the sum of $100,000, in view of the purposes of the building association, and the terms upon which the stock was subscribed, is not considered either as improvident or wrongful. But the Brigantine securities were of slight, if any, immediate value, of doubtful validity, and subject to the hazard of defenses for usury. They were of such a nature and value that they should not have received the approval of the State Bank Examiner. The Holland Trust Company was embarrassed financially, and the Brigantine securities were transferred to the building association for the purpose of affording relief to the trust company, and ridding it of assets at the time substantially worthless, which it was perilous for it to hold. There was nothing at the time in the history or condition of the property which was the subject of the Brigantine collateral to afford just expectation that the loans or securities would be valuable. All this was known to Roosevelt and his fellow trustees and officers who participated in the transfer. However, the bond and mortgage supplied any deficiency in the value of the Brigantine securities, and, had the bond and mortgage been allowed to continue, this suit would not be maintainable.

In January, 1894, the financial difficulties of the trust company constrained it to sell No. 33 Nassau street to the Bank of Commerce in

consideration of the sum of $137,500, over and above the Stuart mortgage. To enable the trust company to deliver the warranty deed of the property, subject to the Stuart mortgage, the defendant Roosevelt called a special meeting of the trustees of the building association on January 30, 1894; and a resolution, the original draft of which was in Roosevelt's handwriting, was presented:

"Whereas, a bond and mortgage were made by Holland Trust Co. to Holland Building Association dated March 16, 1891, to secure the collection of $100,000 upon certain securities assigned to Holland B. Ass'n by H. T. Co. upon the conveyance by the former to the latter of No. 33 Nassau street, and whereas it was resolved by H. B. Ass'n that such mortgage should not be recorded but only held to keep alive the claim for any deficiency agt. H. T. Co. that might by any possibility arise, and whereas H. T. Co. has agreed to sell the said No. 33 Nassau street and has assumed the payment to the stockholders of the H. B. Ass'n of the par value of their stock.

"Now therefore resolved that the aforesaid bond and mortgage be and the same hereby are cancelled, released and discharged and that the secretary and treasurer be directed to cancel the same.

"(Moved by Judge Van Hoesen or else no authorship to be mentioned.)

"Carried unanimously."

The words in parentheses were crossed out by pen marks. The minute book shows the adoption of the resolution, save the part stricken out as just stated. The trustees present were Roosevelt, Van Hoesen, Vermeule, and Van Woert.

Mr. Roosevelt had on January 29th produced the unrecorded mortgage, and, pursuant to the above resolution, it was canceled by the officers of the building association. It is attempted to justify this cancellation of the mortgage upon the ground that on April 4, 1891, Roosevelt, Van Siclen, and Van Nostrand, trustees, passed a resolution that the Brigantine loans should be called; that the Brigantine securities should be offered for sale at public auction, and the officers of the building association be authorized to bid, in their discretion, on behalf of the association. This sale was had April 7, 1891, and the Brigantine stocks and bonds were bid in for the association at the sum of $103,577. The chief purpose of the sale was to foreclose outstanding equities, and Roosevelt was privy to the arrangement to fix the prices at which the securities should be bid in. The bid was neither bona fide, in the sense that it illustrated the value of the securities sold; nor did it, and the purchase of the securities pursuant to it, pay the sum due the building association, or discharge the bond and mortgage. The sale left a deficiency on the Brigantine loans of some $35,803.19, with "700 shares Brig. Co. Trustees Stock Steel Rails, $20,967.50," unsold, and some unsuccessful effort was made thereafter by the building association to collect the deficiency. At the time the bond and mortgage were canceled there was owing the building association the sum of $100,000, although the trust company had from the time of the purchase furnished a sum sufficient to pay thereon a dividend of 6 per cent. on the stock, which was continued until the year 1902. None of the proceedings with reference to the conveyance of No. 33 Nassau street to the trust company, or the cancellation of the mortgage, were submitted to the stockholders of either company. In January, 1894, the Holland Trust Company had decided to go into liquidation, and such liquidation has been continuing until the present time. In

November, 1902, the bank superintendent levied an assessment of 51 per cent. on the stock of the trust company, and collected the sum of $255,000 to meet impairment of its capital. The trust company now owes debts in excess of the value of its remaining securities. If it had not had the advantage of No. 33 Nassau street, for which it in fact paid no consideration, and had it not been aided by a syndicate for the purpose of taking up one of its loans, Mr. Roosevelt being a large contributor to the funds of such syndicate, its financial embarrassment would have been more pronounced. The defendant Roosevelt was the most influential factor in both companies, and his wishes and judgment controlled his official associates. In conjunction with others, he planned the exchange of No. 33 Nassau street for the Brigantine securities, with the collateral bond and mortgage, and for the withholding of the mortgage from record, and for its final cancellation. He either executed the plan, or caused it to be executed. Roosevelt owned 382 shares of the stock of the Holland Trust Company, and members of his immediate family owned 136 shares—a total of 518 shares, representing $103,600. The capital stock of the trust company was $500,000. Roosevelt held 25 shares of the building association stock. Brinckerhoff was an original stockholder of the building association, and so continued. He did not know, nor have notice, of the terms of sale of No. 33 Nassau street, and the cancellation of the bond and mortgage; nor was there any event that should have put him on inquiry as to the disposition of the bond and mortgage until the payment of the dividend in 1902 failed. He thereupon acted with suitable promptness. Due demand was made upon the building association to bring this action, which it declined to do. The facts are neither intricate nor doubtful. Roosevelt may be exculpated with reference to the primary transaction, whereby No. 33 Nassau street was conveyed to the trust company, but should not be excused for his participation in the cancellation of the bond and mortgage. As to that, he and his associates were guilty of culpable negligence, and thereby a sacrifice of important property of the corporation was suffered. Mr. Roosevelt may have considered that his official influence in both companies would enable him to provide for full payment to the association, but the event illustrates the insecurity of such a project. His act aided to take away the association's only legal and valuable asset, and left it without the only security on which there was any reasonable dependence, and which furnished a full and immediate remedy in case of default.

But the counsel for Roosevelt now urgently contend that there was no liability existing at the time the bond and mortgage were canceled, and that the building association had received all that was its due, because the Brigantine collateral had been foreclosed and sold at the sum stated, although the Holland Trust Company continued to pay 6 per cent. dividend until 1902. If that effect be claimed for it, then the public sale of the Brigantine stock should be denounced as a fraud upon the stockholders of the association, inasmuch as there was no bona fide sale of the same at the price bid. If, however, the sale of the Brigantine collateral was for the purpose of foreclosing equities, it was justified. A rightful act should not be deemed to have

been done for wronging the association, and is not so construed. Although there was no formal agreement between the two companies, the trust company paid in all $69,000 for the purpose of meeting the interest secured by the bond and mortgage.

The complainant has not been guilty of laches, nor is the suit barred by the statute of limitations. The loss to the association arises from the fact that the bond and mortgage were canceled. This it has been said was brought about by the unauthorized and negligent act of Roosevelt and his associates. For this he should make restitution. It is considered that the $3,900 taken from the building association and transferred to the trust company in 1891 was without any consideration or justification, and for this he should account.

The defendant is understood to urge that resort cannot be had to Roosevelt, inasmuch as the trust company is liable upon its guaranty. Where now the guaranty resides does not appear. The argument would be this: Roosevelt has wrongfully deprived the association of collateral which it could have enforced, without first exhausting its remedy, if any it had, against the trust company. But in the interest of the wrongdoer, remedy against him should be deferred until the remedy against the trust company shall have been exhausted. If such a rule were adopted, a creditor would be deprived of rights, through a tort, which it could have exercised if the tort had not been committed. The bond and mortgage and the $3,900 have been lost to the association. His act aided the loss. He should restore all. But as he cannot re-establish the bond and mortgage, he should give the association an equivalent in value for that of which he has aided to deprive it.

The complainant urges that payment should be made to a receiver, inasmuch as some of the parties who participated in the unlawful acts are trustees of the building association. As to that, all parties will be heard. However, it is stated that no person who voted to cancel the bond and mortgage should be allowed to participate in any relief afforded by the decree herein.

The defendant Roosevelt should account to the Holland Building Association, or to a receiver, for the sum of $103,900, with 6 per cent. interest on $100,000 from the date of the payment of the last dividend by the trust company, and interest on $3,900 from the time it was transferred, together with such costs, disbursements, and counsel fees as shall be hereafter taxed and allowed by the court.

The foregoing views would not allow the association to retain the Brigantine securities, and yet receive the guarantied sum of $100,000 from Roosevelt. To the extent that they have value, Roosevelt should have the benefit thereof. The parties will be heard as to the decree in this regard.

THE GORDON CAMPBELL.

(District Court, W. D. New York. April 26, 1904.)

1. MARITIME LIENS—STATE STATUTE—SUPPLIES.
   Under a state statute giving a lien on a vessel for supplies furnished for her use on the order of her master, owner, or part owner, there is no lien for provisions furnished to a part owner living on a vessel with his family while she is laid up for the winter in her home port; the presumption being that they were furnished on his personal credit, and for his own use.

2. ADMIRALTY—DISTRIBUTION OF PROCEEDS OF VESSEL—RIGHTS OF MORTGAGEE.
   While Rev. St. §§ 4192, 4193 [U. S. Comp. St. 1901, p. 2837], providing for the recording of mortgages, etc., on vessels, do not make such recorded mortgages maritime liens enforceable in a court of admiralty, yet where such court has in its registry for distribution a fund arising from the sale of a vessel, and the maritime liens have been paid, the holder of a recorded mortgage may prove his claim against the fund, and is entitled to payment therefrom in the order of his priority.

3. SHIPPING—VALIDITY OF MORTGAGE OF VESSEL—STATE STATUTE.
   The Illinois statute which provides that a chattel mortgage given to secure a note which does not, on its face, show that it is so secured, shall be void, cannot affect the validity of a mortgage on an enrolled and licensed vessel which is recorded, pursuant to the statute of the United States, at the home port of the vessel.

4. FEDERAL COURTS—DISTRIBUTION OF FUND—PENDENCY OF SUIT IN STATE COURT.
   A suit was instituted in a state court to set aside a mortgage on a vessel, and a temporary injunction was granted, restraining its foreclosure. On a hearing the bill was dismissed and the injunction dissolved, and thereafter the mortgagee assigned the mortgage. Subsequently an appeal was allowed, and, on complainant giving bond, the injunction was reinstated. Pending the appeal the vessel was libeled for seamen's wages in a court of admiralty, and, at the instance of the owner, was sold; all liens being transferred to the proceeds. The owner then assigned his interest therein to a third person. *Held*, that the pendency of the state suit did not preclude the assignee of the mortgage from proving the same against the fund in the admiralty court, or prevent that court from passing on the claim and distributing the fund.

5. ADMIRALTY—COSTS—COUNSEL FEES.
   Counsel fees may be allowed in admiralty, where there is a fund in court, irrespective of statutory provisions, but a single docket fee only will be allowed to a proctor who represents more than one petitioner or libelant.

In Admiralty. In the matter of the distribution of the proceeds of the sale of the steamer Gordon Campbell.

Harvey L. Brown and John K. White, for claimants.

William B. Wright (William F. Carroll, of counsel), for assignee of fund.

HAZEL, District Judge. This is a review of the report of the commissioner as to the distribution of surplus proceeds of the sale of the steamer Gordon Campbell, now in the registry of the court. A portion of the claim filed by Russell & Watson, as assignees of

¶ 1. Maritime liens created by state laws, see note to The Electron, 21 C. C. A. 21.

Windmuller & Co., and that of William Brinnen, are under exception.

As to the Windmuller claim: Under the law applicable to maritime liens when the ship is in her home port, the parties dealing with the owners for supplies to be furnished to the vessel are presumed to be dealing on the personal credit of the owners, unless such supplies are furnished upon the credit of the vessel, and a lien therefore created by the statute of the state. The statute of Illinois relating to the subject gives a lien for all debts contracted by the owners or part owner, master, and others in the statute mentioned, on account of supplies and provisions furnished for use of the vessel. The record shows that the supplies were furnished to the part owner, who, with his family, lived temporarily upon the vessel while she was laid up for the winter at Chicago, Ill., her port of hail. Some evidence was given tending to show that Bowe, part owner of the Gordon Campbell, to whom the supplies were delivered, was also her master. Assuming that to be the case, the evidence is not convincing that the supplies were actually furnished for the use of the vessel. Such supplies must not only have been furnished to a part owner or master of the vessel, or such other person or persons named in the act, but it must affirmatively appear that the supplies were for the use of the vessel, or for the use of such persons as were actually performing a service for her benefit. The claimants knew that Carroll had purchased a two-thirds ownership in the Gordon Campbell, yet, without inquiring or making any investigation, they furnished provisions to Bowe, a one-third owner, during the winter season, when the vessel was idle and moored to her dock. It may be fairly presumed, I think, from the evidence, that the sale of the provisions was upon the personal credit of Bowe, and not upon the credit of the vessel. The exception is sustained, and the claim, amounting to $46.54, is disallowed.

The Brinnen claim: The contention of the assignee that sections 4192 and 4193 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2837] merely provide for the manner of recording certain conveyances, and that, accordingly, no maritime lien enforceable in the first instance in a court of admiralty is created thereby, is undoubtedly correct. The sections referred to establish a rule of priority between mortgages and conveyances recorded pursuant to its provisions. The right of Congress to regulate such priorities is derived from the commerce clause of the Constitution. Henry on Admy. Juris. & Procedure, p. 206. Although a court of admiralty has no jurisdiction in relation to the enforcement of such a mortgage lien, as distinguished from a hypothecated bottomry bond, yet a common-law lien is distinctly recognized by the enactments of the above-mentioned sections of the Revised Statutes. No maritime lien or contract is created by recording a mortgage in conformity with such provisions. The sole object and purpose intended is to give recorded mortgages and conveyances a priority over such as are of later record, but, as no maritime lien is created by a mortgage upon the vessel, all legal controversies which arise in relation thereto must ordinarily seek a settlement thereof within

the province of other courts. The theory of the law seems to be that mortgages upon vessels are not strictly analogous to maritime contract. The mortgagee, not being permitted to take the mortgaged ship because of the owner's failure to pay the debt secured by the mortgage, must have resort to a court of equity for the enforcement of his lien, or, as has been suggested, to remedies provided by local laws. Bogart et al. v. The Steamboat John Jay, 58 U. S. 399, 15 L. Ed. 95. These questions, it is thought, are foreign to any presented here, for the reason that the court is called upon to distribute the surplus fund on deposit with the registry of the court. Priorities of existing maritime liens against the Gordon Campbell have been established, and hence the surplus may be distributed to such claimants as are shown to have a vested interest therein. The claimant appears to have a specific lien in the nature of a mortgage, which he now urges against the surplus fund after payment of all maritime liens and claims. This court unquestionably has power over surplus moneys in its custody, and its obvious duty is to rightfully distribute the same. The Willamette Valley (D. C.) 76 Fed. 841; The Advance (D. C.) 63 Fed. 704. Proof has been made of the execution and delivery of the mortgage in question to secure the sum of $2,500. The amount unpaid is $1,500. The mortgage was duly recorded, in accordance with the provisions of the Revised Statutes, in the home port of the vessel. The debt is not only admitted upon the proofs, but, as stated, a portion thereof has been paid by the owner, who now appears as counsel for the assignee of the fund. He now asserts that the mortgage lien given by him to secure certain notes is void on its face, and that a claim arising from fraud should not be paid out of the residuum. To establish the invalidity of the mortgage, he relies on the statute of the state of Illinois which, in effect, provides that a mortgage given to secure a note which does not on its face show that it is secured by a chattel mortgage shall be absolutely void. This point is not entitled to the effect contended for. The mortgage which is in evidence shows upon its face that it has been given to secure this note, and has been duly recorded in the port of Chicago, upon a vessel of the United States enrolled and licensed. It has been held that "state statutes are inoperative as to vessel mortgages which have been properly recorded pursuant to the laws of Congress." The Vigilancia, 73 Fed. 455, 19 C. C. A. 528. And in Folger v. Weber, 16 Hun, 512, the court used the following language:

"That, whatever may be the law of the state, a vessel subject to the act of Congress may be mortgaged, and the mortgage, when duly recorded in accordance with the act, cannot be impeached for want of possession in the mortgagee. The act of Congress contains no limitation of time during which the possession may lawfully remain in the mortgagor, and to import into it the limitation of time prescribed by the statute of Illinois would be to hold that the Legislature of Illinois could alter or set bounds to the effect of an act of Congress passed on a subject over which Congress has, when it may see fit to exercise it, exclusive jurisdiction."

In White's Bank v. Smith, 7 Wall. 646, 19 L. Ed. 211, it was held that:

"A recording of a mortgage in the office of the collector of the home port of the vessel has the effect, by its own force, and irrespective of any formalities required by a state statute to give effect to chattel mortgages, to give the mortgagee a preference over a subsequent purchaser or mortgagee."

To hold, therefore, that a mortgage upon a vessel of the United States is absolutely void because the notes for which it was given failed to set out that they were secured by such mortgage, would, in effect, read an important restriction into the act of Congress, which it manifestly was not intended should be included therein. I conclude that the commissioner was right in holding that the lien of the mortgage upon the proceeds of sale is entirely governed by the federal statute. Irrespective, therefore, of the statute of Illinois, the validity of the mortgage executed and delivered in accordance with the provisions of sections 4192 and 4193 of the Revised Statutes [U. S. Comp. St. 1901, p. 2837] is established, and the mortgage claim, unless its invalidity is proven for other reasons, may be paid out of the fund.

It is further objected that a proceeding is now pending in the state court of Illinois to set aside the mortgage upon the vessel on account of fraud, and to permanently restrain the original mortgagee from foreclosing the same. For this reason, it is insisted that no disposition should be made upon the claim against the fund until such action is determined. It appears from the evidence that a temporary order restraining the foreclosure of the mortgage lien was granted in the state court, but the bill upon which the injunction was founded was dismissed for lack of equity. Thereupon an appeal from the order dismissing the same was allowed, which is now pending, and upon filing a bond the injunction was reinstated. Directly after the injunction was dismissed, and before the appeal was allowed, the original mortgagee assigned the mortgage to the claimant. Subsequently the Gordon Campbell was libeled for seamen's wages and sold in this jurisdiction. Prior to the return day of the monition issued upon the original libel, founded upon a claim for but $30, the owner of the vessel applied for an immediate sale, consenting that all liens be transferred to the proceeds. The assignee of the mortgage thereupon presented his claim against the fund. Objection to payment is not made by the owner of the vessel, the complainant in the Illinois suit; it is made by his assignee. It is perfectly true that the court first having jurisdiction of the subject-matter has a prior right to decide the questions involved, but the rule is otherwise whenever the litigation is ended, or when the property which is the subject of the controversy is no longer in the possession of the court first acquiring jurisdiction. In that event it is the duty of another court, whenever redress is sought in its forum, to take cognizance of the rights of the parties. Existing remedies may be invoked, and such appears to be the rule even if a decision was required upon the previous questions before the first tribunal. In the circumstances here presented, the dissolution of the injunction in the state court, and its subsequent renewal, did not revive the same to the extent of depriving the assignee of the mortgage from enforcing his lien to the proceeds on sale of the

vessel seized under admiralty process in this jurisdiction. Assuming the action pending in Illinois will terminate favorably to the complainant, how will such decision affect the fund in the registry of this court? The claimant is not a party to the Illinois action, and, moreover, as has been stated, the complainant in that action has assigned his interest in the res. If the mortgage lien was without consideration, and the same was assigned in furtherance of fraud, no reason is discoverable why such defense was not asserted before the commissioner appointed to ascertain and report upon the validity and priority of claims. Certainly no rule of comity can be invoked where, as here, the specific property is in custodia legis, especially where the owner of the vessel, who sues in another jurisdiction to set aside a mortgage as fraudulent, procures a sale of the property mortgaged in this jurisdiction, and subsequently assigns his interest to a third party. The object of the action pending in the state court of Illinois would seem to be nullified by the sale of the vessel in this port, upon the application of the owner, after seizure of the vessel under admiralty process. Nothing more can be obtained than a personal judgment, because of the alleged fraud of the mortgagee, in the state court of Illinois. Baltimore & O. R. Co. v. Wabash R. Co., 119 Fed. 678, 57 C. C. A. 322. Assuming the validity of the mortgage as a common-law lien, such lien is now transferred to the proceeds of the sale. If this view of the issues in the former suit be correct, I am unable to perceive any conflict of authority. The procedure of the action referred to is in no way obstructed, while, on the other hand, a long delay in disbursing the proceeds of the sale may result in inconvenience to those who are interested in the fund. This court, as was said in The Willamette Valley, supra, "must do something with the fund. It is absurd that it cannot."

Without deeming it necessary to further discuss this somewhat complicated question, I have decided to send the matter back to the commissioner for the purpose of allowing the assignee of the fund to give further evidence in opposition to the allowance of the Brinnen claim; such evidence to be given, at the option of the assignee, within 30 days from the date of the entry of this decision. Upon his failure to exercise his right here given within the period stated, the conclusion of the commissioner in relation to such claim must be sustained. The report of the commissioner in all other respects is accordingly affirmed, and the fund should be paid out in accordance therewith, except as modified by this opinion.

The report shows that fourteen libels have been filed by four different proctors. To lessen expenses, the various claims should be consolidated for further proceedings and payment. The adjudicated cases upon the subject of costs in admiralty do not permit allowing to a proctor who represents more than one petition, separate docket fees. Under the doctrine of Trustees v. Greenough, 105 U. S. 535, 26 L. Ed. 1157, an allowance of counsel fees to be taxed in a case where a fund is in court is permissible, irrespective of the statutory provisions. I think that an allowance equivalent to one docket fee to each proctor who has filed a petition herein, in view

of the statements of counsel, is not unreasonable. The following cases: Black Diamond Coal Mining Co. v. Grady (D. C.) 87 Fed. 483; Barron v. Mt. Eden (D. C.) 87 Fed. 483; The Bay City (D C.) 3 Fed. 47; The Alert (D. C.) 15 Fed. 620—also authorize allowance of a docket fee in admiralty to counsel who have filed petitions or intervening libels.

So ordered.

In re BENSON.

(Circuit Court, S. D. New York. July 28, 1904.)

1. CRIMINAL LAW—REMOVAL OF PRISONER TO ANOTHER DISTRICT—SUFFICIENCY OF INDICTMENT.

Technical or formal objections to the sufficiency of an indictment will not be considered in proceedings for the removal of a federal prisoner to the district in which he is triable, but will be left for determination by the court in which it was found; but if, on a broad and liberal construction, the indictment does not appear to charge an offense, the prisoner should not be held for removal.

2. SAME.

An indictment for conspiracy under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], charged that petitioner conspired with others to obtain by means of fictitious applications and other false and fraudulent practices from the states of California and Oregon the title to large amounts of school lands owned by said several states, and lying within the boundaries of United States forest reservations, and then to exchange such lands, under the federal statutes providing therefor, for public lands of the United States subject to homestead entry outside of such reservations. *Held*, that while such acts would constitute a conspiracy to defraud the states, the indictment did not charge a "conspiracy to commit any offense against the United States, or to defraud the United States in any manner," within the meaning of the statute, since it appeared from its averments that the United States would obtain title to the school lands by the exchanges contemplated; and that such indictment would not sustain proceedings for the removal of petitioner to the district of the indictment for trial.

In the Matter of the Application of John A. Benson for Writs of Habeas Corpus and Certiorari.

The petitioner was indicted in the District of Columbia, and, not being found there, was arrested in the Southern District of New York upon a warrant of United States commissioner, based upon a certified copy of the indictment. Some testimony was introduced before the commissioner, the certified copy of the indictment was before him, identity was not disputed, and he committed the petitioner to the custody of the marshal to await the issuance of a warrant of removal by the district judge under section 1014, Rev. St. U. S. [U. S. Comp. St. 1901, p. 716].

Frank H. Platt, for petitioner.

Henry L. Burnett, U. S. Atty., and E. E. Baldwin, Asst. U. S. Atty.

LACOMBE, Circuit Judge. This court has recently held in another removal proceeding under a different indictment against this same petitioner that the insufficiency of the indictment will not be

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 509.

inquired into in such a proceeding (130 Fed. 486), but is a question to be decided by the court in which the indictment is found. All technical objections, all criticisms growing out of the artificial and often strained scrupulousness of criminal procedure are to be left to the court in whose jurisdiction the indictment is found, if such indictment itself contains a narration of events or acts which tend to establish the existence of the offense sought to be charged. Where, however, even upon a broad, liberal, and inartificial construction of the language of the indictment, it does not appear that any offense against the laws of the United States has been committed, the section (1014, Rev. St. [U. S. Comp. St. 1901, p. 716]) does not apply, and the prisoner should not be held for removal.

The crime with which the indictment purports to charge the petitioner is defined in section 5440, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3676]:

"5440. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

There are 30 counts in the indictment, each concerned with a separate transaction. It will be necessary to consider a single count only, since all are substantially alike. The pleader has followed the archaic forms of expression commonly used in criminal practice—obscure, involved, tautological, and verbose. A single sentence runs stumbling over several printed pages without a period. The meaning can be discovered only by carefully rewriting the sentence actually or mentally, so as to conform it to the canons of modern English. When this is done, it will be found that the facts upon which the charge of conspiracy is based are these: Heretofore the United States, being at the time the owner thereof, conveyed to the states of California and Oregon, respectively, certain sections of public land; the sections so conveyed to these states being known as school lands. These school lands, or at least some portion of them, the two states sold, granted, and conveyed to individual holders. Subsequently the United States decided to establish forest reserves in certain localities in those states (and elsewhere), and under authority of statute maps were filed designating the boundaries of such reserves. Within those boundaries it would happen that, besides land still belonging to the United States, there would be included school lands which had been transferred to the states, and which were still held by them, and also school lands which the said states had conveyed to private owners by patents duly executed, and also school lands as to which steps had been taken to secure patents from the states. Inasmuch as it was desirable that all lands within forest reserves should be under the absolute control of the government, the statutes further provided that United States public lands located outside the limits of the reserves might be exchanged for lands within the same, with assent of the owner. Presumably since the possibility of an increase in value would be greater outside than in, the owners gen-

erally might be expected to accept the offer. The sections providing for such exchange are these:

In Act June 4, 1897, c. 2, 30 Stat. 34, 36 [U. S. Comp. St. 1901, p. 1538], supplemental to Act March 3, 1891, c. 561, § 24, 26 Stat. 1103 [U. S. Comp. St. 1901, p. 1537]:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: provided further, that in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

In Act June 6, 1900, c. 791, 31 Stat. 614:

"That all selections of land made in lieu of a tract covered by an unperfected bona fide claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, * * * shall be confined to vacant surveyed and non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent: provided, that nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof."

This provision was re-enacted March 3, 1901, 31 Stat. 1037, c. 831 [U. S. Comp. St. 1901, p. 1544].

For reasons of public policy, which may be readily appreciated, these two states offered their school lands for sale with certain statutory restrictions. Sales were to be made only to citizens of the United States or to persons who had declared intention to become citizens, and only upon affidavit of the applicant showing his qualifications, and, amongst other things, his intention to purchase such lands in good faith, and for his own benefit, and that he had made no contract or agreement to sell the same. Moreover, the amount of such lands which should be sold by the state to each resident applying therefor was restricted to 640 acres in California and 320 acres in Oregon. Once the sale was made, however, to a bona fide applicant, and title in him perfected by the delivery of a patent for the same, the lands so sold became his to dispose of as he pleased, and there is nothing called to the attention of this court in the legislation of those states which prohibits a purchaser from buying such lands from any resident patentees who might subsequently decide to sell, even although by such purchases he might become the sole owner of thousands of acres of such school lands.

The particular "false and fraudulent practice" which is charged as the gravamen of the conspiracy is this: Applications for purchase were to be made and filed in the names of fictitious persons, and in the names of persons not really desiring and not qualified to purchase the same, and of persons who had already assigned to the conspirators; and these applications were in many instances to be supported by false, fraudulent, or fictitious affidavits. The details need not be more particularly rehearsed. Suffice it to say that the

school lands thus obtained by fraudulent practices from the two states were to be exchanged, under the statutes above quoted, for public lands of the United States lying outside the forest reserves; the said conspirators, in the language of the indictment, "intending thereby and by afterwards selling and disposing of such public lands and patent titles to the general public to defraud the said United States out of the possession and use of, and of the title to, the public lands so to be selected, obtained and appropriated in lieu of such school lands as aforesaid to the profit, gain, use and benefit of themselves." Manifestly, the entering into such a scheme would be a conspiracy to defraud the states of California and Oregon, but it is difficult to understand upon what theory it can be held to be a "conspiracy to commit any offense against the United States or to defraud the United States in any manner." There is nothing to show that the alleged conspirators ever contemplated offering to the United States Land Office in exchange for "outside" lands of the United States any "school" lands for which the state had not granted a patent to the applicant. When patented school lands are taken by the United States in exchange for other lands which constitute a valuable consideration, the government acquires a perfect title to such school lands. Authorities need not be cited, since it was conceded on the argument and on the brief that the title obtained by a patentee cannot be attacked collaterally for frauds practiced in obtaining it. The United States, therefore, assuming that the alleged conspiracy were consummated, would have obtained from the state patentee of school lands a perfect title acre for acre in exchange for its own "vacant surveyed and nonmineral public lands which are subject to homestead entry." With the methods by which the patentee acquired his title from the state it had no concern. If state laws were violated, and the public policy of the state fraudulently evaded, it may be assumed that the state would punish the offender. The language of the federal statute apparently contemplates some inquiry as to whether the requirements of state law respecting settlement, residence, improvements, and so forth have been complied with in cases of "unperfected claims"; but none such is provided for when the tract offered in exchange is covered by a patent. The reason for the distinction is obvious. All that the United States wanted was a good title. Where a claim was unperfected, it would be necessary to ascertain what had been done to make it fruitful; where a patent had issued all such inquiry would be unnecessary. The conspiracy charged, as was said before, did not contemplate the offering in exchange for outside lands of any school lands except such as are covered by patent.

It is true that the result of the conspiracy would be that a single small group of individuals might become possessed by exchange of large holdings of outside lands, which might otherwise have been more widely distributed; but that would not be a fraud on the United States, because under the laws, state and national, as they stand, it would be possible for a single individual, acting in entire good faith, to acquire by purchase from honest, bona fide state patentees the title to all the school lands in the state, and, by exchanging them

under the provisions of statute above quoted, to become the sole owner of an equal quantity of "outside" lands.

Upon the broadest construction which can be given to the indictment it does not set forth facts tending to show a conspiracy to commit any offense against or to defraud the United States, and the petitioner should therefore be discharged. Should the District Attorney desire to appeal, the petitioner will be required during its pendency to give bail in the amount fixed when this proceeding was instituted.

In re MERTENS et al.

(District Court, N. D. New York. August 13, 1904.)

1. BANKRUPTCY—ASSETS—SEMITONTINE INSURANCE POLICY.

A semitontine life insurance policy payable to a bankrupt or his assigns or legal representatives, which contains no provision for a cash surrender value, but, on the contrary, gives the insured no right except to a new paid-up policy without participation in profits in case of lapse, unless it remains in force at the end of the full tontine period, which time had not arrived when the adjudication was made, passes to the trustee as an asset of the estate, under Bankr. Act July 1, 1898, c. 541, § 70a, cl. 5, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]; but such policy is not one having a "cash surrender value," within the meaning of the proviso to said section which entitles the bankrupt to retain the same on making a payment to the trustee, although the company may offer to pay a sum for its surrender.

2. SAME—RIGHT OF TRUSTEE TO MATURE TONTINE INSURANCE POLICY.

A trustee in bankruptcy, acting by direction of the court, has the right to make the payments necessary to mature a tontine life insurance policy payable to the bankrupt or his assigns or legal representatives for the benefit of the estate, and will be required to do so where it is clearly in the interest of the creditors.

In Bankruptcy. On application for an order compelling the bankrupt to assign to the trustee certain policies of life insurance.

This is an application for an order compelling the bankrupt, Jacob M. Mertens, to assign, transfer, and set over unto Albert K. Hiscock, as trustee in bankruptcy of the estates of the firm of J. M. Mertens & Co., and of the individuals composing said firm, certain policies of life insurance. The matter was referred to C. L. Stone, Esq., of Syracuse, N. Y., as special master to take evidence and report the facts with his findings and opinion. The report is that the policies in question passed to the trustee; that they have no cash surrender value; and that the trustee is entitled to take and hold them as against the insured, J. M. Mertens, notwithstanding the fact that said bankrupt has tendered the trustee the alleged cash value of said policies—that is, the sum the insurance company was willing to pay for a surrender thereof.

Lewis & Crowley, for trustee.
Wilson, Cobb & Ryan, for J. M. Mertens.

RAY, District Judge. The petition in bankruptcy herein was filed against the firm of J. M. Mertens & Co. and the individuals composing such firm or copartnership on the 18th day of August, 1903, and Albert K. Hiscock was duly appointed receiver of the estate, etc., of the alleged bankrupts. Thereafter, and on the 15th day of September, 1903, said firm and said individuals, including said Jacob M. Mertens, were duly adjudicated bankrupts, and on the 14th day of

October, 1903, said Albert K. Hiscock was duly appointed trustee in bankruptcy of the estates of said bankrupts, both individually and as such copartners. Said trustee duly qualified. December 21, 1882, the Equitable Life Insurance Society of the United States issued its policy No. 252,314, assuring the life of Jacob M. Mertens. Prior to the institution of such bankruptcy proceedings this policy had become a simple life policy, payable to the wife of the assured, if living at his death; if not living, to his children, if any; and in default of child or children to the personal representatives of the assured. This policy concededly is so conditioned and incumbered, and the interest of the trustee therein, if any, is so remote and uncertain, that it is of no practical value to the estate, and it will not be further considered, and the bankrupt will be allowed to retain the same. March 8, 1884, said Equitable Life Assurance Society of the United States issued its policy No. 274,445, known as a "semitontine" policy, on the life of said Jacob M. Mertens. By this policy said assurance society, after the presentation of satisfactory proofs of the death of said Mertens, promised to pay to his executors, administrators, or assigns (less any indebtedness to the society on account thereof) the sum of $20,000. On its face this policy provides that after payment of premiums for not less than three complete years of assurance, if the policy shall thereafter become void in consequence of default in payment of subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits, in favor of said Jacob M. Mertens, his executors, administrators, or assigns, for the entire amount which the full reserve on said policy, according to the present legal standard of the state of New York, will then purchase as a single premium, calculated by the regular table for single premium policies now published and in use by the society; provided, however, that the policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium. The policy further provides:

"This policy is issued and accepted upon the condition that the provisions and requirements printed or written by the society upon the back of this policy are accepted by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

Under the provisions and requirements referred to in the policy are these:

"(1) That this policy is issued under the semitontine plan, the particulars of which are as follows:

"(2) That the tontine dividend period for this policy shall be completed on the eighth day of March in the year nineteen hundred and four.

"(3) That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its tontine dividend period as aforesaid, and unless this policy shall be then in force.

"(4) That all surplus or profits derived from such policies on the semitontine plan as shall not be in force at the date of the completion of their respective tontine dividend periods, shall be apportioned among such policies as shall complete their tontine dividend periods.

"(5) That upon the completion of the tontine dividend period on 8th March, 1904, provided this policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the option, either: First, to withdraw in cash this policy's entire share of the assets—i. e., the accumulated reserve, which shall be six thousand and forty-six $^{40}/_{100}$ dollars, and in ad-

dition thereto the surplus apportioned by this society to this policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the society's medical examiners shall be required; thirdly, to withdraw in cash the share of the accumulated surplus apportioned by said society to this policy, and continue the policy in force on the ordinary plan; or fourthly, to continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity, to reduce the subsequent premiums falling due upon this policy, provided, that in any year in which the amount derived from such annuity, together with the annual dividend on this policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens or assigns.

"(6) After the completion of the tontine dividend period, while this policy shall remain in force, it shall be entitled to all the rights and privileges of ordinary policies of the same age and kind. * * *

"(11) The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be varied or modified, nor any forfeiture under it waived, except by an agreement in writing, signed by one of the following officers, viz.: * * *."

The application for this policy accords therewith, and assents to the provision limiting participation in the surplus to a time subsequent to the expiration of the tontine period in accordance therewith. The other policies in question, while not in all things identical, are so similar in their terms and provisions that it is unnecessary to recite them here. There is no variance that affects the legal proposition involved.

The bankrupt insists, first, that the policies are not transferable, and do not pass to the trustee in bankruptcy; and, second, that if they are, and would so pass, they have a surrender value, and that on payment thereof to the trustee he is entitled to retain same. He alleges that he has tendered the surrender value. The trustee insists that these policies have no cash surrender value within the meaning of the bankruptcy law, and that they constitute assets, and pass to the trustee. Evidence was given under the objection that the terms, etc., of the policies cannot be changed, enlarged, or varied to the effect that the Equitable Life Insurance Society of the United States had adopted a custom of paying a surrender value to the holders of such policies on the surrender of same in substantially the same manner as when a cash surrender value is provided for in the policy. In the policies in question not only is there a failure to provide for a cash surrender value, but the provisions are inconsistent with the existence of such a value. This, however, is not at war with the fact that the assurance association may be willing to pay money for the surrender of such policies. There is no pretense that this custom of the insurer formed a part of the contract between the parties, or that the insured could enforce the payment of a surrender value, or the payment of anything, on surrendering the policy. In short, the insurer might be willing to pay a surrender value and might not. Such payment would be optional with it. In the case of these policies the assurance association issuing them, at the date of the adjudication, was willing to pay a sum of money for their surrender. It was not obligated to do so. The agent of the association has stated the sums it is willing to pay. These sums the bankrupt has tendered the trustee.

Section 70 of the national bankruptcy law of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], provides:

"Sec. 70. Title to Property.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. * * *"

While courts and judges of great learning have differed as to the proper construction of this section, it seems clear to this court that the policies in question here, containing as they do provisions beyond the ordinary life insurance policy, and in the nature of a contract for the investment of earnings under the policy, constitute assets, and have passed to the trustee, unless the bankrupt has prevented such effect by his action. This depends wholly on whether or not these policies have a "cash surrender value payable to the insured," J. M. Mertens, "his estate or personal representatives," within the intent and meaning of section 70, above quoted. In business circles and among life insurance men the words "cash surrender value" have a well-understood meaning, and no policy is understood to have a "cash surrender value" unless provided for in the policy so as to be enforceable by the insured. How can the holder of a policy say that it has a cash surrender value when such alleged value depends on the whim, caprice, or policy of the company issuing the insurance, and cannot be legally claimed or enforced by the holder of the instrument. The association might be willing to pay one day, entirely unwilling the next; willing to pay a considerable sum one day, only a nominal one the next. Is this the "cash surrender value" spoken of in the bankruptcy law? This court thinks not. It would seem that, had Congress intended that every bankrupt holding a policy of insurance of the nature of these should retain the same as his own on paying to the trustee in bankruptcy the value thereof that the insurer might fix by its custom or otherwise, it would have used language appropriate to that end, and not an expression implying a value the insured has a legal right to demand and the insurer may be compelled to pay—a value generally understood to be provided for in the policy itself. This view of the statute is sustained by two cases: In re Welling (C. C. A. 7th Circuit) 113 Fed. 189, 51 C. C. A. 151, and In re Slingluff, 106 Fed. 154, 5 Am. Bankr. R. 76. See also, In re Steele, 98 Fed. 78, 3 Am. Bankr. R. 549; In re Diack,

100 Fed. 770, 3 Am. Bankr. R. 723; In re Grahs, 1 Am. Bankr. R. 465; In re Boardman, 4 Am. Bankr. R. 620, and Pulsifer v. Hussey, (Me.) 54 Atl. 1076, 9 Am. Bankr. R. 657. It would not be profitable to discuss these cases. In Re Welling, supra, all the judges in the Circuit Court of Appeals agreed as to the proper construction of the proviso in section 70 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]. It is urged that the other construction ought to be given, for the reason that if policies not containing a provision for a cash surrender value may not be held by the bankrupt on his paying to the trustee the amount the company is willing to pay for the surrender thereof, an injustice will be done, as such bankrupt will not be able to take and hold the policy for his benefit in the future, while the bankrupt holding a policy containing such a clause will hold his. It is also urged that a trustee in bankruptcy has no power to pay premiums and preserve a policy in force or mature it for the benefit of the estate or creditors. The first contention may be true. In answer it is sufficient to say that each holder of a policy will stand on its terms, and derive his benefits therefrom. This court dissents in toto from the second contention.

Suppose a policy payable to the insured (a bankrupt) or his executors, administrators, or personal representatives lacks but one payment of premium to mature it and add thousands of dollars to the estate, is the trustee, acting under the direction of the court, powerless to make the payment and add so materially to the assets of the estate? The court would not permit a long delay in the settlement of a bankrupt's estate, or allow the trustee to speculate on the life of the insured, but it would permit the doing of those acts clearly in the interest of the creditors. Take, for instance, this very policy, No. 274,445. It appears from the evidence that at the date of the adjudication September 15, 1903, the company would have paid only $5,905.65 as an alleged surrender value had the policy then lapsed and been surrendered. September 8, 1903, the receiver paid the last premium necessary to mature the policy to the end of the 20-year or tontine period. By making that payment it became a certainty that if Mertens died before March 8, 1904, the policy would be worth $20,000. In case he did not die (and he did not), then the policy, at the end of the tontine period, or March 8, 1904, would be worth $11,318.40, and it is worth that. Hence the payment by the receiver of $293, and a holding on for about six months, has added to the value of that one policy $5,412.75, a sum that either goes to the estate for creditors or to the bankrupt. This court is decidedly of the opinion that the receiver had authority to make that payment and hold onto the policy, and that it was his duty so to do.

The motion is granted, but the order will be settled before me at Utica, N. Y., September 6, 1904.

NERESHEIMER v. UNITED STATES.

(Circuit Court, S. D. New York. December 29, 1903.)

No. 3,328.

1. CUSTOMS DUTIES—CLASSIFICATION—DRILLED PEARLS—SIMILITUDE.
Drilled pearls were imported, which, by a careful process of selection, matching, and assortment, requiring time and skilled labor, had been put in a condition in which they were collectively worth more than the aggregate value of the individual pearls. *Held*, that in this state they bore a closer resemblance to pearls strung than to pearls in their natural state, and that under the requirement of section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], that any article not enumerated in the act "shall pay the same rate of duty which is levied on the enumerated article which it most resembles," they are dutiable at the same rate as the "pearls * * * strung" enumerated in paragraph 434 of said act, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], and not as "pearls in their natural state, not strung or set," under paragraph 436, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], nor as "articles manufactured, in whole or in part, not provided for," under section 6 of said act, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

2. SAME—FINDING OF GENERAL APPRAISERS.
Findings of fact by the Board of General Appraisers will only be reviewed when the court is satisfied that such findings are unsupported by the evidence, or clearly against the weight of evidence, or where new evidence has been introduced which was not before the board.

3. SAME—RELIQUIDATION AT INCREASED RATE OF DUTY—RIGHT OF COLLECTOR OF CUSTOMS.
Certain merchandise was imported, assessed for duty, passed into the possession of the owners, and was sold, and protests against the assessment were made by the importers. Subsequently, but within one year after the original liquidation of the entry, and while the protests were still pending before the Board of General Appraisers, the collector of customs reliquidated the entry, and collected duty at an increased rate. *Held*, that this action of the collector was lawful, under the provision in section 21, Act June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986], that the "settlement of duties shall, after the expiration of one year from the time of entry, * * * be final and conclusive upon all parties."

On Application for Review of a Decision of the Board of General Appraisers.

The decision under review (G. A. 5,146, T. D. 23,748) affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Neresheimer & Co.

W. Wickham Smith, for importers.
Henry C. Platt, Asst. U. S. Atty.

HAZEL, District Judge. The merchandise consists of two importations of drilled pearls—the first entered on March 28, 1901, comprising 39 pearls; another, of 45 pearls, on November 30, 1901—aggregating in value, according to invoices, to $123,804. Each importation was classified and assessed by the collector of customs for duty at the rate of 20 per cent. ad valorem, pursuant to section 6, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], which provides for that rate upon "articles manufactured, in whole or in part, not provided for" in said act. The importers pro-

tested, claiming the pearls to be dutiable by similitude at 10 per cent. ad valorem under paragraph 436 of said act, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], reading as follows: "Pearls in their natural state, not strung or set," or, in the alternative, under paragraph 435, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], providing for a duty of 10 per cent. ad valorem upon "diamonds and other precious stones advanced in condition, * * * and not set." On March 3, 1902—within one year from the entry on the first importation, and three months after entry on the second importation, and before the protests of the importers were acted upon by the Board of General Appraisers—the local appraiser amended his return on the invoices by declaring the pearls to have been in a completed condition, ready to be strung; and he accordingly reliquidated and assessed a duty upon them at 60 per cent., in accordance with paragraph 434, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], which includes "pearls set or strung." The pearls were surrendered to the importers and sold by them at the time of the original entry.

The Board of General Appraisers found the following specific facts:

"(1) That the pearls the subject of each of these protests are drilled, and have, by a careful process of selecting, matching, and assortment as to size, quality, luster, shape, etc., which required time and skilled labor, been so assorted that the collection of pearls thus produced is worth more than the aggregate values of the individual pearls composing it.

"(2) That in the condition imported they bore a closer similitude to pearls strung than to pearls in their natural state.

"(3) That the pearls the subject of these protests are identical in material with both 'pearls strung,' as provided for in paragraph 434, and 'pearls in their natural state,' as provided for in paragraph 436 of said act."

The opinion of the board stated that in arriving at a conclusion here they have been guided by the Circuit Court of Appeals decision in the case of Tiffany v. United States, 112 Fed. 672, 50 C. C. A. 419. By that decision it was decided that loose pearls, unassorted, and of various sizes, colors, and quality, drilled, but not set or strung, are not covered by the provisions of paragraph 434, and accordingly are dutiable as pearls in their natural state. The government contends that the proofs show that the pearls are more similar to pearls strung than to those in their natural state, thus differentiating the facts from those of the Tiffany Case, but adopting the principle of that decision in the case at bar. The evidence as to whether the pearls were in a completed state, namely, whether by a skillful process of selection, matching, and assortment as to size, quality, luster, and shape, they possess a value in excess of the aggregate value of the individual pearls composing the collection, is in dispute. The testimony of Mr. Townsend, one of the importers, tends to show that the pearls received in bond were sent to him as loose pearls. He testified that he sold them as loose pearls, and that they could not be used as jewelry in that condition. Mr. Black, witness for the importers, after testifying that he bought the pearls in question from the importers, said they were not in a completed condition; that it was necessary to rebore and polish some of them. Mr. Reich, witness for the importers, testified that it was necessary, in order to

string the pearls in question, to rim out or straighten the hole in each pearl. The record discloses that witnesses for the government testified that the imported articles apparently were strung, assorted, matched, and sized, as to color and quality. Assuming such evidence to be credible and trustworthy, the Board of General Appraisers were justified in their conclusion that the pearls were laboriously selected, matched in size and color, shape, luster, and quality, and therefore collectively worth more than the aggregate value of the individual pearls. The importers argue upon the facts that the evidence adduced by the government is susceptible of the finding that the pearls were not of uniform color and quality; that they were not fit for a pearl necklace; and therefore the board fell into an error, which should be corrected on this appeal. The facts as found by the board seem to be supported by the evidence, and therefore ought not to be disturbed by this court. Well-considered cases hold that a finding of facts by the Board of General Appraisers will alone be reviewed when the court is satisfied that such findings are unsupported by the evidence, or clearly against the weight of evidence, or where new evidence is before the Circuit Court which was not considered by the board. Apgar v. U. S., 78 Fed. 332, 24 C. C. A. 113; U. S. v. Van Blankensteyn, 56 Fed. 474, 5 C. C. A. 579; In re White (C. C.) 53 Fed. 787.

The decisions also hold the burden to be upon the importer to overthrow the presumption of correctness of the collector's decision. Pickhardt v. U. S., 67 Fed. 111, 14 C. C. A. 341, 35 U. S. App. 72. The importers, however, insist that the tariff laws contemplate that the examiners or other government officials charged with the duty of originally determining the character of the imported articles shall make their report upon which the duty is assessed at the time the merchandise is actually inspected. This contention, while challenging the credibility and weight of the testimony for the government, has not sufficient force to justify disturbing the decision of the board upon the general question of fact.

At the argument the point was made that the collector exceeded his power in reliquidating the duties. Such power is given by section 21 of Act June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986]. The cases construing the power of the collector under that provision of the statute hold that the collector may liquidate the duties at any time after entry, but, once liquidated, he may not reliquidate in the absence of fraud, or protest by the owner, after a year from the date of entry. Gandolfi v. U. S., 74 Fed. 549, 20 C. C. A. 652; Abner Doble Company v. U. S., 119 Fed. 152, 56 C. C. A. 40. It is clear, therefore, that the original assessment of duties in this case was not final and conclusive, even though said pearls were delivered to the owner. It was entirely within the power of the collector to reliquidate the duties before the expiration of the year from the time of the entry, even though such goods had been delivered to the owner. U. S. v. Comarota (D. C.) 2 Fed. 145; U. S. v. Campbell (D. C.) 10 Fed. 816; U. S. v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039. See, also, U. S. v. De Rivera (C. C.) 73 Fed. 679.

In view of the sale of the pearls at the time of the original liquida-

tion, and the probabilities that the selling price largely depended upon the rate of duty exacted by the government, it is manifest that the importers should in some manner be relieved, if possible, from the burden of additional taxation. I am unable to point out how it may be brought about. The court, as already remarked, is precluded from disturbing the finding of facts, unless the conclusion upon the facts is clearly against the weight of evidence. I am also of opinion that the evidence, as found and considered by the board, brings this case precisely within the principle announced in the Tiffany Case, hitherto cited.

For these reasons the decision of the Board of General Appraisers is sustained.

YORK COUNTY SAV. BANK v. ABBOT.

(Circuit Court, D. Maine. August 18, 1904.)

No. 542.

1. FEDERAL COURTS—MOTION TO DISMISS FOR WANT OF JURISDICTION.

On a motion to dismiss for want of jurisdiction, the court will not ordinarily enter into a consideration of the merits, but, if the case shows a bona fide claim within the jurisdiction of the court, with a reasonable plausibility in support thereof, the question of jurisdiction will be passed until the cause is considered on the merits on formal pleadings.

2. SAME—JURISDICTION—LOCAL ACTION.

A suit in equity by a lessee against a nonresident lessor to enforce alleged rights under the terms of the lease, by requiring the defendant to elect either to buy the building from, or to sell the land to, complainant at an appraised value, or to have the court make such election and enforce its decree through a master or trustee authorized to execute a deed, may be one to enforce a lien or claim to the property, which, when in good faith, is on the face of the bill within the jurisdiction of the Circuit Court of the United States for the district in which the property is situated, under section 8 of the judiciary act of March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513].

In Equity. On motion to dismiss for want of jurisdiction.

E. W. Freeman and Enoch Foster, for plaintiff.

Brandeis, Dunbar & Nutter (Bird & Bradley, specially), for defendant.

PUTNAM, Circuit Judge. The pending matter is a motion by the respondent to dismiss this case on the ground that the court has no jurisdiction thereof. The motion as originally drawn alleged another reason for dismissal, which has been obviated by subsequent proceedings in reference thereto.

The case, for present purposes, is stated with sufficient accuracy by the respondent as follows:

"This is a bill in equity, filed in March, 1901, by the York County Savings Bank of Biddeford, Maine, against Martha T. Abbot of Cambridge, Mass. The material facts as alleged in the bill and appearing from the record are as follows:

"On October 1, 1867, Eben Steele, of Portland, owned in fee a lot of land on Middle street, Portland. On that day he made a lease of the premises to one Lewis for twenty-five (25) years at a yearly rent of $450, payable quarterly.

By the lease the lessee undertook to erect a building on the premises within one year. The lease then provided as follows:

" '(1) At the end of said term of twenty-five years the lessor or his representatives shall have the privilege of extending this lease by a perpetual lease forever, to the lessee, or his assigns at the above described rent and taxes, or if the lessor or his assigns or representatives prefer, they may have an appraisal of the lot and building thereon, with the option on their part of purchasing said buildings at such appraised value, or of selling to the lessee or his representatives the lot at such appraised value, whichever the lessor, his assigns or representatives may then elect. Each party on request to choose an appraiser and the two so selected to choose a third; and if either party neglects to choose an appraiser, such appraiser is to be selected for such party by the Judge of Probate of Cumberland County; and the appraisal of a majority of such appraisers to be conclusive, in case of disagreement. And the said lessee doth hereby covenant for himself, his heirs and representatives to purchase said lot at such appraisal, or to convey said building to the lessor or his representatives, according to the decision and election of said lessor, or his representatives, or to execute and complete a perpetual lease of said lot as above stipulated at the end of said term, if the lessor, or his representatives shall demand such lease. The building erected on said lot is hereby pledged and conveyed to the lessor, his heirs, executors, and assigns, as security for the faithful performance of this agreement, and every covenant therein by the lessee, his heirs, executors or assigns.'

"The lessee's interest under the lease of October 1, 1867, subsequently and before the end of the term became and is vested in the complainant. The lessor, Eben Steele, died in 1871, and devised his interest in the leased premises to Abby A. Steele and Martha T. Abbot. Mrs. Abbot, in 1876, released all interest to Miss Steele, and on the death of the latter, in 1898, by inheritance became sole owner.

"Abby A. Steele, it is alleged in the bill, did not within one year after the expiration of the lease exercise her right to elect to extend the lease as a perpetual lease, and neither she nor the respondent at any time prior to June 1, 1899, or thereafter, requested the complainant to appoint an appraiser.

"On June 1, 1899, the complainant, in writing, requested the respondent to choose an appraiser, but the respondent neglected and refused to do so. Thereafter, and prior to November 10, 1899, the complainant selected an appraiser, and on November 10, 1899, applied to the judge of probate for Cumberland county, Me., to appoint an appraiser, and the judge, after giving notice to the respondent of such application, did appoint an appraiser, and these two selected a third. The appraisers subsequently notified both parties of their intention to appraise the premises at a time and place specified, and at such time and place did appraise the building at $3,500, and the land at $2,887.50, and notified the parties thereof.

"On August 24, 1900, the complainant requested the respondent to exercise her option to purchase the building from or sell the land to the complainant, each at the appraised price, and notified her of its willingness to abide by and carry out such election by her; but the respondent did not do either of the acts. On October 30, 1900, the complainant tendered to the respondent for execution a quitclaim deed of the land, and tendered $2,887.50 in payment therefor, and tendered a bill of sale of the building for delivery upon payment of $3,500, but the respondent refused to accept either offer.

"The bill prays that the respondent be ordered to elect whether to buy the building from or sell the land to the complainant, each at the appraised price; that the court appoint a master to exercise this right of election; that the court itself exercise this right of election; that the court order the respondent, pursuant to the election made under one or the other of the first three prayers, either to pay to the complainant $3,500 for a bill of sale of the building, or execute and deliver a deed of the land for $2,887.50; that the court appoint a master or some suitable person to execute the order made under the preceding prayer; that the court restrain the respondent pending the suit from incumbering or transferring the property; for general relief.

"On September 25, 1901, the respondent, appearing specially for the purpose by leave of court, filed a motion to dismiss the bill for want of jurisdiction."

The specific reasons assigned by the respondent for raising the objection that this court has no jurisdiction are as follows:

First. There is no obligation binding upon the respondent to be enforced.

Second. The court can have no jurisdiction unless there is an obligation enforceable against the land.

Third. If any obligation exists binding on the respondent, it is one not enforceable against the land.

Fourth. If the alleged obligation is in any aspect enforceable against the land, it is not enforceable in this court.

The motion, of course, involves the construction and application of the eighth section of Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], the essential parts of which are as follows:

"When in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, or lien, or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur," etc.

As apparent from the specific grounds assigned for the dismissal, it might well be apprehended the propositions which have been submitted to us by the respondent relate mainly to the merits of the cause. On a motion to dismiss for want of jurisdiction it is not to be expected that the court will ordinarily enter on a discussion of the merits. If the case shows a bona fide claim within the jurisdiction of the court, with a reasonable plausibility in support thereof, it behooves the court to pass on the merits on a formal plea, demurrer, or answer, rather than summarily on a motion to dismiss. Of course, there are exceptional cases, like North American Company v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061, and Magruder v. Armes, 180 U. S. 496, 21 Sup. Ct. 454, 45 L. Ed. 638, where, notwithstanding there were specific allegations, which, standing alone, were sufficient for jurisdictional purposes, yet nevertheless, from the general tenor of the whole declaration, the court perceived that the specific allegations did not truly state the controversy between the parties. But in Millingar v. Hartupee, 6 Wall. 258, 262, 18 L. Ed. 829, it was said, in discussing a motion to dismiss, as follows:

"In many cases the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order."

In Douglas v. Wallace, 161 U. S. 346, 348, 16 Sup. Ct. 485, 40 L. Ed. 727, this expression in Millinger v. Hartupee was practically applied, and various decisions cited showing it was in accordance with the settled practice of the court. Indeed, it is the constant practice of that tribunal to postpone motions to dismiss to be heard in connection with the merits. In City Railway Company v. Citizens'

Railroad Company, 166 U. S. 557, 563, 17 Sup. Ct. 653, 655, 41 L. Ed. 1114, it was said:

"All that is necessary to establish the jurisdiction of the court [meaning in that case the Circuit Court of the United States] is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

The expression in this citation which we emphasize is covered by the words "claimed in good faith." To apply this expression precisely to the present case, as it is apparent that the complainant, in good faith, seeks to proceed in a controversy which it in good faith regards as within our jurisdiction, we feel authorized, on a motion to dismiss for want of jurisdiction, to decline any discussion of the merits so far as it is possible for us so to do. Not only is this the more convenient practice, but it protects against a hasty adjudication on a summary proceeding with reference to substantial questions.

In view of these propositions, but a very few observations are required. The first of the respondent's specifications with reference to this motion to dismiss is to the effect that here is no obligation binding on her, which is clearly to the merits alone, and cannot be entered upon in this summary way. All the others are limited to the land which has been described. On this account alone those specifications are defective. This bill lies not merely in reference to the land, but also covers the buildings, which, although to be regarded as personal property, have, under the circumstances of this case, an absolutely local situs, and are clearly within the letter and spirit of section 8 of the act of 1875. Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229; Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.

Neither is the case taken out of the act of 1875 because the complainant's claim or right is put as conditional, dependent on the election of the respondent, or in any manner having an apparent double aspect. The statute covers all claims, whether absolute or contingent. Neither is it excluded from the operation of the statute because it relates to the adjustment of rights depending on a formal written agreement, so that in some respects they cannot be regarded as adversary. The true underlying proposition was fully settled in the way we state it in Greeley v. Lowe, 155 U. S. 58, 67, 74, 15 Sup. Ct. 24, 39 L. Ed. 69. That proceeding was one for the partition of real estate between tenants in common, where there was no dispute as to title, but the only thing involved was an adjustment of the admitted respective interests of the various tenants in common. Greeley v. Lowe covers in this respect the case at bar, and even goes beyond it; but it is sufficient to say that in each suit there was a common interest, dependent in one on an admitted title and in the other, that is before us, on the construction of a formal contract; in either instance to be determined and adjusted in accordance with the statute of 1875. Neither is the doubt which is suggested with reference to parties pertinent to this motion to dismiss. If any question with reference to parties develops on the formal hearing, leave to amend will be granted as of course; and it may

be that any question of that kind will be anticipated by the complainant providing for it in advance. If not so provided for, the question of parties is so difficult, and so far involves the merits, that the court declines at the present stage to dismiss on that account, both by reason of the difficulty involved and because also a mere question of parties, which in this case is whether or not the administrator of the lessor should be joined as respondent with the owner of the fee, is not cognate to the question now specially urged upon us—that is, whether we can take jurisdiction over this controversy in any event.

This leaves only one proposition which can be claimed to be strictly one of jurisdiction, and which, therefore, ought to be considered by us; that in the absence of any special statutory provision as to the form of relief in case the complainant is entitled to any, a Circuit Court of the United States sitting in equity is powerless to shape it. Of course, if we are powerless to give relief in case we find the merits are with the complainant, it would be fruitless for us to proceed further and the bill should be dismissed; but if the complainant has any right we are confident that some form of relief will be found, although it would not at present be prudent to assume to forecast its particular character, nor would we be able to do so with certainty. What it would be will, of course, depend on the particular result on the merits. In this respect the respondent shares the impression which has gone abroad from the decision of the Supreme Court in Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101. Taken broadly, and in some aspects in which it might be taken, the result of that case would be astonishing, and might afford serious difficulties in the way of the present complainant; but Hart v. Sansom has never been taken seriously since it was announced. Indeed, subsequent decisions of the Supreme Court have so cut it down that it must be held to have decided only as to the particular form of procedure marked out by the judgment which it reviewed. Sugg v. Thornton, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. Ed. 447; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918; Carpenter v. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. Ed. 640; and other cases which might be cited. That it has no application to the federal courts proceeding upon broad principles of equity was formally decided in Lynch v. Murphy, 161 U. S. 247, 250, 251, 252, 16 Sup. Ct. 523, 40 L. Ed. 688, where exactly the relief prayed for by the complainant, in the way of appointing a trustee to make a conveyance of the title of an absent party by the Supreme Court of the District of Columbia, was sustained.

We do not think that we can go further on this motion to dismiss without involving ourselves in discussing the merits to an extent which we wish to avoid; nor do we think it necessary that we should do so.

The motion of the respondent, filed on September 25, 1901, to dismiss this bill for want of jurisdiction, is denied, without prejudice to any matter covered by it, or to which it was intended to relate, so far as it may affect the merits of the cause, or may be renewed on demurrer, plea, or answer.

McINTYRE v. SOUTHERN RY. CO.

(Circuit Court, D. South Carolina. July 9, 1904.)

1. MASTER AND SERVANT—JOINT NEGLIGENCE.
In order to render a master and servant jointly liable for injuries to a third person, there must be actual negligence, as distinguished from imputed negligence of the master concurring with a negligent act of the servant.

2. FEDERAL COURTS—REMOVAL OF CAUSE—SEPARABLE CONTROVERSY.
Though, in a suit against two or more defendants, one of whom is a nonresident, there may be charges of concurrent negligence against all, yet, if there be also a distinct charge of negligence against the nonresident defendant alone, sufficient in and of itself to constitute a cause of action, the case is one involving a separable controversy between citizens of different states, and is therefore removable to the federal courts.

3. SAME—PLEADING.
A complaint against a nonresident railway company and certain of its employés in charge of the train by which deceased was killed, who were of the same citizenship as plaintiff, alleged that, in violation of the rules of the railway company, "defendants negligently, willfully, and maliciously, by their joint, concurrent acts," gave certain box cars a high, unusual, and dangerous rate of speed, uncoupled them from the engine, turned a switch, and permitted them to roll down a steep grade over a crossing, by which plaintiff's intestate was knocked down and killed. The complaint also charged defendants jointly with negligence in maintaining such steep grade and closely adjoining switch at such place, in not providing a switchman at the crossing, in not providing a brakeman in charge of the cars, and in that the railway company's employés were incompetent, and that they were retained in its employ with knowledge that they were accustomed to violate its rules. *Held*, that such acts of negligence were not joint, but that the complaint alleged a separable controversy, entitling the railway company to remove the cause to the federal courts.

McCullough & McSwain, for plaintiff
T. P. Cothran, for defendants.

BRAWLEY, District Judge. This is a motion to remand the case, which was commenced in the court of common pleas for Greenville county, and removed on a petition of the Southern Railway Company, which, among other things, alleged that the complaint presented a separable controversy, and that the defendants other than the petitioner were joined for the sole purpose of preventing petitioner from removing the cause to the federal court. There was a traverse of the petition, and it was referred to the standing master to take testimony; and it appears from his report that the petitioner examined one of the plaintiff's attorneys, and his testimony is before me.

It has become a common practice, in suits for damages against railway companies, to join as defendants with the railway company an employé or several employés, charging joint negligence. It taxes the credulity of the court to believe that in suits of that character there is

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 1238.

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

any bona fide expectation of recovering damages from any other than the railway companies. They are solvent and able to respond in damages, and the persons joined with them as defendants are, as a rule, men of little substance, and unable to pay any damages which may be recovered. There is, in consequence, a strong presumption in every such case that employé defendants are joined for no other purpose than to defeat the right of a nonresident defendant to remove its cause to the federal court, and thus deprive it of its rights under the Constitution and laws of the United States. But cases often arise wherein it is a great hardship upon a plaintiff to have his cause removed from the county where his witnesses reside, to a forum where, by reason of his poverty, he may ill afford to carry a case. In every proper case he has the right to choose the court in which his cause shall be tried; and the defendant company here, having by removal exercised its choice, has no just ground for criticism if the plaintiff wishes to exercise a like right. If there is a separable controversy, the defendant company has the right to remove; if not, not; and, to determine this question, the complaint must be examined, to see whether there is a real joint cause of action, or merely a simulated one. The pleader cannot, by mere ingenuity in the framing of his complaint, or by repeated charges of joint and concurrent negligence, make it so, when in fact it is not so.

The plaintiff is the administrator of one Patrick Brady. The defendants are the Southern Railway Company; William Grubbs, a conductor on a freight train; Ernest Culbraith, an engineer; Henry Williams, switchman and train hand; and Henry Lomax, brakeman—all employed by the defendant company at the time of the injury complained of, and all of the last-named citizens of South Carolina. The heirs at law and distributees of Patrick Brady are his brother and sister, who live in Ireland, his sister living in New York, and certain nephews and nieces named, who are residents of Pennsylvania. Patrick Brady was killed on the track of the railway company, in or near the town of Honea Path, while crossing the track at a place where it is alleged there was a path or passageway which had been used by the public for many years with the knowledge and acquiescence of the defendant company. There was a steep grade at that point from this crossing or passageway up to the railroad station in the town of Honea Path, and the act of negligence charged is in these words:

"And then and there, in utter violation of the rules, regulations, and practices of the Southern Railway Company, the defendants carelessly, negligently, recklessly, willfully, wantonly, and maliciously, by their joint and concurrent acts, gave to three freight box cars, which they had orders to place upon the side track of said railroad in said town, a high, unusual, and dangerous rate of speed, and then uncoupled said three freight box cars from connection with the engine of said train, and allowed said three freight box cars to roll back down said steep grade at a high, dangerous, and increasing rate of speed; and just as plaintiff's intestate had crossed the main line of said railroad at the crossing or passageway aforesaid, and was in the act of crossing the side track, as he had a right to do, and as the defendants had invited him to do, the defendants, by their joint and concurrent negligence, carelessness, and recklessness, suddenly opened the switch at said end of said side track, and diverted the course of said three freight box cars into and upon said side track, and then and there, before the plaintiff's intestate could pass from the side track of said railroad, said three freight box cars, moving at said unusual and dangerous rate of speed, in utter violation of the rules of the de-

fendant Southern Railway Company, struck, knocked down, bruised, mangled, and instantly killed plaintiff's intestate."

It will be observed that this charges a reckless, willful, wanton, and malicious act upon the part of the four defendant employés, for which they would be responsible in punitive or vindictive damages, if the proof sustained the charge. There is no charge that the principal participated in this wrongful act of its agents, expressly or impliedly; that it authorized or approved of it, either before or after it was committed. On the contrary, the allegation is that it was done in "utter violation of the rules, regulations, and practices of the Southern Railway Company." Under this paragraph, which is the sixth paragraph of the complaint, there is surely no joint and concurrent act of negligence. It is true that a master is held responsible for the acts of those whom he employs, done in and about his business, even though they are in conflict with orders which he has given; but this is on the grounds of public policy, and not upon the theory that he personally causes the injury, while the liability of the servant arises wholly because of his personal act in doing the wrong. A willful act, done by a servant at the command or authority of his principal, makes them both jointly liable, because both are, in law, principal trespassers. To unite wrongdoers in one action, the injury must be in some sense their joint work. There must be some community in the wrongdoing. "It is not enough," says Pomeroy on Code Remedies, § 307, "that the injured party has on certain grounds a cause of action against one for the physical tort done to himself or his property, and has on entirely different grounds a cause of action against another for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action. This principle is of universal application." To make the master and servant jointly liable, there must be actual negligence, as contradistinguished from imputed negligence of the master concurring with an act negligently committed by the servant. In Davenport v. Southern Railway Company (C. C.) 124 Fed. 983, where the deceased was killed upon the railroad track, in circumstances very similar to those stated in the complaint, and it was charged that the acts of the agents were "reckless, willful, and malicious," the late Judge Simonton held that the controversy was separable, and refused to remand the cause.

The seventh paragraph of the complaint charges in these words:

"That the proximate cause of the death of the plaintiff's intestate was the joint and concurrent negligence, carelessness, recklessness, willfulness, and wantonness of the defendants in the following respects: (1) In maintaining within the limits of said town, and at and near said crossing, where the public had the right and were invited to be, the aforesaid steep grade and closely adjacent switch."

This is clearly a specification of negligence of the company, for which the other defendants cannot be jointly charged.

The second specification is in "giving a high rate of speed to and detaching the said three freight box cars, and allowing the same to run into and upon said side track at a high, unusual, and dangerous rate of speed, in utter violation of the rules of the defendant Southern

Railway Company." This does not charge any joint act of negligence, and what we have already said makes it clearly fall within the rule of Davenport's Case, above cited.

The third specification is in "not providing and having a watchman at the crossing." The fourth is in "not providing a brakeman in charge of the three freight box cars." These are acts of negligence for which the company alone is responsible. The other defendants are surely not liable for such a default.

The fifth specification is that the employés were insufficient and incompetent; that the defendant company had knowledge that they were accustomed to violate its rules, and, notwithstanding this knowledge, retained them in its service; and that the company was negligent, careless, and reckless in the selection of its servants. The company alone is responsible for this negligence or breach of duty. So it is clear that no joint liability arises under this specification. A late case in Georgia (Southern Railway Company v. Edwards, 42 S. E. 375) seems in point upon this phase of the case. The syllabus, which, under the practice in that state, is prepared by the court, is as follows:

"Although there may be, in a suit against two or more defendants, one of whom is a nonresident, charges of concurrent negligence against all, yet, if there be also a distinct charge of negligence against a nonresident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different states, and therefore removable to the proper United States court."

In that case the railway company and Russell, one of its engineers, were joined as defendants; and the plaintiff sued for injuries suffered in consequence of being struck by a lump of coal which fell from the tender of a passing locomotive, of which Russell was in charge. The petition alleged a number of acts of negligence, one of which was overloading the tender with coal; and it was alleged also that the company was negligent "in not providing said engine with an engineer who was careful and prudent, and who would not have permitted said tender to be thus overloaded." The court says:

"That paragraph certainly did not charge an act of concurrent negligence, for it cannot be true that the company's negligence in providing a careless and incompetent engineer was an act in which the latter participated. Indeed, the plaintiff does not undertake to allege that this was so, but makes his charge of negligence with respect to employing an incompetent engineer against the company alone. As to this particular matter, therefore, there was a 'separable controversy' between the plaintiff and the company. The alleged negligent act of employing such an engineer, with resulting damage to the plaintiff, would, in and of itself, have given rise to a distinct cause of action, involving a controversy wholly between citizens of different states, and a suit of this kind would certainly have been removable. The fact that there is in the suit a 'controversy, which is wholly between citizens of different states, and which can be fully determined as between them,' brings the case within the removal act of 1887. Black, Dillon on Removal of Causes, § 139. See, also, section 143, and cases cited. That there is a separable controversy, must appear from the plaintiff's pleadings. Id. § 141. When the removal is proper, the effect is to carry the entire case into the federal courts. Id. § 142. The court erred in not granting the order of removal."

I am of opinion that although the complaint charges, repeatedly, joint and concurrent negligence, carelessness, recklessness, willfulness, and wantonness of the defendants, this is mere brutum fulmen, for the

specifications upon which these charges or conclusions are predicated do not show any co-operation between the defendant company and the employés in the acts which caused the injury to the deceased, and consequently there is no joint cause of action against them. The maintaining a steep grade, the employment of incompetent servants, the failure to provide a watchman and a switchman, are acts of negligence for which the company alone was responsible. The company is responsible for the acts and omissions and negligence of its servants upon grounds of public policy, and, to make it jointly liable with the servant, there must be some actual negligence, as contradistinguished from the negligence imputed by law. The wanton, willful, and malicious acts of the servants charged in the complaint give a separate cause of action against them, and damages may be assessed to the party injured, upon principles altogether different to those allowable against the company itself, for the party may recover punitive damages upon such a cause of action, while the company, although liable in damages for the negligence of its servants, is only liable for compensatory damages, unless it, by its conduct, expressly or impliedly authorized or approved the wrongful act which the complaint herein negatives, for it charges that these wanton, willful, and malicious acts were done in utter violation of its rules, regulations, and practices. This conclusion renders it unnecessary to consider the testimony submitted.

The motion to remand is refused.

CONSOLIDATED CAL. & VA. MIN. CO. v. BAKER et al. (two cases).

(Circuit Court, D. Nevada. August 1, 1904.)

Nos. 772, 774.

1. COSTS—ALLOWANCE IN EQUITY.

While the allowance of costs in an equity suit is not governed by statute, and is largely within the discretion of the court, the general rule is that the prevailing party in cases in equity, as at law, is entitled to recover costs; and a plaintiff in an action in ejectment for mining property and also in a suit in equity against the same defendant to enjoin trespass thereon, who recovers in both cases on issues joined, will be allowed costs in both, although it recovered only as to part of the ground claimed, the title of each party to a portion thereof being stipulated on the trial.

W. E. F. Deal, for plaintiff.

George N. Noel, for defendants.

HAWLEY, District Judge (orally). The only controversy between the parties relates to the question of costs. The facts necessary to present this question may be briefly stated as follows: The plaintiff brought an action at law in ejectment (No. 772) against defendants to recover possession of portions of two mining claims situate in Silver Star mining district in Storey county, Nev., the two claims being contiguous, having a common side line, the west side line of one being

¶ 1. Right to costs in equity, see note to Tug River Coal & Salt Co. v. Brigel, 17 C. C. A. 368.

See Costs, vol. 13, Cent. Dig. § 108.

the east side line of the other. The plaintiff also brought a suit in equity (No. 774) to enjoin the defendants from working upon any part or portion of the mining ground described in the bill of complaint. A temporary injunction was issued, and a day set for defendants to show cause why an injunction pendente lite should not issue. No steps were ever taken to bring the rule to show cause to trial. The defendant Frank Baker answered in each suit, denying the material allegations in the plaintiff's complaint, and claimed title to the entire ground. Both cases were set for trial. Prior to the time the cases were set for trial, the temporary injunction was, upon plaintiff's motion, modified so as not to affect any of the defendant's rights in the premises. The parties appeared, and by consent and stipulation both cases were tried together before the court, and the following admissions were made:

"The plaintiff in the above-entitled action admits that it has no right, title, or interest or right of possession of, in, or to any part of the Twentieth Century mining claim, described in the answers in said actions, north of the south side line of said Twentieth Century mining claim, as described in said answers, or westerly of the east side line of the mining claim known as and called the 'Dexter Claim,' as described in United States survey No. 122, surveyed for the La Fayette Consolidated Mining Company, or north of the north end line of the West Con. Cal. and Va. Mining Claim, described in the complaint on file in said action. The defendant Frank Baker admits that he has no right, title, or interest or right of possession of any portion of the mining claims and premises described in the complaints in said actions south of the southerly side line of said Twentieth Century mining claim, described in said answers, or easterly of east side of line of said Dexter claim."

The testimony of a surveyor was taken on behalf of the plaintiff, giving the metes and bounds of the respective claims, and the location and work on the claim admitted by defendant to belong to the plaintiff. It was shown that defendant had not extracted any ore from any part of the vein admitted to belong to plaintiff. The defendant offered no testimony.

Upon these facts plaintiff is entitled to judgment in its favor in both cases for the ground admitted and proved to belong to it, and to the nominal damages of $1. Is it entitled to the costs in each suit? Speaking generally as to costs in equity cases, it may be said that the allowance or disallowance of costs is a matter largely within the sound discretion of the court. There are no fixed rules which govern this question. It is the duty of the court in every case to take into consideration all the circumstances, and grant or refuse costs as justice may dictate. As was said by the court in Black v. O'Brien, 23 Hun, 82, following the language of the court in Eastburn v. Kirk, 2 Johns. Ch. 318:

"Costs in equity 'do not depend upon any statute, nor do they absolutely depend upon the event of a cause. They depend upon conscience, and upon a full and satisfactory view and determination of the whole merits of a case. They rest in sound discretion, to be exercised under a consideration of all the circumstances.'"

See, also, 5 Ency. Pl. & Pr. 186, and authorities there cited.

But this general statement must be taken in connection with the general rule, equally well settled, that in all actions or suits where the title to realty is involved costs should be awarded without reference to the amount of the recovery therein, and the plaintiff will be entitled

to his costs, if he recovers at all. 5 Ency. Pl. & Pr. 172, and authorities there cited; 13 Cent. Dig. 112, and authorities there cited. In Hunter v. Marlboro, 2 W. & M. 168, Fed. Cas. No. 6,908, Justice Woodbury, in speaking of the rule in equity courts, said:

"The inclination should, in my opinion, be to conform to the standard established at law, unless in extreme or strong cases."

Primarily the rule is that the prevailing party in cases in equity, as at law, is entitled to recover costs. But the unsuccessful party may show circumstances which will defeat this right. In the present cases the contention of the defendant is that the plaintiff knew, or could readily have ascertained by an examination of the records of Storey county, that the claim, as admitted by stipulations at the trial, was the property of Frank Baker at the time of the commencement of the action, that the suit was brought without any foundation, and that the plaintiff should be compelled to pay all costs occasioned by its own negligence or inadvertence. But the answer to this contention is that an examination of the records would not have necessarily disclosed the title to the claim. The title to a mining claim depends not only upon the record, but also upon the performance of the annual labor, and making improvements of the value required by law. It may be that, if the minds of the parties had met before the suit was brought, the matter in dispute could have been amicably adjusted; but the issues raised by the pleadings made it necessary for plaintiff to establish its title to the ground claimed (although it was admitted at the trial that it was only entitled to a portion of the ground claimed in its complaint), and this entitles it to the costs. Such is the weight of authority. Rogers v. McGregor, 4 Cow. 531; Hubbell v. Rochester, 8 Cow. 115; Powers v. Leach, 22 Vt. 226; Kelly v. Railroad Co., 81 N. Y. 233; Morris v. Telegraph Co., 38 N. J. Eq. 301; Brown v. Ashley, 13 Nev. 251; Kittredge v. Race, 92 U. S. 116, 121, 23 L. Ed. 488.

My conclusion is that the plaintiff in each case is entitled to recover costs.

THE ALLISON WHITE.

(District Court, D. Rhode Island. August 15, 1904.)

No. 1,110.

1. SHIPPING—INJURY OF STEVEDORE—FALLING OF STANCHION.

Evidence considered, and *held* insufficient to show that the falling of a stanchion in the hold of a coal barge, by which libelant was injured, while engaged in discharging cargo, was caused by its unsoundness or insecure fastenings, so as to render the barge liable for the injury; it appearing that it had been struck by the steam shovel used by the consignees in discharging, and that other stanchions had been loosened in such manner, which was not an infrequent occurrence.

In Admiralty. Suit for personal injury.

Hugh J. Carroll, for libelant.

Carpenter, Park & Symmers and Frank Healy, for claimant.

BROWN, District Judge. The libelant was seriously and permanently injured by the fall of a stanchion, while he was at work as a

coal shoveler or trimmer in the hold of the barge. He was in the employment of the Newell Coal & Lumber Company, consignee, which had full control of the discharge of the cargo of coal. The libel alleges that the fall of the stanchion was due "to its unsound, weak, and unsafe condition, and to its weak, negligent, and unsafe fastening." The claimant contends that the stanchion was of proper character and construction, but was knocked out by the steam shovel in use by the consignee. After the accident an inspection was made by the master of the barge, who says that he found that a cleat of oak, used to fasten the top of the stanchion, was split, one end being fast in the beam, the other hanging down; that the split was in the center of the cleat. Thomas B. Markham also made an inspection, finding broken two spikes which had been driven into the stanchion. He admitted that at a previous trial he testified, "I felt of it—felt where it was broken off—and along this beam it was ripped off and slivered off the same as you would take an axe; the same as something heavy had driven that stanchion away from the beam where it was fastened." Markham was not questioned as to the cleat. According to the testimony of the guyman and of other workmen that were in the hold, the steam shovel did not strike the stanchion at the precise time of its fall. There is evidence, however, that the stanchion had been struck previous to its fall, though no one heard the cracking of wood. Peterson, the guyman, testified that before the accident he noticed that the stanchion was loose at the top, and that he said to the master of the barge, "That post is loose, and we get the coal out of the way there it might fall down." This the master expressly denies. At a previous trial in the state court, wherein the Newell Coal & Lumber Company was defendant, and the declaration alleged that the steam shovel struck the post and knocked it against the plaintiff, Peterson was a witness, and was asked as to the stanchion: "Q. What made it fall? A. Well, I don't know; couldn't tell you. * * * They must have been loose. I can't tell. I didn't examine it." He then said nothing about seeing that the stanchion was loose, nor about calling it to the attention of the master. Carlson, another witness for the libelant, testifies that he saw that the post was loose about an hour before the accident. His testimony at the former trial is not consistent with this testimony. The stanchion was a sound timber. No fault was found with the original construction or method of fastening. Counsel for libelant argues, from the fact that the stanchion had been spiked, that it had been previously broken and temporarily repaired, and that the motion of the vessel, with or without the pressure of the coal, had broken the spikes, and that the stanchion was loose, "so that when the support afforded by the cargo was withdrawn, some slight vibration, occurring in the ordinary sequence of events, changed its center of gravity, and caused it to fall." The libelant relies chiefly upon the William Branfoot, 52 Fed. 390, 3 C. C. A. 155. In that case, however, there was clear evidence of an old break; and it was held that a proper examination would have disclosed the dangerous condition of the stanchion, and that the condition was probably known to those having the vessel in charge. In this case there is no sufficient evidence that the stanchion was not in sound condition when the barge was turned over to

the consignee to be discharged. The existence of broken spikes after the accident is not inconsistent with a sound condition of the stanchion at the time the vessel reported for discharge. The contention that the post was seen by Peterson and Carlson to be loose before the accident, is not sustained by a satisfactory preponderance of evidence; but, even if it were, this would not be sufficient to exclude a blow of the steam shovel as a probable cause of the loosening of the stanchion.

Upon the evidence, I find myself in doubt as to the cause of the loosening of the stanchion. It is impossible in this case to apply the doctrine res ipsa loquitur, and to say that the fall of the stanchion casts upon the claimant the burden of explanation to relieve the barge from fault. The circumstances raise no presumption that the stanchion was insecurely fastened before the steam shovel was put into the hold, or that there had been a failure of proper inspection after previous discharges of cargoes. It is, to say the least, quite as probable that the stanchion was broken from its fastenings by the steam shovel operated by the Newell Coal & Lumber Company, as that it had been broken previously. The libelant's brief says, "It can be said to be wholly impossible for a shovel of this kind, thus handled, * * * to strike against a stanchion with sufficient force to injure it." Nevertheless it appears that two other stanchions were loosened in this way, and that it is not infrequent for an automatic steam shovel to knock out stanchions. When filled with coal, the shovel would weigh between 4,000 and 5,000 pounds. A swinging blow from this would apparently be a sufficient reason to account for the condition of the beam as described by Markham, and for the breaking of the cleat. I am of the opinion that the libelant has failed to establish, by a preponderance of evidence, negligence as charged in the libel, or negligence of any other character for which the barge is responsible.

The libel will be dismissed.

In re MERROW.

(District Court, D. Massachusetts. July 22, 1904.)

No. 6,291.

1. BANKRUPTCY—ATTACHMENTS—PRESERVATION OF LIEN.

In a valid attachment of land standing in the bankrupt's name, but claimed by his wife, the trustee will be subrogated to the attaching creditor with the consent of the latter.

In Bankruptcy.

Harrison Dunham and James S. Bourke, for trustee.
Howard F. Butler and J. S. Sullivan, for M. Anna Merrow.

LOWELL, District Judge. The referee has found that the bankrupt's wife on January 23d, before her marriage, conveyed real estate to the bankrupt with intent to protect it from attachment. At that time the bankrupt agreed in writing to hold the estate for the grantor, stating expressly that he had no claim thereto. This agreement was not recorded. On January 26th occurred the marriage. At some time

in February or March the estate was attached in suits against the bankrupt. On May 13th he reconveyed it through a third party to his wife. On June 13th he was adjudged bankrupt on his own petition. His trustee in bankruptcy has filed a petition praying that the rights under the attachment may be preserved for the benefit of the estate, and that he may be subrogated to the attaching creditors. These attaching creditors in open court assented to the granting of the petition.

It seems that this land would not have passed to an assignee in insolvency under the state law. Low v. Welch, 139 Mass. 33, 29 N. E. 216; Smythe v. Sprague, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822. And it may not have passed to the trustee in bankruptcy. See In re Hammond (D. C.) 98 Fed. 845, 860; Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261. The question does not arise here, where the title is not in controversy. Here there were existing attachments, apparently valid. The bankrupt act did not dissolve these, except for the benefit of the estate. If they were valid as against Mrs. Merrow before bankruptcy, as against her they were equally valid afterwards. Powers Dry Goods Co. v. Nelson (N. D.) 88 N. W. 703, 58 L. R. A. 770; Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The only controversy here possible concerning the rights arising thereunder is between the attaching creditor and the trustee. As both these parties are agreed that the latter shall be subrogated to the rights of the former, the judgment of the referee is affirmed. See In re N. Y. Printing Co., 110 Fed. 514, 49 C. C. A. 133.

TRAITEL BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1904.)

No. 3,264.

1. CUSTOMS DUTIES—CLASSIFICATION—WELSH QUARRY TILES—BRICK—SIMILITUDE.

   So-called "Welsh quarries" are not dutiable as "tiles" under paragraph 88, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], but under paragraph 87 of said act, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], as "brick, other than fire brick," which they closely resemble in material, quality, texture, and the use to which they are put, within the meaning of the so-called "similitude clause" in section 7 of said act, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

On application for a review of a decision of the Board of General Appraisers, which affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Traitel Bros. Note G. A. 4,645, T. D. 21,957.

J. Stuart Tompkins, for importers.
Henry A. Wise, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question comprises Welsh quarries, so called, which were assessed for duty by the collector at the rate of four cents per square foot, under the pro-

visions of paragraph 88 of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], as "tiles, plain, unglazed, one color, exceeding two square inches in size." The importers protested, claiming said merchandise to be properly dutiable at the rate of 25 per cent. ad valorem, under the provisions of paragraph 87 of said act, as "brick other than fire brick, not glazed, enameled, painted, vitrified, ornamented or decorated in any manner." The Board of Appraisers found that the merchandise is a species of tile known as "quarry tile," and accordingly overruled the protest. This decision appears to be based upon evidence taken in another case, and which is not a part of the record herein. It appears from the evidence herein that the merchandise passed upon in said case was of a different character from that which was before the board on the present protest. The evidence herein does not justify the finding of the board. It appears from the great weight of evidence that quarries are unlike tiles, and in material, quality, texture, and the use to which they may be applied closely resemble brick. They should therefore have been classified by similitude, under the provisions of paragraph 87, for "brick, other than fire brick," etc.

The decision of the Board of General Appraisers is reversed.

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

(Circuit Court, D. Vermont. August 19, 1904.)

1. EMINENT DOMAIN—TAKING OF LAND WITHOUT PAYMENT—ACQUIESCENCE OF OWNER.

   Where a landowner expressly consents or clearly acquiesces in the taking of right of way over his land for a railroad without payment, his right to hold the land is gone and he has only a personal claim against the company for the debt.

2. SAME.

   The absence of any agreement between a landowner and a railroad company as to the price to be paid for right of way, or the manner of determining the same, negatives a claim that the company was to be given credit, and the owner's right to the land can only be extinguished by appraisal and payment.

In Equity.

John J. Wilson, for claimants.
Eleazer L. Waterman, for purchasers.

WHEELER, District Judge. This cause has been heard upon a report of commissioners agreed upon by the parties pursuant to a bond given by the purchasers of the railroad at the receiver's sale to secure the payment of land damages adjudged to be preferred above unsecured debts in a proceeding in which all might join. It is objected that the proceeding is irregular, and it would be so but for the provisions of the bond that cover the subject, which would be within the jurisdiction of the court in the cause upon motion at the foot of the decree, for which this proceeding appears to be substituted by stipulation of the parties, as shown by the bond and the

agreement upon commissioners. In this view the rights of the several claimants to have their claims passed upon appear. Their rights to preference depend upon their claims upon the property itself to secure payment. They each had a right to insist upon payment or tender of the damages before letting the land go for the road. If they did not insist, but let the land go, and trusted the company for the pay, the land would be gone, and they would have the debt of the company for it. McAuley v. Western Vt. R. R. Co., 33 Vt. 311, 78 Am. Dec. 627; Troy & Boston R. R. Co. v. Potter, 42 Vt. 265, 1 Am. Rep. 325; Kittell v. Missisquoi R. R. Co., 56 Vt. 96. In each case the question is whether the landowner trusted the railroad company for the land by acquiescence in the taking of it for the road without payment, or the company was a trespasser upon the rights of the landowner as they existed or should accrue. Where the landowners trusted the railroad company for the land damages, the claim, however ascertained in amount, became a common debt. As to all the claims except those particularly mentioned the findings of the commissioners show such express consent or clear acquiescence as to leave nothing preferred, but only a mere common liability.

In No. 1—the case of the Burrells—the title of one of three tenants in common appears to have been in a trustee, who said he could not concede anything, but did not object when the work went on without deposit of amount of damages agreed upon in bank, as had been talked. It does not appear that by the talk the deposit was to be made before entry, and the whole appears to show acquiescence by the trustee, and trusting for payment.

In No. 2—the case of the Morses and Harding—an express consent to immediate entry without payment or ascertainment, which was to be by submission and award, is found. This consent appears to be a full waiver and acquiescence, notwithstanding a provision in the submission for a deed upon payment. The land was let go without payment.

In No. 3, Mannix was a second mortgagee, and the first mortgagee objected. The rights of the second mortgagee were not provided for by the company, nor waived by him. He has had to pay off the first mortgage to save his own, which still remains. He appears to have a right to have his damages paid or to assert his title. The road can be relieved by payment of his damages, found to be $25. Austin v. Rutland R. R. Co., 45 Vt. 215.

In No. 4—Morses—there appears to have been an agreement of sale of other lands and the right of way for $600, to be paid before entry. That entry was made without payment, and objected to on that account, and desisted from because of the objection, and begun again without further consent, or payment or ascertainment or assessment of damages, or objection. The failure to take and pay for the lands was the fault of the railroad company, and the entry against objection was a trespass upon the landowners' rights. They did not need to make continual objection to preserve their rights, but the railroad company could extinguish the right by appraisal and payment of the damages under the statute. When the railroad company failed to so proceed, they could assert their rights to the land.

In No. 5—Leavetts—consent seems to be included in the general finding, notwithstanding an award.

In No. 7—Taggarts—the railroad appears to be upon their land with no facts as to ascertainment of damages, consent, or waiver found. The general findings refer only to cases where there were awards or verbal agreements. So the case is left to stand upon the mere appraisal of the commissioners, which would be necessary, with payment, to extinguish the rights of these landowners. Austin v. Rutland R. R. Co., 45 Vt. 215. The want of any price or agreement or consent negatives any trusting of the railroad company for the land. The damages to the cemetery are, upon any facts found, too remote to be included. The expenditure about it is not found to have been necessary. This appraisal must, under these circumstances, be paid, in order to relieve the road.

No. 10—Steele—is somewhat like No. 4—Morses. There was an agreement of purchase of the place, the land not to be disturbed until the damages were paid. The work, begun without payment, was a trespass, and was forbidden. The railroad company thereby acquired no rights but to proceed by appraisal and payment. The title changed before appraisal, which, however, is of damages to the owner at that time.

In No. 12—Gays—the facts are similar to those in No. 4 and No. 10. The appraisal and payment are necessary to extinguish the rights of the owners.

In No. 17—Conner—there was no objection to the entry. There was an award, and an agreement that it should be paid before work. It was not so paid, but the work proceeded, according to the general finding, without objection. This seems to be letting the land go without payment, on credit.

In No. 23, Grant let his land go on the agreement of the railroad company to buy other lands for him of Baker. His claim, therefore, appears to be for damages for nonfulfillment of that agreement, and not for his land. There was no trespass upon his rights.

Upon these views the damages in No. 3, Mannix, $25; No. 4, Morses, $600; No. 7, Taggarts, $150; No. 10, Steele, $100; No. 12, Gays, $100—appear and are adjudged to be due as preferred claims above unsecured debts of the railroad company.

Report accepted, and decree for claimants Mannix for $25, Morses for $600, Taggarts for $150, Steele for $100, and Gays for $100, respectively, as preferred claims.

INMAN v. NEW YORK INTERURBAN WATER CO. et al.

(Circuit Court, S. D. New York. July 22, 1904.)

1. EQUITY—MULTIFARIOUSNESS OF BILL.

To settle the right of ownership of stock of a corporation and to ask relief which depends on such ownership are two independent and disconnected matters, and a bill which attempts to join them in one suit is multifarious.

2. SAME.

A bill examined, and *held* not only multifarious, but without equity.

In Equity. On demurrers to bill.

Roger M. Sherman, for complainant.

Keatinge & Walradt, for defendant New York Interurban Water Co.

Horace B. Hord, for defendants New York Suburban Water Co. and New York City Suburban Water Co.

Ward, Hayden & Satterlee, for defendant Atlantic Trust Co.

PLATT, District Judge. In order that we may appreciate the scope of this bill in equity, it is necessary to make a brief statement of the material facts alleged and of the relief demanded. Complainant is the owner of stock in the New York & Mt. Vernon Water Company, which, by consolidation, in 1892, was merged in the defendant New York City Suburban Water Company. Said New York City Suburban Water Company mortgaged all its property to the defendant Atlantic Trust Company. Said Atlantic Trust Company brought an action of foreclosure in the Supreme Court of the state of New York against the New York City Suburban Water Company, and in the year 1895 a judgment of foreclosure and sale was rendered in the said action. Complainant thereafter applied to said Supreme Court to be admitted to intervene and defend said action, and said application, which was based upon all the facts herein, was denied by said Supreme Court. Said property was sold in conformity with said judgment of foreclosure and sale, and subsequent to said sale said property came into possession of the defendant New York Interurban Water Company, which said company has mortgaged the same to the defendant West End Trust & Safe Deposit Company of Philadelphia; and the stock of which complainant claims to be owner in said New York & Mt. Vernon Water Company is now partly in the possession of said New York Suburban Water Company and partly in the possession of defendant John Doe, having been wrongfully delivered to them by complainant's agent without his authority or consent. The bill prays for the following relief against defendant the New York Interurban Water Company: (1) That complainant be declared owner of the value of such part of the property originally belonging to the New York & Mt. Vernon Water Company, and ultimately coming into the hands of said defendant company, in the manner above alleged, as is represented by and equivalent to the stock alleged to be owned by complainant. (2) That said foreclosure judgment be declared null and void as to complainant. (3) For discovery as to John Doe. (4) That defendant be enjoined from mortgaging said property. (5) For a receiver. The bill is attacked by demurrers filed by divers defendants. At the hearing counsel were heard and briefs filed in respect of the New York Interurban Water Company and the Atlantic Trust Company. The former says that the bill is altogether multifarious, and without equity. The latter emphasizes those points, and also says that it does not follow the twentieth equity rule, and that this court is without jurisdiction.

I have given the matter that careful examination which such an important subject demands, and a number of substantial reasons

occur to me which imperatively suggest that the bill ought to be dismissed. If my conclusions are sound, it is better for all parties that the controversy should end as soon as possible. On the whole case, this appears to be an accentuated example of fleeing hither "from the justice of the state courts." Let me outline, very briefly, some of my reasons for dismissing the bill:

The foundation of the complainant's right to the relief demanded is that he owned 100 shares of the original company, which by consolidation, in 1892, was merged in defendant New York City Suburban Water Company. There were two certificates, each for 50 shares, which it is claimed were wrongfully disposed of in 1887. One certificate is claimed to have been purchased by said defendant, and the other is in the hands of a mythical John Doe, another defendant. As against both defendants memtioned complainant wishes a decree that he is the lawful owner of the stock represented by both certificates held by them respectively. Passing over the obvious suggestions that if John Doe is a mythical personage—in other words, if the name used represents some one unknown—it must be impossible to allege with any show of reason that he or she is an inhabitant of New York, and that an allegation of inhabitancy is not the same thing as an allegation of citizenship, we reach this serious trouble: It is settled law that when the right of a party to specific relief is so incumbered that he cannot assert that right against another until he has removed the incumbrance, he cannot include an attempt to get rid of the incumbrance in a suit for specific relief, which he might be entitled to have, if the incumbrance were out of the way. 1 Daniell's Chancery Pleading & Practice (6th Am. Ed.) 339. Here he wishes to have the stock first called his own, and then have such action taken as might perhaps be demanded if the stock were his own without question at the time of bringing suit. The position is untenable. Furthermore, the bill recognizes that John Doe may have an equity in the stock, and prays that such equity may be determined. These certificates of stock go to the root of the whole matter, and complainant's clear right to them must be settled absolutely before he can be permitted to assert such right. To settle such right and to ask relief which depends upon the right are two independent, disconnected, and unrelated questions, and the bill which attempts to join them in one suit is multifarious. Shields v. Thomas, 18 How. 253, 259, 15 L. Ed. 368; Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729. Again, the litigation of complainant in settling his rights as to John Doe's stock, and taking care of John Doe's equities, if any shall be found to exist, are matters of no moment to the principal defendant, since, after all has been done, complainant simply steps into John Doe's shoes, and begins his main line of attack. There is no joint interest in opposing the relief unless it be claimed that John Doe's actions have been controlled by main defendant. I find no such assertion. Again, the very case now brought forward has been thoroughly and exhaustively discussed by the courts of the state of New York. The principle involved has been settled adversely to complainant. The refusal to permit him to intervene in the foreclosure suit of the

Atlantic Trust Company may have been discretionary, but it was that kind of judicial discretion which could have been taken to the highest state court, and then reviewed by the Supreme Court of the United States, if it involved a final disposal of the questions which the complainant insists that it settled. Again, whether the case is or is not res adjudicata, I am convinced, after studying the action of the New York courts, that, if the action of the trial court had been sustained on appeal, a very serious injustice would have been worked upon a great many innocent investors. The Cameron Case, 133 N. Y. 336, 31 N. E. 104, followed by the Drake Case, 26 App. Div. 499, 50 N. Y. Supp. 826, and the Drake Case again, 36 App. Div. 275, 55 N. Y. Supp. 225, and finally the petition of the present plaintiff to intervene, which was denied, 75 App. Div. 354, 78 N. Y. Supp. 120, all taken together, furnish, to my mind, a clear and satisfactory solution of the problem.

Let the bill be dismissed, with costs.

HAHN v. UNITED STATES (two cases).

(Circuit Court, S. D. New York. December 29, 1903.)

Nos. 2,781, 3,324.

1. CUSTOMS DUTIES—CLASSIFICATION—PEARLS—PRECIOUS STONES.

Pearls are within the provisions in paragraphs 434, 435, Tariff Act July 24, 1897, c. 11, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].

2. SAME—HALF PEARLS—SIMILITUDE.

Under section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], providing that any unenumerated article "shall pay the same rate of duty which is levied on the enumerated article which it most resembles," *held* that so-called "half pearls," consisting of the better part of the true pearl, from which the flaws or blemishes have been removed by sawing or splitting, and which are not adapted for stringing, but are chiefly useful for jewelry settings, and require labor and expense in completion, are dutiable at the same rate as "pearls in their natural state," under paragraph 436 of said Act July 24, 1897, c. 11, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], which they resemble more than the "pearls, set or strung," enumerated in paragraph 434 of said act, c. 11, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].

3. SAME—CONSTRUCTION—COMMERCIAL DESIGNATION.

The designation of an article in a tariff provision by a term having a commercial signification is not controlling in the classification of the article where a different intent is inferable from the context.

Applications for Review of Decisions of the Board of General Appraisers.

These proceedings relate to two decisions of the Board of General Appraisers (G. A. 4,163, T. D. 19,449, and G. A. 5,148, T. D. 23,750), affirming the assessment of duty by the collector of customs at the port of New York on importations by Rudolph C. Hahn.

Albert Comstock, for importer.

Charles D. Baker, Asst. U. S. Atty.

¶ 3. See Customs Duties, vol. 15, Cent. Dig. § 14.

HAZEL, District Judge. The articles were invoiced and entered as half pearls. They were also commercially known as split pearls or sawed pearls, and concededly were neither set, strung, nor in their natural state. The importations were assessed by the collector at 20 per cent. ad valorem, and were classified pursuant to section 6 of the tariff act of July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], as nonenumerated "articles manufactured in whole or in part." The importers paid the duty under protest, claiming that the merchandise was dutiable at 10 per cent. ad valorem, either directly under paragraph 435, c. 11, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], or, in the alternative, by similitude or component material of chief value, under paragraph 436, or under section 6 of said act, which provides for unenumerated articles. The Board of General Appraisers sustained the collector as to suit No. 2,781; and subsequently, as to suit No. 3,324, the board found and decided that the pearls in question could be held dutiable by similitude, either as "pearls, set or strung," or as "pearls in their natural state," and accordingly the higher rate of duty under section 7 applied, namely, 60 per cent. ad valorem. It is contended by the government that the decision of the Board of General Appraisers upon the question of similitude is fully justified by the facts. The argument and evidence of the importers were chiefly directed toward establishing that half pearls in fact are precious stones advanced by splitting.

Much testimony is found in the record, little of which was before the board, tending to show that pearls also belong to the category of "precious stones." Twenty-four expert witnesses testified upon the controverted point; 17 substantially to the effect that pearls were commercially regarded as precious stones, and were generally known as such in trade and commerce, though it was practically admitted by all the witnesses that pearls are not strictly precious stones. The board was of the opinion that the term "precious stones," as commercially used, did not include pearls, and that the meaning of that term is limited to mineral substances of that nature. Congress, however, has made a significant distinction between pearls and precious stones, which must prevail irrespective of the evidence tending to establish a different trade designation. This intention of the lawmaking power is quite apparent from an examination of the various paragraphs declaratory of a duty upon precious stones, jewels, and pearls. For example, paragraph 434 refers to "precious stones set, pearls set or strung." These terms are not correlative. If Congress had intended to include pearls in the category of precious stones, a phrase reading "precious stones set or strung" would have more aptly expressed such intention. It is settled law that when an article of importation, through having a commercial signification, has been plainly and specifically described in the tariff laws, the intention of Congress must be looked to for the purpose of fixing the rate of duty. Cadwalader v. Zeh, 151 U. S. 171, 14 Sup. Ct. 288, 38 L. Ed. 115. As already appears, half pearls are not enumerated in the tariff act. Their resemblance to an enumerated article must, therefore, be ascertained in order to fix the rate of duty. Arthur v. Fox,

108 U. S. 125, 2 Sup. Ct. 371, 27 L. Ed. 675; Hahn v. United States, 112 Fed. 635, 40 C. C. A. 622; Tiffany v. United States, 112 Fed. 672, 50 C. C. A. 419. I think the record discloses that the importations more nearly resemble pearls in their natural state than pearls set or strung. They were not adapted for stringing, but were chiefly useful for jewelry setting, involving labor and expense in completion. The half pearl is the better part of the true pearl, from which the flaws or blemishes in appearance and shape have been removed by sawing or splitting. The decision of the circuit court of appeals in the Tiffany Case, supra, is in strong analogy to the case at bar. I think the Board of General Appraisers erred in deciding that the importations are equally within the terms, by similitude, of said paragraphs 434 and 436. The half pearls in question, in my opinion, are dutiable by similitude under paragraph 436 only, and hence should be assessed at the rate of 10 per cent. ad valorem.

The decision of the Board of General Appraisers is reversed.

THE ADELAIDE. THE COFFIN. THE M. A. LENNOX.

(District Court, E. D. New York. July 7, 1904.)

1. SHIPPING—INJURY TO BARGE BY CROWDING AGAINST DOCK.

A steamship *held* liable for breaking the guard rail of a barge, which was between herself and a dock, caused by pressing the barge against the dock, on the ground that proper care was not exercised in adjusting the booms so as to keep her off with the changing tide.

In Admiralty. Suit to recover for damage to barge.

Wilcox & Green, for libelant.
Convers & Kirlin, for respondent Hudson.
James J. Macklin, for the Adelaide.
Wing, Putnam & Burlingham, for the Lennox.

THOMAS, District Judge. The only question in this case is whether the steamship Westmeath was properly boomed off, so that within reasonable expectation she would not press the scow Buffalo against the dock, and cause the injury to the guard of the latter for which the libel was filed. The accident happened in 1897, and the evidence of witnesses as to what was said and done on the occasion is scrutinized with unusual care after such an interval. The correspondence after the event throws very little light upon the subject. Capt. Cherry, the libelant's superintendent, on September 20, 1897, wrote to the superintendent of the East Central Pier, where the accident occurred, but there is no suggestion of specific negligent acts or admissions which caused the injury. He says:

"By orders of your stevedore our barge Buffalo was placed between your pier and steamship Westmeath, and against the persistence of the captain of the barge. He warned the stevedore that it was unsafe to place the barge there. Placing said barge at that point caused considerable damage to her guards."

This letter was referred to Tiffany, the superintendent of the stevedoring company, who forwarded it to Barber & Co., the ship's agents, with his report indorsed thereon. He said that the captain of the barge

"made no objections until after the barge was jammed; then he claimed that it was no place for to put the barge"; and adds: "The damage was to the guard rail, and if the barge's rail had been in good condition it would have stood the strain. The wood was very rotten, and perfectly unsound." In October, 1897, Capt. Cherry wrote to Barber & Co., agents of the vessel, but his statements made no important addition to those in his former letter. Burrows, master of the Buffalo, upon the trial stated that no timbers or booms were used to keep the ship off. Morrisey, foreman of the stevedores of the Atlantic Stevedoring Company, Tiffany, the company's superintendent, and Jansen, one of the company's employés, all testify that the vessel was boomed off. Belton's evidence adds nothing in this regard. It is apparent that the evidence of the respondent that the booms were used is stronger in the number of witnesses and equal in quality to that of the libelant. Hence it is concluded that the booms were used. But, even so, it is probable that the booms were not suitably adjusted to keep the steamship off with the changing tide. Jansen testified:

"If a tugboat came and squeezed against the ship's side, it would squeeze her in up against the barge. Q. And the weight of the steamship against the barge would squeeze her up against the string piece? Is that right? A. Yes, that is right. Q. And that is what probably broke the guard? Is that your judgment? A. That is my judgment, yes."

It is true that more or less of the timbers to which the rail was fastened were rotten. Capt. Cherry told the entire truth as to that. But it is not believed that an ordinary pressure would have broken off so many of these timbers had the booms been properly readjusted to meet changing conditions. It was the duty of the vessel and those to whom it committed the management of affairs to see to it that the booms were readjusted as occasion demanded.

Pursuant to these views the libelant should have a decree against the respondent, who was the owner of $^{48}/_{64}$ of the vessel, and under the Dingley act of June 26, 1884, c. 121, § 18, 23 Stat. 57, 1 Supp. Rev. St. p. 443 [U. S. Comp. St. 1901, p. 2945], the decree against him must be limited to the proportion of the damage that his individual share of the vessel bears to the whole.

CHADWICK et al. v. WILEY et al.

(District Court, E. D. New York. July 7, 1904.)

1. COLLISION—STEAMER AND SAILING VESSEL MEETING—CHANGE OF COURSE BY STEAMER.

A schooner *held* not chargeable with contributory fault for a collision with a steamer, brought about by the gross fault of the latter in changing her course so as to cross the schooner's bows when they were approaching nearly head on, on the ground that she should have luffed, where there was very little time for such maneuver after the steamer was seen to change her course, and no certainty that it would then have avoided the collision.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libelants.

Hyland & Zabriskie (Charles M. Hough, of counsel), for respondents.

THOMAS, District Judge. With the burden of proof on the respondents, it is not sufficiently clear that the failure of the Lockwood to luff contributed to the collision. The master testified:

"I was just getting on deck about the time she struck—getting on deck—and she struck pretty near the time I got on deck. * * * Q. When did you see the steamer? A. * * * About two points on the port bow. * * * She was showing her green lights then. Q. How far distant was she then? A. I guess perhaps a quarter of a mile, when I saw her. I don't know. An eighth of a mile I guess. * * * Q. When you were called on deck, tell me what was said by the person who called you? A. The mate says, 'There is a steamer coming.' I came on deck, and I says, 'What is the matter?' He says, 'That fool of a steamer is putting his wheel up, and is sheering across our bow, and he will be into us. Q. When you got on deck, did you see the steamer? A. Yes. Q. Did you see her hull? A. Yes, sir. Q. See the whole of her? A. * * * I guess she was about an eighth of a mile [away]. She was pretty close to us. Q. And she was then sheering under a starboard wheel? A. Yes, sir."

It appears that the schooner was going three or four knots per hour and the steamer at full speed. Although the schooner was on a course northeast one-half north, with the wind north-northwest, and the steamer was going at full speed, and changing from southwest by south one-half south, until at the time of the collision she was heading south one-half east, yet it is apparent that the time for change of course on the part of the schooner was very limited. Whether the mate at the wheel, not called as a witness, saw the steamer sheering before he summoned the captain, or before the captain same on deck, does not clearly appear, although it is inferable that the steamer had begun to sheer before the captain arrived. Just how much time the mate had to luff is in doubt. It does seem that it would have been better had the schooner luffed, but it is not sufficiently clear that either the mate or captain were guilty of culpable negligence in not luffing after the steamer had made the gross error of starboarding across the schooner's bow; or that, if the schooner had luffed, she would have cleared the steamer, although it seems probable that such maneuver would have caused the vessels to clear. In any case it is regarded as a mere mistake of judgment, that should not condemn the schooner.

The cargo should contribute in general average. The amount will be determined on a reference, but salvage will be excluded.

In re WILKA.

(District Court, N. D. Iowa, W. D. August 26, 1904.)

1. BANKRUPTCY—JURISDICTION OF COURT—SALE OF PROPERTY OUTSIDE OF DISTRICT.

A trustee in bankruptcy is vested with title to the bankrupt's property wherever situated; and when he has taken actual possession thereof, although it may be in another state, it is in the custody of the court of bankruptcy administering the estate, and a referee has jurisdiction to order its sale free from liens.

2. SAME—RESIDENCE OF CREDITOR.

The fact that a mortgagee of a bankrupt's property resides in another state, where the property is also situated, does not affect the jurisdiction of the bankruptcy court administering the estate to order it sold free from the lien of the mortgage on proper notice to the mortgagee.

In Bankruptcy. Submitted on petition of the Granite City Bank of Dell Rapids, South Dakota, for review of order of referee directing the trustee to sell personal property of the bankrupt free from the mortgage liens of said bank.

From the certificate of the referee it appears that the trustee presented a petition to the referee alleging: That certain property of the bankrupt, to wit, live stock and grain, situate in Moody county, S. D., was covered by liens and mortgages, one of which was to the Granite City Bank of Dell Rapids, S. D., for over $15,000, made by the bankrupt June 27, 1903, shortly after said bank had attached said property in an action against the bankrupt; that said mortgage was a preference within the meaning of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and that the amount due the bank thereon from the bankrupt, if anything, is uncertain; that the property is of a perishable nature, and will be lost if not soon sold; and praying that he be authorized to sell the property free from the mortgage and other liens thereon. The referee fixed a time for the hearing of said petition, and gave to all creditors notice thereof by mail, and notice was also served personally upon the Granite City Bank of such hearing, in Dell Rapids, S. D. At the time fixed for such hearing the Granite City Bank appeared specially to object to the jurisdiction of the court, and did object thereto upon the grounds, in substance, that neither the property referred to in the petition of the trustee nor the Granite City Bank were within the territorial jurisdiction of the court, and for that reason the court had no authority to order a sale of the property free from the lien of the bank's mortgage. The referee found that the trustee was in the actual possession of the property, and ordered that it be sold free from the liens thereon, and that the proceeds be applied to the payment of the liens as they may be established. The Granite City Bank petitions for a review of this order.

Aiken & Judge, for Granite City Bank.
C. J. Miller, for trustee.

REED, District Judge (after stating the facts). The sole objection urged in argument to the jurisdiction of the referee is that, because the property covered by the liens of the bank's mortgage and the bank itself were without the territorial jurisdiction of the court, it had no jurisdiction to make the order for the sale. The referee finds, however, that the trustee was in the actual possession of the property. If this is true, though the property may then have been situated in South Dakota, the court was in the actual custody and possession of the property through its trustee. Section 70 of the bankruptcy act vests the trustee, by operation of law, as of the date of the adjudication, with the title to the property of the bankrupt not exempt to him, wherever it may be situated. Such title authorizes the trustee to reduce such property to his actual possession, and when he has done so the property is then in the actual custody and control of the bankruptcy court administering the estate. The Granite City Bank is a creditor of the bankrupt, Wilka, and therefore a party to the bankruptcy proceedings in such sense that it is bound by the orders of the court made with reference to property in its actual custody. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113; In re Pekin Plow Co., 112 Fed. 308, 50 C. C. A. 257.

Section 58 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444] provides "that creditors shall have ten days notice by mail * * * (4) of all proposed sales of

property." The bankruptcy court may, if circumstances require, order a sale of the property of the bankrupt free from the liens of mortgage creditors or other lienholders, so that the purchaser will take the title free from said liens; the liens being remitted to the proceeds of the property. In re Worland (D. C.) 92 Fed. 893. In this case the Granite City Bank was given the notice required by the bankruptcy act, and by personal service of such notice upon it at Dell Rapids, S. D., as well. The conclusion is that the referee had jurisdiction to make the order of sale. This, of course, does not preclude the bank from establishing its claim, if it can do so, to the proceeds of the property covered by its mortgage. It may propound its claim thereto before the referee. In fact, the referee should require it to do so before making any order for the distribution of such proceeds. Upon the bank's presenting its claim to such proceeds, the trustee may take issue thereon, if he so elects, and the referee will then determine the matter upon evidence taken under his directions. Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; In re Rochford, 124 Fed. 182, 59 C. C. A. 388; In re Worland (D. C.) 92 Fed. 893.

The order of the referee, upon the issues and facts shown by his certificate, is approved.

UNITED STATES v. ASTORIA & C. R. R. CO.

(Circuit Court, D. Oregon. August 12, 1904.)

No. 2,847.

1. UNITED STATES—ARMY SHIPMENTS—RIGHT TO REDUCED RATES.

The act of Congress of July 2, 1864, c. 217, 13 Stat. 370, § 11, requiring land-grant railroads to carry freight for the army at not exceeding 50 per cent. of the tariff rates charged the general public, does not entitle the government to a reduced rate for the carriage of freight between two points by a railroad company which received no land grant, merely because its trains run for a part of the distance over the track of a land-grant road.

In Equity. Suit for injunction.

John H. Hall, U. S. Atty.
C. W. & G. C. Fulton, for defendant.

BELLINGER, District Judge. The railroad of the Northern Pacific Company is a land-grant road. The act of Congress of July 2, 1864, c. 217, 13 Stat. 370, § 11, by which the company is incorporated, provides that said railroad, "or any part thereof, shall be a post route and a military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation." By subsequent enactments it is provided, in effect, that land-grant roads shall be paid for army transportation not more than 50 per centum of the tariff rates for like transportation performed for the public at large. The defendant, the Astoria & Columbia River Railroad Company, owns and operates a line of road between Astoria

and Goble, a point on the line of the road of the Northern Pacific Company 40 miles distant from Portland. The defendant, under a contract with the latter company, runs its trains over the track of that company between Goble and Portland. By the terms of this contract, the defendant is not permitted to carry passengers or freight from Portland to Goble or intermediate points. The freight rate of the Northern Pacific Company from Portland to Goble is 14 cents per 100 pounds. The rate of the defendant company is 25 cents from Portland or Goble to Astoria. The United States brings this suit to enjoin the defendant from charging for army supplies from Portland, destined for Fort Stevens, a point beyond Astoria, more than 20 cents per 100 pounds; the contention being that two-fifths of the Portland-Astoria rate is on account of the haul on the land-grant road to Goble, and that of this two-fifths the defendant is only entitled to receive 50 per cent. of its regular rate.

The defendant's use of the Northern Pacific Railroad track between Portland and Goble does not affect the transportation due from the latter company to the plaintiff. It is still open to the latter to have its freight carried over every part of the railroad of the land-grant company at 50 per cent. of the regular rate. This is the extent of its right. And this right, as already appears, has not been affected by the use of a part of that company's track by the defendant company. It is a matter of no consequence to the plaintiff how many railroads use this particular track of the Northern Pacific Company, nor what their tariff rates are, so long as the latter company continues to afford all the facilities for transportation over every part of its road required by the plaintiff. As a matter of fact, the plaintiff seeks to compel the defendant, which is not a land-grant or otherwise government aided road, to transport its supplies over the defendant's road from Goble to Astoria at a less rate than that charged the general public, by the device of apportioning a part of the Goble-Astoria rate to the Portland-Goble route, and compelling a reduction in the part so apportioned. The defendant makes no charge between Portland and Goble, and is not permitted to do so, under its contract with the Northern Pacific Company. The plaintiff is entitled to one-half of the rate between these points established by the Northern Pacific Company, and can obtain it by applying therefor to that company. But this it does not want. It wants, in fact, a reduction of the defendant's rate between Goble and Astoria, although there is no complaint as to this rate, and the defendant owes no duty to the plaintiff respecting it.

The case does not appear to admit of doubt. The plaintiff must pay the established rate over the defendant's road for transportation from Goble to Astoria. It cannot complain that it is charged the same rate for the longer haul from Portland. The application for an injunction is denied.

END OF CASES IN VOL. 131.

INDEX.

ABANDONMENT.

Of mining claims, see "Mines and Minerals," § 1.
Of mining leases, see "Mines and Minerals," § 2.

ABATEMENT AND REVIVAL.

Election of remedy, see "Election of Remedies."
Place where cause of action for wrongful death survives, see "Death," § 1.

§ 1. Death of party and revival of action.

A suit by depositors against directors of an insolvent national bank for breach of an implied contract that the bank's funds should be used in accordance with the national bank act survives against the representatives of deceased directors. —Boyd v. Schneider (C. C. A.) 223.

ACCOUNT.

See "Account Stated."
Accounting by parties to joint adventure, see "Joint Adventures."
Accounting in patent infringement suit, see "Patents," § 6.

ACCOUNT STATED.

An account stated, retained by the debtor without objection for an unreasonable time, estops him, in the absence of fraud or mistake, from denying liability for all the items it contains.—Patillo v. Allen-West Commission Co. (C. C. A.) 680.

A consideration and legal liability for each item stated in an account is not essential, outside of the stated account, to sustain a cause of action for the balance.—Patillo v. Allen-West Commission Co. (C. C. A.) 680.

ACKNOWLEDGMENT.

Internal revenue tax on, see "Internal Revenue."

§ 1. Taking and certificate.

A notary, in taking a married woman's acknowledgment to her declaration of homestead under Civ. Code Mont. §§ 1606, 1609, 1611, 1700, does not act in a judicial capacity.—Sackett v. McCaffrey (C. C. A.) 219.

ACTION.

Election of remedy, see "Election of Remedies."
Jurisdiction of courts, see "Courts."
Laches, see "Equity."
Limitation by statute, see "Limitation of Actions."
Survival, see "Abatement and Revival," § 1.

Actions between parties in particular relations.

See "Master and Servant," § 1.
Parties to joint adventure, see "Joint Adventures."

Actions by or against particular classes of parties.

See "Corporations," § 6; "Railroads," § 3; "Receivers," § 1; "United States," § 2.
Corporate officers, see "Corporations," § 3.
Foreign corporation, see "Corporations," § 6.
National bank officers, see "Banks and Banking," § 2.
Stockholders, see "Corporations," § 2.
Trustees in bankruptcy, see "Bankruptcy," § 6.

Particular causes or grounds of action.

See "Account Stated"; "Collision," § 7; "Death," § 1; "Insurance," § 4; "Libel and Slander," § 1.
Breach of contract, see "Sales," §§ 1, 2.
Enforcement of liability of bank officers, see "Banks and Banking," § 2.
Enforcement of stockholder's liability, see "Corporations," § 2.
Forfeited bail bond, see "Bail," § 1.
Infringement of copyright, see "Copyrights," § 1.
Infringement of patent, see "Patents," § 6.
Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 3.
Injury to tow, see "Towage."
Personal injuries, see "Master and Servant," § 1; "Railroads," § 3; "Shipping," § 3.
Stock subscription, see "Corporations," § 1.
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," § 3.

Particular forms of special relief.

See "Injunction"; "Specific Performance."
Foreclosure of mortgage, see "Mortgages," § 3.
Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

Particular proceedings in actions.

See "Costs"; "Damages"; "Evidence"; "Judgment"; "Limitation of Actions"; "Pleading"; "Removal of Causes"; "Trial."

Particular remedies in or incident to actions.

See "Receivers."

Stay of proceedings, see "Appeal and Error," § 3.

Proceedings in exercise of special jurisdictions.

Criminal prosecutions, see "Criminal Law."

Suits in admiralty, see "Admiralty"; "Collision," § 7; "Shipping," § 7.

Suits in equity, see "Equity."

Review of proceedings.

See "Appeal and Error."

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1; "Injunction," § 1; "Specific Performance," § 1.

ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," § 2.

ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 5.

Of estate of decedent, see "Executors and Administrators."

ADMIRALTY.

See "Collision"; "Maritime Liens"; "Seamen"; "Shipping"; "Towage."

Conflicting and concurrent jurisdiction of courts of admiralty and other courts, see "Courts," § 4.

§ 1. Parties, process, claims, and stipulations or other security.

Where a fund has been deposited in the registry of the court of admiralty, a motion for leave to withdraw a part thereof and substitute a bond will not be granted; the practice being to distribute the same under Admiralty Rules 57, 58.—The R. C. Veit (D. C.) 400; The Chief, Id.

§ 2. Pleading, petitions, and motions.

Where an answer alleged that a release was executed without consideration, but the proof showed that there was a consideration, but that the execution of the release was obtained through duress, the defendant would be permitted to amend his answer so as to raise such issue.—Naretti v. Scully (D. C.) 399.

§ 3. Evidence, and taking and filing proofs.

On a libel to recover for failure to deliver pig iron shipped, respondent *held* not entitled to object to interrogatories on the ground that the information desired constituted a disclosure of the business of other shippers in the same business as libelant.—Dana & Co. v. Cosmopolitan Shipping Co. (D. C.) 158.

§ 4. Appeal.

The decision of a trial judge, who has seen the witnesses in an action for damages resulting from a collision, will not be reversed on appeal, unless it is against the evidence.—Jameson v. Lewis (C. C. A.) 728.

§ 5. Costs.

Where there was no proof that libelant's sworn statement that he was unable to pay the costs of a proceeding in admiralty for collision (Act Cong. July 20, 1892, c. 209, § 1, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706]) was false, the fact that he paid $500 for the sloop which was destroyed in the collision was insufficient to justify the court in subsequently requiring him to give security for costs.—The Our Friend (D. C.) 395; The Majestic, Id.

Counsel fees may be allowed in admiralty, where there is a fund in court, irrespective of statutory provisions; but a single docket fee only will be allowed to a proctor who represents more than one petitioner or intervening libelant.—The Gordon Campbell (D. C.) 963.

AFFIDAVITS.

Forgery of, see "Forgery."

In actions on insurance policies, see "Insurance," § 4.

AFFREIGHTMENT.

Contracts, see "Shipping," § 4.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

AGRICULTURE.

Irrigation, see "Waters and Water Courses," § 1.

ALIENS.

See "Indians."

§ 1. Naturalization.

Rev. St. § 5424 [U. S. Comp. St. 1901, p. 3668], *held* not to include the uttering of a forged naturalization certificate by a person other than the person applying for the same, or who appeared as a witness for such person.—United States v. York (C. C.) 323.

An indictment for violation of Rev. St. §§ 5424–5426 [U. S. Comp. St. 1901, pp. 3668, 3669], punishing attempts to commit offenses against the naturalization laws, *held* not invalid by reason of the fact that such offenses were erroneously described as felonies by section 5427 [page 3670]. — United States v. York (C. C.) 323.

AMENDMENT.

Of claims for patent, see "Patents," § 3.
Of petition for removal of cause from state court to United States court, see "Removal of Causes," § 3.

ANCILLARY JURISDICTION.

See "Courts," § 1.

ANTICIPATION.

Of invention, see "Patents," § 2.

ANTI TRUST LAWS.

Validity of contracts in restraint of trade in general, see "Contracts," § 1.

APPEAL AND ERROR.

Review in bankruptcy, see "Bankruptcy," § 9.
Review of proceedings in admiralty, see "Admiralty," § 4.
Review of proceedings of Board of General Appraisers, see "Customs Duties," § 3.

§ 1. Nature and grounds of appellate jurisdiction.

A decree sustaining the legality of rates fixed by a municipal body to be charged by an irrigation company for water furnished to consumers during a certain year is reviewable on appeal, although the year has expired, where under the statute such rate remains in force until changed.—Boise City Irrigation & Land Co. v. Clark (C. C. A.) 415.

§ 2. Decisions reviewable.

A decree dismissing a bill and discharging a receiver appointed *held* a final decree from which an appeal might be taken.—Viquesney v. Allen (C. C. A.) 21.

Act Cong. June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551], amending Court of Appeals Act, § 7, *held* not to prevent an appeal from an order dissolving a preliminary restraining order which was in fact a final order, though it did not in terms dismiss the bill.—Bailey v. Willeford (C. C. A.) 242.

An order in mandamus proceedings *held* not a final determination, which will authorize a writ of error.—Jabine v. Sparks (C. C. A.) 440.

A federal judgment is not final, so that the jurisdiction of the appellate court may be invoked pending a motion in the trial court for a new trial.—Clarke v. Eureka County Bank (C. C.) 145.

§ 3. Supersedeas or stay of proceedings.

That the amount of a supersedeas bond on an appeal was inadvertently fixed at a sum which was $30 less than the amount actually due on the judgment, including the interest, etc., to which no objection was made by the opposite party at the time, *held* immaterial.—Clarke v. Eureka County Bank (C. C.) 145.

Where a supersedeas bond has been accepted, a writ of error granted, and citation issued, a motion to increase the bond is within the exclusive jurisdiction of the appellate court.—Clarke v. Eureka County Bank (C. C.) 145.

§ 4. Record and proceedings not in record.

A declaration of homestead, objected to on the ground that it was not stamped, having been transmitted to the Circuit Court of Appeals under Court Rule 14, subd. 4 (91 Fed. vii, 32 C. C. A. lxxxix), it was immaterial that the copy contained in the record did not show that it was not stamped.—Sackett v. McCaffrey (C. A. A.) 219.

§ 5. Review.

The opinion of the trial judge on conflicting evidence will be presumed correct on appeal.—Burns v. Burns (C. C. A.) 238.

Findings of fact made by a master in pursuance of the order of the court, that depend upon conflicting testimony or upon the credibility of witnesses, especially where they have been approved by the trial court, will not be disturbed.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

§ 6. Determination and disposition of cause.

It is proper for a trial court, under the mandate of a court of appeals directing a new trial, to render a judgment on the pleadings without taking testimony.—Dodge v. United States (C. C. A.) 849.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 1.
Requirements as to use of by railroads, see "Railroads," § 3.

APPOINTMENT.

Of trustee in bankruptcy, see "Bankruptcy," §§ 2–7.

APPRAISAL.

Of merchandise subject to duty, see "Customs Duties," § 3.

ARMY AND NAVY.

Right of United States to reduced rates for transportation of army freight over land-grant railroad, see "Railroads," § 1.

ARREST.

See "Bail."

ASSESSMENT.

Of tax, see "Taxation," § 1.
On stockholders of national bank, see "Banks and Banking," § 2.

ASSETS.

Of estate of decedent, see "Executors and Administrators," § 1.

ASSIGNMENTS.

Fraud as to creditors, see "Fraudulent Conveyances."
In bankruptcy, see "Bankruptcy," § 3.
Of earnings to become due as act of bankruptcy, see "Bankruptcy," § 1.
Of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 2.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."
As act of bankruptcy, see "Bankruptcy," § 1.

ASSUMPSIT, ACTION OF.

See "Account Stated."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 1.

ATTACHMENT.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.
Effect of removal of cause from state court to United States court, see "Removal of Causes," § 4.

ATTORNEY AND CLIENT.

Allowance of counsel fees in admiralty, see "Admiralty," § 5.
Attorneys in fact, see "Principal and Agent."
Liability of attorney for contempt of court, see "Contempt," § 2.

§ 1. Retainer and authority.

The assumption by an attorney of authority within the scope of the ordinary power of a practicing lawyer to act for a party to an action is presumptive proof of actual authority.—Brown v. Arnold (C. C. A.) 723.

The general rule that the authority of an attorney ceases when the judgment is rendered does not prevail, so as to prevent the attorney from collecting the judgment, receipting for its proceeds, and discharging it, or admitting service of a citation to review it.—Brown v. Arnold (C. C. A.) 723.

The retainer authorizes an attorney to stipulate with the opposing counsel, after the judgment in favor of his client and after the term, but within the time for procuring a writ of error, that the case shall abide the final decision of another action involving the same question, conducted by the same attorney.—Brown v. Arnold (C. C. A.) 723.

AUTHORITY.

Of agent, see "Principal and Agent," § 1.
Of attorney, see "Attorney and Client," § 1.

BAIL.

Federal courts following state practice as to scire facias on forfeited bail bond, see "Courts," § 2.

§ 1. In criminal prosecutions.

Two returns nihil to scire facias on a forfeited recognizance *held* equivalent to personal service only when the defendant is domiciled or found within the jurisdiction of the court issuing the writ.—Kirk v. United States (C. C.) 331.

Where scire facias is issued against bail, an execution cannot be awarded against a defendant who has not been personally served with process, until there have been two returns of nihil to the writ.—Kirk v. United States (C. C.) 331.

Where a recognizance obligated defendant to appear from day to day during the term, and from term to term, the court had power to forfeit such recognizance for failure to appear and answer a second indictment, and to confirm such forfeiture on defendant's failing to appear on a subsequent date, on which the first indictment was set for trial.—Kirk v. United States (C. C.) 331.

A surety on a bail bond requiring the principal to appear from day to day and term to term *held* not entitled to object that the forfeiture was not declared on the precise day of the term when the principal was obliged to appear.—Kirk v. United States (C. C.) 331.

A federal district court has jurisdiction under Rev. St. U. S. § 716 [U. S. Comp. St. 1901, p. 580], to issue a writ of scire facias on a forfeited recognizance or bail bond.—Kirk v. United States (C. C.) 331.

Scire facias on a forfeited recognizance being in the nature of an original action, unless the surety has voluntarily submitted himself to the jurisdiction of the court out of which the writ issued, he must be personally served within the district.—Kirk v. United States (C. C.) 331.

Removal of accused from one district to another to answer a federal indictment *held* to exonerate his bail from liability for his appearance in the district from which he was removed.—In re Beavers (D. C.) 366.

BAILMENT.

Embezzlement or larceny by bailee, see "Embezzlement."

BANKRUPTCY.

Contracts of bankrupts fraudulent as to creditors, see "Fraudulent Conveyances," § 1.
Partnership between bankrupts, see "Partnership," § 1.
Validity of laws relating to discharge in bankruptcy as ex post facto in operation, see "Constitutional Law," § 2.

§ 1. Petition, adjudication, warrant, and custody of property.

Where a prior suit for the appointment of receivers was collusive, it was ineffective to prevent the appointment of such receivers in a subsequent suit from constituting an act of bankruptcy.—Blue Mountain Iron & Steel Co. v. Portner (C. C. A.) 57.

The appointment of temporary receivers for a corporation because of insolvency *held* to constitute an act of bankruptcy within Bankr. Act 1898, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].—Blue Mountain Iron & Steel Co. v. Portner (C. C. A.) 57.

Record of proceedings in a state court appointing receivers for an alleged bankrupt corporation *held* admissible in a proceeding to have the corporation adjudged a bankrupt.—Blue Mountain Iron & Steel Co. v. Portner (C. C. A.) 57.

On the hearing of an involuntary bankruptcy petition, questions submitted to the jury relative to the bankrupts' insolvency and the appointment of receivers charged as an act of bankruptcy *held* proper.—Blue Mountain Iron & Steel Co. v. Portner (C. C. A.) 57.

A court of bankruptcy is authorized in its discretion to permit the withdrawal of a petition filed by a creditor, asking leave to join in a petition in bankruptcy which has been filed against the debtor, when no action has been taken thereon, and the right of such creditor to become a petitioner was not free from doubt.—Moulton v. Coburn (C. C. A.) 201; In re George M. Coburn & Co., Id.

A creditor who has assented in writing to the terms of a common-law assignment for the benefit of creditors, unless under special circumstances, is not entitled to join in an involuntary petition alleging as the sole act of bankruptcy the making of such assignment.—Moulton v. Coburn (C. C. A.) 201; In re George M. Coburn & Co., Id.

To entitle less than three creditors to maintain a petition in involuntary bankruptcy it must appear that there were less than 12 creditors at the date of the filing of the petition.—Moulton v. Coburn (C. C. A.) 201; In re George M. Coburn & Co., Id.

In determining whether a transfer of property by an insolvent corporation was made in good faith, or with intent to hinder, delay, or defraud creditors, so as to constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3, cl. a, subd. 1, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422] the jury may properly take into consideration the natural and necessary result of the transfer.—Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. (C. C. A.) 215.

A subsequent proceeding in bankruptcy to obtain a discharge, which a prior proceeding has determined that the bankrupt is not entitled to, cannot be maintained.—Kuntz v. Young (C. C. A.) 719.

Under Bankr. Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], the District Court has power to dismiss a proceeding brought for the sole purpose of obtaining a discharge which a prior proceeding has determined the bankrupt is not entitled to.—Kuntz v. Young (C. C. A.) 719.

A discharge granted to a bankrupt as a member of a partnership, in proceedings instituted by himself, is one granted in voluntary proceedings, and precludes him from obtaining a second discharge within six years, under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411].—In re Carleton (D. C.) 146.

An assignment of earnings to become due under a building contract, by an insolvent to a creditor, recorded, as required by the state law, within four months prior to the filing of a petition in bankruptcy against the assignor, was an act of bankruptcy which sustained the petition, under Bankr. Act, § 3b (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]).—In re O'Donnell (D. C.) 150.

An accommodation indorser of notes, even before payment, is a creditor of the maker, and a transfer of property to him as security by such maker while insolvent constitutes an act of bankruptcy.—In re O'Donnell (D. C.) 150.

The right to continue the hearing of contests of claims against a bankrupt's estate is within the discretion of the referee.—In re Cohen (D. C.) 391.

The filing of a bankruptcy petition *held* to operate as an attachment on the bankrupt's property and an injunction restraining all persons from intermeddling therewith.—In re Mertens (D. C.) 507.

A court of bankruptcy has jurisdiction, under Bankr. Act July 1, 1898, c. 541, § 2, cl. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], to take possession by its marshal or receiver of property in the possession of an adverse claimant, to whom the petition alleges it was fraudulently transferred, where it finds such action necessary to preserve the estate, and, having taken such possession, it has jurisdiction to determine the question of ownership as between the claimant and the estate.—In re Moody (D. C.) 525.

Where a federal District Court in a district other than that where a corporation was adjudged a bankrupt extended a receivership over property in its district and granted other orders, it had ancillary jurisdiction to grant an application for the examination of witnesses under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].—In re Sutter Bros. (D. C.) 654.

Payments of comparatively small sums of money by an insolvent corporation to each of a number of its creditors, made in the usual course of business, do not raise a presumption of an intent to prefer such creditors over its other creditors, so as to establish an act of bankruptcy by a transfer of property with intent to prefer, within Bankr. Act July 1, 1898,

c. 541, § 3, subd. 2, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].—In re Douglas Coal & Coke Co. (D. C.) 769.

The appointment of a receiver for the property of a corporation in a suit for the foreclosure of a mortgage on the ground of a breach of its covenants, insolvency not being alleged as a ground, is not an appointment "because of insolvency," which constitutes an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901. p. 3422] as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].—In re Douglas Coal & Coke Co. (D. C.) 769.

§ 2. Assignment, administration, and distribution of bankrupt's estate.

Where by reason of contests concerning claims filed against a bankrupt it was impossible to appoint a trustee at the creditors' first meeting, it was proper for the referee to appoint a trustee of his own selection under Bankr. Act July 1, 1898, c. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438].—In re Cohen (D. C.) 391.

§ 3. —— Assignment, and title, rights, and remedies of trustee in general.

Evidence *held* to establish a partnership relation between bankrupts, so that on bankruptcy the capital employed, although all contributed by one partner, became assets of the firm, and not of the individual estate of such partner, and the debts incurred in the business firm debts.—Buckingham v. First Nat. Bank (C. C. A.) 192.

Petitioner, having purchased certain carriages from the S. Co., which it had previously sold to the bankrupt under a conditional sale which was void under Code Iowa 1897, § 2905, and having failed either to take possession or execute a bill of sale under section 2906, was not entitled to the carriages as against the bankrupt's trustee.—In re Tweed (D. C.) 355.

Sequestration of a bankrupt's property by the filing of a bankruptcy petition *held* to apply to property purchased under invalid conditional sales as well as to property unconditionally owned by the bankrupt.—In re Tweed (D. C.) 355.

Contracts for the purchase of merchandise *held* conditional sales in effect, and being void as against creditors of the purchaser without notice for want of record and acknowledgment, as required by Code Iowa 1897, § 2905, the property passed to the purchaser's trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451].—In re Tweed (D. C.) 355.

Under Bankr. Act, § 70 (Act July 1, 1898, c. 541. 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), property sold and delivered to one who subsequently becomes a bankrupt in Pennsylvania, for a fixed price and on definite terms of payment, *held* on the bankruptcy to pass to the trustee.—In re Butterwick (D. C.) 371.

Where in Pennsylvania goods are sold to a bankrupt at a specified price, a superadded agreement that the title shall remain in the seller until the price is paid is without avail as against creditors.—In re Butterwick (D. C.) 371.

A bankrupt's trustee *held* not liable to a claimant of property in the hands of a bankrupt for the alleged conversion thereof by a sale under order of the court of bankruptcy.—In re Mertens (D. C.) 507.

Under Michigan wrongful death act (Comp. Laws, § 10,427), a father's right to recover as next of kin for the wrongful death of his son *held* assets of the father's estate in bankruptcy, which passed to his trustee under Bankr. Act July 1, 1898. § 70, subd. 5, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451].—In re Burnstine (D. C.) 828.

A semitontine insurance policy, payable to the bankrupt or his assigns or legal representatives, *held* to pass to the trustee, and not to have a cash surrender value, within the meaning of the proviso to Bankr. Act July 1, 1898, c. 541, § 70a, cl. 5, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451].—In re Mertens (D. C.) 972.

When a trustee has taken actual possession of property of a bankrupt, although it may be situated in another state, it is brought within the custody of the court, which may order it sold free from liens.—In re Wilka (D. C.) 1004.

§ 4. —— Preferences and transfers by bankrupt, and attachments and other liens.

Bankrupt Act, § 23a–b (Act July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]), *held* to relate only to suits brought by trustees in bankruptcy, and not to authorize the maintenance of a bill in equity by a simple contract creditor to set aside alleged fraudulent conveyances in aid of a bankruptcy proceeding.—Viquesney v. Allen (C. C. A.) 21.

A bankrupt cannot be held to have given a preference, recoverable by his trustee, because of sums collected by a creditor after the bankruptcy from third persons under a contract which had been in force between the bankrupt and the creditor for a number of years.—Ryttenberg v. Schefer (D. C.) 313.

A parol assignment of a husband's claim for the wrongful killing of his son to his wife, in consideration of money advanced for funeral expenses, etc., *held* valid, as against his trustee in bankruptcy, to the extent it secured the amount expended.—In re Burnstine (D. C.) 828.

Where attachments on land standing in the name of a bankrupt were apparently valid, a petition of the bankrupt's trustee to be subrogated to the rights of the assenting attachment creditors would be allowed.—In re Merrow (D. C.) 993.

§ 5. —— Administration of estate.

A finding by a referee, affirmed by the District Court, that a partner in a bankrupt firm was not indebted to the partnership on account of money drawn out, which was less than he was entitled to draw under the partnership agreement, *held* sustained by the evidence.—Buckingham v. First Nat. Bank (C. C. A.) 192.

A referee in bankruptcy has power to exclude inadmissible evidence offered before him under objection.—In re Wilde's Sons (D. C.) 142.

A referee in bankruptcy *held* bound to personally hear the evidence introduced, unless his presence is waived by the parties.—In re Wilde's Sons (D. C.) 142.

A bankruptcy court has jurisdiction to determine in the first instance whether an asserted adverse claim to property claimed by the bankrupt's trustee is colorable or actual.—In re Kane (D. C.) 386.

A bankrupt *held* not entitled to refuse to answer certain questions asked him on his examination before the referee on the ground that his answers might tend to criminate him.—In re Levin (D. C.) 388.

Where bankrupts' hotel was operated during bankruptcy proceedings by a receiver and by the trustee, a deficit accruing during such operation *held* chargeable as a preferred lien on the proceeds of the sale of the property.—In re Prince & Walter (D. C.) 546.

Taxes assessed prior to or pending bankruptcy proceedings *held* payable as a preferred claim from the proceeds of the bankrupts' personal property, where they were not payable from the proceeds of the sale of the bankrupts' real estate.—In re Prince & Walter (D. C.) 546.

Where bankrupts' real estate was sold, subject only to a first mortgage thereon, the proceeds should be applied to the payment of other liens, undiminished by anything except the costs of the sale, etc., to the exclusion of the costs of administering the bankrupts' estate. — In re Prince & Walter (D. C.) 546.

A sale of real estate in bankruptcy proceeedings, subject only to a first mortgage, *held* to devest a tax lien against the property, notwithstanding Act Pa. June 4, 1901 (P. L. 375) § 32. —In re Prince & Walter (D. C.) 546.

Under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3451], the lien of a second mortgage on bankrupts' real estate *held* devested by sale under an order providing that the sale could convey a title subject only to the first mortgage.—In re Prince & Walter (D. C.) 546.

To justify an order requiring a bankrupt to turn over money or property to his trustee, under penalty of imprisonment for contempt, it must be shown clearly and beyond a reasonable doubt that he has such money or property in his possession or under his control.—In re Goldfarb Bros. (D. C.) 643.

The testimony of a third person, taken generally, under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], not directed to any defined issue, is not admissible in subsequent proceedings to compel the bankrupt to surrender property or money of the estate alleged to be in his possession. —In re Alphin & Lake Cotton Co. (D. C.) 824.

The testimony of the officers of a bankrupt corporation, taken either under section 7, cl. 9, or section 21a, of Bankr. Act July 1, 1898, c. 541, 30 Stat. 548, 552 [U. S. Comp. St. 1901, p. 3425, 3430], and reduced to writing, is admissible against them in a subsequent proceeding by the trustee to require them to surrender money or property of the estate alleged to be in their possession or under their control.—In re Alphin & Lake Cotton Co. (D. C.) 824.

A trustee in bankruptcy, acting by direction of the court, has the right to make the payments necessary to mature a tontine life insurance policy payable to the bankrupt or his assigns or legal representatives for the benefit of the estate, and will be required to do so where it is clearly in the interest of the creditors.— In re Mertens (D. C.) 972.

The fact that a mortgagee of a bankrupt's property resides in another state, where the property is also situated, does not affect the jurisdiction of the bankruptcy court to order it sold free from the lien of the mortgage, on proper notice to the mortgagee.—In re Wilka (D. C.) 1004.

§ 6. —— Actions by or against trustee.

A court of bankruptcy has no jurisdiction of summary proceedings to recover a preference, where there is no allegation that respondent's claim is colorable only, and objection is promptly taken by the respondent to the form of the proceeding.—In re Scherber (D. C.) 121.

A court of bankruptcy has jurisdiction by consent of a suit by a trustee to recover a fund for the estate, under Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431] where the defendant appears generally and answers to the merits.—Ryttenberg v. Schefer (D. C.) 313.

Where an adverse claim to property alleged to belong to a bankrupt's trustee is colorable only, it may be determined by the referee in summary proceedings, but if made in good faith it can be determined only in a plenary suit.— In re Kane (D. C.) 386.

A court of bankruptcy *held* to have jurisdiction, under Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], to restrain a claimant of goods sold to a bankrupt from prosecuting a suit in a state court against the bankrupt's trustee for conversion of the proceeds thereof.—In re Mertens (D. C.) 507.

Under Bankr. Act July 1, 1898, c. 541, subc. 2, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], as amended by Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409], a court of bankruptcy has jurisdiction to determine the title to property sold and delivered to the bankrupt; the sale not having been rescinded for fraud until after the bankruptcy proceedings had been instituted.—In re Mertens (D. C.) 507.

Claimants of goods sold to a bankruptcy *held* parties to the bankruptcy proceedings, and therefore bound to prosecute their claim therefor in the court in which such proceedings were pending.—In re Mertens (D. C.) 507.

§ 7. —— Claims against and distribution of estate.

Holders of notes of a bankrupt partnership indorsed by the partners individually *held* en-

titled at their election to prove the same as individual debts of one of the partners, and to priority of payment over firm debts from his estate, under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], although all the capital of the firm was also furnished by such partner.—Buckingham v. First Nat. Bank (C. C. A.) 192.

A loan by a wife to her husband from her separate estate is provable as a debt against his estate in bankruptcy.—James v. Gray (C. C. A.) 401; In re James, Id.; Ex parte James. Id.

Facts *held* insufficient to show the ratification of firm notes given without authority by one of the partners to secure his pre-existing debt.—First Nat. Bank v. State Nat. Bank (C. C. A.) 422; In re McIntire, Id.

Where a bank was a large creditor of a partner before the formation of a firm, and was put on inquiry as to the partner's authority to execute firm notes for his pre-existing indebtedness, the bank was not entitled to prove such notes as a claim against the firm, in the absence of such authority.—First Nat. Bank v. State Nat. Bank (C. C. A.) 422; In re McIntire, Id.

A new firm *held* not to have contracted to assume the liabilities of its predecessor, and hence renewal notes representing such debt were not provable against the new firm's estate in bankruptcy.—First Nat. Bank v. State Nat. Bank (C. C. A.) 422; In re McIntire, Id.

Under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], joint debts of partners composing a bankrupt partnership cannot be proved against the partnership estate, to share on an equality with the firm creditors.—In re L. B. Weisenberg & Co. (D. C.) 517.

Notes given by the members of a bankrupt partnership to a bank for money borrowed and passed to the credit of the partners severally, who checked it into the firm account and used it in the firm business, *held* not to constitute debts of the partnership estate.—In re L. B. Weisenberg & Co. (D. C.) 517.

Taxes assessed against a bankrupts' property during the administration of his estate in bankruptcy need not be proved as a claim in order to be allowed.—In re Prince & Walter (D. C.) 546.

An oral assignment of a debt which had been proved and allowed against an estate in bankruptcy under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) is sufficient to pass the title, where made and accepted in good faith and accompanied with a delivery of the notes proved.—In re Sweetser (D. C.) 567.

A loan to a bankrupt by his wife of property received from him by way of a gift, which was void under the law of Massachusetts, where the parties resided, affords no basis for any claim by her against his estate in bankruptcy.—In re Tucker (D. C.) 647; Ex parte New York Cotton Exch., Id.

§ 8. Rights, remedies, and discharge of bankrupt.

Failure of bankrupt to apply in due time for, or refusal to grant, a discharge in bankruptcy, renders the question of the right to a discharge in a subsequent petition res judicata.—Kuntz v. Young (C. C. A.) 719.

When, in an involuntary proceeding in bankruptcy, the bankrupt made no application for discharge within 12 months after the adjudication, and failed to comply with an order to pay over to the trustees $6,185.37, but while the proceeding was pending commenced a voluntary proceeding, and applied for a discharge from the debts scheduled in the first proceeding, the application was properly denied.—Kuntz v. Young (C. C. A.) 719.

Where, on an application for a bankrupt's discharge, the facts give rise to a presumption of collusion between the bankrupt and objecting creditors, a discharge should be denied pending a further report of the referee.—In re Sanborn (D. C.) 397.

Tax collectors, having filed claims for taxes against bankrupts' estate, *held* not estopped from repudiating their agreement that the bankrupts' exemptions might be paid to them in cash.—In re Prince & Walter (D. C.) 546.

Bankrupts' trustee *held* not authorized to pay the amount of the bankrupts' exemptions to them in cash with the unanimous consent of the creditors; the bankrupts having failed to designate specific articles for their exemption at the time of filing their schedules, etc., under Bankr. Act July 1, 1898, c. 541, § 7a (8), 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], and section 47a (11), 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439].—In re Prince & Walter (D. C.) 546.

Where a partnership is adjudged a bankrupt, the partners are not entitled to exemptions out of the partnership property.—In re Prince & Walter (D. C.) 546.

§ 9. Appeal and revision of proceedings.

Where an appeal has been duly taken and perfected under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], from a judgment allowing or rejecting a debt, the District Court is thereby deprived of jurisdiction to further consider matters involved in the appeal, and cannot entertain a motion for a rehearing so long as the appeal is pending.—First Nat. Bank v. State Nat. Bank (C. C. A.) 430.

Where on a petition for review of a referee's order appointing a trustee in bankruptcy the creditors desire a review of the evidence, they should have a stenographer's report thereof certified, or findings of fact with the parts of the testimony desired summarized and returned by the referee.—In re Cohen (D. C.) 391.

BANKS AND BANKING.

Embezzlement by bank officer, see "Embezzlement."

Evidence showing intent in prosecution for violation of national banking laws, see "Criminal Law," § 3.

Multifariousness in pleading in action against directors of insolvent bank, see "Equity," § 3.

Survival of action against bank directors, see "Abatement and Revival," § 1.

§ 1. Banking corporations and associations.

That certain of the defendants sued were not directors of an insolvent bank at the time acts of mismanagement complained of occurred did not exempt them from liability to depositors, where it appeared that during their term of office dividends were paid from the capital, also alleged as a ground of liability.—Boyd v. Schneider (C. C. A.) 223.

§ 2. National banks.

Depositors in a national bank *held* not precluded by the national bank act from suing the bank's directors for damages arising out of breach of the bank's implied contract to use such deposits and assets in conformity with the safeguards provided by law.—Boyd v. Schneider (C. C. A.) 223.

Several depositors of an insolvent national bank, entitled to sue its directors for permitting the bank to loan its assets in violation of law, *held* entitled to maintain a single suit in equity against such directors.—Boyd v. Schneider (C. C. A.) 223.

In a suit by depositors against directors of a national bank, complainants *held* entitled to leave to amend the bill with respect to the time when deposits were made.—Boyd v. Schneider (C. C. A.) 223.

A transfer of stock in a national bank to transferror's infant children *held* not to relieve him from liability for assessments levied on the stock after the bank's insolvency.—Aldrich v. Bingham (D. C.) 363.

A stockholder of a bank *held* estopped to deny liability for assessments on the ground that he had not expressly assented to the reorganization of the bank as a national bank.—Aldrich v. Bingham (D. C.) 363.

The elements of the offenses of embezzlement, abstraction, and willful misapplication of funds by officers, clerks, or agents of a national bank, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], considered, and the offenses distinguished.—United States v. Breese (D. C.) 915.

The crime of embezzlement by an officer, clerk, or agent of a national bank, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], necessarily includes the offenses of abstraction and willful misappropriation; but either of the latter offenses may be committed without embezzlement.—United States v. Breese (D. C.) 915.

The fact that an officer of a national bank obtained money from the bank by means of overdrafts and loans, which were authorized by the officers or committee having authority to represent the bank, is a defense to the charge of abstraction or willful misapplication only where those so representing the bank acted in good faith and for its supposed benefit.—United States v. Breese (D. C.) 915.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 1.

BILL OF LADING.

See "Shipping," § 4.

BILLS AND NOTES.

By corporation, see "Corporations," § 4.
Opinion evidence as to character in which parties signed notes, see "Evidence," § 3.
Parol or extrinsic evidence, see "Evidence," § 2.

BOARD.

Of General Appraisers, see "Customs Duties," § 3.

BONA FIDE PURCHASERS.

Of lands, see "Vendor and Purchaser," § 1.
Of public lands, see "Public Lands," § 1.

BONDS.

Bonded debt of municipal corporations, see "Municipal Corporations," § 2.
County bonds, see "Counties," § 1.
Impairing obligation, see "Constitutional Law," § 1.
Of corporation, see "Corporations," § 4.
Sureties on bonds, see "Principal and Surety."

Bonds in legal proceedings.

See "Appeal and Error," § 3; "Bail."

BREACH.

Of condition, see "Insurance," § 2.

BRIBERY.

By United States officers, see "United States," § 1.

BRIDGES.

Liability of bridge company for death of employé in building bridge, see "Master and Servant," § 1.

BROKERS.

See "Factors."
Effect of illegality of contract on right of brokers to commissions, see "Contracts," § 1.

BUILDING CONTRACTS.

Release of surety, see "Principal and Surety," § 1.

CANCELLATION OF INSTRUMENTS.

Rescission of contract of insurance, see "Insurance," § 5.
Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CARGO.

See "Shipping."

CARRIERS.

Carriage of goods by vessels, see "Shipping," § 4.
Carriage of passengers by vessels, see "Shipping," § 5.
Rates of carriage as affected by agreements relating to aid granted to railroads, see "Railroads," § 1.

CERTIFICATE.

Of acknowledgment of written instrument, see "Acknowledgment," § 1.

CHANCERY.

See "Equity."

CHANGE OF POSSESSION.

Necessity as against creditors of grantor, see "Fraudulent Conveyances," § 1.

CHARACTER.

Of accused in criminal prosecutions, see "Criminal Law," § 3.

CHARGE.

To jury in civil actions, see "Trial," § 2.

CHARTER PARTIES.

See "Shipping," § 2.

CHATTEL MORTGAGES.

Of vessel, see "Shipping," § 1.

§ 1. Requisites and validity.
A description of property in a chattel mortgage *held* sufficient under the Iowa authorities.—In re Brannock (D. C.) 819; Wickham v. Barlow, Id.

§ 2. Filing, recording, and registration.
The fact that a mortgage covering both personal and real estate was not recorded does not invalidate it as between the parties under the law of New York.—Ward v. Ward (C. C.) 946.

The recording of a chattel mortgage and the effect of such recording are governed by the law of the state where the property is situated.—In re Brannock (D. C.) 819; Wickham v. Barlow, Id.

Under Code Iowa, § 2906, a railroad contractor, engaged in performing a contract in a county in Iowa, and actually residing there with his family while doing the work, although temporarily, is a "resident" of the county, in such sense that a chattel mortgage given by him on property then in his possession in such county is properly recorded there.—In re Brannock (D. C.) 819; Wickham v. Barlow, Id.

The recital in a chattel mortgage of the residence of the mortgagor is not evidence of his place of residence, to affect the question of where the mortgage should be recorded.—In re Brannock (D. C.) 819; Wickham v. Barlow, Id.

When a chattel mortgage was duly executed in Iowa, and recorded in the county where the property was actually situated and in the possession of the mortgagor, the burden rests on one attacking the validity of the record to show by competent evidence that the mortgagor was not a resident of such county.—In re Brannock (D. C.) 819; Wickham v. Barlow, Id.

CHEAT.

See "Fraud."

CIRCUIT COURTS.

See "Courts," § 1.

CIRCUIT COURTS OF APPEALS.

See "Courts," § 1.

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Aliens"; "Indians."
Citizenship ground of jurisdiction of United States courts, see "Courts," § 1; "Removal of Causes," § 2.
Citizenship of parties as affecting jurisdiction of suit to enjoin infringement of trade-marks or trade-names, see "Trade-Marks and Trade-Names," § 3.
Equal protection of laws, see "Constitutional Law," § 3.

CIVIL RIGHTS.

See "Constitutional Law," § 3.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 7.
In suits in admiralty, see "Admiralty," § 1.
Mining claims, see "Mines and Minerals," § 1.
Of patent, see "Patents," § 5.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 2.

COLLATERAL ATTACK.

On appointment of receiver of corporation, see "Corporations," § 5.
On judgment, see "Judgment," § 1.
On judgment, state laws as rules of decision in federal courts, see "Courts," § 3.

COLLATERAL INHERITANCE TAXES.

See "Taxation," § 4.

COLLISION.

§ 1. Rules and precautions for preventing collisions in general.

Except as adopted by statute, the general maritime law is not the law of the United States.—The Sacramento (D. C.) 373.

§ 2. Steam vessels and sail vessels.

A steamer *held* solely in fault for a collision with a meeting schooner, brought about by her changing her course across the schooner's bows when approaching nearly head on, and when it was too late for the schooner to change with any assurance of avoiding the collision.—Chadwick v. Wiley (D. C.) 1003.

§ 3. Vessels in tow.

The rule reaffirmed that a tug with a long tow, navigating the New England coast, will be held to the exercise of extraordinary care, in the interest of common safety.—The Admiral Schley (C. C. A.) 433; The Charles F. Mayer, Id.

A steamer loitering with a long tow outside of Boston Harbor, across the usual path of outgoing vessels, while waiting for a fog to clear away, held in fault for a collision with an outgoing steamer, which was also in fault for excessive speed.—The Admiral Schley (C. C. A.) 433; The Charles F. Mayer, Id.

Conflicting evidence considered, and *held* insufficient to charge a tug with fault for a collision between her tow and a meeting steamer, which occurred on the Mississippi river opposite New Orleans in the evening.—The Echo (D. C.) 622.

A tug, with tows, one of which was alongside, is not liable for a collision between such tow and a meeting steamer in the night, arising either from the position of the vessels in the channel or the failure of the tow to carry proper lights, where the navigation and movements of the whole fleet were controlled by a pilot, who was on the tow and employed for that purpose by its owner.—The Echo (D. C.) 622.

§ 4. Vessels at rest, at anchor, or at piers.

A tug *held* solely in fault for a collision between her tow and a steamship which was about to anchor and was substantially, if not wholly, at rest, and was seen to be so by the tug in time to have allowed more room in passing.—Britain S. S. Co. v. J. B. King Transp. Co. (C. C. A.) 62.

An anchored schooner *held* not in fault for collision with another vessel, which dragged anchor and drifted against her in the night during a high wind, because she did not maneuver to keep out of the way.—The Robert Rickmers (D. C.) 638.

A vessel which dragged her anchors during a high wind and drifted against another anchored vessel *held* in fault for the collision, on the ground that her anchors were not suitable and safe, or that she was not properly anchored.—The Robert Rickmers (D. C.) 638.

The fact that the place of anchorage of a sailing vessel was selected by the master of a tug having her in tow does not relieve her from liability for damages caused by her dragging her anchors and drifting against it through her inability to anchor safely in the place chosen.—The Robert Rickmers (D. C.) 638.

A steamship *held* liable for breaking the guard rail of a barge, which was between herself and a dock, caused by pressing the barge against the dock, on the ground that proper care was not exercised in adjusting the booms, so as to keep her off with the changing tide.—The Adelaide (D. C.) 1002; The Coffin, Id.; The M. A. Lennox, Id.

§ 5. Fog or thick weather.

A vessel may be in fault for a collision in a fog, which would not have occurred but for her being in the usual track of vessels leaving a port, where she was there without necessity, although, if it had been in the line of her voyage, she would have been within her right and not chargeable with fault.—The Admiral Schley (C. C. A.) 433; The Charles F. Mayer, Id.

A steamer *held* liable for collision with a schooner by reason of her negligence in maintaining an immoderate speed or an insufficient lookout during a fog.—The Vedamore (D. C.) 154.

§ 6. Narrow channels, harbors, rivers, and canals.

A steamship and tug both *held* in fault for a collision between the ship and barges in tow of the tug, which occurred in the night on the Delaware river.—The John I. Brady and The Wildcroft (C. C. A.) 235.

A steamer passing down the Mississippi in front of New Orleans in the evening, where other vessels are liable to be encountered, should have a lookout other than the master, who has also other duties.—The Echo (D. C.) 622.

§ 7. Suits for damages.

The rule that a vessel has the right to assume that another will obey maritime rules and proceed with due care will not relieve her from fault for a collision, where she was herself violating the rules of care which the situation imposed on her.—The Admiral Schley (C. C. A.) 433; The Charles F. Mayer, Id.

The rule that, where one vessel is shown to have been clearly in fault, without which a collision would not have occurred, the other vessel is to be presumed not in fault, is artificial and misleading, unless very carefully applied.—The Admiral Schley (C. C. A.) 433; The Charles F. Mayer, Id.

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMITY.

Between courts, see "Courts," § 4.

COMMERCE.

Carriage of goods and passengers, see "Shipping."
Interstate character of business of railroad company as affecting liabilities under federal laws relating to safety appliances, see "Railroads," § 3.

COMMISSION MERCHANTS.

See "Factors."

COMMISSIONS.

As usury, see "Usury," § 1.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 3.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 1.

CONCLUSION.

Of witness, see "Evidence," § 3.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 4.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In insurance policies, see "Insurance," § 2.
Precedent to action for breach of contract for sale of goods, see "Sales," § 1.

CONFLICT OF LAWS.

As to record of chattel mortgage, see "Chattel Mortgages," § 2.
Conflicting jurisdiction of courts, see "Courts," § 4.

CONSIDERATION.

For items of account stated, see "Account Stated."
Of contract, see "Contracts," § 1.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.
New trial, see "Criminal Law," § 4.
Removal of accused to other district for trial, see "Criminal Law," § 2.

§ 1. Criminal responsibility.

An indictment for conspiracy to defraud the United States by obtaining the entry of imported merchandise without payment of the duty imposed by law must set out, to some extent at least, the means intended to be used, although the details of the plan need not be alleged.—United States v. Grunberg (C. C.) 137.

An indictment for conspiracy to defraud the United States by obtaining the entry of imported merchandise without payment of the duty thereon imposed by law need not allege the tenor of an instrument by means of which, as charged, it was intended to accomplish the fraudulent entry.—United States v. Grunberg (C. C.) 137.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Eminent Domain," § 1; "Municipal Corporations," § 2; "Taxation," § 1.

§ 1. Obligation of contracts.

Const. S. C. Amend. 1903 (23 St. at Large, S. C. p. 1227), in so far as it was intended to impair the means for the payment of bonds issued by townships in aid of a certain railroad, under Act S. C. 1882 (18 St. at Large, p. 216) as amended by Act 1885 (19 St. at Large, p. 240), *held* in violation of Const. U. S. art. 1, cl. 10.—Ex parte Folsom (C. C.) 496; Folsom v. Ninety-Six Tp., Id.

§ 2. Retrospective and ex post facto laws.

The provision of Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], which requires a discharge to be denied if the bankrupt has been granted a discharge in voluntary proceedings within six years, is applicable to cases where the prior discharge was granted before its enactment.—In re Carleton (D. C.) 146.

§ 3. Equal protection of laws.

A railroad company *held* entitled to relief in equity in a federal court against the collection of taxes based on an assessment of its intangible property at its full cash value, where the greater part of all other property in the state was assessed at not to exceed 80 per cent. of such value as a violation of its constitutional right to the equal protection of the laws.—Louisville & N. R. Co. v. Coulter (C. C.) 282.

CONTEMPT.

By violation of injunction restraining use of trade-name, see "Trade-Marks and Trade-Names," § 3.
Release by habeas corpus from imprisonment for, see "Habeas Corpus," § 1.

§ 1. Acts or conduct constituting contempt of court.

Under Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], defining the jurisdiction of federal courts to punish for contempt, such courts have no power to punish a newspaper publisher for contempt consisting of the publication of editorials reflecting on the court's official conduct and integrity.—Cuyler v. Atlantic & N. C. R. Co. (C. C.) 95; In re Daniels, Id.

§ 2. Power to punish and proceedings therefor.

Evidence *held* insufficient to sustain charges of contempt of court against attorneys, in that they acted in collusion, as representing the respective parties to a suit, to impose upon the court a feigned and fictitious case, in the sole interest of the complainant therein.—Hatfield v. King (C. C.) 791.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."
Impairing obligation, see "Constitutional Law," § 1.
Operation and effect of usury laws, see "Usury," § 1.
Parol or extrinsic evidence, see "Evidence," § 2.
Proximate or remote consequences of injuries from breach, see "Damages," § 1.
Restraining performance or breach, see "Injunction," § 2.
Specific performance, see "Specific Performance."

Contracts of particular classes of parties.

See "Corporations," § 4; "Factors"; "Master and Servant."
Water companies, see "Waters and Water Courses," § 1.

Contracts relating to particular subjects.

See "Mines and Minerals," § 2.
Carriage by vessel, see "Shipping," § 5.
Limitation of liability for injury to goods shipped, see "Shipping," § 4.

Particular classes of express contracts.

See "Insurance"; "Joint Adventures"; "Partnership"; "Sales."
Affreightment, see "Shipping," § 4.
Agency, see "Principal and Agent."
Charter parties, see "Shipping," § 2.
Employment, see "Master and Servant."
Sales of realty, see "Vendor and Purchaser."
Shipping articles, see "Seamen."
Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Account Stated."

§ 1. Requisites and validity.

An agreement by which the stockholders of a corporation, on selling its assets to plaintiff's assignor, agreed not to again engage in a similar business for a specified period in certain localities, *held* not contrary to public policy.—Davis v. A. Booth & Co. (C. C. A.) 31.

A contract for the sale of the business of a corporation, binding its stockholders not to again engage in such business within a specified time, etc., *held* not in violation of federal Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], though it might, incidentally and in a remote degree, injuriously affect interstate commerce.—Davis v. A. Booth & Co. (C. C. A.) 31.

3 How. Ann. St. § 9354j, prohibiting trust combinations, *held* not to prohibit the sale of a business to another, where it was intended that the seller should not therafter have any interest therein, etc.—Davis v. A. Booth & Co. (C. C. A.) 31.

An agreement by stockholders of a corporation, on selling its business to another, not to again engage in the same business within distinct localities for a certain period, *held* not an unreasonable restraint of trade at common law.—Davis v. A. Booth & Co. (C. C. A.) 31.

A manufacturer of machinery *held* not entitled to refuse to furnish machinery contracted for on the ground that it would infringe outstanding patents.—E. W. Bliss Co. v. Buffalo Tin Can Co. (C. C. A.) 51.

A contract authorizing a street railway company to discontinue the operation of a portion of its line without the consent of the state *held* void as against public policy.—Thompson v. Schenectady Ry. Co. (C. C. A.) 577.

In an action between brokers for an accounting of profits on the purchase and sale of certain stock, it was no defense that part of the profits received by defendant had been illegally obtained, plaintiff not having participated in such illegal transaction.—Van Tine v. Hilands (C. C.) 124.

§ 2. Construction and operation.

A contract for the sale of the good will of a business, binding the sellers not to again engage in business in certain localities, *held* restricted to localities in which the selling company had establishments for doing business, and the immediate vicinity thereof.—Davis v. A. Booth & Co. (C. C. A.) 31.

CONTRIBUTORY INFRINGEMENT.

Of patent, see "Patents," § 6.

CONTRIBUTORY NEGLIGENCE.

Of person injured by operation of railroad, see "Railroads," § 3.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."
Of mining property, see "Mines and Minerals," § 2.
Particular classes of conveyances, see "Chattel Mortgages"; "Mortgages."

COPYRIGHTS.

See "Trade-Marks and Trade-Names," § 1.

§ 1. Infringement.

A notice, printed underneath the notice of copyright in a book, that a sale at retail at less than $1 will be treated as an infringement of the copyright, *held* not to entitle the publishers to control the price of the book under the copyright statutes.—Bobbs-Merrill Co. v. Snellenburg (C. C.) 530.

Where two legal digests of the same laws were made by the same person, and he committed the same errors in the latter work that he did in the first, the owner of the first copyrighted publication was entitled to a preliminary injunction on the ground of infringement.—George T. Bisel Co. v. Welsh (C. C.) 564.

Under federal equity rules the waiver of an answer under oath, where the bill for infringement of copyright prayed discovery, an answer to both allegations and interrogatories did not entitle defendant to answer by way of general denial only.—John Church Co. v. Zimmermann (C. C.) 652.

CORPORATIONS.

Multifariousness in pleading in suit involving ownership of corporate stock, see "Equity," § 3.

Taxation of corporations and corporate property, see "Taxation," § 1.

Particular classes of corporations.

See "Municipal Corporations"; "Street Railroads," § 1.

Banks, see "Banks and Banking," § 1.

Water companies, see "Waters and Water Courses," § 1.

§ 1. Capital, stock, and dividends.

Statements in stock subscription contract *held* representations of fact, and therefore proper subjects of false representations.—American Alkali Co. v. Salom (C. C. A.) 46.

Where false representations were made in a stock subscription contract, a subscriber's signature thereto, in the absence of proof to the contrary, was sufficient to show that he relied on such representations.—American Alkali Co. v. Salom (C. C. A.) 46.

In an action on a stock subscription contract an objection that an offer of evidence was not complete, in that it was not proposed to show that false statements were made with a fraudulent intent, *held* cured by an instruction.—American Alkali Co. v. Salom (C. C. A.) 46.

A corporation *held* estopped to claim that a subscriber was bound to promptly investigate the truth of false representations contained in the subscription contract issued by the corporation itself.—American Alkali Co. v. Salom (C. C. A.) 46.

A subscriber to the stock of a corporation *held* entitled to plead rescission for fraud as a defense to an action at law on the contract.—American Alkali Co. v. Salom (C. C. A.) 46.

A tender of stock purchased on a rescission of the sale for fraud *held* sufficient, notwithstanding a sale of certain of the shares purchased before the discovery of the fraud.—American Alkali Co. v. Salom (C. C. A.) 46.

§ 2. Members and stockholders.

A creditor of a corporation, who rendered services, not relying on the fact that the corporation's stock had been fully paid, *held* not entitled to enforce the stockholder's statutory liability on the ground that the subscription was paid by the transfer of property at an excessive valuation.—McBride v. Farrington (C. C.) 797.

Leases of mineral land in Indian Territory, assigned to a Wisconsin mining corporation in return for stock, *held* not void ab initio, and hence, in an action to enforce the assignor's statutory liability for debts, the burden was on the plaintiff to show actual fraud.—McBride v. Farrington (C. C.) 797.

§ 3. Officers and agents.

The president and trustee of a building association, who, with other trustees and without the knowledge or consent of the stockholders, canceled a mortgage in favor of the association without consideration, which was the only valid security for the price of property sold, *held* individually liable for the price of such property at suit of a stockholder.—Brinckerhoff v. Roosevelt (C. C.) 955.

Trustees of a corporation, who negligently and without authority canceled a mortgage securing an obligation due to the corporation, may be sued directly for the value of such obligation without exhausting the personal remedy of the corporation against the debtor.—Brinckerhoff v. Roosevelt (C. C.) 955.

§ 4. Corporate powers and liabilities.

A corporation has no power to execute its notes, secured by a mortgage of its property for individual debts of its stockholders, incurred in the purchase of their stock, to the exclusion of creditors of the corporation, although their claims arose after the mortgage was executed and recorded.—In re Haas Co. (C. C. A.) 232; Taylor v. Ziegenhagen, Id.

Where one corporation, on the transfer of securities to another in payment for property, executed a bond and mortgage as a guaranty of their collection, a sale of such securities at auction by the transferee which bid them in, the purpose being to cut off outstanding equities, *held*, under the circumstances shown, not to affect the right to enforce the bond and mortgage.—Brinckerhoff v. Roosevelt (C. C.) 955.

§ 5. Insolvency and receivers.

Appointment of receivers for a corporation by a court of general jurisdiction was not subject to collateral attack on the ground that the court did not have jurisdiction of the corporation's person.—Blue Mountain Iron & Steel Co. v. Portner (C. C. A.) 57.

§ 6. Foreign corporations.

In an action against a corporation in the federal courts, a return on the summons *held* insufficient, where neither the statement, sum-

mons, præcipe, nor return recited that the corporation was transacting business in the state where the court was sitting.—Jackson v. Delaware River Amusement Co. (C. C.) 134.

An application to vacate service of process on a corporation *held* properly presented by a rule to show cause, instead of by plea in abatement. —Jackson v. Delaware River Amusement Co. (C. C.) 134.

COSTS.

In admiralty, see "Admiralty," § 5.
In action for infringement of patent, see "Patents," § 6.

§ 1. Nature, grounds, and extent of right in general.

Where a bill for infringement is dismissed for want of jurisdiction, costs cannot be awarded to defendant.—International Wireless Telegraph Co. v. Fessenden (C. C.) 493.

A plaintiff, who recovered in an action in ejectment for mining property, and also in a suit in equity to enjoin trespass thereon by defendant, *held* entitled to recover costs in both cases, although the recovery was as to part only of the ground claimed; it being stipulated that the remainder was owned by defendant.—Consolidated California & V. Min. Co. v. Baker (C. C.) 989.

§ 2. Amount, rate, and items.

Where the successful party in a suit in equity has taken the testimony of a largely unnecessary number of witnesses on an issue, he will be allowed as costs the fees and cost of examination of only such number as the court deems reasonable.—Kane v. Luckman (C. C.) 609.

COUNTERFEITING.

See "Forgery."

COUNTIES.

Mandamus to compel levy and collection of tax to pay judgment on county bonds, see "Mandamus," § 2.

§ 1. Fiscal management, public debt, securities, and taxation.

The provision of Act Ky. Feb. 24, 1868 (Laws 1868, p. 622, c. 548), authorizing counties to issue bonds in aid of railroads, which requires the county judge to levy a tax to pay such bonds, has not been repealed by the Constitution of 1891 or subsequent legislation.—Guthrie v. Sparks (C. C. A.) 443.

The proviso of Ky. St. 1894, § 1882, which excepts from the powers conferred on fiscal courts of counties that of levying taxes to pay any railroad bond indebtedness is not repealed by implication by section 1839. — Guthrie v. Sparks (C. C. A.) 443.

Abolition of corporate authority of townships organized for the purpose of issuing bonds and subscribing for stock of railway, under Act S. C. 1882 (18 St. at Large, p. 216), as amended by Act 1885 (19 St. at Large, p. 240), by Const. S. C. Amend. 1903 (23 St. at Large, p. 1227), *held* not to deprive the county auditor and treasurer of the counties containing such townships from levying a tax to pay the bonds.—Ex parte Folsom (C. C.) 496; Folsom v. Ninety-Six Tp., Id.

Where a township was liable for the payment of railroad bonds issued under Act S. C. 1882 (18 St. at Large, p. 216), as amended by Act 1885 (19 St. at Large, p. 240), the fact that the township was subsequently included in a different county by reason of a change of boundaries did not alter its liability on the bonds.—Ex parte Folsom (C. C.) 496; Folsom v. Ninety-Six Tp., Id.

COURTS.

Ancillary jurisdiction as to examination of witnesses in bankruptcy proceedings, see "Bankruptcy," § 1.
Collateral attack on jurisdiction, see "Judgment," § 1.
Contempt of court, see "Contempt."
Fiscal courts, see "Counties," § 1.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."

Jurisdiction of particular actions, proceedings, or subjects.

Against receiver, see "Receivers," § 1.
Patent infringement suit, see "Patents," § 6.
Proceedings by or against trustee in bankruptcy, see "Bankruptcy," § 6.

§ 1. United States courts.

Where an order sustaining a demurrer to a bill for want of jurisdiction was not appealed from and was in appellant's favor, it could not be objected that the Circuit Court of Appeals had no jurisdiction on the ground that the question of jurisdiction could only be reviewed by the Supreme Court.—Viquesney v. Allen (C. C. A.) 21.

Federal jurisdiction to issue a writ of habeas corpus to determine a father's right to the custody of his child under a decree of the courts of the state in which the father resided *held* not conferred by an alleged failure to give such decree full faith and credit in another state.—Clifford v. Williams (C. C.) 100.

An averment that defendant was a corporation organized under the laws of the commonwealth of Massachusetts, and that plaintiff was of B., state of Vermont, executrix of the will of the deceased, for whose death the action was brought, *held* insufficient to show diversity of citizenship.—Stockwell v. Boston & M. R. Co. (C. C.) 152.

The federal courts have jurisdiction of an action for death of a servant, only where it is between citizens of different states, or between citizens and aliens.—Stockwell v. Boston & M. R. Co. (C. C.) 152.

Where a demurrer to a declaration was sustained for failure to disclose diversity of citizenship, the writ was amendable in that regard to conform to the fact.—Stockwell v. Boston & M. R. Co. (C. C.) 153.

A federal court, having appointed a receiver for a street railway company, *held* to have ancillary jurisdiction of a petition by the receiver to restrain a competing street railway company from closing a highway which would practically destroy the property in the hands of the receiver, without regard to citizenship.—Hampton Roads Ry. & Electric Co. v. Newport News & O. P. Ry. & Electric Co. (C. C.) 534.

Property owners on a street may maintain a suit in a federal court against a city and a street railroad company to enjoin the laying of tracks on the street under a void enactment by the city council purporting to grant a franchise therefor, as a taking of property under color of authority from the state without due process of law.—Holst v. Savannah Electric Co. (C. C.) 931.

On a motion to dismiss for want of jurisdiction, the court will not ordinarily enter into a consideration of the merits; but, if the case shows a bona fide claim within the jurisdiction of the court, with a reasonable plausibility in support thereof, the question of jurisdiction will be passed until the cause is considered on the merits on formal pleadings.—York County Sav. Bank v. Abbot (C. C.) 980.

A suit by a lessee against a lessor to enforce rights under the provisions of an expired lease *held* on the face of the bill to be one to enforce a claim against the property within Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], of which the Circuit Court of the district had jurisdiction, with power to bring in the defendant by citation.—York County Sav. Bank v. Abbot (C. C.) 980.

Federal courts can only grant a writ of mandamus in aid of an existing jurisdiction.—In re Coleman (D. C.) 151.

§ 2. —— Procedure, and adoption of practice of state courts.

Facts constituting an equitable estoppel may be pleaded as a defense to an action of ejectment in the federal courts.—Cheatham v. Edgefield Mfg. Co. (C. C.) 118.

In an action at law in the federal courts on a contract between a school district and a building contractor's surety, the surety *held* not entitled to have the contract reformed for the purpose of inserting an alleged omitted provision.—York City School Dist. v. Ætna Indemnity Co. (C. C.) 131.

Since the federal statutes do not expressly indicate the practice to be followed on scire facias on a forfeited recognizance or bail bond, resort must be had to the procedure which obtained at common law.—Kirk v. United States (C. C.) 331.

Under section 537, Code Civ. Proc. N. Y., it is not necessary that a notice of motion should be given in moving for a judgment on the pleadings at the time of trial, but only when special application is to be made for judgment on the pleadings in advance of trial.—Dodge v. United States (C. C. A.) 849.

§ 3. —— State laws as rules of decision.

The right of collateral attack on a judgment is a matter of general law, as to which the decisions of the courts of a state are not binding on a federal court.—Phœnix Bridge Co. v. Castleberry (C. C. A.) 175.

Decisions of state courts, that unstamped instruments required to be stamped by War Revenue Act June 13, 1898, c. 448, § 14, 30 Stat. 455 [U. S. Comp. St. 1901, p. 2296], were admissible in evidence, have no application to federal courts.—Sackett v. McCaffrey (C. C. A.) 219.

A federal court, in an action based on a state statute providing for the sale of state lands, *held* bound to follow the construction placed on the statute by the highest state court.—Lockard v. Asher Lumber Co. (C. C. A.) 689.

The opinion of a state court of last resort, construing a state statute, is conclusive on the federal court sitting in such state to the extent only of the precise question decided.—Southern Ry. Co. v. Simpson (C. C. A.) 705.

Where rights involved in a suit in a federal court were acquired on the faith of a constitutional or statutory provision of a state, the court is not bound by a construction subsequently placed on such provision by the highest court of the state, but is required to exercise its own independent judgment as to such construction.—Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 890.

§ 4. Concurrent and conflicting jurisdiction, and comity.

Under the South Carolina statute (Code Civ. Proc. § 48) the probate court which first grants letters of administration on the estate of a decedent acquires exclusive jurisdiction to administer the estate.—Phœnix Bridge Co. v. Castleberry (C. C. A.) 175.

The pendency of a suit in a state court for the cancellation of a mortgage on a vessel *held*, under the facts shown, not to preclude a court of admiralty, in which the vessel had subsequently been libeled and sold, from passing on the validity of the mortgage and allowing the same against the proceeds in the registry of the court for distribution.—The Gordon Campbell (D. C.) 963.

CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances."
Remedies against surety, see "Principal and Surety," § 2.

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

Bail, see "Bail," § 1.
Indictment, information, or complaint, see "Indictment and Information."

Offenses by particular classes of parties.

National bank officer, see "Banks and Banking," § 2.

Particular offenses.

See "Conspiracy," § 1; "Contempt"; "Embezzlement"; "Forgery."

Bribery by United States officers, see "United States," § 1.

Offenses against customs laws, see "Customs Duties," § 4.

Offenses against naturalization laws, see "Aliens," § 1.

§§ 1, 2. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

Technical or formal objections to the sufficiency of an indictment will not be considered in proceedings for the removal of a federal prisoner to the district in which he is triable, but will be left for determination by the court in which it was found; but if, on a broad and liberal construction, the indictment does not appear to charge an offense, the prisoner should not be held for removal.—In re Benson (C. C.) 968.

An indictment for conspiracy to defraud the United States, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], *held* insufficient to charge any offense thereunder to support proceedings for the removal of the defendant to another district for trial.—In re Benson (C. C.) 968.

The United States, though not entitled to pursue two antagonistic applications for removal of a federal prisoner to different districts for trial, *held* entitled to pursue the application for removal first made, and, after securing the prisoner's arraignment in that district, to prosecute new proceedings to remove him to another district.—In re Beavers (D. C.) 366.

A federal prisoner *held* not entitled to object to a second removal to a particular district for trial on an indictment pending therein before trial on an indictment pending in the district to which he was first removed, in the absence of a showing of prejudice.—In re Beavers (D. C.) 366.

§ 3. Evidence.

On the trial of an officer of a national bank for embezzlement, abstraction, and misapplication of funds, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], which makes an intent to injure or defraud an element of either offense, evidence of other transactions by defendant of similar character is admissible, but may be considered by the jury only on the question of the knowledge and intent of the accused when he committed the acts charged in the indictment.—United States v. Breese (D. C.) 915.

The good character of a defendant, proved in a criminal case, is evidence in his favor which goes to strengthen the presumption of his innocence.—United States v. Breese (D. C.) 915.

While the burden of proof rests upon the prosecution in a criminal case from the beginning to the end of the trial, it is successfully met whenever, from all the evidence introduced in the case, and taking into consideration the presumption of innocence in favor of the accused, the jury are satisfied of his guilt beyond a reasonable doubt.—United States v. Breese (D. C.) 915.

§ 4. Motions for new trial and in arrest.

In a prosecution for conspiracy to defraud the United States, defendant *held* entitled to a new trial for newly discovered evidence.—United States v. Radford (D. C.) 378.

Defendant, convicted of conspiracy against the United States, *held* not precluded by laches from obtaining a new trial for newly discovered evidence.—United States v. Radford (D. C.) 378.

CROSS-EXAMINATION.

See "Witnesses," § 1.

CURTESY.

See "Dower."

CUSTOMS DUTIES.

Conspiracy to defraud United States by fraudulent entry of merchandise, see "Conspiracy," § 1.

§ 1. Validity, construction, and operation of customs laws in general.

Where for a period of years the Secretary of the Treasury has made regulations carrying out certain provisions in the various tariff acts in operation during that period, it is to be presumed that subsequent legislation by Congress was enacted with reference to such regulations.—United States v. Bartram Bros. (C. C. A.) 833; Same v. Benjamin H. Howell, Son & Co., Id.; Same v. American Sugar Refining Co., Id.

The designation of an article in a tariff provision by a term having a commercial signification is not controlling in the classification of the article, where a different intent is inferable from the context.—Hahn v. United States (C. C.) 1000.

§ 2. Goods subject to duty, rate, and amount.

The expressions, "testing by the polariscope" and "shown by the polariscope," used in Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 209, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], providing for a polariscopic test of sugar, have no special meaning indicating any particular method of conducting such test, other than that calculated to make a scientific determination.—United States v. Bartram Bros. (C. C. A.) 833; Same v. Benjamin H. Howell, Son & Co., Id.; Same v. American Sugar Refining Co., Id.

Women's silver hand bags or purses are not dutiable as "articles commonly known as jewelry" under Tariff Act 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], but as articles of silver, under paragraph 193 of said act (Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645.]).—Tiffany v. United States (C. C.) 398.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 313, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], for a duty on figured cotton cloth additional to that to which cotton cloth of the "same description or condition" would be subject if not figured, contem-

plates a duty additional only to that to which cloth of the same physical conditions would be subject, and not to that which is regulated by the condition of value.—George Riggs & Co. v. United States (C. C.) 568.

Woolen clippings are dutiable as "woolen rags," under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 363, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1666], rather than as woolen waste, under paragraph 362 of said act (30 Stat. 183 [U. S. Comp. St. 1901, p. 1666]).—United States v. Pearson & Emmott (C. C.) 571.

Silk ribbons are not dutiable as silk trimmings, under Tariff Act 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], but as manufactures of silk not specially provided for, under paragraph 391 of said act (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]). — Gartner & Friedenheit v. United States (C. C.) 574.

Ferro-chrome, ferro-tungsten, ferro-molybdenum, and ferro-vanadium are dutiable by similitude as ferro-manganese, under Tariff Act 1897, c. 11, § 1, Schedule C, par. 122, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645].—United States v. Roessler & Hasslacher Chemical Co. (C. C.) 576.

Embroidered dress goods of wool are dutiable as "dress goods * * * of wool, and not specially provided for," under Tariff Act of July 24, 1897, c. 11, § 1, Schedule K, par. 369, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], and not as "articles embroidered by hand or machinery, * * * made of wool," under paragraph 371 of said act (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]).—Hall & Bishop v. United States (C. C.) 648.

It is not necessary that the flax fabrics made dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 346, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], according to count of threads per square inch, should be homogeneous throughout, and that provision may include so-called drawnwork from which some of the threads have been removed.—J. R. Simon & Co. v. United States (C. C.) 649; B. Ulmann & Co. v. Same, Id.

Drawnwork articles, in which figures have been produced by drawing a portion of the threads and manipulating them with other threads, are not imitations of lace, as provided for in Tariff Act July 24, 1897, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], but are dutiable as fabrics of flax under paragraph 346 of said act (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]).—J. R. Simon & Co. v. United States (C. C.) 649; B. Ulmann & Co. v. Same, Id.

Sake, a Japanese alcoholic beverage, resembles neither wine, beer, nor ale sufficiently to be dutiable as either by similitude, but is an unenumerated manufactured article, under Tariff Act 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693.]—Nishimiya v. United States (C. C.) 650.

Sandal wood with the bark removed, which has been sawed into pieces several feet long for convenience in transportation, is free of duty as "logs of wood," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 699, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689].—George Lueders & Co. v. United States (C. C.) 655.

Pencils composed in chief value of soap are dutiable as unenumerated manufactured articles, under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].—United States v. American Exp. Co. (C. C.) 656.

Edible wafers, raised in the making by the use of baking powder or bicarbonate of soda, are "leavened," although such agents do not produce fermentation, and are dutiable under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], as nonenumerated manufactured articles, and not entitled to free entry under paragraph 696 in the free list (Act July 24, 1897, c. 11, § 2, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1688]), covering "wafers, unleavened or not edible."—F. H. Leggett & Co. v. United States (C. C.) 817; Meyer & Lange v. Same, Id.

Drilled pearls, which through assorting and matching have been put into a condition in which collectively they are worth more than the aggregate value of the individual pearls, are dutiable, by virtue of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], at the rate applicable to the "pearls strung" enumerated in paragraph 434, Schedule N, § 1 (30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]), and not as "pearls in their natural state," under paragraph 436 (30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]), nor as unenumerated articles, under section 6 (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).—Neresheimer v. United States (C. C.) 977.

So-called "Welsh quarries" are not dutiable as "tiles" under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 88, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], but as "brick, other than fire brick," under paragraph 87 of said act (30 Stat. 155 [U. S. Comp. St. 1901, p. 1632]), and the so-called similitude clause in section 7 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).—Traitel Bros. v. United States (C. C.) 994.

Pearls are not "precious stones," within the meaning of Tariff Act July 24, 1897, c. 11. Schedule N, pars. 434, 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].—Hahn v. United States (C. C.) 1000.

Half-pearls bear a stronger resemblance, within the meaning of the similitude provision in Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], to the "pearls in their natural state," enumerated in paragraph 436, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], than to the "pearls set or strung," enumerated in paragraph 434, schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].—Hahn v. United States (C. C.) 1000.

The exemption in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 697, 30 Stat. 202

[U. S. Comp. St. 1901, p. 1689], of one hundred dollars in value of merchandise does not carry with it an exemption from the enforcement of the penalties prescribed in section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], for such articles when not legally entered.—United States v. Harts (D. C.) 886.

§ 3. Entry and appraisal of goods, bonds, and warehouses.

The Secretary of the Treasury, under the general power given him by section 251, Rev. St. U. S. [U. S. Comp. St. 1901, p. 138], does not exceed his powers in prescribing a method of "testing by the polariscope" sugars dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 209, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], so long as he acts in good faith and the method prescribed does not make the polariscopic test less accurate than when Congress adopted it.—United States v. Bartram Bros. (C. C. A.) 833; Same v. Benjamin H. Howell, Son & Co., Id.; Same v. American Sugar Refining Co., Id.

Where an importer, in protesting against the classification of imported merchandise under a paragraph of the tariff that is not applicable to the merchandise, refers to another paragraph that is also inapplicable, but which provides the same rate of duty as the paragraph which covers the goods, and he specifies that as the correct rate, *held* that the protest answers the requirements of Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].—United States v. Fleitmann & Co. (C. C.) 396.

Warping is not a part of the process of weaving; and in finding the component material of chief value in fabrics under Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], the cost of warping should be included wholly in the value of the material comprising the warp.—Hoeninghaus & Curtis v. United States (C. C.) 570.

In finding the component material of chief value, under Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], the value of each component should be taken when in the condition that nothing remains to be done by the manufacturer, except to put the materials together, to make the completed product.—Hoeninghaus & Curtis v. United States (C. C.) 570.

A protest by an importer against the reliquidation by a collector of customs under a decision of the Board of General Appraisers, in which it was contended that the collector had not refunded the entire amount, *held* valid and within the requirements for protests as established by Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].—Dickson v. United States (C. C.) 573.

The amount of certain French imposts, known as the "octroi tax" and the "droit de ville," which are not general in their application, but vary with the locality, and which are remitted if the merchandise is exported, should not be included as a part of the market value of merchandise, as defined in Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924].—United States v. R. F. Downing & Co. (C. C.) 653; Same v. Godillot & Co. (C. C.) 653.

Findings of fact by the Board of General Appraisers will be reviewed only when unsupported by or clearly against the weight of the evidence, or new evidence has been introduced which was not before the board.—Neresheimer v. United States (C. C.) 977.

Under Act June 22, 1874, c. 391, § 21, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986], a collector of customs may reliquidate an entry of imported merchandise at an increased rate of duty, within one year after entry, even though the merchandise has passed from customs custody and been sold, and protests against the original liquidation are pending undecided before the Board of General Appraisers.—Neresheimer v. United States (C. C.) 977.

§ 4. Violations of customs laws.

It is not necessary to show fraudulent intent to secure the enforcement of the penalties provided in section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], for dutiable articles found in the baggage of persons arriving in the United States which have not been duly entered.—Dodge v. United States (C. C. A.) 849.

Articles in passengers' baggage which are exempt from duty under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 697, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], should be entered and their value declared on importation, and, if not so declared, are subject to forfeiture under section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873].—Dodge v. United States (C. C. A.) 849.

It is not necessary to show fraudulent intent to secure the enforcement of the penalties provided in section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], for dutiable articles found in the baggage of persons arriving in the United States, which have not been duly entered.—United States v. Harts (D. C.) 886.

The penalties provided in section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], are enforceable as to articles intentionally left unmentioned in the entry, though it was not intended to avoid the payment of duty.—United States v. Harts (D. C.) 886.

A certain method of packing dutiable articles in a passenger's baggage *held* not to justify the conclusion that there was an intention to avoid payment of duty on the articles.—United States v. Harts (D. C.) 886.

Under section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], it is not contemplated that a court, in applying the penalty for illegally entering merchandise, shall be required to appraise the value thereof in order to ascertain what portion would have been exempt from duty, if imported in a legal manner.—United States v. Harts (D. C.) 886.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Damages for particular injuries.

Breach by buyer of contract for sale of goods, see "Sales," § 1.
Breach by seller of contract for sale of goods, see "Sales," § 2.
Infringement of patent, see "Patents," § 6.

§ 1. Grounds and subjects of compensatory damages.

In an action for breach of contract for the manufacture and sale of machinery, the purchaser *held* not entitled to recover alleged lost profits.—E. W. Bliss Co. v. Buffalo Tin Can Co. (C. C. A.) 51.

§ 2. Measure of damages.

In an action against a master for injuries to a servant, in the absence of aggravating circumstances, the measure of damages is the pecuniary loss sustained by plaintiff, and compensation for the suffering endured.—Peterson v. Roessler & Hasslacher Chemical Co. (C. C.) 156.

§ 3. Inadequate and excessive damages.

In an action for injuries to a servant, a verdict for $9,500 *held* excessive, and should be reduced to $8,000.—Peterson v. Roessler & Hasslacher Chemical Co. (C. C.) 156.

DEATH.

Jurisdiction of federal courts in action for wrongful death, see "Courts," §§ 1–3.
Liability of master for death of servant through negligence of fellow servants, see "Master and Servant," § 1.
Of party to action ground for abatement, see "Abatement and Revival," § 1.
Removal to federal court of action for, see "Removal of Causes," § 2.
Right of parent to recover for wrongful death of child as asset in bankruptcy, see "Bankruptcy," § 3.

§ 1. Actions for causing death.

A cause of action for wrongful death *held* to accrue in the state where the person killed was domiciled at the time of his death, and not in the state where he was killed.—Stockwell v. Boston & M. R. Co. (C. C.) 153.

A cause of action for wrongful death does not survive under Pub. St. N. H. 1901, c. 191, in any place where an administrator is appointed, but only in the place where deceased had his domicile at the time of his death where the cause of action accrued.—Stockwell v. Boston & M. R. Co. (C. C.) 153.

DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Executors and Administrators."

DECEIT.

See "Fraud."

DEEDS.

Acknowledgment of execution, see "Acknowledgment."
Of mining property, see "Mines and Minerals," § 2.
Of trust, see "Chattel Mortgages"; "Mortgages."

DEFAMATION.

See "Libel and Slander."

DELAY.

In unloading vessels, see "Shipping," § 6.
Laches, see "Equity," § 2.

DEMURRAGE.

See "Shipping," § 6.
Parol or extrinsic evidence, see "Evidence," § 2.

DEMURRER.

In pleading, see "Pleading," § 1.

DEPOSITIONS.

In admiralty, see "Admiralty," § 3.

DEPOSITS IN COURT.

Deposits in admiralty court, see "Admiralty," § 1.

DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Wills."
Inheritance and transfer taxes, see "Taxation," § 4.

DESCRIPTION.

Of mortgaged chattels, see "Chattel Mortgages," § 1.

DESIGN PATENTS.

See "Patents," § 1.

DEVISES.

See "Wills."

DISCHARGE.

From indebtedness, see "Bankruptcy," §§ 1, 8.
From liability as surety, see "Principal and Surety," § 1.
In bankruptcy, validity of ex post facto laws, see "Constitutional Law," § 3.

DISMISSAL AND NONSUIT.

Dismissal of bankruptcy proceedings, see "Bankruptcy," § 1.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 7.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 1; "Removal of Causes," § 2.

DOCKS.

See "Wharves."

DOMICILE.

As affecting right to writ of habeas corpus, see "Habeas Corpus," § 1.
Residence as ground of jurisdiction, see "Courts," § 1.

DOWER.

§ 1. Nature and requisites.

Under the law of New York a wife has no dower rights in lands in which her husband has only an estate in remainder expectant upon a life estate.—Ward v. Ward (C. C.) 946.

DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

EJECTMENT.

Federal courts following state practice, see "Courts," § 2.

ELECTION OF REMEDIES.

Seller's notice to the buyers, after buyers' notice of refusal to accept, that the seller would store or sell the goods for the buyers' account, *held* not to constitute such an election as precluded the seller from treating the contract at an end and recovering damages for breach thereof.—Habeler v. Rogers (C. C. A.) 43.

EMBEZZLEMENT.

By officer of national bank, see "Banks and Banking," § 2.

Elements of the offenses of embezzlement, abstraction, and willful misapplication of funds by officers, clerks, or agents of a national bank, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], considered, and the offenses distinguished.—United States v. Breese (D. C.) 915.

The intent to injure or defraud, made by Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], an element of the offenses of embezzlement, abstraction, or willful misapplication of funds by an officer, clerk, or agent of a national bank, need not necessarily have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done.—United States v. Breese (D. C.) 915.

That an officer of a national bank obtained money from the bank by means of overdrafts and loans, which were authorized by the officers or committee having authority to represent the bank, *held* a defense to the charge of embezzlement only where those representing the bank acted in good faith and for its supposed benefit.—United States v. Breese (D. C.) 915.

EMINENT DOMAIN.

Priority of right of way of railroad company as determined by filing petition for condemnation, see "Railroads," § 2.
Whether contract for sale of right of way is within statute of frauds, as affecting subsequent condemnation proceedings, see "Frauds, Statute of," § 1.

§ 1. Nature, extent, and delegation of power.

Where the plant of an irrigation company was built on a scale to supply more consumers than it has as yet obtained, a maximum rate prescribed by county commissioners did not deprive it of property without due process of law, because insufficient to pay a reasonable income on the money invested.—Boise City Irrigation & Land Co. v. Clark (C. C. A.) 415.

§ 2. Compensation.

Shannon's Code Tenn. §§ 1844–1867, providing for condemning right of way for railroad purposes, do not authorize an entry on the land until the owner's compensation has been ascertained and paid or secured; and a company, having commenced proceedings for condemnation, can acquire no rights by going upon the land and commencing construction work without the owner's consent.—Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (C. C. A.) 657.

§ 3. Remedies of owners of property.

The absence of any agreement between a landowner and a railroad company as to the price to be paid for right of way, or the manner of determining the same, negatives a claim that the company was to be given credit, and the owner's right to the land can only be extinguished by appraisal and payment.—Bibber-White Co. v. White River Valley Electric R. Co. (C. C.) 995.

Where a landowner expressly consents or clearly acquiesces in the taking of right of way over his land for a railroad without payment, his right to hold the land is gone, and he has only a personal claim against the company for the debt.—Bibber-White Co. v. White River Valley Electric R. Co. (C. C.) 995.

EMPLOYES.

See "Master and Servant."

EQUITABLE ESTOPPEL.

See "Estoppel."

EQUITY.

Equitable estoppel, see "Estoppel," § 1.
Federal courts refusing to follow state practice, see "Courts," § 2.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Fraudulent Conveyances"; "Injunction"; "Receivers"; "Specific Performance."
Enforcement of liability of stockholders in national bank, see "Banks and Banking," § 2.
Suits for infringement of patents, see "Patents," § 6.

§ 1. Jurisdiction, principles, and maxims.

Equity will not interfere, at the suit of a holder of a prior equitable title, to deprive an innocent purchaser for value of a junior equitable estate of a legal estate which he has obtained after notice.—United States v. Detroit Timber & Lumber Co. (C. C. A.) 668.

In a suit in equity in a federal court the objection that plaintiff has an adequate remedy at law is jurisdictional and may be made at any stage of the case.—Kane v. Luckman (C. C.) 609.

§ 2. Laches and stale demands.

In the absence of extraordinary circumstances, laches is inapplicable to suits in equity within the limited time for analogous actions at law.—Brown v. Arnold (C. C. A.) 723.

§ 3. Pleading.

Where the rights of each of several complainants in a bill against the directors of an insolvent bank was based upon the same theory, the bill was not multifarious.—Boyd v. Schneider (C. C. A.) 223.

A bill examined, and *held* not only multifarious, but without equity.—Inman v. New York Interurban Water Co. (C. C.) 997.

To settle the right of ownership of stock of a corporation, and to ask relief which depends on such ownership, are two independent and disconnected matters, and a bill which attempts to join them in one suit is multifarious.—Inman v. New York Interurban Water Co. (C. C.) 997.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of railroads, see "Street Railroads," § 1.

ESTATES.

See "Dower."
Decedents' estates, see "Executors and Administrators."

ESTOPPEL.

By account stated, see "Account Stated."
By judgment, see "Judgment," § 2.
Of corporation as to misrepresentations inducing subscription to corporate stock, see "Corporations," § 1.
Of stockholder of bank to deny liability for assessments, see "Banks and Banking," § 2.
To claim rescission of insurance contract, see "Insurance," § 5.
To deny validity of patent, see "Patents," § 4.
To enforce maritime lien, see "Maritime Liens," § 2.
To repudiate agreement relating to bankrupt's exemptions, see "Bankruptcy," § 8.

§ 1. Equitable estoppel.

The expression of an opinion on a question of law, where both parties have full knowledge of the facts, cannot create an estoppel.—Ward v. Ward (C. C.) 946.

EVIDENCE.

See "Witnesses."
Admission in evidence of documents required by War Revenue Act to be stamped, see "Internal Revenue."
Newly discovered evidence ground for new trial in criminal prosecution, see "Criminal Law," § 4.
Questions of fact for jury, see "Trial," § 1.
Review of evidence taken in proceedings for appointment of trustee in bankruptcy, see "Bankruptcy," § 9.
Review on appeal or writ of error, see "Appeal and Error," § 5.
State laws as rules of decision in federal courts, see "Courts," § 3.
Sufficiency of record on appeal to present questions relating to, see "Appeal and Error," § 4.

As to particular facts or issues.

See "Statutes," § 2.
Authority of attorney, see "Attorney and Client," § 1.
Fault for collision, see "Collision," § 3.
Location of mining claim, see "Mines and Minerals," § 1.
Place for record of chattel mortgage, see "Chattel Mortgages," § 2.
Prior use of invention, see "Patents," § 2.
Invention, see "Patents," § 2.

In actions by or against particular classes of parties.

See "Railroads," § 3.
Parties to joint adventure, see "Joint Adventures."
Stockholders, see "Corporations," § 2.

In particular civil actions or proceedings.

See "Bankruptcy," § 1; "Contempt," § 2.
Admiralty, see "Admiralty," § 3; "Collision," § 7.
For breach of contract, see "Sales," § 1.
For infringement of patent, see "Patents," § 6.

For injury to tow, see "Towage."
For personal injuries, see "Railroads," § 3.
Proceedings before referee in bankruptcy, see "Bankruptcy," § 5.
To enforce stockholders' liability, see "Corporations," § 2.

In criminal prosecutions.
See "Contempt," § 2; "Criminal Law," § 3.

§ 1. Best and secondary evidence.
In an action to recover internal revenue taxes paid under protest by a distiller, proof of search for plaintiff's record book, required to be kept by Rev. St. §§ 3303, 3318 [U. S. Comp. St. 1901, pp. 2157, 2164], *held* insufficient to justify the admission of parol evidence of the contents of such book.—Brown v. Harkins (C. C. A.) 63.

§ 2. Parol or extrinsic evidence affecting writings.
Parol evidence of the judge who made an order appointing receivers for a corporation *held* inadmissible for the purpose of showing the grounds thereof.—Blue Mountain Iron & Steel Co. v. Portner (C. C. A.) 57.

Where written contracts were ambiguous, parol evidence tending to show the construction which the parties had placed thereon was properly admitted.—Consolidated Dental Mfg. Co. v. Holliday (C. C.) 384; Holliday v. Consolidated Dental Mfg. Co., Id.

Memorandum delivered by carrier to master of lighter after she had been loaded *held* not to exclude evidence of the parol agreement between them as to liability for demurrage.—Ronan v. 155,453 Feet of Lumber (D. C.) 345.

Parol evidence is admissible to show that joint notes signed by the members of a bankrupt partnership are in fact firm debts.—In re L. B. Weisenberg & Co. (D. C.) 517.

§ 3. Opinion evidence.
The testimony of the cashier of a bank that loans made by the bank on notes signed by members of a bankrupt partnership were made to the firm and not to the partners is not admissible to establish such fact, which must be determined from the facts of the transaction and not from the intention of the witness.—In re L. B. Weisenberg & Co. (D. C.) 517.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 1.

EXCEPTIONS, BILL OF.

Taking exceptions at trial, see "Trial," § 2.

EXCESSIVE DAMAGES.

See "Damages," § 3.

EXCISE.

Duties, see "Internal Revenue."

EXECUTION.

In action on forfeited bail bond, see "Bail," § 1.

EXECUTORS AND ADMINISTRATORS.

See "Wills."
Conflicting and concurrent jurisdiction of courts as to administration of decedents' estates, see "Courts," § 4.
Survival of action for wrongful death, see "Death," § 1.
Survival of action to personal representatives, see "Abatement and Revival," § 1.

§ 1. Assets, appraisal, and inventory.
Under Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, § 1425], on the death of the locator of a mining claim on public land prior to the issuance of a patent, such claim passed to his administrator, and not to his heirs as grantees of the government.—O'Connell v. Pinnacle Gold Mines Co. (C. C.) 106.

EXEMPTIONS.

Allowance to bankrupt, see "Bankruptcy," § 8.
Of goods from customs duties, see "Customs Duties," §§ 2, 4.

EX POST FACTO LAWS.

Constitutional restrictions, see "Constitutional Law," § 2.

EXTRALATERAL RIGHTS.

In mining claims, see "Mines and Minerals," § 1.

FACTORS.

Commissions as usury, see "Usury," § 1.

Where parties attempted by an agreement to give one a factor's lien on property of the other, but such agreement did not create a lien because possession of the property remained in the debtor, an equitable lien will not arise, although the agreement was made in good faith.—Ryttenberg v. Schefer (D. C.) 313.

A contract between two commission firms by which one agreed to do all its business through the other construed with reference to the lien of the latter upon goods in the possession of the former at the time of its bankruptcy, and upon accounts due for goods which had been sold.—Ryttenberg v. Schefer (D. C.) 313.

FAULT.

For collision, see "Collision," § 2.

FEDERAL COURTS.

See "Courts," §§ 1–3.

FEDERAL QUESTIONS.

Ground for jurisdiction, see "Courts," § 1.

FELLOW SERVANTS.

See "Master and Servant," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 5.

FISCAL COURTS.

See "Counties," § 1.

FOG.

Collision of vessels, see "Collision," § 5.

FORECLOSURE.

Of mortgage, see "Mortgages," § 3.

FOREIGN CORPORATIONS.

See "Corporations," § 6.

FORFEITURES.

For failure to properly stamp goods, see "Internal Revenue."
Of bail, see "Bail," § 1.
Of insurance, see "Insurance," § 2.

FORGERY.

Forgery of an affidavit by a pensioner, to be used to contest his deserted wife's claim for one-half of his pension under Act Cong. March 3, 1899, c. 460, § 1, 30 Stat. 1379 [U. S. Comp. St. 1901, p. 3288], *held* not to constitute an offense within Rev. St. U. S. § 5421 [U. S. Comp. St. 1901, p. 3667].—United States v. Swan (D. C.) 140.

FORMER ADJUDICATION.

See "Judgment," § 2.

FRANCHISES.

Of street railroad company, see "Street Railroads," § 1.
Of water companies, see "Waters and Water Courses," § 1.

FRAUD.

See "Fraudulent Conveyances."
Claim to public land, see "Public Lands," § 1.
Inducing stock subscription, see "Corporations," § 1.
Jurisdiction of Postmaster General to issue fraud order, see "United States," § 1.

§ 1. Deception constituting fraud, and liability therefor.

A letter written by a trustee under a deed of trust to a pledgee of bonds secured thereby *held* to contain an implied representation that valid bonds were held by the trustee for the pledgee's benefit, for the falsity of which the pledgee was entitled to maintain an action against the trustee for deceit.—Sprigg v. Commonwealth Title Ins. & Trust Co. (C. C. A.) 5.

FRAUDS, STATUTE OF.

§ 1. Operation and effect of statute.

A contract for the sale or conveyance by a landowner of right of way to a railroad company, although in parol and executory, is good as against another company which subsequently institutes proceedings for condemnation of the same land, with notice that such an agreement had been made; such company not being an innocent purchaser protected by the statute of frauds.—Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (C. C. A.) 657.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 4.

§ 1. Transfers and transactions invalid.

A contract by which a bankrupt commission firm, some years before its bankruptcy, agreed to do all its business through another firm, obtaining the benefit of the latter's credit, *held* not invalid as a scheme to hinder, delay, or defraud its creditors.—Ryttenberg v. Schefer (D. C.) 313.

An agreement by which a buyer of carriages agreed to hold certain of them in trust for the seller *held* void as against the buyer's creditors and purchasers without notice for failure to comply with Code Iowa 1897, § 2906.—In re Tweed (D C.) 355.

§ 2. Remedies of creditors and purchasers.

A simple contract creditor *held* not entitled to maintain a bill in equity in the federal circuit court to set aside a fraudulent conveyance of his debtor's property and have the same administered through a receiver.—Viquesney v. Allen (C. C. A.) 21.

GIFTS.

Transfer taxes, see "Taxation," § 4.

GOOD FAITH.

Of purchaser, see "Vendor and Purchaser," § 1.

GOOD WILL.

Construction of contract for sale of, see "Contracts," § 2.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

HABEAS CORPUS.

Failure to give full faith and credit to decree of foreign state as to custody of child as ground for habeas corpus from federal court, see "Courts," § 1.

§ 1. Nature and grounds of remedy.

A newspaper publisher, having been imprisoned for contempt on a void judgment of a federal court, *held* entitled to a discharge on habeas corpus.—Cuyler v. Atlantic & N. C. R. Co. (C. C.) 95; In re Daniels, Id.

Neither Rev. St. tit. 13, c. 13, §§ 751–766 [U. S. Comp. St. 1901, pp. 592–597] nor the general law defining the jurisdiction of federal circuit courts, authorizes such court to issue a writ of habeas corpus to determine a controversy, between persons who are residents of different states, as to the right of custody of their infant child, who was neither restrained of her liberty nor imprisoned.—Clifford v. Williams (C. C.) 100.

HIGHWAYS.

Accidents at railroad crossings, see "Railroads," § 3.

HOMESTEAD.

Internal revenue tax on acknowledgment attached to declaration of, see "Internal Revenue."

HUSBAND AND WIFE.

See "Dower."

Loan by wife to husband as debt provable against his estate in bankruptcy, see "Bankruptcy," § 7.

Validity of transfers between as against rights of trustee in bankruptcy, see "Bankruptcy," § 4.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 1.

IMPLIED CONTRACTS.

See "Account Stated."

IMPORTS.

Duties, see "Customs Duties."

IMPRISONMENT.

See "Bail."

Habeas corpus, see "Habeas Corpus."

INDEMNITY.

See "Principal and Surety."

INDIANS.

The President of the United States *held* entitled to reserve public unoccupied lands for an Indian reservation by proclamation, notwithstanding Rev. St. § 2319 [U. S. Comp. St. 1901, p. 1424].—Gibson v. Anderson (C. C. A.) 39.

Act Cong. June 28, 1898, c. 517, § 13, 30 Stat. 498, and statutes of Chickasaw Nation passed in 1886 (Laws Chickasaw Nation, p. 188), as amended September 24, 1887 (Laws Chickasaw Nation, p. 190), *held* to impliedly authorize the leasing of coal lands, allotted to Indians, to white persons for a limited period for the benefit of the Indians.—McBride v. Farrington (C. C.) 797.

INDICTMENT AND INFORMATION.

Examination of indictment in proceedings for removal of prisoner to other district for trial, see "Criminal Law," § 2.

For particular offenses.

See "Conspiracy," § 1.

Bribery by United States officers, see "United States," § 1.

Offenses against naturalization laws, see "Aliens," § 1.

§ 1. Motion to quash or dismiss, and demurrer.

On a motion to quash an indictment the court will consider only such propositions as raise clear points of law.—United States v. Grunberg (C. C.) 137.

INFRINGEMENT.

Costs on dismissal of bill for lack of jurisdiction, see "Costs," § 1.

Of copyright, see "Copyrights," § 1.

Of patent, see "Patents," § 6.

Of trade-mark, see "Trade-Marks and Trade-Names," § 3.

INHERITANCE TAX.

See "Taxation," § 4.

INJUNCTION.

Ancillary jurisdiction of federal courts, see "Courts," § 1.
Appealability of orders relating to, see "Appeal and Error," § 2.
Jurisdiction of court of bankruptcy to restrain action in state court relating to property of bankrupt estate, see "Bankruptcy," § 6.

Restraining particular acts or proceedings.

Infringement of copyright, see "Copyrights," § 1.
Infringement of patent, see "Patents," § 5.
Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 2.
Maintenance of water system by city, see "Waters and Water Courses," § 1.
Obstruction of access to street railroad, see "Street Railroads," § 1.
Unfair competition, see "Trade-Marks and Trade-Names," § 3.

§ 1. Nature and grounds in general.

A court of equity has jurisdiction of a suit by numerous property owners on a street to enjoin the laying of a street railroad track thereon under a void ordinance purporting to grant a franchise therefor, on the ground of preventing a multiplicity of suits and because there is no adequate remedy at law.—Holst v. Savannah Electric Co. (C. C.) 931.

§ 2. Subjects of protection and relief.

Equity has jurisdiction of an action to enforce a contract by which the sellers of a business agreed not to again engage in the same for a definite time, etc., to prevent a multiplicity of suits at law, and because of the difficulty of estimating damages.—Davis v. A. Booth & Co. (C. C. A.) 31.

INNKEEPERS.

Liability for injuries inflicted by servants on guests, see "Master and Servant," § 2.

Innkeepers are not insurers of the safety of their guests, but the limit of their liability is the exercise of reasonable care for their safety and comfort.—Clancy v. Barker (C. C. A.) 161.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Bankruptcy."

INSTRUCTIONS.

In civil actions, see "Trial," § 2.

INSURANCE.

Rights of trustee in bankruptcy as to insurance in favor of bankrupt, see "Bankruptcy," § 3.
Right of trustee in bankruptcy to pay premiums so as to mature policy payable to bankrupt, see "Bankruptcy," § 5.

§ 1. The contract in general.

Where insurer did not give notice of its election to terminate a provisional policy and not to issue a permanent policy until after the time for which the provisional policy was issued had expired, insured *held* entitled to assume that the permanent policy had been issued, and was insured at the time of his death, shortly after the expiration of such period.—Keen v. Mutual Life Ins. Co. of New York (C. C.) 559.

§ 2. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

A sale of damaged property after proof of loss had been furnished, but before such proof had been received by insurers, over the latter's protest, *held* a violation of the conditions of the policy, precluding a recovery thereon.—Astrich v. German-American Ins. Co. (C. C. A.) 13.

§ 3. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

The making and compliance with a request by an adjuster, acting for several insurance companies, that insured furnish proofs of loss as to furniture and fixtures, *held* not to waive a forfeiture, incurred with reference to insurance on insured's merchandise, by a company whose policy covered merchandise only.—Astrich v. German-American Ins. Co. (C. C. A.) 13.

§ 4. Actions on policies.

An affidavit of defense to a suit on a life insurance policy, relying on false representations in the application and certain letters, *held* insufficient for failure to attach copies of such letters and application to the affidavit.—Keen v. Mutual Life Ins. Co. of New York (C. C.) 559.

§ 5. Mutual benefit insurance.

Where a mutual benefit association without legal authority adopted a by-law reducing the amount payable on its contracts of insurance, and proceeded to levy assessments on the new basis, a member who had complied with his contract and had not consented to the reduction was entitled to treat the contract as rescinded and to recover the amount paid.—McAlarney v. Supreme Council A. L. H. (C. C.) 538.

Where a mutual benefit association broke its insurance contract with plaintiff, the fact that it lost members by death and gained others, who joined without knowledge of plaintiff's claim, during the interim between the breach and plaintiff's election to rescind, did not preclude plaintiff from recovering on the ground of laches.—McAlarney v. Supreme Council A. L. H. (C. C.) 538.

INTEREST.

See "Usury."

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

INTERNAL REVENUE.

Admissibility of unstamped instruments in federal courts as affected by decisions of state courts, see "Courts," § 3.
Best and secondary evidence in action to recover revenue tax, see "Evidence," § 1.

Under Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], the repeal of War Revenue Act June 13, 1898, c. 448, § 13, 30 Stat. 454 [U. S. Comp. St. 1901, p. 2295], as amended by Act March 2, 1901, c. 806, § 7, 31 Stat. 941 [U. S. Comp. St. 1901, p. 2294], and by Act April 12, 1902, c. 500, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 276], *held* not to authorize the subsequent admission in evidence of an instrument containing an unstamped notarial acknowledgment subject to the tax.—Sackett v. McCaffrey (C. C. A.) 219.

War Revenue Act June 13, 1898, c. 448, § 14, 30 Stat. 455 [U. S. Comp. St. 1901, p. 2296], taxing certificates of acknowledgment affixed to homestead declarations, *held* not objectionable on the ground that the notary in executing such acknowledgment was exercising a function of the state government.—Sackett v. McCaffrey (C. C. A.) 219.

The acknowledgment attached to a declaration of homestead *held* subject to tax under War Revenue Act June 13, 1898, c. 448, § 13, 30 Stat. 454 [U. S. Comp. St. 1901, p. 2294].—Sackett v. McCaffrey (C. C. A.) 219.

In a proceeding to forfeit certain liquors for failure to properly stamp the same, the fact that the stamps indicated that the barrels contained more liquor than was actually placed therein *held* no defense.—United States v. Seven Barrels of Whisky (D. C.) 806.

The penalty prescribed by Rev. St. § 3323, as amended by Act July 16, 1892, c. 196, 27 Stat. 200 [U. S. Comp. St. 1901, p. 2167], for failure of a wholesale liquor dealer or rectifier to properly stamp liquors in his possession, *held* not exclusive, so as to prevent the United States from forfeiting liquors not properly stamped, under section 3289 [U. S. Comp. St. 1901, p. 2132].—United States v. Seven Barrels of Whisky (D. C.) 806.

Marks and stamps prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, under Rev. St. § 3323, as amended by Act Cong. July 16, 1892, c. 196, 27 Stat. 200 [U. S. Comp. St. 1901, p. 2167], *held* marks and stamps required therefor by law, within section 3289 [U. S. Comp. St. 1901, p. 2132], providing for the forfeiture of liquors not properly stamped.—United States v. Seven Barrels of Whisky (D. C.) 806.

INTERNATIONAL LAW.

See "Aliens."

INTOXICATING LIQUORS.

Forfeiture for violation of internal revenue laws, see "Internal Revenue."

INVENTION.

See "Patents."

IRRIGATION.

See "Waters and Water Courses," § 1.

JOINT ADVENTURES.

In a suit for an accounting of the profits of a joint adventure, evidence reviewed, and *held* to justify a finding that the parties had agreed to prosecute the same in partnership and share equally the profits and losses.—Van Tine v. Hilands (C. C.) 124.

JUDGES.

See "Courts."

JUDGMENT.

Conclusiveness against surety of judgment against principal, see "Principal and Surety," § 2.
Failure to give full faith and credit to decree of foreign state as ground of jurisdiction of federal court, see "Courts," § 1.
On appeal or writ of error, see "Appeal and Error," § 6.
Review, see "Appeal and Error."
State laws as rules of decision in federal courts as to collateral attack on judgment, see "Courts," § 3.

§ 1. Collateral attack.

The jurisdiction of a court to render a judgment is always subject to collateral attack and inquiry in a court of another sovereignty in which such judgment is relied on; and in such respect federal and state courts are foreign to each other, although sitting within the same state.—Phœnix Bridge Co. v. Castleberry (C. C. A.) 175.

§ 2. Conclusiveness of adjudication.

Where complainants' rights in the property of a street railway company were acquired after a foreclosure decree had been entered, but before sale of the property, and they were not parties to the foreclosure suit, they were not bound by the decree.—Thompson v. Schenectady Ry. Co. (C. C. A.) 577.

JURISDICTION.

Collateral attack on, see "Judgment," § 1.

Jurisdiction of particular actions or proceedings.

See "Injunction," § 1.
Against receiver, see "Receivers," § 1.
By or against trustee in bankruptcy, see "Bankruptcy," § 6.
For causing death, see "Death," § 1.
For infringement of patent, see "Patents," § 6.
For infringement of trade-marks or trade-names, see "Trade-Marks and Trade-Names," § 3.

Special jurisdictions.

Appellate jurisdiction, see "Appeal and Error," § 1.
Particular courts, see "Courts."

JURY.

Instructions in civil actions, see "Trial," § 2.
Jury trial in bankruptcy proceedings, see "Bankruptcy," § 1.
Questions for jury in civil actions, see "Trial," § 1.

LACHES.

Affecting right to enforce maritime lien, see "Maritime Liens," § 2.
Effect in equity, see "Equity," § 2.
In claiming rescission of insurance contract, see "Insurance," § 5.

LANDLORD AND TENANT.

Discharge of surety on lease, see "Principal and Surety," § 1.
Jurisdiction of circuit court of action to enforce rights under expired lease, see "Courts," § 1.
Leases of lands allotted to Indians, see "Indians."
Mining leases, see "Mines and Minerals," § 2.

LANDS.

See "Public Lands."
Indian lands, see "Indians."

LARCENY.

See "Embezzlement."

LEASES.

Discharge of surety, see "Principal and Surety," § 1.
Jurisdiction of circuit court of action involving rights under, see "Courts," § 1.
Mining leases, see "Mines and Minerals," § 2.
Of lands allotted to Indians, see "Indians."

LEGACIES.

See "Wills."

LEGACY TAX.

See "Taxation," § 4.

LETTERS PATENT.

For inventions, see "Patents."
For public lands, see "Mines and Minerals," § 1.

LIBEL AND SLANDER.

§ 1. Actions.

A declaration in libel, based on a mercantile report, *held* to state a cause of action for actual damages; express malice being alleged.—Mower-Hobart Co. v. R. G. Dun & Co. (C. C.) 812.

LICENSES.

For mining, see "Mines and Minerals," § 2.

LIENS.

Application of property of bankrupt estate to payment of, see "Bankruptcy," § 5.
Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

Particular classes of liens.

See "Maritime Liens."
Factor's lien, see "Factors."
Tax liens, see "Taxation," § 2.

LIFE ESTATES.

See "Dower."

LIFE INSURANCE.

See "Insurance."

LIMITATION.

Of claim of patent, see "Patents," § 5.

LIMITATION OF ACTIONS.

Laches, see "Equity," § 2.

§ 1. Computation of period of limitation.

An amendment to a petition which introduces a new cause of action or makes a new demand does not relate back to the beginning of the action, so as to stop the running of limitations.—Patillo v. Allen-West Commission Co. (C. C. A.) 680.

An amendment to a petition which sets up no new cause of action relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that time.—Patillo v. Allen-West Commission Co. (C. C. A.) 680.

Amendment to complaint *held* to present no new cause of action and to relate back to the commencement of the action, when the running of limitations against the cause of action ceased.—Patillo v. Allen-West Commission Co. (C. C. A.) 680.

LIMITATION OF LIABILITY.

Of owner of vessel, see "Shipping," §§ 4, 7.

LITERARY PROPERTY.

See "Copyrights."

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

LODE MINING CLAIMS.

See "Mines and Minerals," § 1.

LOOKOUT.

On vessel, see "Collision," § 6.

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 1.

MALICE.

As element of libel, see "Libel and Slander," § 1.

MANDAMUS.

Ancillary jurisdiction of federal courts, see "Courts," § 1.
Appealability of orders in mandamus proceedings, see "Appeal and Error," § 2.
To compel payment of bonds by irrigation district, see "Waters and Water Courses," § 1.

§ 1. Subjects and purposes of relief.

Where a receiver of a bankrupt publishing house was authorized to continue a publication, mandamus would not be granted to reverse a post-office order refusing the publication access to the mails.—In re Coleman (D. C.) 151.

§ 2. Jurisdiction, proceedings, and relief.

A sheriff, whose duty it was under the statute to collect a tax levied for the payment of county bonds, *held* properly joined in proceedings for a writ of mandamus to compel the levy and collection of a tax to pay a judgment recovered on such bonds.—Guthrie v. Sparks (C. C. A.) 443.

MANDATE.

See "Mandamus."

MARITIME LIENS.

§ 1. Nature, grounds, and subject-matter in general.

Under a state statute giving a lien on a vessel for supplies furnished for her use on the order of a master, owner, or part owner, to entitle a claimant to a lien for supplies furnished an owner in the home port, it must affirmatively appear that they were for the use of the vessel.—The Gordon Campbell (D. C.) 963.

§ 2. Creation, operation, and effect.

A libelant who had a maritime lien on a vessel *held* to be estopped to enforce the same as against a purchaser of the vessel under the judgment of a state court in a suit in which libelant participated and asserted his right to the proceeds after the sale was made and confirmed with his assent.—Northwestern Commercial Co. v. Bartels (C. C. A.) 25.

It seems that, under the admiralty law applicable to the enforcement of liens, the holder of a maritime lien who participates in a proceeding in a state court which results in a sale of the vessel at his instance loses his lien, if not by estoppel, at least by laches.—Northwestern Commercial Co. v. Bartels (C. C. A.) 25.

§ 3. Enforcement.

Where a court of admiralty has in its registry for distribution a fund arising from the sale of a vessel, the holder of a mortgage thereon, recorded as required by Rev. St. §§ 4192, 4193 [U. S. Comp. St. 1901, p. 2837], may prove the same against such fund, although it does not constitute a maritime lien enforceable against the vessel in such court.—The Gordon Campbell (D. C.) 963.

MASTER AND SERVANT.

See "Seamen."
Excessive damages for injuries to servant, see "Damages," § 3.
Jurisdiction of federal courts of actions for wrongful death by servant, see "Courts," §§ 1–3.
Measure of damages for injuries to servant, see "Damages," § 2.
Removal to federal court of action for personal injuries to servant, see "Removal of Causes," § 2.
Servants on vessels, see "Shipping," § 3.

§ 1. Master's liability for injuries to servant.

A bridge company *held* under the evidence not liable for the death of a workman who was killed by the giving way of a wooden frame which had been constructed by the workmen under charge of a foreman to temporarily support a steel girder while being placed in position.—Phœnix Bridge Co. v. Castleberry (C. C. A.) 175.

The rule stated as to the duty of a master in respect to appliances or tools furnished by him, as distinguished from the case where he furnishes the materials with which the workmen themselves are to construct appliances or instrumentalities for use as incidental to the main work.—Phœnix Bridge Co. v. Castleberry (C. C. A.) 175.

The rule as to the duty of a master to provide a safe place to work *held* not applicable where servant is injured by defects in or insufficiency of a temporary scaffolding for supporting heavy materials.—Phœnix Bridge Co. v. Castleberry (C. C. A.) 175.

A master of a vessel *held* guilty of negligence in permitting a cable topping lift, which had been exposed to the weather for several voyages, to be used without more than external inspection.—The King Gruffydd (C. C. A.) 189.

A fellow servant of a stevedore injured by the breaking of a cable topping lift *held* not guilty

of negligence in selecting the same instead of using a "chain span," intended for heavy loads. —The King Gruffydd (C. C. A.) 189.

In an action for injuries to the servant of a contractor, evidence *held* insufficient to justify submission of the case to the jury on the theory that defendant, by the exercise of care, could have avoided the injury after discovering plaintiff's peril.—Richmond Locomotive Works v. Ramsey (C. C. A.) 197.

Master *held* not liable for injuries to a servant by his being struck by certain planks which fell from a temporary partition in charge of the workmen themselves, and used to separate broken stone and sand used in the work.—Galow v. Chicago, M. & St. P. Ry. Co. (C. C. A.) 242.

Evidence in an action by an engineer against a railroad to recover for injuries caused by a washout in the roadbed reviewed, and *held*, that neither the absence of negligence of the sectionmen and telegraph operator, nor the contributory negligence of the plaintiff, was so clear that it was the duty of the court to direct a verdict for defendant.—Chicago Great Western Ry. Co. v. Roddy (C. C. A.) 712.

A master *held* not liable for an injury to a servant through the falling of a guy line rigged to a derrick by fellow servants for their own convenience and without the master's orders.—Maxfield v. Graveson (C. C. A.) 841.

The fact that an employé was not present at the time a change was made in an appliance by his fellow servants without the master's knowledge, by reason of which he was subsequently injured, does not render the master liable for the injury.—Maxfield v. Graveson (C. C. A.) 841.

In an action for injuries to a telephone lineman by the falling of a pole, whether his employer was guilty of negligence in failing to warn him to inspect the pole, and as to the manner of such inspection, before attempting to ascend the pole, *held* for the jury.—Britton v. Central Union Telephone Co. (C. C. A.) 844.

A telephone lineman *held* to assume the risk incident to climbing poles, after making such examination and tests of their safety as his experience and judgment indicated were necessary. —Britton v. Central Union Telephone Co. (C. C. A.) 844.

A telephone pole on which a servant was at work removing wires *held* a mere appliance, and not a place which his master was required to make safe for his benefit.—Britton v. Central Union Telephone Co. (C. C. A.) 844.

A ship *held* liable for injuries to a longshoreman in the employ of the head stevedore caused by the negligence of the vessel's watchman in failing to properly light the hold.—The Santiago (D. C.) 383.

A sailor in charge of a winch on a vessel *held* not a fellow servant of an employé of the stevedore engaged in unloading the vessel.—The Elton (D. C.) 562.

A steamer *held* liable for the injury of a seaman by reason of the giving way of a capstan, to which a hawser was made fast by order of the master while the vessel was being warped to a wharf, and which was wholly unfit to stand the strain put upon it, as the master knew.—The Westport (D. C.) 815.

§ 2. Liabilities for injuries to third persons.

Innkeeper *held* not liable under the circumstances for injuries inflicted on a guest by a servant.—Clancy v. Barker (C. C. A.) 161.

Innkeepers do not contract to insure the safety of their guests against injuries inflicted upon them by the willful acts of their servants beyond the scope of their employment.—Clancy v. Barker (C. C. A.) 161.

A master and servant are not jointly liable for the injury of a third person, unless there was actual negligence, as distinguished from imputed negligence, on the part of the master, concurring with an act negligently committed by the servant.—McIntyre v. Southern Ry. Co. (C. C.) 985.

Where a negligent person is placed by a master in a position requiring care and caution, such person is incompetent, rendering the master liable.—The Elton (D. C.) 562.

MAXIMS.

Of equity, see "Equity," § 1.

MEASURE OF DAMAGES.

See "Damages," § 2.

MINES AND MINERALS.

Leases of coal lands allotted to Indians, see "Indians."

§ 1. Public mineral lands.

Joint resolutions of Congress of May 27, 1902 (32 Stat. pt. 1, 742, 744), suspending the act of Congress of the same date opening Spokane Indian Reservation to mineral entry, *held* to suspend the right of an entryman to make a mineral location under such act.—Gibson v. Anderson (C. C. A.) 39.

Where the apex of a vein crosses what were originally intended as the side lines of a lode claim, and they are parallel, they become by operation of law the end lines.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

The fact that the locator of a lode claim failed to record the notice of location within 15 days, as required by the Idaho statute, did not invalidate the location nor affect his extralateral rights as against another claim located within the 15 days by one who had knowledge of the prior location.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

The fact that a vein or lode is of such width on the surface as to extend beyond the side line of a claim located thereon does not affect the extralateral rights of such claim as against a junior location.—Last Chance Min. Co. v. Bun-

ker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

The ownership and possession of the surface of a lode mining claim carries with it the ownership and possession of the lode which has its apex therein to the full extent of the extralateral right given by the statute to the owner of the claim.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

The right given by the location of a lode mining claim in that portion of the vein lying within its surface boundaries and that portion lying beyond them in which the statute gives the owner extralateral rights is integral, and no adverse right can be acquired by the locator of another claim in respect to the latter portion that could not in respect to the former.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

Where the end lines of a lode claim cross the surface outcropping of a vein, they determine the extralateral right of the claim, without regard to the angle at which they cross the general course of the vein; its course for that purpose being fixed by the course of the apex on the surface of the claim.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

A bill filed by the owner of a lode mining claim to establish extralateral rights and quiet its title need not allege the general course of the vein beyond the limits of the claim.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

The issuance of a patent for a mining claim is conclusive evidence of the sufficiency of the steps taken by the locator as against one claiming adverse rights.—Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 579.

An amended location of a lode mining claim *held* not to have operated as a total abandonment of rights under the original location in respect to extralateral rights.—Empire State Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 591.

The locator of a lode mining claim has the legal right to lay an end line of his claim on the surface of a prior claim, in the absence of objection by the owner, and as against the government and subsequent locators such location carries precisely the same rights, both surface and extralateral, as it would if all its lines were laid on unappropriated ground.—Empire State Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 591.

Where the apex of a vein is of such width as to extend beyond the side line of a claim onto a junior claim, the extralateral rights therein belong to the senior claim within its extended end line planes.—Empire State Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 591.

An agreement between the owners of two overlapping lode mining claims as to the boundary between them *held* not to affect the extralateral rights of one as against junior locators not in privity.—Empire State Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (C. C. A.) 591.

Where locators of a mining claim mistook the direction of the vein and laid out their claim crosswise instead of lengthwise thereof, their original side lines became the legal end lines, and vice versa, for the purpose of determining their extralateral rights.—Empire Mill. & Min. Co. v. Tombstone Mill & Min. Co. (C. C.) 339.

§ 2. Title, conveyances, and contracts.

A mining lease *held* to require the grantee to make a bona fide search for all minerals named in the lease which might reasonably be expected to be found sufficient to determine their presence or absence and their commercial value.—Tennessee Oil, Gas & Mineral Co. v. Brown (C. C. A.) 696.

Failure of a grantee in a mining lease to make a bona fide search for minerals for 15 years after the execution of the lease *held* to entitle the lessor to treat the lease as abandoned.—Tennessee Oil, Gas & Mineral Co. v. Brown (C. C. A.) 696.

Where a mining lease was terminable at the election of the grantee, it was also terminable at the will of the grantor.—Tennessee Oil, Gas & Mineral Co. v. Brown (C. C. A.) 696.

A contract between a landowner and plaintiff's assignor construed, and *held* not a conveyance of the fee in minerals and timber on the land described, but a mining lease, requiring the grantee to search for ores within a reasonable time.—Tennessee Oil, Gas & Mineral Co. v. Brown (C. C. A.) 696.

Plaintiff, having taken the ground that defendant was a naked trespasser in removing certain ore from plaintiff's mining claim, *held* not entitled to urge that defendant was estopped to claim the right to remove such ore under a contract between the parties.—Empire Mill. & Min. Co. v. Tombstone Mill & Min. Co. (C. C.) 339.

§ 3. Operation of mines, quarries, and wells.

Plaintiff *held* entitled to recover money paid to defendant to develop plaintiff's mine, which defendant had wrongfully used in developing its own mine.—Empire Mill. & Min. Co. v. Tombstone Mill & Min. Co. (C. C.) 339.

MISREPRESENTATION.

See "Fraud."

Inducing subscription to corporate stock, see "Corporations," § 1.

MONEY PAID.

On insurance contract, right to recover on change of contract by benefit association, see "Insurance," § 5.

MONOPOLIES.

Validity of agreements in restraint of trade in general, see "Contracts," § 1.

§ 1. Trusts and other combinations in restraint of trade.

In determining whether or not a combination is in violation of the federal anti-trust law, as in restraint of interstate commerce, *held* immaterial that such is not its ultimate purpose; the true inquiry being whether it tends directly and to an appreciable extent to restrain interstate trade.—Ellis v. Inman, Poulsen & Co. (C. C. A.) 182.

The allegations of a complaint *held* to state a cause of action for the recovery of damages resulting from the violation by defendants of the federal anti-trust law by entering into a combination with the purpose and effect of restraining interstate commerce.—Ellis v. Inman, Poulsen & Co. (C. C. A.) 182.

MORTGAGES.

Claim against fund in court of admiralty arising from sale of vessel mortgaged, see "Maritime Liens," § 3.
Conclusiveness of judgment in foreclosure suit, see "Judgment," § 2.
Conflicting and concurrent jurisdiction of courts as to actions involving mortgage, see "Courts," § 4.
Jurisdiction in general of action against receiver in foreclosure proceedings, see "Receivers," § 1.
Lien on property of bankrupt estate, see "Bankruptcy," § 5.

Mortgages by or to particular classes of parties.

See "Corporations," § 4.
Devisees or legatees, see "Wills," § 1.
Of personal property, see "Chattel Mortgages."
Water companies, see "Waters and Water Courses," § 1.

§ 1. Recording and registration.

That a mortgage covering both personal and real estate was not recorded does not invalidate it as between the parties under the law of New York.—Ward v. Ward (C. C.) 946.

§ 2. Construction and operation.

A mortgage on the plant of a glass factory construed, and *held* not to cover after-acquired merchandise for sale in the ordinary course of business.—Mallory v. Maryland Glass Co. (C. C.) 111.

§ 3. Foreclosure by action.

Under the law of New York, the failure to procure an order confirming a referee's report of sale in a foreclosure suit does not invalidate the purchaser's title, where he has paid the consideration and received a deed from the referee.—Ward v. Ward (C. C.) 946.

MOTIONS.

In admiralty, see "Admiralty," § 2.
New trial in criminal prosecutions, see "Criminal Law," § 4.
Quashing indictment or information, see "Indictment and Information," § 1.

MULTIFARIOUSNESS.

In pleading in equity, see "Equity," § 3.
In pleading in patent infringement suit, see "Patents," § 6.

MUNICIPAL CORPORATIONS.

See "Counties."
Federal jurisdiction of proceedings under invalid ordinance on ground of denial of due process of law, see "Courts," § 1.
Irrigation districts, see "Waters and Water Courses," § 1.
Regulation of railroads, see "Railroads," § 3.
Street railroads, see "Street Railroads."
Water supply, see "Waters and Water Courses," § 1.

§ 1. Proceedings of council or other governing body.

A city ordinance is not admissible in evidence to establish a defendant's negligence in the running of a railroad train, unless pleaded.—Garlich v. Northern Pac. Ry. Co. (C. C. A.) 837.

§ 2. Fiscal management, public debt, securities, and taxation.

Const. S. D. art. 13, § 4, as amended in 1902, authorizes counties, cities, etc., to incur an indebtedness for the purpose of procuring a water supply to the extent only of 10 per cent. of its assessable property, in addition to the 5 per cent. to which its indebtedness for general purposes is limited, and a city already indebted to 15 per cent. of its assessed valuation has no power to construct waterworks by an issue of bonds.—Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 890.

Sess. Laws S. D. 1899, p. 62, c. 53, §§ 1, 2, which give cities the power, on a vote of the electors, to issue bonds "for the purpose of constructing, equipping, maintaining, and operating or purchasing a system of waterworks," do not authorize the submission of an alternative proposition to issue bonds for the purpose of "constructing * * * or purchasing" a system of waterworks; and an election in which the question voted on is stated in such form is void and confers no authority.—Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 890.

A city in South Dakota has no power to construct waterworks by an issue of bonds, under Const. art. 13, § 4, as amended in 1902, upon a vote taken at an election held prior to such amendment.—Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 890.

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 5.

MUTUALITY.

Of contract as affecting right to specific performance, see "Specific Performance," § 2.

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 2.

NATURALIZATION.

See "Aliens," § 1.

NAVIGABLE WATERS.

See "Waters and Water Courses"; "Wharves."

NAVIGATION.

Rules for preventing collisions, see "Collision," § 1.

NEGLIGENCE.

Causing death, see "Death."
Causing loss of or injury to goods shipped, see "Shipping," §§ 2, 4.
City ordinances as evidence of, see "Municipal Corporations," § 1.

By particular classes of parties.

See "Innkeepers."
Employers, see "Master and Servant," § 1.
Master of vessel toward injured seaman, see "Seamen."
Master or crew of vessel, see "Shipping," § 3.
Railroad companies, see "Railroads," § 3.
Vessel owner, see "Shipping," § 4.

Condition or use of particular species of property, works, or machinery.

See "Railroads," § 3; "Wharves."
Tug, see "Towage."
Vessel and appliances, see "Shipping," § 3.

Contributory negligence.

Of person injured by operation of railroad, see "Railroads," § 3.

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in criminal prosecution, see "Criminal Law," § 4.

NEWSPAPERS.

Publication of articles reflecting on court as contempt, see "Contempt," § 1.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 4.
Pendency of motion for as affecting finality of judgment for purpose of review, see "Appeal and Error," § 2.

NOTARIES.

Nature of act of taking acknowledgment, see "Acknowledgment," § 1.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 1.

OFFICERS.

Embezzlement, see "Embezzlement."
Mandamus, see "Mandamus," § 2.

Particular classes of officers.

See "Receivers."
Bank officers, see "Banks and Banking," § 1.
Corporate officers, see "Corporations," § 3.
United States officers, see "United States," § 1.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 3.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," § 1.
Violation of speed ordinances by railroads as negligence, see "Railroads," § 3.

PARENT AND CHILD.

Failure to give full faith and credit to decree of foreign state as to custody of child as ground for habeas corpus from federal court, see "Courts," § 1.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 2.

PARTIES.

Character ground of jurisdiction, see "Courts," § 1.
Death ground for abatement, see "Abatement and Revival," § 1.
Joint interest, see "Joint Adventures."
Persons concluded by judgment, see "Judgment," § 2.
To mandamus proceedings, see "Mandamus," § 2.
To patent infringement suit, see "Patents," § 6.

PARTNERSHIP.

See "Joint Adventures."
Proof of partnership and individual debts in bankruptcy, see "Bankruptcy," § 7.
Rights of trustee in bankruptcy as to partnership property, see "Bankruptcy," § 3.

§ 1. The relation.

Evidence considered, and *held* to establish a partnership relation between bankrupts, so that on the bankruptcy the capital employed in the

business, although all contributed by one partner, became assets of the firm and not of the individual estate of such partner, and the debts incurred in the business firm debts.—Buckingham v. First Nat. Bank (C. C. A.) 192.

PASSENGERS.

Carriage of by vessels, see "Shipping," § 5.

PATENTS.

See "Trade-Marks and Trade-Names," § 1.
For public lands, see "Mines and Minerals," § 1; "Public Lands."
Validity of contract to furnish machinery infringing patent, see "Contracts," § 1.

§ 1. Subjects of patents.

A design patent cannot be made to cover a mechanical function or construction.—Weisgerber v. Clowney (C. C.) 477.

A process claim in a patent, which is for nothing more than the operative effect or function of a mechanical device described in another claim, is invalid.—Cleveland Foundry Co. v. Detroit Vapor Stove Co. (C. C.) 740.

§ 2. Patentability.

A patentee cannot be denied invention because of a prior patent for a device which never came into use, unless the idea upon which his patent is predicated is so clearly set forth or suggested in the alleged anticipating patent that a mechanic with such patent before him could by the exercise of mere mechanical skill so modify proportions, or change the mode of operation, as to overcome the difficulties which excluded the prior device from commercial utility.—Ideal Stopper Co. v. Crown Cork & Seal Co. (C. C. A.) 244.

In determining the question of identity of the inventive idea involved in two patents, it is not a sufficient answer to say of an alleged anticipation that it was a mere paper patent, and that the device had never been operative or commercially successful, because prior existing conditions may not have stimulated full development.—Ideal Stopper Co. v. Crown Cork & Seal Co. (C. C. A.) 244.

A patent for an improvement or machine which does not accomplish the purpose of its conception, and is impracticable, does not anticipate a later patent for a similar device, which is operative and successful, unless the defects of the prior device are such as could be remedied by a mechanic of ordinary skill.—Timolat v. Philadelphia Pneumatic Tool Co. (C. C.) 257.

A defendant has the burden to establish an alleged prior use to defeat a patent by proofs clear, satisfactory, and beyond reasonable doubt.—Timolat v. Philadelphia Pneumatic Tool Co. (C. C.) 257.

Oral testimony of prior invention and use, not only unsupported by any writing or exhibit, but also contradicted upon a question of priority of date, and which at best shows only an unsuccessful and abandoned experiment, is insufficient to defeat a patent.—Arrott v. Standard Sanitary Mfg. Co. (C. C.) 457; Standard Sanitary Mfg. Co. v. Arrott, Id.

An improvement in a mechanical process, which results in increased rapidity of manufacture and consequent cheapening in cost of the article, does not for that reason alone disclose invention, where the steps in the process remain the same; the only difference being in the relative extent to which certain of such steps are carried.—Kahn v. Starrells (C. C.) 464.

The Kahn patent, No. 669,011, for a process of making flat knit caps, and the product as an article of manufacture, construed, and *held* void for lack of novelty and patentable invention; also not infringed, if conceded validity.—Kahn v. Starrells (C. C.) 464.

Anticipation is not avoided because the anticipating structure, while mechanically the same, is not as efficient as that of the patent, owing to the use in the latter of different and better materials, which are not, however, claimed as a feature of the invention.—Daniel v. Restein & Co. (C. C.) 469.

The Miller patent, No. 524,178, for a packing, *held* void for anticipation.—Daniel v. Restein & Co. (C. C.) 469.

To constitute an anticipation by an unpatented device it is not necessary that it should have come into general use, but it is sufficient if it was in actual and practical use by a number of persons.—Daniel v. Restein & Co. (C. C.) 469.

Under the rule that the defense of prior use must be established beyond a reasonable doubt, it will not be sustained when it rests upon the recollection of a single witness, especially when his knowledge depends in large part on information received from others who are not called.—Albright v. Langfeld (C. C.) 473.

A patent for an improvement which, although simple, overcomes objections long known, and which others have attempted to overcome without complete success, and which has gone into immediate use, will as a rule be sustained as disclosing invention.—Albright v. Langfeld (C. C.) 473.

The Weisgerber design patent, No. 35,043, for a design for a rolling chair, *held* not infringed.—Weisgerber v. Clowney (C. C.) 477.

A patent for an improvement in chairs having an adjustable back, and one for a similar device as an improvement in articles of furniture having a swinging member, are in the same art; only mechanical skill being required to adapt the device to the different articles.—S. A. Cook & Co. v. Heywood Bros. & Wakefield Co. (C. C.) 755.

As a general rule the mere making in one piece of a device formerly made in two parts does not constitute patentable invention.—General Electric Co. v. Yost Electric Mfg. Co. (C. C.) 874.

The fact that a patented device has come into general use, because it can be made more cheaply than those previously in use, is not sufficient to establish invention, unless in a limited class of cases, where that is otherwise

doubtful.—General Electric Co. v. Yost Electric Mfg. Co. (C. C.) 874.

A prior patent for a device does not defeat a patent for a combination of which such device forms one of the elements.—Spear v. Keystone Lantern Co. (C. C.) 879.

§ 3. Applications, and proceedings thereon.

If an inventor comes to better understand the principles of his invention while his application for a patent is pending, an amendment of his claims to conform thereto does not introduce any original matter, nor enlarge his invention, and is within his legal right.—Cleveland Foundry Co. v. Detroit Vapor Stove Co. (C. C. A.) 853.

Where an applicant for a patent fails to pay the fees therefor within six months after notice of its allowance, Rev. St. § 4897 [U. S. Comp. St. 1901, p. 3386], does not authorize the filing of a renewal application in any event after the expiration of two years from the date of the first or original allowance.—Weston Electrical Instrument Co. v. Empire Electrical Instrument Co. (C. C.) 90.

§ 4. Requisites and validity of letters patent.

Where a patent first granted is distinctly and only for an improvement on another and generic invention, which is the subject of a prior application by the patentee, it does not invalidate the patent subsequently granted thereon, although there is no express disclaimer of the matter claimed in such prior application.—Cleveland Foundry Co. v. Detroit Vapor Stove Co. (C. C. A.) 853.

The assignor of a patent when sued for its infringement by the assignee cannot introduce evidence to disprove the novelty or utility of the patented article where he uses the identical structure described, so that no question of construction of the patent is involved.—Frank v. Bernard (C. C.) 269.

Mortgage trustees of a corporation licensed under a patent, who have taken possession of the property on default, and through their agents have continued the business, and to manufacture and sell the patented article, placing the patent stamp thereon, are estopped to deny the validity of the patent when sued for the infringement.—Regina Music Box Co. v. Newell (C. C.) 606.

§ 5. Construction and operation of letters patent.

If the construction of a patentee effects the desired results, and they are beneficial, he is entitled to the benefit of his invention, though he may not have correctly understood the principles of its operation.—Cleveland Foundry Co. v. Detroit Vapor Stove Co. (C. C. A.) 853.

A patentee, having described his invention and shown its principle, and claimed it in that form which perfectly embodies it, is in contemplation of law deemed to claim every form in which his invention may be copied, unless these are disclaimed.—Albright v. Langfeld (C. C.) 473.

An inventor, having accurately described his invention both in his description and his claim, *held* entitled to restrain other forms of construction embraced in his claim, unless such forms are disclaimed.—Oehrle v. William H. Horstmann Co. (C. C.) 487.

§ 6. Infringement.

A suit which raises a question of infringement is one arising under the patent law, and the fact that the patentee may also have a remedy by action for breach of contract does not defeat the jurisdiction.—Rupp & Wittgenfeld Co. v. Elliott (C. C. A.) 730.

A defendant who sold wire to licensees of complainant for use on its patented machines, in violation of the conditions of the licenses, *held* liable for contributory infringement.—Rupp & Wittgenfeld Co. v. Elliott (C. C. A.) 730.

The statement in a printed copy of a patent, issued and sold by the Patent Office, of the date when the application was filed, will be taken as prima facie evidence of such date, in the absence of objection, and the date of invention will be presumed to have been the same.—Drewson v. Hartje Paper Mfg. Co. (C. C. A.) 734.

On an accounting for damages and profits for infringement of a patent for a manufactured article, defendants cannot be required to account for the profit on machines manufactured and sold by them to be used by others in making the infringing article.—Diamond Drill & Mach. Co. v. Kelley (C. C.) 89.

It is within the right of the owner of a patent for a machine to sell the machines under a license containing a condition that they shall be used only in connection with patented materials also made by such owner, and one who makes and sells to users other materials specially designed and intended to be used with such machines, and which are so used, is liable as a contributory infringer.—Brodrick Copygraph Co. v. Mayhew (C. C.) 92.

Defendant in an infringement suit will not be taxed with the costs of taking testimony and printing the record, after he has consented to a decree as prayed in the bill.—Brunswick-Balke-Collender Co. v. Klump (C. C.) 93.

The fact that an application for a patent was considered in the patent office in connection with a prior patent, and several claims rejected thereon, creates an unusually strong presumption that the structure of the patent as granted is substantially different from the earlier patent.—New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co. (C. C.) 265.

A bill for the infringement of two patents, although one is for a process and the other for a product, is not multifarious where both relate to the same article and are capable of being conjointly infringed, as it is alleged they are by the defendant.—American Graphophone Co. v. Leeds & Catlin Co. (C. C.) 281.

The Weisgerber patent, No. 675,693, for a rolling chair, construed, and *held* not infringed.—Weisgerber v. Clowney (C. C.) 477.

A mere denial by a defendant that he uses the process of a patent, where he admits using the same materials to obtain the same product,

without disclosing the process claimed to be used, is insufficient to meet the charge of infringement.—Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. (C. C.) 483.

A court is without jurisdiction of a suit for infringement of a patent, where the bill shows that defendant is a nonresident of the district, and it is not alleged that any act of infringement was committed within the district, or that defendant has an office or place of business within the district, with an agent in charge on whom service could properly be made.—International Wireless Telegraph Co. v. Fessenden (C. C.) 491.

On an accounting for infringement of a patent, complainant is entitled to recover the amount of the profits he would have realized if he had made the sales which were made by defendant, where he was prepared to supply the demand, although it may exceed the profits made by defendant.—Westinghouse v. New York Air Brake Co. (C. C.) 607.

The rule determined for estimating the profits and damages recoverable for infringement of the Westinghouse patent, No. 376,837, for an improvement in air brakes.—Westinghouse v. New York Air Brake Co. (C. C.) 607.

Where an invention is for an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by the use of a different form or combination performing the same function.—S. A. Cook & Co. v. Heywood Bros. & Wakefield Co. (C. C.) 755.

A patentee *held* to have conveyed his entire interest in the patent, and not to be a necessary party to a suit for its infringement.—Lincoln Iron Works v. W. H. McWhirter Co. (C. C.) 860.

Defendant *held*, under the circumstances shown, not relieved from accounting for infringement because the cost of manufacture could not be definitely separated from the cost of other articles made by it.—Force v. Sawyer-Boss Mfg. Co. (C. C.) 884.

Where it appears that the improvements covered by complainant's patent constituted the chief value of the infringing articles sold by defendant, and that without them no sales would probably have been made, complainant is entitled to recover the entire profits realized from the sale.—Force v. Sawyer-Boss Mfg. Co. (C. C.) 884.

PATENTS ENUMERATED.

ENGLISH.

1848.

12,247. Bottle stopper 244, 247, 248

UNITED STATES.

DESIGN.

35,043. Rolling chair..... 477

ORIGINAL.

64,659. Fireproof floor construction..... 267
67,284. Portable drilling machine..... 258
70,485. Device for treating vegetable substances for making paper plup.. 737
91,375. Fireproof floor construction..... 267
104,323. Ore roasting furnace..... 69
129,441. Hair comb 277
137,069. Adjustable supports for chair backs 758
137,345. Fireproof floor construction..... 267
162,822. Fireproof floor construction..... 267
172,470. Fireproof floor construction..... 267
183,773. Music desk..... 273
219,821. Music desk..... 273
240,743. Spring bed bottoms..... 278
247,473. Music desk..... 274
247,474. Music desk..... 274
249,130. Portable drilling machine..... 258
263,797. Device for manufacture of tannic acid 737
269,442. Spring bed bottoms..... 279
273,136. Portable drilling machine..... 258
306,375. Portable drilling machine..... 258
307,933. Music desk..... 274
320,526. Process of making logwood extract 483
331,523. Spring bed.....278, 279
347,743. Spring bed bottoms..... 279
356,704. Fireproof floor construction..... 268
361,361. Fireproof floor construction..... 268
369,120. Portable drilling machine..... 257
371,069. Music desk..... 274
372,616. Music desk 274
376,837. Air brakes 607
381,305. Electrical conductor 90
392,386. Electrical measuring instruments 494
392,387. Electrical measuring instruments 280, 494
399,995. Ore roasting furnace..... 69
408,700. Button fastening machine..... 730
412,155. Electric railway trolleys.....78, 79
438,548. Vapor burner.....740, 741, 746, 752
439,086. Coin purse 474
459,799. Ore roasting furnace..... 69
461,219. Vapor burner 741, 753
467,466. Vapor burner 741, 753
468,077. Music desk..... 273
469,809. System of electrical distribution.. 86
471,772. Fireproof floor construction..265, 268
475,401. Oil burner 740, 741, 752
491,972. Process of making logwood extract 483
495,883. Ore roasting furnace.....68, 69, 73
497,482. Electric shunt 82
500,371. Music box 606
508,542. Ore roasting furnace.....68, 69, 73
514,403. Adjustable supports for chair backs 758
520,429. Electric battery 495
521,461. Telephone switch board..... 75
524,178. Packing 469
526,012. Button fastening machine..... 730
529,724. Fireproof floor construction..265, 268
535,954. Hair comb 276
540,072. Bottle stopper 244
545,550. Apparatus for separating gases from liquids 738
551,175. Hair comb 277
552,869. Button fastening machine..... 730
565,263. Apparatus for separating gases from liquids 734
571,121. Match safes 270
582,895. Spring bed bottoms..... 278
583,560. Log turner and loader..... 762

584,787. Rotary neostyle 92
589,342. Acetylene gas burners..... 94
599,191. Ornamental rope 487
599,447. Bowling apparatus 255, 256
604,191. Vessels for administering volatile liquids 765
617,592. Electric hand lamp 495
617,691. Telephone switch board..... 75
617,692. Telephone switch board..... 75
617,942. Acetylene gas burners..... 94
623,933. Bowling alleys 93
628,596. Hair fastener 276
633,941. Dredger 457, 459, 460, 461, 462
634,838. Acetylene gas burners..... 94
639,222. Spring bed and seat bottom..... 278
667,162. Chair 755
669,011. Flat knit cap..... 464
673,650. Hair retainer 277
675,693. Rolling chair 477
678,162. Improvement in furniture..... 755
679,896. Sound box for talking machine... 67
682,448. Hair retainer 275, 276
690,639. Electric railway trolleys.....78, 81

REISSUED.

10,945. Electrical conductor 90
11,689. Bottle stopper 244
11,919. Adjustable supports for chair backs 755

PENALTIES.

Construction of penal statute, see "Statutes," § 1.
For failure to stamp goods, see "Internal Revenue."
For violation of customs laws, see "Customs Duties," § 4.

PENSIONS.

Forgery of affidavit by pensioner, see "Forgery."

PERSONAL INJURIES.

Excessive damages, see "Damages," § 3.
Measure of damages, see "Damages," § 2.
Removal of cause to federal court, see "Removal of Causes," § 2.
To employé, see "Master and Servant," § 1.
To person on or near railroad tracks, see "Railroads," § 3.
To servant on vessel, see "Shipping," § 3.
To traveler on highway crossing railroad, see "Railroads," § 3.

PETITION.

For limitation of liability of vessel owner, see "Shipping," § 7.
For removal of cause from state court to United States court, see "Removal of Causes," § 3.
In Bankruptcy, see "Bankruptcy," § 1.

PIERS.

See "Wharves."

PLEADING.

Amendment as affecting limitations, see "Limitation of Actions," § 1.
Federal courts following state practice, see "Courts," § 2.

Allegations as to particular facts, acts, or transactions.

City ordinances, see "Municipal Corporations," § 1.
Diversity of citizenship as ground of federal jurisdiction, see "Courts," § 1.

In actions by or against particular classes of parties.

See "Railroads," § 3.
National bank officers, see "Banks and Banking," § 2.

In particular actions or proceedings.

See "Admiralty," § 2; "Equity," § 3; "Removal of Causes," § 3.
For infringement of copyright, see "Copyrights," § 1.
For infringement of patent, see "Patents," § 6.
For infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 3.
For libel, see "Libel and Slander," § 1.
For personal injuries, see "Railroads," § 3.
Indictment or criminal information or complaint, see "Indictment and Information."
On insurance policies, see "Insurance," § 4.
To enforce liability of stockholders of national bank, see "Banks and Banking," § 2.

§ 1. Demurrer or exception.

Where paragraphs of an answer pleaded an equitable estoppel, it might be properly attacked by demurrer, though it also stated facts constituting a legal defense, which were pleaded as a mere inducement to such estoppel.—Cheatham v. Edgefield Mfg. Co. (C. C.) 118.

POLICY.

Of insurance, see "Insurance."

POSSESSION.

Retention by grantor in fraudulent conveyance, see "Fraudulent Conveyances," § 1.

POSTMASTER GENERAL.

See "United States," § 1.

POST OFFICE.

Jurisdiction of Postmaster General to issue fraud order, see "United States," § 1.
Mandamus to compel admission of publication to mails, see "Mandamus," § 1.

POWERS.

Of attorney, see "Principal and Agent."

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 2.
In patent office, see "Patents," § 3.
Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Contempt," § 2; "Mandamus," § 2.

Particular proceedings in actions.

See "Costs"; "Evidence"; "Judgment"; "Limitation of Actions"; "Pleading"; "Removal of Causes"; "Trial."

Particular remedies in or incident to actions.

See "Receivers."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

Procedure in exercise of special jurisdictions.

In admiralty, see "Admiralty"; "Collision," § 7; "Shipping," § 7.
In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."

Procedure on review.

See "Appeal and Error."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 4.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Factors."
Corporate agents, see "Corporations," § 3.

§ 1. Mutual rights, duties, and liabilities.

Facts *held* not to show a breach of trust.—Havana City Ry. Co. v. Ceballos (C. C.) 381.

PRINCIPAL AND SURETY.

See "Bail."

§ 1. Discharge of surety.

A surety is discharged by a material alteration of the principal contract without his consent, even though it may have been beneficial to him.—Zeigler v. Hallahan (C. C. A.) 205.

A modification of the terms of a lease without the consent of a surety for the lessee's performance, by adding a provision that if the premises should become untenantable by reason of fire or other casualty the lease should at once become void, *held* material and to discharge the surety from liability.—Zeigler v. Hallahan (C. C. A.) 205.

The rule as to the discharge of a surety by an alteration of the principal contract without his consent is not affected by the fact that his undertaking recites that it was made by him for a valuable consideration.—Zeigler v. Hallahan (C. C. A.) 205.

Payments by the owner of a building to a contractor without requiring satisfactory releases of liens, as required by the contract, constituted a departure, relieving the contractor's surety from liability for loss sustained thereby.—Shelton v. American Surety Co. of New York (C. C. A.) 210.

§ 2. Remedies of creditors.

Where a contractor agreed to indemnify plaintiff against suits and claims of third persons, records in suits brought on such claims *held* conclusive against the contractor's surety.—Lake Drummond Canal & Water Co. v. West End Trust & Safe-Deposit Co. (C. C.) 147.

In an action against a contractor's surety for failure to indemnify plaintiff against claims of third persons, records in suits against plaintiff for which recoveries had been had on such claims *held* properly excluded.—Lake Drummond Canal & Water Co. v. West End Trust & Safe-Deposit Co. (C. C.) 147.

PRIORITIES.

As to railroad right of way, see "Railroads," § 2.
Of taxes, see "Taxation," § 2.

PROCESS.

See "Injunction"; "Mandamus."
In action against foreign corporation, see "Corporations," § 6.
In action on forfeited bail bond, see "Bail." § 1.

PROFITS.

Loss of as element of damages, see "Damages," § 1.
Loss of as element of damages for infringement of patent, see "Patents," § 6.

PROOF.

Taking and filing proofs in admiralty, see "Admiralty," § 3.

PROPERTY.

See "Copyrights"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."
Taking for public use, see "Eminent Domain."

PROTEST.

Under customs laws, see "Customs Duties," § 3.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.

PUBLIC AID.

To railroads, see "Railroads," § 1.

PUBLIC DEBT.

See "Counties," § 1; "Municipal Corporations," § 2.

PUBLIC LANDS.

Land grant railroads, see "Railroads," § 1.
Mineral lands, see "Mines and Minerals," § 1.
Reservation for Indians, see "Indians."
State laws as rules of decision in federal courts relative to sale of state lands, see "Courts," § 3.

§ 1. Survey and disposal of lands of United States.

The title of a bona fide purchaser of lands after the issue of a patent *held* superior to the equitable claim of the United States to avoid the patent.—United States v. Detroit Timber & Lumber Co. (C. C. A.) 668.

Purchasers in good faith, with notice, for value, of the equitable title evidenced by receivers' final receipts, upon which patents subsequently issue, have a complete defense to a suit by the United States to avoid the patents for fraud or perjury.—United States v. Detroit Timber & Lumber Co. (C. C. A.) 668.

Receivers' final receipts are notice to the purchasers of the equitable title that they are voidable by the Land Department for fraud or error before the patents issue upon them, but not that the equitable titles they disclose were procured by fraud, perjury, or irregularity.—United States v. Detroit Timber & Lumber Co. (C. C. A.) 668.

§ 2. Disposal of lands of the states.

Under Rev. St. Ky. c. 102, as construed by the Kentucky court of last resort, a patent for lands sold under such chapter *held* not void on its face because it conveyed a tract in excess of 200 acres.—Lockard v. Asher Lumber Co. (C. C. A.) 689.

PUBLIC POLICY.

Affecting validity of contract, see "Contracts," § 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 1.

PUNCTUATION.

Of statutes, see "Statutes," § 1.

QUASHING.

Indictment or information, see "Indictment and Information," § 1.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 1.

QUIETING TITLE.

To mining claims, see "Mines and Minerals," § 1.

RAILROADS.

See "Street Railroads."
Acquisition of rights under power of eminent domain, see "Eminent Domain," §§ 2, 3.
As employers, see "Master and Servant," § 1.
City ordinances as evidence of negligence in running train, see "Municipal Corporations," § 1.
Contracts within statute of frauds, see "Frauds, Statute of," § 1.
Levy of county taxes for payment of railroad aid bonds, see "Counties," § 1.
Receivers in general, see "Receivers," § 1.
Removal to federal court of action against, see "Removal of Causes," § 2.
Taxation of, see "Taxation," § 1.
Validity of laws relating to taxation of railroad property as denying equal protection of law, see "Constitutional Law," § 3.
Validity of laws impairing obligation of railroad aid bonds, see "Constitutional Law," § 1.

§ 1. Public aid.

Act Cong. July 2, 1864, c. 217, 13 Stat. 370, § 11, requiring land-grant railroads to carry freight for the army at not exceeding 50 per cent. of the tariff rates charged the general public, do not entitle the government to a reduced rate for the carriage of freight between two points by a railroad company which received no land grant, merely because its trains run for a part of the distance over the track of a land-grant road.—United States v. Astoria & C. R. R. Co. (C. C.) 1006.

§ 2. Right of way and other interests in land.

The filing of a petition by a railroad company to condemn land for right of way gives it no right, as against another company which has previously obtained a conveyance of the land for the same purpose from the owner, although the deed has not been recorded.—Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (C. C. A.) 657.

There being no statute in Tennessee requiring a survey before the institution of proceedings to condemn right of way for railroad purposes, or authorizing the recording of surveys, such a survey gives no priority of right as against another company, which subsequently acquires right of way over the land by conveyance from the owner.—Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (C. C. A.) 657.

§ 3. Operation.

An intrastate railroad *held* not engaged in interstate commerce, and therefore not liable for noncompliance with Safety Appliance Act Cong. March 2, 1893, c. 196, 27 Stat. 532, as amended by Act Cong. April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175].—United States v. Geddes (C. C. A.) 452.

Shannon's Code Tenn. §§ 1574–1576, *held* not to render a railroad absolutely liable for collision occurring while the engine was being op-

erated backward with the tender in front, provided the engineer kept a lookout ahead, blew his alarm whistle, and exercised every possible means to prevent the accident.—Southern Ry. Co. v. Simpson (C. C. A.) 705.

Where a railroad company was not required by Shannon's Code Tenn. § 1574, to ring the bell or blow whistle at a crossing where plaintiff was injured, evidence that the company, after plaintiff's injury, customarily blew the whistle at such crossing, was inadmissible.—Southern Ry. Co. v. Simpson (C. C. A.) 705.

An amendment adding a count under Shannon's Code Tenn. §§ 1574–1576, in an action for injuries at a railroad crossing, *held* not to constitute a departure.—Southern Ry. Co. v. Simpson (C. C. A.) 705.

Contributory negligence *held* no defense to an action for injuries at a railroad crossing, under Shannon's Code Tenn. §§ 1574–1576.—Southern Ry. Co. v. Simpson (C. C. A.) 705.

A plaintiff *held* guilty of such contributory negligence as precluded him as matter of law from recovering for an injury by a railroad train which struck him while he was walking beside the track.—Garlich v. Northern Pac. Ry. Co. (C. C. A.) 837.

The fact that a railroad train was being run at a rate of speed prohibited by a city ordinance when it struck and injured a person walking on or near the track does not affect the defense of contributory negligence in an action for the injury.—Garlich v. Northern Pac. Ry. Co. (C. C. A.) 837.

A person walking on a railroad track, or so near it as to be in danger from passing trains, is bound to use his senses of sight and hearing to protect himself from danger, and no reliance upon the exercise of care by those in control of trains will excuse his failure to do so.—Garlich v. Northern Pac. Ry. Co. (C. C. A.) 837.

RECEIVERS.

Ancillary jurisdiction of federal court as to matters relating to receivership, see "Courts," § 1.
Appointment of as an act of bankruptcy, see "Bankruptcy," § 1.
Finality for purpose of review of bill discharging receiver, see "Appeal and Error," § 2.
Mandamus by, see "Mandamus," § 1.
Of corporations in general, see "Corporations," § 5.
Parol or extrinsic evidence of appointment of, see "Evidence," § 2.

§ 1. Actions.

Where a receiver was appointed for a railroad in proceedings to foreclose an underlying mortgage, a proceeding against such receiver by another railroad to condemn a grade crossing could be maintained only in the court where such receiver was appointed.—Coster v. Parkersburg Branch R. Co. (C. C.) 115.

RECOGNIZANCES.

See "Bail," § 1.

RECORDS.

Of mortgage, see "Chattel Mortgages," § 2; "Mortgages," § 1.
Transcript on appeal or writ of error, see "Appeal and Error," § 4

REGISTRATION.

Of mortgage, see "Chattel Mortgages," § 2; "Mortgages," § 1.

RELEASE.

Of judgment in admiralty, see "Admiralty," § 2.

REMAINDERS.

Created by will, see "Wills," § 1.
Right to dower in estate in remainder, see "Dower," § 1.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1; "Injunction," § 1; "Specific Performance," § 1.

REMOVAL OF CAUSES.

Removal of accused to other district for trial, see "Criminal Law," § 2.

§ 1. Power to remove and right of removal in general.

The filing by a defendant in a state court of an answer and a motion to dissolve a preliminary injunction granted ex parte, and the hearing of such motion on affidavits by the judge in chambers, do not preclude the defendant from removing the cause, where the petition therefor is filed before the time when a pleading was required by the state law or practice.—Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (C. C. A.) 657.

§ 2. Citizenship or alienage of parties.

Where a petition in an action in a state court for injuries to a servant alleged concurring acts of negligence of the master and a servant jointly sued, the case was not removable to the federal courts; the servant being of the same citizenship as plaintiff.—Roberts v. Shelby Steel Tube Co. (C. C.) 729.

Though in a suit against two or more defendants, one of whom is a nonresident, there are charges of concurrent negligence against all, yet if there is a separate cause of action alleged against the nonresident alone, the cause involves a separable controversy, and is removable to the federal courts.—McIntyre v. Southern Ry. Co. (C. C.) 985.

A complaint in an action for death at a railway crossing against the railway company, which was a nonresident corporation, and certain resident employés, *held* to allege a separable controversy, and therefore to entitle such railway company to remove the cause to the

federal court.—McIntyre v. Southern Ry. Co. (C. C.) 985.

§ 3. Proceedings to procure and effect of removal.

A petition for removal on the ground of diverse citizenship should not only allege that the citizenship of the parties is diverse, but should also disclose the states of which the parties, respectively, are citizens.—Thompson v. Stalmann (C. C.) 809.

A petition for removal on the ground of diverse citizenship *held* amendable, so as to show the citizenship of the parties.—Thompson v. Stalmann (C. C.) 809.

§ 4. Proceedings in cause after removal.

An attachment granted by a state court in a suit in which service was made by publication cannot be vacated on removal merely because such service is not provided for by the federal practice in such actions, being protected by Removal Act March 3, 1875, c. 137, § 4, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511].—Blumberg v. A. B. & E. L. Shaw Co. (C. C.) 608.

RENEWAL.

Of application for patent, see "Patents," § 3.

REQUESTS.

For instructions in civil actions, see "Trial," § 2.

RESALE.

Of goods by seller, see "Sales," § 1.

RES JUDICATA.

See "Judgment," § 2.
As to question of right of bankrupt to discharge, see "Bankruptcy," § 8.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.
Validity of contracts, see "Contracts," § 1.

RETROSPECTIVE LAWS.

Constitutional restrictions, see "Constitutional Law," § 2.

REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error."
Of proceedings in bankruptcy, see "Bankruptcy," § 9.

RIGHT OF WAY.

Of railroads, see "Railroads," § 2.

RISKS.

Assumed by employé, see "Master and Servant," § 1.

RULES OF NAVIGATION.

See "Collision," § 1.

SALES.

Election of remedies for refusal of buyer to accept goods, see "Election of Remedies."
Of realty, see "Vendor and Purchaser."
On foreclosure of mortgage, see "Mortgages," § 3.
Of property of bankrupt estate, see "Bankruptcy," § 5.
Rights of trustee in bankruptcy as to conditional sales to bankrupt, see "Bankruptcy," § 3.

§ 1. Remedies of seller.

On breach of a contract of sale by the buyer, the seller may recover the contract price, the difference between the contract price and the net proceeds of the goods sold for the buyer's account, or the difference between the contract price and the market value at the time and place of delivery.—Habeler v. Rogers (C. C. A.) 43.

In an action for breach of a contract of sale by the seller, the buyer *held* not required to prove a formal tender of the goods.—Habeler v. Rogers (C. C. A.) 43.

In an action for breach of a contract for the sale of phosphate rock, evidence *held* sufficient to establish the seller's ability to perform.—Habeler v. Rogers (C. C. A.) 43.

§ 2. Remedies of buyer.

In an action for breach of a contract for the manufacture and sale of machinery, the measure of damages stated.—E. W. Bliss Co. v. Buffalo Tin Can Co. (C. C. A.) 51.

SCIRE FACIAS.

Federal courts following state practice, see "Courts," § 2.
On forfeited bail bond, see "Bail," § 1.

SEAMEN.

Liability of vessel for personal injuries to, see "Master and Servant," § 1.

Facts considered, and *held* not to show that the master of a ship was chargeable with neglect of duty toward an injured seaman in not taking him to a port for medical and surgical treatment, but proceeding on his voyage, the injury being treated by the mate, who had

some skill and experience.—The Erskine M. Phelps (C. C. A.) 1.

Failure of the master of a vessel to replace a second mate (who had been paid off at an intermediate port), as required by Rev. St. § 4516 [U. S. Comp. St. 1901, p. 3071], *held* no excuse for a total refusal of members of the crew to work the vessel.—The Cora F. Cressy (D. C.) 144.

A provision of shipping articles that the crew should not receive wages while the vessel was detained by ice *held* not void under Rev. St. § 4524 [U. S. Comp. St. 1901, p. 3076].—The Lillian (D. C.) 375.

Rev. St. § 4511 [U. S. Comp. St. 1901, p. 3068], *held* to apply to shipping articles for crews of American vessels engaged in the coastwise trade and in trade between ports of the United States and Canada.—The Lillian (D. C.) 375.

A stipulation in shipping articles that the crew should make no claim for wages while the vessel was detained by ice *held* reasonable, and not in violation of Rev. St. § 4511 [U. S. Comp. St. 1901, p. 3068].—The Lillian (D. C.) 375.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 1.

SECURITY.

For costs in admiralty, see "Admiralty," § 5.

SEPARABLE CONTROVERSY.

Removal from state court, see "Removal of Causes," § 2.

SETTLEMENT.

See "Account Stated."

SHERIFFS AND CONSTABLES.

Mandamus to, see "Mandamus," § 2.

SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Seamen"; "Towage"; "Wharves."

Fellow servants in loading or unloading vessel, see "Master and Servant," § 1.

Parol or extrinsic evidence as to demurrage, see "Evidence," § 2.

§ 1. Title.

The Illinois statute, which provides that a chattel mortgage given to secure a note which does not on its face show that it is so secured shall be void, cannot affect the validity of a mortgage on an enrolled and licensed vessel, which is recorded pursuant to the statute of the United States at the home port of the vessel.—The Gordon Campbell (D. C.) 963.

§ 2. Charters.

A provision of a charter party that the master shall employ the charterers' stevedores at ports of loading and discharge, and pay them stated compensation, "the stevedores to be wholly under the direction and control of the master," does not affect the liability of the ship or owners for improper stowage.—Bethel v. Mellor & Rittenhouse Co. (D. C.) 129.

§ 3. Liabilities of vessels and owners in general.

Injury to the servant of a stevedore by the sudden lowering of a bucket of ore *held* the result of negligence on the part of the winchman.—The Elton (D. C.) 562.

Evidence *held* insufficient to show that the falling of a stanchion in the hold of a coal barge, by which libelant was injured while engaged in discharging cargo, was due to its unsoundness or insecure fastening, so as to render the barge liable for the injury.—The Allison White (D. C.) 991.

§ 4. Carriage of goods.

Statement of things necessary to establish a constructive delivery of goods by ship.—The Titania (C. C. A.) 229.

A bill of lading *held* prima facie proof of receipt on board of goods therein described.—The Titania (C. C. A.) 229.

Any right under the contract of the ship to compel the consignees to take goods "from alongside" *held* waived by the carrier unloading onto the dock.—The Titania (C. C. A.) 229.

The duty of the ship to deliver *held* to be determined by the bill of lading without regard to the charter party.—The Titania (C. C. A.) 229.

A notation on a bill of lading that the ship should not be responsible for broken or cut bales *held* ineffective, under section 1 of the Harter act (Act Feb. 13, 1893, 27 Stat. 445, c. 105 [U. S. Comp. St. 1901, p. 2946]), to relieve the ship from liability for damage arising from the breaking of bales and improper stowage of cargo by stevedores.—Bethel v. Mellor & Rittenhouse Co. (D. C.) 129.

Damage to a cargo of hay from water *held*, under the evidence, to have been due to leakage owing to the inability of the vessel to carry the cargo for which she was chartered without straining which rendered her unseaworthy.—The William Power (D. C.) 136.

The owner of a vessel *held* guilty of negligence in permitting the majority of the crew to leave her at night while in her home port, rendering her liable for the loss of cargo, notwithstanding Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946].—The Valentine (D. C.) 352.

§ 5. Carriage of passengers.

Allegations of a libel by steerage passengers on a voyage from Seattle to San Francisco to recover damages for breach of contract, on the ground that the ship failed to furnish them with proper food, quarters, and bedding, *held* not sustained by the evidence.—The Centennial (D. C.) 816.

§ 6. Demurrage.

A consignee of a cargo of coal, who was the owner thereof, *held* liable for demurrage at the rate fixed in an oral contract with the carrier, and not at the rate inserted in the bill of lading by shipper, of which the consignee was not informed until after delivery.—Burns v. Burns (C. C. A.) 238.

The owner of a barge employed to lighter part of a cargo of lumber to be delivered at a dock, who took on a load which he knew would probably, if not certainly, prevent the barge from going up to the dock, *held* not entitled to recover demurrage for the resulting delay in discharging.—Ronan v. 155,453 Feet of Lumber (D. C.) 345.

A memorandum delivered by a carrier to the master of a lighter after she had been loaded *held* not to exclude evidence of the parol agreement between them as to liability for demurrage.—Ronan v. 155,453 Feet of Lumber (D. C.) 345.

Libelants of a cargo *held* not entitled to recover for delay in loading, where such delay occurred by reason of the vessel's failure to arrive as scheduled.—McArthur Bros. Co. v. 622,714 Feet of Lumber (D. C.) 389; McArthur v. 836,693 Feet of Lumber, Id.

Where, by the exercise of customary diligence and promptitude, a steamer and tow could have been unloaded 2½ days earlier than the discharge was effected, the consignee was liable for the delay.—McArthur Bros. Co. v. 622,714 Feet of Lumber (D. C.) 389; McArthur v. 836,693 Feet of Lumber, Id.

§ 7. Limitation of owner's liability.

A petition under Admiralty Rules 54–57, to limit the liability of a vessel and cargo growing out of a collision, failing to state the circumstances on which the exemption was based, as required by Rule 56, *held* insufficient to entitle the petitioner to contest the question of fault.—The Sacramento (D. C.) 373.

SMUGGLING.

See "Customs Duties," § 4.

SPECIFIC PERFORMANCE.

§ 1. Nature and grounds of remedy in general.

An action for damages for breach of a stipulation that an action which has passed to judgment shall abide the final decision of another action *held* not as efficient as a suit in equity for specific performance.—Brown v. Arnold (C. C. A.) 723.

Under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], a federal court cannot entertain a suit for the specific enforcement of a contract for the purchase of cows at an agreed price per head, where there is no evidence that they possess any peculiar value which cannot be ascertained and recovered in an action at law.—Kane v. Luckman (C. C.) 609.

§ 2. Contracts enforceable.

Evidence considered, and *held* not to establish an oral contract of such completeness and definiteness of terms as to entitle plaintiff to a decree for specific performance.—Kane v. Luckman (C. C.) 609.

A verbal contract by which plaintiff agreed to convey land in exchange for personal property, and which was not binding on him under the statute of frauds, will not be specifically enforced against the other party for want of mutuality of obligation.—Kane v. Luckman (C. C.) 609.

STALE DEMAND.

See "Equity," § 2.

STATES.

See "United States."
Courts, see "Courts."
Public lands, see "Public Lands," § 2.

STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 3.
Laws impairing obligation of contracts, see "Constitutional Law," § 1.
Validity of retrospective or ex post facto laws, see "Constitutional Law," § 2.

Provisions relating to particular subjects.

See "Counties," § 1; "Customs Duties"; "Habeas Corpus," § 1; "Indians"; "Maritime Liens," § 1; "Mines and Minerals," § 1; "Railroads," § 3; "Seamen"; "Taxation," §§ 2, 4.
Revenue laws, see "Internal Revenue."
Statute of frauds, see "Frauds, Statute of."

§ 1. Construction and operation.

The scope of a penal statute which is grammatically correct cannot be extended by repunctuation.—United States v. York (C. C.) 323.

§ 2. Pleading and evidence.

Published record of joint resolutions of Congress *held* not impeachable by proof that they were not approved until a date subsequent to that disclosed by the record.—Gibson v. Anderson (C. C. A.) 39.

A private statute *held* not admissible in evidence to establish negligence in running of railroad train, unless pleaded.—Garlich v. Northern Pac. Ry. Co. (C. C. A.) 837.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Art. 1, cl. 10..... 496

STATUTES AT LARGE.

1864, July 2, ch. 217, § 11, 13 Stat. 370...1006
1867, March 2, ch. 176, 14 Stat. 517..... 567
1874, June 22, ch. 391, § 21, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986]..... 977

1875, March 3, ch. 137, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511]..... 608
1875, March 3, ch. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]..... 980
1890, June 10, ch. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]..... 396
1890, June 10, ch. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]..... 573
1890, June 10, ch. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]..... 653
1890, July 2, ch. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]..... 31
1892, July 16, ch. 196, 27 Stat. 200 [U. S. Comp. St. 1901, p. 2167]..... 806
1892, July 20, ch. 209, § 1, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706]..... 395
1893, Feb. 13, ch. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]..... 129
1893, Feb. 13, ch. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]..... 352
1893, March 2, ch. 196, 27 Stat. 532. Amended by Act 1896, April 1, ch. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175] 452
1896, April 1, ch. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]..... 452
1897, July 24, ch. 11, § 1, Schedule B, pars. 87, 88, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632]..... 994
1897, July 24, ch. 11, § 1, Schedule C, pars. 122, 183, 30 Stat. 166 [U. S. Comp. St. 1901, pp. 1636, 1645]..... 576
1897, July 24, ch. 11, § 1, Schedule C, par. 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645] 398
1897, July 24, ch. 11, § 1, Schedule E, par. 209, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647] 833
1897, July 24, ch. 11, § 1, Schedule I, pars. 306, 307, 313, 30 Stat. 176, 178 [U. S. Comp. St. 1901, pp. 1656, 1657, 1659]... 568
1897, July 24, ch. 11, § 1, Schedule J, pars. 339, 346, 30 Stat. 181 [U. S. Comp. St. 1901, pp. 1662, 1663]..... 649
1897, July 24, ch. 11, § 1, Schedule K, pars. 362, 363, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1666]..... 571
1897, July 24, ch. 11, § 1, Schedule K, pars. 369, 371, 30 Stat. 184, 185 [U. S. Comp. St. 1901, p. 1667]..... 648
1897, July 24, ch. 11, § 1, Schedule L, pars. 390, 391, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]..... 574
1897, July 24, ch. 11, § 1, Schedule N, par. 434, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676] 398, 977, 1000
1897, July 24, ch. 11, § 1, Schedule N, par. 436, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676] 977, 1000
1897, July 24, ch. 11, § 2, Free List, par. 696, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1688] 817
1897, July 24, ch. 11, § 2, Free List, par. 697, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689] 849, 886
1897, July 24, ch. 11, § 2, Free List, par. 699, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689] 655
1897, July 24, ch. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]..... 650, 656, 817, 977
1897, July 24, ch. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]..... 570, 576, 977, 994, 1000
1898, June 13, ch. 448, 30 Stat. 450 [U. S. Comp. St. 1901, p. 2291]. Repealed by Act 1902, April 12, ch. 500, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279]... 651
1898, June 13, ch. 448, § 13, 30 Stat. 454 [U. S. Comp. St. 1901, p. 2294]. Amended by Act 1901, March 2, ch. 806, § 7, 31 Stat. 941 [U. S. Comp. St. 1901, p. 2294] 219
1898, June 13, ch. 448, § 14, 30 Stat. 455 [U. S. Comp. St. 1901, p. 2296]..... 219
1898, June 28, ch. 517, § 13, 30 Stat. 498.. 797
1898, July 1, ch. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]. Amended by Act 1903, Feb. 5, ch. 487, § 1, 32 Stat. 797 [U. S. Comp. St. 1903, p. 409]..... 507
1898, July 1, ch. 541, § 2, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421].....525, 719
1898, July 1, ch. 541, § 3b, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].....150, 215
1898, July 1, ch. 541, § 3, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. Amended by Act 1903, Feb. 5, ch. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410] 769
1898, July 1, ch. 541, § 4b, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. Amended by Act 1903, Feb. 5, ch. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].... 57
1898, July 1, ch. 541, § 5f, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424].....192, 517
1898, July 1, ch. 541, § 7, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425].....546, 824
1898, July 1, ch. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]. Amended by Act 1903, Feb. 5, ch. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411] 146
1898, July 1, ch. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].....654, 824
1898, July 1, ch. 541, § 23, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]..21, 313
1898, July 1, ch. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]..... 430
1898, July 1, ch. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]..... 391
1898, July 1, ch. 541, §§ 47a (11), 64, 67d, 30 Stat. 557, 563, 564 [U. S. Comp. St. 1901, pp. 3439, 3448, 3451]..... 546
1898, July 1, ch. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]..355, 371, 828, 972
1899, March 3, ch. 460, § 1, 30 Stat. 1379 [U. S. Comp St. 1901, p. 3288]..... 140
1900, June 6, ch. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 551]..... 242
1901, March 2, ch. 806, § 7, 31 Stat. 941 [U. S. Comp. St. 1901, p. 2294]..... 219
1902, April 12, ch. 500, 32 Stat. 96 [U. S. Comp. St. Supp. 1903, p. 276]..... 219
1902, April 12, ch. 500, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279]..... 651
1902, May 27, ch. 888, 32 Stat. 742, 744.. 39
1903, Feb. 5, ch. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410].....57, 769
1903, Feb. 5, ch. 487, § 1, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409]..... 507
1903, Feb. 5, ch. 487, § 4. 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]..... 146

REVISED STATUTES.

Tit. 13, ch. 13, § 751 [U. S. Comp. St. 1901, pp. 592–597] 100
§ 13 [U. S. Comp. St. 1901, p. 6] 219
§ 251 [U. S. Comp. St. 1901, p. 138] 833
§ 716 [U. S. Comp. St. 1901, p. 580] 331
§ 720 [U. S. Comp. St. 1901, p. 581] 507
§ 723 [U. S. Comp. St. 1901, p. 583] 609
§ 725 [U. S. Comp. St. 1901, p. 583] 95
§ 1782 [U. S. Comp. St. 1901, p. 1212] 552
§ 2319 [U. S. Comp. St. 1901, p. 1424] 39
§ 2322 [U. S. Comp. St. 1901, p. 1425] 106
§ 2802 [U. S. Comp. St. 1901, p. 1873] ..849, 886
§ 3289 [U. S. Comp. St. 1901, p. 2132] 806
§§ 3303, 3318 [U. S. Comp. St. 1901, pp. 2157, 2164] 63
§ 3323. Amended by Act 1892, July 16, ch. 196, 27 Stat. 200 [U. S. Comp. St. 1901, p. 2167] 806
§ 3929 [U. S. Comp. St. 1901, p. 2686] 552
§§ 4192, 4193 [U. S. Comp. St. 1901, p. 2837] 963
§ 4511 [U. S. Comp. St. 1901, p. 3068] 375
§ 4516 [U. S. Comp. St. 1901, p. 3071] 144
§ 4524 [U. S. Comp. St. 1901, p. 3076] 375
§ 4897 [U. S. Comp. St. 1901, p. 3386] 90
§ 5209 [U. S. Comp. St. 1901, p. 3497] 915
§ 5421 [U. S. Comp. St. 1901, p. 3667] 140
§§ 5424–5427 [U. S. Comp. St. 1901, pp. 3668, 3670] 323
§ 5440 [U. S. Comp. St. 1901, p. 3676] 968
§ 5480 [U. S. Comp. St. 1901, p. 3696] 552

COMPILED STATUTES 1901.

Page 6 219
Page 138 833
Page 511 608
Page 513 980
Page 551 242
Page 580 331
Page 581 512
Page 583 .....95, 609
Pages 592–597 100
Page 706 395
Page 1212 552
Page 1424 39
Page 1425 106
Page 1632 994
Page 1636 576
Page 1645 .....398, 576
Page 1647 833
Pages 1656, 1657, 1659 568
Pages 1662, 1663 649
Page 1666 571
Page 1667 648
Page 1670 574
Page 1676 .....398, 977, 1000
Page 1688 817
Page 1689 .....655, 849, 886
Page 1693 .....570, 576, 650, 656, 817, 977, 994, 1000
Page 1873 .....849, 886
Page 1924 653
Page 1933 .....396, 573
Page 1986 977
Page 2132 806
Pages 2157, 2164 63
Page 2167 806
Page 2291 651
Pages 2294, 2296 219
Page 2686 552
Page 2837 963
Page 2946 .....129, 352
Page 3068 375
Page 3071 144
Page 3076 375
Page 3175 452
Page 3200 31
Page 3288 140
Page 3386 90
Page 3420 507
Page 3421 .....525, 719
Page 3422 .....57, 150, 215, 769
Page 3424 .....192, 517
Page 3425 .....546, 824
Page 3427 146
Page 3430 824
Page 3431 .....21, 313, 654
Page 3432 430
Page 3438 391
Pages 3439, 3448 546
Page 3451 .....355, 371, 546, 828, 972
Page 3497 915
Page 3667 140
Pages 3668–3670 323
Page 3676 968
Page 3696 552

COMPILED STATUTES (SUPP.) 1903.

Page 276 219
Page 279 651
Page 409 507
Page 410 .....57, 769
Page 411 146
Pages 2157, 2164 63

CALIFORNIA.

LAWS.

1887, pp. 29, 37, ch. 34, § 17. Amended by Laws 1891, p. 142, ch. 127 780
1891, p. 142, ch. 127 780

GEORGIA.

CITY CHARTER.

Savannah. McDonnell's Code, p. 12, §§ 32, 44 931

INDIAN TERRITORY (CHICKASAW NATION).

LAWS.

1886, p. 188. Amended by Laws 1887, p. 190 797
1887, p. 190 797

IOWA.

CODE 1897.

§ 2905 355
§ 2906 .....355. 819

KENTUCKY.

REVISED STATUTES 1852.

Ch. 102 689

STATUTES 1894.

§ 1882 443

LAWS.

1868, p. 622, ch. 548..... 443
1892, p. 302, ch. 103, art. 3, § 5. Amended by Laws 1893, p. 991, ch. 217, § 4..... 282
1893, p. 991, ch. 217, § 4..... 282

MICHIGAN.

COMPILED LAWS 1897.

§ 10,427 828

HOWELL'S ANNOTATED STATUTES.

Volume 3.

§ 9354j 31

MONTANA.

CIVIL CODE.

§§ 1606, 1609, 1611, 1700..... 219

NEW HAMPSHIRE.

PUBLIC STATUTES 1901.

Ch. 191 153

NEW YORK.

CODE OF CIVIL PROCEDURE.

§ 537 849

REVISED STATUTES.

First Edition.

Volume 1.

Pages 722–725, pt. 2, art. 1, ch. 1, tit. 2.. 946

PENNSYLVANIA.

LAWS.

1901, pp. 364, 375, §§ 2, 32..... 546

SOUTH CAROLINA.

CODE OF CIVIL PROCEDURE.

§ 48 175

LAWS.

1882, p. 216. Amended by Laws 1885, p. 240 496
1885, p. 240..... 496
1902, p. 1227..... 496

SOUTH DAKOTA.

CONSTITUTION.

Art. 13, § 4..... 890

LAWS.

1899, p. 62, ch. 53, §§ 1, 2..... 890

TENNESSEE.

SHANNON'S CODE.

§§ 1574–1576 705
§§ 1844–1867 657

STAY.

Pending appeal or writ of error, see "Appeal and Error," § 3.

STIPULATIONS.

Authority of attorney to make, see "Attorney and Client," § 1.

STOCK.

Corporate stock, see "Corporations," § 1.

STOCKHOLDERS.

Of corporations, see "Corporations," § 2.
Of national bank, see "Banks and Banking," § 2.

STREET RAILROADS.

Contract allowing discontinuance of operation of without consent of state as against public policy, see "Contracts," § 1.
Injunction against laying track under void ordinance, see "Injunction," § 1.
Parties concluded by judgment in foreclosure suit against street railroad companies, see "Judgment," § 2.

§ 1. Establishment, construction, and maintenance.

A receiver of a street railway company *held* entitled to a temporary injunction restraining a competing railroad from closing certain land dedicated to the public as an approach to a beach, by reason of which passengers on the receiver's line were precluded from obtaining direct access to the beach.—Hampton Roads Ry. & Electric Co. v. Newport News & O. P. Ry. & Electric Co. (C. C.) 534.

Under the charter of the city of Savannah, Ga., MacDonell's Code, p. 12, §§ 32, 44, the mayor and city council have no power to grant by resolution a franchise to a street railroad company to occupy a street.—Holst v. Savannah Electric Co. (C. C.) 931.

SUBSCRIPTIONS.

For corporate stock, see "Corporations," § 1.

SUMMARY PROCEEDINGS.

To determine claim to property alleged to belong to trustee in bankruptcy, see "Bankruptcy," § 6.

SUPERSEDEAS.

On appeal or writ of error, see "Appeal and Error," § 3.

SURETYSHIP.

See "Principal and Surety."

SURVIVAL.

Of cause of action, see "Abatement and Revival," § 1.

TARIFF.

See "Customs Duties."

TAXATION.

See "Customs Duties"; "Internal Revenue."
County taxes, see "Counties," § 1.
Lien for against bankrupt estate, see "Bankruptcy," § 5.
Mandamus to compel levy and collection of tax, see "Mandamus," § 2.
Proof of claim for taxes against bankrupt estate, see "Bankruptcy," § 7.
Validity of tax laws or denying equal protection of law, see "Constitutional Law," § 3.

§ 1. Levy and assessment.

In fixing the proportion of the property of an interstate railroad company taxable in Kentucky under Ky. Revenue Act Nov. 11, 1892, p. 302, c. 103, art. 3, § 5, as amended by Act June 9, 1893, p. 991, c. 217, § 4, which provides that the mileage of lines "owned, operated, leased or controlled" by such company shall be taken into consideration, a line owned and operated by another company, but which is controlled by the one being assessed through its ownership of a majority of the stock of such other company, must be considered.—Louisville & N. R. Co. v. Coulter (C. C.) 282.

The valuation of the property of a railroad company for taxation by the railroad commission of a state *held* to have been at its fair cash value.—Louisville & N. R. Co. v. Coulter (C. C.) 282.

Evidence considered, and *held* to sustain the claim of a complainant that property in Kentucky which was subject to equalization by the state board of equalization under the statute was assessed for taxation for the year 1902 at not to exceed 80 per cent. of its fair cash value, notwithstanding the requirement of the state Constitution that all property shall be assessed at its fair cash value.—Louisville & N. R. Co. v. Coulter (C. C.) 282.

§ 2. Lien and priority.

Act Pa. June 4, 1901 (P. L. 364) § 2, providing that taxes shall be a first lien on the property assessed, *held* only to apply to taxes assessed subsequent to its enactment.—In re Prince & Walter (D. C.) 546.

§ 3. Collection and enforcement against persons or personal property.

In order to entitle one whose property has been fully valued for taxation to complain of an undervaluation of other property, and to relief in equity by having his own valuation cut down to an equality with that of the property undervalued, it is essential that the undervaluation should have been intentional, and that it should have been systematic or habitual, relating to a large species of property.—Louisville & N. R. Co. v. Coulter (C. C.) 282.

§ 4. Legacy, inheritance, and transfer taxes.

Where a succession tax, under Act Cong. June 13, 1898, c. 448, 30 Stat. 450 [U. S. Comp. St. 1901, p. 2291], was neither due, payable, nor a lien on the estate of a deceased person at the time the act was repealed by Act April 12, 1902, c. 500 (32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279]), the tax was not "imposed," within the saving clause of the repealing act.—Tilghman v. Eidman (C. C.) 651.

TELEGRAPHS AND TELEPHONES.

Risks assumed by servant in construction and repair of, see "Master and Servant," § 1.

TENDER.

Of goods as condition to action against buyer for breach of contract, see "Sales," § 1.

TESTAMENT.

See "Wills."

TITLE.

Retention of apparent title by grantor, see "Fraudulent Conveyances," § 1.

Particular species of property or rights.

See "Mines and Minerals," § 2; "Shipping," § 1.

TOOLS.

Liability of employer for defects, see "Master and Servant," § 1.

TORTS.

Causing death, see "Death."

By particular classes of parties.

Employés, see "Master and Servant," § 2.

Particular torts.

See "Fraud"; "Libel and Slander."
Maritime torts, see "Collision."

TOWAGE.

Collisions with tugs and vessels in tow, see "Collision," §§ 3, 6.

Two tugs belonging to the same owner engaged to tow a steamer, and which co-operated in the service and in directing the movements of the steamer, are both liable for her stranding through the negligence of either.—The W. G. Mason (D. C.) 632; The W. I. Babcock, Id.

The stranding of a steamer while being taken from her dock by two tugs through a narrow channel, with which her master was unacquainted, *held* to have been due to the fault of the pilot tug, whose orders the steamer promptly obeyed as to her own movements.—The W. G. Mason (D. C.) 632; The W. I. Babcock, Id.

Where a steamer stranded while in charge of two tugs employed to take her through a channel well known and commonly used, and it was shown that she promptly obeyed all signals given her as to her own movements, a presumption is raised that the fault was that of the tugs.—The W. G. Mason (D. C.) 632; The W. I. Babcock, Id.

TOWNS.

See "Counties."

Validity of statutes as impairing obligation of township bonds, see "Constitutional Law," § 1.

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

The name "Pepto-Mangan," as applied to a medicinal preparation, is apparently arbitrary and fanciful, rather than merely descriptive, and, in the absence of evidence to the contrary, must be assumed to be one which may be lawfully appropriated as a trade-mark.—M. J. Breitenbach Co. v. Spangenberg (C. C.) 160.

The inventor of a game, by giving it a distinctive name and selling it thereunder, may acquire a trade-mark in such name, though he did not patent or copyright the game.—H. B. Chaffee Mfg. Co. v. Selchow (C. C.) 543.

The generic name of a thing is not the subject of a trade-mark.—H. B. Chaffee Mfg. Co. v. Selchow (C. C.) 543.

§ 2. Title, conveyances, and contracts.

An instrument *held* to make such an assignment of the exclusive ownership and good will in trade-marks as to authorize the assignee to maintain suit to enjoin infringement.—Griggs, Cooper & Co. v. Erie Preserving Co. (C. C.) 359.

Complainant and its assignors, by making and selling a game, *held* not to have acquired a trade-mark in the name thereof as against an assignor of the originator.—H. B. Chaffee Mfg. Co. v. Selchow (C. C.) 543.

§ 3. Infringement and unfair competition.

An admission in defendant's answer in a suit to restrain unlawful competition in the sale of grinding mills *held* to justify a decree restraining the sale of mills similar to the numbers of mills manufactured and sold by complainant.—Enterprise Mfg. Co. v. Landers, Frary & Clark (C. C. A.) 240.

The construction and sale of mills by defendant which were in all substantial respects the same as mills sold by complainant, and intended by defendant to be sold in competition with plaintiff's mills, *held* to constitute unlawful competition, entitling complainant to an injunction.—Enterprise Mfg. Co. v. Landers, Frary & Clark (C. C. A.) 240.

The president of a defendant corporation *held* guilty of contempt of court for violation of an injunction restraining the use of a trade-name.—Janney v. Pan-Coast Ventilator & Mfg. Co. (C. C.) 143.

A bill alleging that defendants make a medicinal preparation similar to one sold by complainant, which they have given a similar name and have supplied to customers asking for complainant's preparation, states a cause of action.—M. J. Breitenbach Co. v. Spangenberg (C. C.) 160.

A federal court *held* to have jurisdiction of a suit between citizens of different states to enjoin infringement of a trade-mark, without the actual value being alleged.—Griggs, Cooper & Co. v. Erie Preserving Co. (C. C.) 359.

The words "Home Comforts" *held* to infringe the trade-mark "Home Brand."—Griggs Cooper & Co. v. Erie Preserving Co. (C. C.) 359.

TRANSFER TAX.

See "Taxation," § 4.

TRESPASS.

Removal of ore from mines, see "Mines and Minerals," § 2.

TRIAL.

See "Witnesses."

In bankruptcy, see "Bankruptcy," § 1.

In action between master and servant, see "Master and Servant," § 1.

§ 1. Taking case or question from jury.

Where the evidence on a question of fact is such that the court would be bound in a sound judicial discretion to set aside a finding in opposition to it, it is its duty to direct a verdict.—Patillo v. Allen-West Commission Co. (C. C. A.) 680.

Where there is a substantial conflict in the evidence as to material facts, the court should submit the issue to the jury.—Chicago Great Western Ry. Co. v. Roddy (C. C. A.) 712.

Where the evidence leaves material facts undisputed, and they are such that the court could give effect to but one verdict, it is its duty to direct the verdict.—Chicago Great Western Ry. Co. v. Roddy (C. C. A.) 712.

§ 2. Instructions to jury.

A general exception to the refusal of a number of requests to charge is not well taken if any of such requests were properly refused.—Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. (C. C. A.) 215.

Where a principle of law is clearly declared in the general charge, it is not error to refuse to repeat it in the words of counsel.—Chicago Great Western Ry. Co. v. Roddy (C. C. A.) 712.

Where a request for an instruction contains several propositions of law, any one of which is unsound, it is not error to refuse it.—Chicago Great Western Ry. Co. v. Roddy (C. C. A.) 712.

TROVER AND CONVERSION.

Wrongful conversion of property in hands of bankrupt, see "Bankruptcy," § 3.

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.
Fraud by trustee, see "Fraud," § 1.
Trust deeds, see "Chattel Mortgages."

TUGS.

See "Towage."

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 3.

UNITED STATES.

See "Customs Duties."
Conspiracy to defraud, see "Conspiracy," § 1.
Courts, see "Courts," §§ 1–3; "Removal of Causes."
Indians, see "Indians."
New trial in prosecution for defrauding, see "Criminal Law," § 4.
Removal of accused charged with conspiracy to defraud United States to other district for trial, see "Criminal Law," § 2.
Right to reduced rates for carriage of freight over land-grant railroad, see "Railroads," § 1.

§ 1. Government and officers.

A proceeding before the Post Office Department to determine whether a fraud order should be issued against a corporation *held* a proceeding in which the United States is "interested," within Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212], prohibiting a United States senator from accepting compensation for services rendered before any department of the government in a matter in relation to which the United States is interested.—United States v. Burton (D. C.) 552.

Where a Postmaster General had jurisdiction in the abstract to issue a fraud order against a corporation, such jurisdiction was sufficient to sustain a prosecution of a United States senator for receiving money for services rendered the corporation before the Post Office Department in such proceedings, in violation of Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212].—United States v. Burton (D. C.) 552.

Certain averments in an indictment against a United States senator for bribery, in violation of Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212], *held* surplusage.—United States v. Burton (D. C.) 552.

Under Rev. St. §§ 3929, 5480 [U. S. Comp. St. 1901, pp. 2686, 3696], it was not necessary to the jurisdiction of the Postmaster General to consider the issuance of a fraud order against a corporation that it should be "then engaged," as distinguished from past transactions, in violating section 5480.—United States v. Burton (D. C.) 552.

An inquiry as to whether a fraud order should be issued by the Post Office Department against a person fraudulently using the mails is "a matter or thing" concerning which a United States senator may not receive pecuniary compensation for services, under Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212].—United States v. Burton (D. C.) 552.

§ 2. Actions.

In equity the equities of the United States appeal with the same but with no greater force than those of an individual in like circumstances.—United States v. Detroit Timber & Lumber Co. (C. C. A.) 668.

A bill *held* not maintainable against the United States, sued jointly with a United States marshal, to restrain the collection of a judgment against a surety on a bail bond.—Kirk v. United States (C. C.) 331.

USURY.

§ 1. Usurious contracts and transactions.

A commission charged by one commission house to another for the use of its credit under an arrangement by which it guarantied all consignments sent to the second house did not constitute usury.—Ryttenberg v. Schefer (D. C.) 313.

VACATION.

Of attachment on removal of cause from state court to United States court, see "Removal of Causes," § 4.

VENDOR AND PURCHASER.

See "Sales."
Specific performance of contract, see "Specific Performance."

§ 1. Rights and liabilities of parties.

The concurrence of good faith, absence of notice, payment of value, and legal estate in the purchaser at one time constitutes a complete defense of a bona fide purchase.—United States v. Detroit Timber & Lumber Co. (C. C. A.) 668.

Where a vendor of land presents conveyances to himself prima facie valid, and assures the purchaser that his title is perfect, no duty to investigate further is imposed on the buyer.—United States v. Detroit Timber & Lumber Co. (C. C. A.) 668.

WAIVER.

See "Estoppel."

Of rights or remedies.

See "Removal of Causes," § 1.
Right to avoid or forfeit policy of insurance, see "Insurance," § 3.
Rights under bill of lading, see "Shipping," § 4.

WARRANT.

In bankruptcy, see "Bankruptcy," § 1.

WATERS AND WATER COURSES.

City waterworks system, see "Municipal Corporations," § 2.
Maximum rate charges by irrigation company prescribed by public authorities as taking of property without due process of law, see "Eminent Domain," § 1.
Review of decree relating to water rates as dependent on existence of actual controversy, see "Appeal and Error," § 1.

§ 1. Public water supply.

In determining the validity and reasonableness of a maximum rate fixed by county commissioners in Idaho to be charged by an irrigation company for water furnished to consumers, such rate must be considered as applied to all the water furnished to consumers by the company, although it has private contracts with certain customers by which they are supplied at a much lower rate.—Boise City Irrigation & Land Co. v. Clark (C. C. A.) 415.

Where an irrigation district was organized and issued bonds under Act Cal. March 7, 1887, p. 29, c. 34, as amended by Act March 20, 1891, p. 142, c. 127, the remedy of an unpaid holder of such bonds was by mandamus against the officers of the district to compel an assessment to pay the same, and not by a bill for the appointment of a receiver.—Marra v. San Jacinto & P. V. Irr. Dist. (C. C.) 780.

The mortgagee of a water company has such an interest in the property of the company pledged as security as entitles it to maintain a suit to enjoin the city from constructing and maintaining a rival water system, the effect of which will be to cause irreparable damage to such security, on the ground that the city has no constitutional or statutory power to build such works.—Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 890.

The granting of a franchise by a city to a water company to construct and maintain waterworks to supply water for public use does not raise an implied contract that the city will not itself construct and maintain a waterworks system in competition with that of the grantee. —Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 890.

A contract by which a city granted a franchise to lay and maintain water pipes on its streets, and contracted to pay hydrant rental, the contract to remain in force for 20 years, *held* not to prevent the city from constructing waterworks of its own after the expiration of the 20 years, provided it had the constitutional and statutory power to do so.—Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 890.

WHARVES.

The owner of a dock *held* guilty of negligence in failing to maintain a safe bottom along the dock, rendering him liable for injuries to a vessel caused by her settling on a pointed rock which rose some 18 inches above the bottom of the sea along the dock.—Daly v. Quinlan (D. C.) 394.

WIDOWS.

Dower, see "Dower."

WILLS.

See "Executors and Administrators."
Legacy and succession taxes, see "Taxation," § 4.

§ 1. Rights and liabilities of devisees and legatees.

A mortgage by a contingent remainderman of his interest, and the foreclosure and sale thereunder, *held* to have been presumptively bona fide, and to have devested him of his interest, in the absence of proof that such was not the intention, although no reasonable explanation of the transaction appeared.—Ward v. Ward (C. C.) 946.

A will construed, and *held* to give remaindermen a contingent estate in expectancy, which was mortgageable under the New York statute (1 Rev. St. pp. 722–725, pt. 2, art. 1, c. 1, tit. 2).—Ward v. Ward (C. C.) 946.

The death of a contingent remainderman before the determination of the precedent estate, by which his interest lapsed, *held* not to affect the right of his heirs to the estate of another remainderman, whose interest he had acquired by purchase on foreclosure of a mortgage thereon, and who lived until the estate vested.—Ward v. Ward (C. C.) 946.

WITNESSES.

See "Evidence."
Examination of pending proceedings in bankruptcy, see "Bankruptcy," § 1.
Fees of as costs, see "Costs," § 2.
Opinions, see "Evidence," § 3.

§ 1. Examination.

It is no objection to the cross-examination of a plaintiff's witness that it discloses facts tending to constitute a defense, where such facts relate directly to matters about which he testified on his direct examination.—Garlich v. Northern Pac. Ry. Co. (C. C. A.) 837.

WRITS.

Particular writs.

See "Habeas Corpus"; "Injunction"; "Mandamus."
Writ of error, see "Appeal and Error."

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